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Table of Contents

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Fresh Carrot, Bigger Stick: Forthcoming Rule Changes and the 'Encouragement' of NCDR

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FPR Part 3 has historically been underused. This is strange given that FPR 1.4 provides that the court 'must further the overriding objective by actively managing cases' and FPR 1.4(2)(f) states that active case management includes 'encouraging the parties to use a non-court dispute resolution', or 'NCDR', 'procedure if the court considers that appropriate and facilitating the use of such procedure.'

Perhaps because of this, the Family Procedure (Amendment No. 2) Rules 2023 (SI 2023/1324) – which were laid before Parliament on 7 December 2023 and will come into force partly on 8 April 2024 and partly on 29 April 2024 – provide for a major overhaul of Part 3 and a significant amendment to Part 28.

A new FPR 3.3(1A) will allow the court to require parties to file and serve 'a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings'.

In this context, the definition of NCDR at FPR 2.3(1)(b) has now been widened to mean 'methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law'.

The making of an order under FPR 3.3(1A) will be closely akin to the making of an Ungley order (so-called because it was first devised by Master Ungley to encourage the use of NCDR in clinical negligence cases), by which a court may require a party to file a statement to similar effect and thereafter make an adverse costs order if there have been no reasonable invitations made to engage in NCDR, or if such invitations have either been ignored or unreasonably refused. The only substantive difference is that whereas the statement filed pursuant to an Ungley order is 'without prejudice save as to costs', one filed pursuant to this rule will be open, meaning that the court will be aware at all stages of the case of the parties' positions regarding NCDR.

An Ungley order was made in *Mann v Mann* [2014] 2 FLR 928, by Mostyn J, who also noted that what was then FPR 3.3(1)(b), but later became FPR 3.4(1)(b), permitted the court to adjourn for NCDR only 'where the parties agree' and called for consideration to be given by the Family Procedure Rule Committee to the removal of that proviso.

From 29 April 2024, that provision will be deleted and an amended FPR 3.4(1A) will provide that where 'the timetabling of proceedings allows sufficient time for these steps to be taken', the court may adjourn proceedings to 'encourage parties' to 'undertake non-court dispute resolution'. The agreement of the parties will therefore no longer be required.

Most importantly, in financial remedies cases, this power to 'encourage' will be backed with an amended FPR 28.3(7), which will expressly make a failure, without good reason, to engage in NCDR a reason to consider departing from the general starting point that there should be no order as to costs.

Given other recent rule changes, and the more robust approach to the making of costs orders encouraged in cases such as *OG v AG* [2020] EWFC 52, this may well create conditions in which many parties will have to ask themselves whether they can really afford not to participate in appropriate NCDR.

Taken together, the new provisions go close to, but do not quite amount to, the mandation of NCDR, which was the subject of a separate Ministry of Justice consultation, the outcome of which is not yet determined.

Of course, very recently, on 29 November 2023, the Court of Appeal handed down judgment in *Churchill v Merthyr Tydfil CBC* [2023] EWCA 1416 (*'Churchill'*) in which case the court declined to follow its earlier decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and held that, in civil proceedings, the courts do have the power to compel parties to participate in NCDR.

Having reviewed international and domestic cases on the constitutional right of access to the court, Sir Geoffrey Vos MR concluded in *Churchill* that the power does exist to stay proceedings for, or order the parties to participate in, NCDR.

That power must be exercised in such a way that does not impair a claimant's Article 6 right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

If applied to family proceedings, that element of the court's reasoning might be considered to pose an interesting question as to whether arbitration under the IFLA scheme is among the forms of NCDR which the court can 'encourage', almost to the point of mandation (arbitration being specifically referred to in the amended definition of NCDR). This may turn on whether the court's residual discretion, to decline to uphold an arbitral award which is subject to a successful challenge, tantamount to an appeal, provides sufficient access to a full judicial hearing.

Sir Geoffrey Vos MR declined to lay down fixed principles as to what will be relevant in determining the question of any stay of proceedings or an order that the parties engage in NCDR, although he set out in paragraphs [61] to [63] of his judgment some factors that may be relevant.

The decision in *Churchill* was not unexpected. The Court of Appeal had previously held that, pursuant to CPR 3.1(2)(m), the consent of the parties was not necessary for a case to be referred to Early Neutral Evaluation (*Lomax v Lomax* [2019] EWCA Civ 1467 on appeal from *Lomax v Lomax (Referral to Early Neutral Evaluation)* [2020] I FLR 30) and in *Compulsory ADR* (a report of the Civil Justice Council published in June 2021) it was said that any form of compulsory NCDR which is 'not disproportionately onerous and does not foreclose the parties' effective access to the court' is lawful.

Time will tell whether the forthcoming amendments to the FPR 2010 will herald a change in culture and interest in NCDR, as PD 28A, paragraph 4.4, and recent case law have incentivised cultural change with regard to the making of open offers.

Likewise it will be interesting to see if the Family Procedure Rule Committee, emboldened by *Churchill*, now chose to go further and permit the court to require parties to engage in NCDR, with or without awaiting the outcome of the Ministry of Justice consultation before deciding whether or not to do so.

- Blog - Out of Court Dispute - NCDR

The Use and Misuse of the Rubric in the Family Courts

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Sir James Munby

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In a familiar line of cases of which the first was *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, paras [100]–[114], and the last *In re PP (A Child: Anonymisation)* [2023] EWHC 330 (Fam), [2023] 4 WLR 48, paras [49]–[62], and *Augousti v Matharu* [2023] EWHC 1900 (Fam), paras [68]–[93], Mostyn J has explosively ignited a most necessary debate about the anonymisation of judgments in financial remedy cases. Part of his compelling analysis – which, so far as I am aware, no-one has yet succeeded in challenging successfully – relates to the use, or as he would have it, the inveterate misuse of the rubric attached to judgments in such cases.

I have myself written about the rubric in a number of recent articles: see 'Some Sunlight Seeps In' [2022] FRJ 79; *Law Commission – Contempt of Court Project: Memorandum by Sir James Munby* (26 September 2022); 'Family Justice: Ostiis Apertis? Or a mantle of inviolable secrecy? A challenge to those who would keep the doors closed' (12 January 2023); and 'Groundhog Day: A response to the Report of the Financial Remedies Sub-Group of The Transparency Implementation Group' (2 July 2023).

On 13 April 2022, the day after Mostyn J had handed down his judgment in *Xanthopoulos v Rakshina* [2022] EWFC 30, Moor J handed down, in public, a judgment in a financial remedies case (it was in fact an appeal) in which the parties were named: *Lockwood v Greenbaum* [2022] EWHC 845 (Fam). The attached rubric read:

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

With all respect to the judge, this surely invites two questions, to neither of which there is a satisfactory answer: (1) What (if any) is the effect of this in law?

(2) What is the basis for the assertion that failure to comply 'will be a contempt of court'? [1]

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

A particularly egregious example of the problem can be found in the recent case of *Mahtani v Mahtani* [2023] EWHC 2988 (Fam). I have no wish to scapegoat this particular judge, for the example is, unhappily, representative of too many others. The judgment bears the standard rubric in red at the top:

> 'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children *and members of their family* must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court (emphasis added).'

In fact, and despite this rubric, the heading of the judgment as published by the judge includes the full names of the parties.

What are the media supposed to do? Can they name the parties or not? Are they at peril of proceedings for contempt if they do?

Surely, we cannot allow this kind of thing to go on.

I offer this latest contribution on the topic as part of what ought to be an anxious ongoing debate.

History of the rubric

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

(1) During 2001 [2] the practice emerged of attaching two standard form rubrics to written judgments handed down in the Family Division. In their developed form, one rubric read as follows:

> 'I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.' [3]

The other rubric (what I shall refer to hereafter as 'the rubric'), in its developed form, read:

> 'This judgment was handed down in private on [date]. The judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person

other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.'[4]

(2) During 2002, electronic templates for the preparation of written judgments were made available to the judges. These templates (i) automatically formatted the judgment so as to comply with *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194, para 1.1; (ii) automatically generated the appropriate form of neutral citation number; and, in the case of the Family Division template, (iii) automatically inserted both rubrics (though the judge could, if desired, alter the text of the rubrics or delete them altogether). [5]

The problems with the rubric

The current problems in relation to the rubric – to speak plainly, its all too frequent misuse – are the consequence of the combination of three factors:

(1) The purpose and effect of the rubric are, even after all these years, still not as well understood as they should be.

(2) This is exacerbated by the inveterate elision in professional understanding and practice of those types of case which are covered by s 12 of the Administration of Justice Act 1960 (and/or s 97(2) of the Children Act 1989) with those types of case which are not. Cases in the former category are subjected to strict statutory secrecy. Cases in the latter category are subject to no such restrictions. Yet the practice has been to treat them as if they were. Hence the application in such cases of a mordant rubric to the judgment threatening imprisonment if a word is breathed about the case.

(3) The problem is further exacerbated by the unhelpfully misleading form of the template.

I shall return in due course to the last point, but for the moment focus on the second.

In children cases, whether brought under the inherent jurisdiction or the Children Act 1989 (including financial remedy proceedings under Schedule 1), there are stringent statutory provisions restricting what can be reported:

- Section 12(1)(a) of the Administration of Justice Act 1960 prohibits the publication of 'information relating to proceedings … in private'. [6] For detailed analysis of what this means see *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, para [82], and *A v Ward* [2010] EWHC 16, [2010] 1 FLR 1497, paras [112]–[114].
- Section 97(2) of the Children Act 1989 prohibits the identification of the children.

It is well established that these restrictions can be *relaxed*, either in accordance with s 12(4) of the 1960 Act or s 97(4) of the 1989 Act or, more generally, by judicial order.

In the case of financial remedy proceedings under the Matrimonial Causes Act 1973, the legal landscape is in this respect entirely different:

- There are no relevant statutory prohibitions in place. Section 12 and s 97 have no application and the Judicial Proceedings (Regulation of Reports) Act 1926, even if it applies (which is debateable) does not prevent either the publication of a judgment or the identification of the parties.
- As Mostyn J has convincingly demonstrated, there is thus no automatic prohibition on the publication of a judgment in a financial remedy case under the 1973 Act, even if given in private, nor of naming the parties.

The implications of this are profound: whereas in children cases the judicial task, when the issue arises, is to consider whether there should be a *relaxation* of the automatic restrictions on publication otherwise imposed by the law, in financial remedy cases under the 1973 Act the judicial task, when the issue arises is to consider whether there should be an *imposition* of restrictions on publication not otherwise imposed by law.

This last point is fundamental, because it is clear law, established by the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, that such restrictions can be imposed only following a judicial 'balancing exercise' which has regard to and balances the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, *considered in the particular circumstances of the case*. This last point is vital, reflecting what Lord Steyn said in *In re S* at para [17]:

> 'an *intense focus* on the comparative importance of the specific rights being claimed in the *individual* case is *necessary* (emphases added).'

And there is an important corollary. As Mostyn J has reminded us, it is vital in undertaking this 'balancing exercise' that the critical question is correctly framed. As he explained (correctly) in *Xanthopoulos v Rakshina* [2022] EWFC 30, [2023] 1 FLR 388, para [128]:

> 'The fallacy lying at the heart of current practice, which seems to be ingrained, is that the wrong question is invariably asked when it comes to anonymising a judgment … The correct question is not:
>
> "Why is it in the public interest that the parties should be named?"
>
> but rather:
>
> "Why is it in the public interest that the parties should be anonymous?"'

There is one important qualification to this, as explained by Mostyn J in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin), paras [82], [84]:

> 'In my judgment, in circumstances where the judge had not heard all the evidence, let alone rendered findings in a judgment, the better course, in order to hold the ring, would have been to have made a temporary RRO, with a specific provision in it for the matter to be reconsidered once judgment had been given: see *R v Somerset Health Authority ex p S* [1996] C.O.D. 244 per Brooke J; *ASG v GSA* [2009] EWCA Civ 1574 per Waller LJ at [4]; and *XZ v YZ* [2022] EWFC 49, [2022] 1 WLR 4365. In the latter case I held that that, to hold the ring, the court could make a temporary RRO, without full evidence and without performing the established exercise of striking a balance between the various rights under the Convention and that such a temporary RRO would endure only until the parties and the court were ready to deal substantively, justly and fairly with the question of whether to make a final order.
>
> … In my judgment, to make a strictly temporary RRO would be appropriate where the court could not be satisfied that it had all the evidence, and was not in the position to foresee all its likely findings, so as to enable it to make a final order.'

The purpose and effect of the rubric

I need to emphasise two preliminary points, which are vital to what follows.

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

In the context of ancillary relief, consider *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, paras [19]–[22].[7] I had been invited by counsel (one of whom I note, in the interests of historical completeness, was a certain Mr Nicholas Mostyn QC) 'to make abundantly clear to the media' that the 1926 Act applied to the proceedings before me. I refused to do so, observing (para [21]) that:

> 'what I am being invited to do is to give an advisory opinion and to offer advice to the media – advice which it is insinuated will carry the more force because it comes from a judge. The difficulty is that although persons, the media included, may be obliged to obey the *orders* of a judge, if the judge offers advice they are entitled to accept or reject that advice as they wish, just as they are entitled to accept

> or reject advice from any other quarter. So, were I to express any views on the matter, and all the more so were I to address the media in the way suggested, not merely would I be stepping outside any proper judicial function, I would not, in fact, be achieving anything of utility to the parties.'

This was followed by Roberts J in *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam), [2015] 1 FLR 745, paras [27]–[28].

The second, and equally fundamental point is that, if it is to be effective and enforceable, if the need arises, as an order of the court, it must be drafted in the way in which injunctions are usually drafted and, moreover, in terms which are clear, precise and unambiguous. And there must be a penal notice.

Against this background, what are the purpose and effect of the rubric?

The important points for present purposes are that:

(a) The rubric is not an injunction; and accordingly

(b) The rubric 'works' – has any legal effect – only in cases where s 12 of the Administration of Justice Act 1960 applies.

I need to elaborate.

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

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

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

> 'The rubric is not an injunction: see *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97. It is not drafted in the way in which injunctions are usually drafted. There is no penal notice.'[8]

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

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

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

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

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

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

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

(Mis)use of the rubric in financial remedy cases

It follows from this that the rubric has no proper role to play in a financial remedy case where, to repeat, there is, in contrast to a case involving a child, no statutory prohibition on the publication of a judgment handed down in chambers, and, absent any reporting restriction order, nothing to prevent anyone doing so. In financial remedy cases heard in private (except those under Schedule 1 of the Children Act 1989) the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment. It is not worth the paper it is written on. Its continued use in such cases – which is still endemic – is a legal oxymoron.

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

I therefore agree entirely with Mostyn J's conclusion (*Xanthopoulos v Rakshina* [2022] EWFC 30, para [119]) that:

> 'in a financial remedy case heard in private … the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment.'

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

The existing rubric should be abolished in financial remedy cases at the earliest opportunity. It is a *brutum fulmen*, is thoroughly misleading and is almost

certainly unlawful.

Thus the position in relation to financial remedy cases.

I add that, for reasons which have already been explained, the rubric is ineffective in the Court of Protection when, in accordance with current practice, an order has been made at the outset for the case to be heard in public. The present arrangements in the Court of Protection are for this reason incorrect: see *Re EM* [2022] EWCOP 31, para [43].

The corollary of this, as Mostyn J has correctly held, is that in such cases the court's objective can be achieved only if the court makes a reporting restriction order following a process in which a judge has undertaken the 'balancing' exercise mandated by *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593. As Mostyn J put it in *Gallagher v Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52, para [81], and I agree:

> 'the standardised anonymisation of judgments is unlawful and … a reporting restriction or anonymisation order can only be made in an individual case where it has been applied for, and awarded, after a full *Re S* balancing exercise.'

Peel J has very recently made precisely the same point in *Tsvetkov v Khayrova* [2023] EWFC 130, para [116]:

> 'All that said, whether the starting point is as per the long established practice (i.e. non reportability unless the judge orders otherwise) or as per the thesis of Mostyn J (ability to report unless prohibited by the court), if the court is considering whether to permit or prohibit (as the case may be) reporting, it will need to carry out the *Re S* balancing exercise.'

The template

Correct use of the rubric is not assisted – it is in fact hindered – by the misleading format of the template provided for family court judgments. The template (with its automatic inclusion of a rubric in a single standard and often inappropriate form) is, in truth, a snare and delusion for the unwary.

For family cases the template generates a single form of rubric, making no distinction between children cases and financial remedy cases or between proceedings heard or judgments delivered in private or in public. The unwary can all too easily be lulled into believing that the one form of rubric is appropriate for all family cases when, as we have seen, it is not. As already noted, the rubric can of course be adapted by the judge to fit the circumstances, but as the still endemic misuse of the rubric all too obviously demonstrates this is not a task that can confidently be left any longer to individual judicial initiative.

It is noteworthy that even today, almost 10 years since its creation in 2014, the template does not recognise the existence of the family court. The settings option list presented to a judicial user of the template lists, as the only relevant option, the Family Division of the High Court. A judge sitting in the family court has to adapt the Family Division template (including adapting it to give the family court, rather than a Family Division, neutral citation number).

Moreover, as already noted, the template continues to generate an additional rubric referring to CPR PD 39A para 6.1, even though PD 39A was revoked as long ago as April 2019.

A further problem

An important point which Mostyn J goes on to make is that the fundamental problem about anonymity which he has identified cannot be resolved by the Rules Committees. Primary legislation is required. He has convincingly demonstrated that, absent further primary legislation, there is no power in the Family Procedure Rule Committee to impose such restrictions generally, whether by rule or by practice direction: see *Xanthopoulos v Rakshina* [2022] EWFC 30, para [140], *Gallagher v Gallagher* [2022] EWFC 52, [2022] 1 WLR 4370, [2023] 1 FLR 120, paras [82]–[85], and *Augousti v Matharu* [2023] EWHC 1900 (Fam), paras [92]–[93]. Nor, it must follow, and as Mostyn J has recognised, can the President do so by issuing guidance. Non-statutory presidential guidance can no more change the law than can a statutory practice direction.

As he said in *Gallagher*:

> 'to create a scheme providing for standardised anonymisation of financial remedy judgments will require primary legislation.'

Where do we go from here?

Neither legislation nor rule changes are required if the immediate problems in relation to the template and the rubric are to be resolved, as they must be.

The template urgently needs to be revised in three respects:

1. Separate templates should be provided for the Family Division and the family court.
2. The additional rubric referring to CPR PD 39A para 6.1 should be removed.
3. Alternative forms of rubric should be provided for the different types of case.

I suggest that the template should offer three alternative forms of rubric.

Alternative 1 (children cases heard in private):

> 'This judgment was delivered in private in proceedings heard in private to which the provisions in section 12 of the Administration of

Justice Act 1960 [INCLUDE IF THE PROCEEDINGS HAVE NOT YET CONCLUDED and section 97 of the Children Act 1989] apply. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment and in any report of or commentary on the proceedings **the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

INCLUDE IF APPROPRIATE The judge has made an order dated [date] in accordance with section 97(4) which [summarise its terms]. Reference should be made to that order for its full terms and effect.

INCLUDE IF APPROPRIATE The judge has made a reporting restriction order dated [date] which [summarise its terms]. Reference should be made to that order for its full terms and effect. All persons, including representatives of the media, must ensure that in any published version of the judgment the terms of that order are strictly complied with. Failure to do so will be a contempt of court.'

Alternative 2 (non-children cases heard in private):

'This judgment was delivered in private in proceedings heard in private to which the provisions in section 12 of the Administration of Justice Act 1960 and section 97 of the Children Act 1989] do *not* apply. The judge hereby gives permission – if permission is needed – for it to be published.

INCLUDE IF APPROPRIATE The judge has made a reporting restriction order dated [date] which [summarise its terms]. Reference should be made to that order for its full terms and effect. All persons, including representatives of the media, must ensure that in any published version of the judgment the terms of that order are strictly complied with. Failure to do so will be a contempt of court.'

Alternative 3 (judgments delivered in public):

'This judgment was delivered in public.

EITHER There are no restrictions on publication.

OR, AS APPROPRIATE The judge has made a reporting restriction order dated [date] which [summarise its terms]. Reference should be made to that order for its full terms and effect. All persons, including representatives of the media, must ensure that in any published version of the judgment the terms of that order are strictly complied with. Failure to do so will be a contempt of court.'

No doubt the drafting can be improved.

I must end with a final confession. As I have already acknowledged, my own record in this matter has not been free of error. And the response of some to what I am now saying may be 'well, if this is all so obvious why did you do nothing about it when you were is a position to act?' The criticism would be well-merited. Mea maxima culpa.

Sir James Munby, 2 January 2024

- Blog

- Anonymity - Reporting Restriction Order

When Is an Add-Back Not an Add-Back?

Published: 15/01/2024 11:06

Stephanie Coker

Stephanie Coker is a barrister at FOURTEEN. She specialises in financial remedies following the breakdown of a relationship (including TOLATA matters), complex private children matters and international family law. Outside of practice, she was awarded a PhD and has acted as an Associate Lecturer where her teaching responsibilities spanned across family law, land law and foundations of property.

https://www.bailii.org/ew/cases/EWFC/HCJ/2023/244.html

So-called 'small money' cases have historically been rarely published. However, the President's *Confidence and Confidentiality: Transparency in the Family Courts Report* of 29 October 2021, in which he asked all judges to publish at least 10% of their judgments each year, and the subsequent reports of the TIG Anonymisation & Publication and Financial Remedies sub-groups (amongst others), have led to a welcome increase in such judgments.

A recent published *extempore* judgment from District Judge Hatvany sitting at the Family Court at Swindon – *JN v GN* [2023] EWFC 244 (21 November 2023) – is one such decision and a good example of justice 'at the coal face'.

The facts were simple: a long marriage of 23 years to separation in 2013 with one adult child. W continued to live in the family home following separation whereas for the last four years H had lived with his new partner who lived in social housing with a secure tenancy. Both parties had modest incomes and pension provision.

The main asset was a three-bed family home worth £280,000 and after deduction of a mortgage of c.£47,000 net equity of c.£224,500. An equal share would have been c.£112,000 each. The parties agreed in 'constructive discussions' prior to the start of the final hearing (W represented by counsel and H in person) that the property should be transferred into W's sole name but W sought that H should also discharge the mortgage in full and pay her outstanding costs (c.£19,000).

There were no other assets.

The judge stated that despite the large measure of agreement between the parties, he had to be satisfied that the outcome was fair having regard to the MCA 1973 s 25 factors. He stated that after a marriage of this length with one

grown-up child ordinarily the starting point should be a 50-50 division. Both parties had identical housing needs and W was arguably over-housed in a three-bed property with an additional box room and so ordinarily it would have been sold to enable the parties to go their separate ways. The judge also acknowledged that H would be homeless if his new partner terminated their relationship. He therefore said that W's proposals would leave her in a three-bedroom mortgage-free property and H with no security of tenure whatsoever. As such '[a]t first blush, and without further analysis, this does seem manifestly unfair'.

So far so relatively straightforward.

However in early 2020 H had received £468,000 by way of inheritance from his father with an additional £30,000 for a painting. He had then engaged in 'an extraordinary generous and reckless spending spree'. H acknowledged spending £75,000 on his new partner and her family. Money was spent on holidays, a car and even a hot tub. H spent at a rate of £16,000 pm over a 2½ year period. H accepted that this expenditure had been both wanton and reckless. The judge found that none of this money remained despite H's lack of disclosure.

Despite this money being non-matrimonial, it would have enabled H to rehouse and clear the mortgage on the family home. Were it not for the dissipation 'this sum alone could have been used both to meet [H's] housing need and discharge the mortgage on the former matrimonial home which would have left both parties with a mortgage free property'.

In addition, H admitted to receiving the benefit of an endowment policy in 2016 and that the parties had intended to put the proceeds of £28,000 towards the mortgage but this did not happen. It was on this basis that W argued H should now clear the mortgage. H also received £56,000 in 2019 when he cashed in one of his pensions.

Unlike his inheritance the court classed these monies as matrimonial assets – 'both assets which had their origins in matrimonial endeavour' – and so would have been available for division but H had had sole benefit.

As a consequence of this expenditure the judge said that H was:

> 'right not to attempt to argue that his housing needs are not met if his beneficial interest in the property is to be transferred to [W] given this extraordinary dissipation of funds that could and should have been used to meet [H's] housing need.'

The judge approved the parties' agreement for the transfer of the family home into W's sole name. The 'radical departure from equality' was justified in light of H's spending of his inheritance, the endowment policy and pension. H was therefore forfeiting his claim to £112,000. However H was not required to clear the mortgage as there were not the funds to facilitate this. He was, however,

ordered to pay £10,000 towards W's outstanding costs to be paid in instalments of £350 pm owing to his lack of resources.

There is of course much reported authority on the 'add back' jurisprudence with its modern origins in *Norris v Norris* [2003] 1 FLR 1142 per Bennett J at [77] as developed in *Vaughan v Vaughan* [2008] 1 FLR 1108 per Wilson LJ (as he then was) at [14] from which the word 'wanton' is first drawn (with 'reckless' being drawn from *Martin v Martin* [1976] Fam 335 per Cairns LJ at 342H).

There can be little doubt that H's expenditure in *JN v GN* was rightly classified as both wanton and reckless. It was (as it needs to be found to be) s@nbsp;25(2)(g) 'conduct that it was "inequitable to disregard"'. However, as *Vaughan v Vaughan* makes clear at [14], the fiction of a notional reattribution 'does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation' because 'it does not re-create any actual money' (*BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 per Mostyn J (at [51]).

It is clear from the concessions made by H in his oral evidence (admitting not only the expenditure but also that it had been both wanton and reckless) why the judge decided the case as he did. He was clearly right to do so. The decision is consistent with the comments made in *Butler v Butler* [2023] EWHC 2453 Fam per Moor J at [39] that '[t]he fact that a judge rightly concludes that a case is a "needs" case does not mean that the judge must then make an order that satisfies both parties' needs'.

However, given the judge's view that W was over-housed in a three-bed (plus) property and his acknowledgement that H risked potential homelessness if his current relationship ended (and as the judge said the court had no crystal ball in this regard), would the decision necessarily have been the same if it had been argued on H's behalf that the reality of the judgment was in effect to treat the 'add back' sums as being available to meet H's accommodation needs? In other words was H right not to attempt to argue that his housing needs would not be met if his interest in the family home was transferred to W given his dissipation of monies that otherwise would have been available to meet his housing needs?

- Blog

- Add-Backs

The Unopposable Application for a Penal Notice

Published: 18/01/2024 17:00

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There are relatively few applications for a court order in financial remedy proceedings that cannot be opposed and which are bound to succeed. One is an application for a penal notice. As paragraph 59(c) of the *Interim Report of the Financial Remedies Group* dated 31st July 2014 stated:

> 'c. Penal notice. [1] In a financial remedy case the applicant is entitled to the endorsement as of right, (a point which should be wider understood by judges and court staff). We consider that it is probably wise for each order to be endorsed with a penal notice at the time it is made (often orders are seen to say *"a penal notice is attached to this paragraph"* which is not enough). The full content of the penal notice should be prominently displayed on the front of the copy of the order and/or spelt out in the body of each paragraph to which it applies. All

> the financial orders in the suggested standard orders wardrobes follow this suggestion.'

The final report of the Financial Remedies Group dated 15th December 2014 maintained the recommendation in this regard.

The fact that an applicant is entitled to the endorsement of a penal notice as of right is set out in *R v Wandsworth County Court, ex parte Munn* [1994] 26 HLR 697. The case concerned an application for leave to apply for judicial review of the refusal of Wandsworth County Court to endorse a penal notice on an order. It was held that the endorsement of a penal notice is a mandatory and ministerial act to which no discretion arises. *Per* Sedley J (as he then was) at p.700:

> 'I accept the submission made by Mr Post … that the indorsement of a penal notice on an order which the court has made is (a) a mandatory act, and (b) a ministerial act, as to which no discretion arises. It is an act that can be performed by a chief clerk or any person on the chief clerk's behalf.'

This point was emphasised in *Ahmed v Khan* [2022] EWHC 1748 (Fam) per Mostyn J when commenting on the safeguards for the defendant in contempt proceedings now codified in FPR 37.4 which includes at 2 (e) 'confirmation that any order allegedly breached or disobeyed included a penal notice'. At [83 i)] he stated as follows:

> 'The defendant must have been personally served with the original order with a penal notice endorsed on its front, unless the court or the parties dispensed with personal service. If the original order did not contain a penal notice the claimant can later endorse the notice thereon as of right – the court's permission is not required.'

And at [88] that:

> 'As I have explained above, where the original order does not have the penal notice on its front the claimant can write the words on it as of right before arranging for personal service of the order.'

The suggestion that if the original order does not have a penal notice 'the claimant can write the words on it' is contradicted by *Re Taray Brokering Ltd Avery-Gee (as trustee in bankruptcy of Lawrence Coppen) v Coppen & Anor* [2022] EWHC 2958 (Ch) where His Honour Judge Pearce (sitting as a Judge of the High Court) in construing CPR 81.4(2)(e) – which is in identical to r 37.4(2)(e) – stated that a party is *not* at liberty to add a penal notice to an order of its own volition:

> '[21] … A party to litigation is not at liberty to add a penal notice to an order of the court of its own motion; rather, that party must apply to the court to vary the order if it wishes a penal notice to be added.'

The court's rationale for this was that unlike the previous version of CPR Part 81 which was in force prior to 1 October 2020 – where the wording of r 81.9 meant that it was arguable that the penal notice was not part of the order itself and hence might be added by a party onto the copy of the order served – the wording of the new CPR 81.4(2)(e) referred to confirmation that the 'order … *included* a penal notice' (original emphasis) and therefore contemplated that the penal notice was part of the order itself and hence had to be added by the court and not by a party of its own volition.

This conclusion contradicted the then version of the *Chancery Guide 2022* (which does not appear to have been considered by the court) – but these paragraphs had been revised by the Second Update in June 2023.

In *Ahmed v Khan* [2022] EWHC 1748 (Fam) Mostyn J did not consider whether changes between the previous and new versions of FPR Part 37 – which likewise came into effect on 1st October 2020 – may have had the same consequence.

In *CH v CT (Committal: Appeal)* [2019] 1 FLR 700 Baker J (as he then was) stated at [33] in the context of the original version of FPR Part 37 that:

> 'it is important to note the effect of r37.9(3)(a). A penal notice under r37.9 must not be endorsed on an order under s8 of the 1989 Act, including a child arrangements order, unless the court, on the application of the person entitled to enforce the order, has expressly directed that it be endorsed'

that

> 'the provision in FPR 2010, r 37.9(3)(a) that, in the case of a s8 order, the court *may* (my emphasis) direct that the order be endorsed with a penal notice, and that without such a direction no copy of the order shall be so endorsed, is aimed at countering the observation that the purpose and effect of s 11I was to remove judicial discretion as to whether or not a penal notice should be attached'

and at [34] that 'a child arrangements order may be endorsed with a penal notice, if expressly directed by the court'.

If and to the extent that these comments suggest that a party is not entitled to the endorsement of a penal notice as of right and that it a matter of judicial discretion then they would appear to contradict *R v Wandsworth County Court, ex parte Munn*. However it may well be relevant in this context that when this case was cited in *Re Taray Brokering Ltd Avery-Gee) v Coppen* His Honour Judge Pearce stated at [10] that 'this case is specific to the context of the Family Procedure Rules and the Children Act 1989'.

- Penal Notices

The PAG2 Guide – What Has Changed?

Published: 22/01/2024 11:43

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The publication of the Pension Advisory Group (PAG2) guidance in December 2023 marked the end of another lengthy and significant piece of interdisciplinary work by experienced practitioners in the field of pensions on divorce.

Much has already been written about the new guide and the overall changes, so the aim of this piece is to focus just on the material changes in what is now referred to as the PAG2 guide.

It is worth highlighting that the remit of the two PAG2 working groups was not to re-write the original guidance or to start afresh. Rather, the instruction was to make changes only where they were required, where case-law had moved on since 2019, to correct any errors and omissions and to make any improvements in light of feedback PAG has received since 2019.

The main changes can be summarised as follows:

General

There has been a general refresh of the original text, including changes to legal terminology following the introduction of no-fault divorce, and the addition of references to recent case law.

References have also been added to direct readers to relevant blogs and articles in the *Financial Remedies Journal*, as well as articles in *Family Law*.

Part 4 - Treatment of pensions in 'needs-based' and 'sharing' (non-needs) cases

Significant guidance update to entire section, including:

4.4 – Whilst there can be no 'one size fits all' approach to the interplay between 'needs' and 'sharing', it would be wrong to apportion pensions so as to exclude the 'non-cohabitation/marriage' element without first considering the relevant s.25 factors, which in most cases [save where parties young or marriage is very short] will include the income needs of the parties in retirement

4.6 – If apportionment is justified, then the date for commencement of apportionment will almost without exception be the date of commencement of seamless cohabitation, and not the date of marriage, see for example *GW v RW* [2003] EWHC 611 (Fam), *Co v Co (Ancillary Relief – Pre Marriage Cohabitation)* [2004] 1 FLR 1095.

4.7 – Post separation accrual – there remains room for debate and some conflict in the authorities, with references to the various key competing cases.

4.8 to 4.11 – Section on Short Marriages now added.

Part 6 - Dealing with pensions fairly on divorce

6.4 – Reference to Defined Benefit tax free cash differences and pension credits from already crystallised benefits, known as 'disqualifying pension credit'

6.4 – Percentage pension share must apply to each component of a pension arrangement, including crystallised and uncrystallized benefits

6.10 Case 1 – Commentary on the Defined Contribution issues to be aware of.

6.10 Case 3 – 'Big Money' cases where pensions are relatively modest in value compared to the capital – the approach in the High Court exemplified by *SJ v RA* [2014] EWHC 4054 and *CMX v EJX* (French Marriage Contract) [2022] EWFC 136

6.11 Case 5 – Comment added – There may be terms on your firm's professional indemnity insurance that requires a PODE report to be recommended to be obtained for all pension funds over the value of £100,000, whatever the nature.

6.11 Case 12 – Cases in Family Court below High Court level exemplified by *W v H (divorce financial remedies)* [2020] EWFC B10

6.15 to 6.29 – greatly expanded commentary regarding the debate and leading authorities/ opinions for equality of income v equality of capital

Part 7 - Pension Offsetting

Expansion of Key Points to highlight issue relating to the weight to be attached to PODE offsetting figures.

7.24 – Inclusion of the Galbraith tables as an offsetting valuation methodology and commentary on and the limitations of these tables [7.25]

7.31 – Expansion of guidance on adjusting for tax in offsetting cases.

7.34 – Some PODEs may consider that when the offset amount is invested it may be subject to tax.

Part 8 - Pension Freedoms

8.21 – Commentary on changes to the Normal Minimum Pension Age from 2028

Part 9 - Taxation of pension benefits

Refresh of all pension tax allowances

9.6 – Commentary on the abolition of the LTA

9.7 – Explanation of anticipated restrictions to future tax-free cash amounts, the legacy of LTA protections continuing and the introduction of a new Lump Sum Allowance and a Lump Sum Death Benefit Allowance

9.8 – Funding changes for those with Fixed Protections

Part 10 - Age differential and 'income gap' syndrome

Expansion of Key Points

10.8 – Possible mitigation of the 'age differential and income gap syndrome' issue – expanded from 6 to 10 ways, new methods including Judicial Separation, Spousal Maintenance, an increased percentage PSO and Consecutive Orders (PAO to PSO)

Part 11 - State Pensions

Expansion of Key points

11.3 New commentary on reclaiming credits from ex-spouses where 'working spouse' also claimed child benefit and effectively obtained duplicate credits

11.20 – New guidance if considering apportioning State Pension rights to period of cohabitation/marriage

Part 12- Some issues in valuing pensions for divorce

12.2 – Additional commentary that pre-marital cohabitation running seamlessly into marriage should be treated as part of the marriage

Part 13 - Pensions where an application has been made to vary the original order

Significant expansion of Part 13 by inclusion of new sections on Applications to vary Pension Sharing Orders [13.10 to 13.17] and Applications to set aside Pension Sharing Orders [13.18 to 13.25], including detailed case law commentary and references

Part 14 - Pensions and International issues

14.11 – Refinement to post Brexit changes

Appendix A - Glossary

General refresh and some additions

Appendix C - Who can be instructed as a PODE or SJE

General refresh and update

C.8 – Suggests that when instructing experts, check to ensure the PODE currently resides in the UK and expects to do so for the foreseeable future

Appendix D - Self-certification of expertise

General refresh

xxii – New para 22 dealing with experts having appropriate arrangements in place to cover professional shortcomings

Appendix E - Specimen letter of instruction to SJE/PODE

Some amendments to letter of instruction and the notes now recorded separately to the letter for ease of reference

Appendix F - Post-order implementation issues

New Key Points commenting on new Standard Family Order template and unresolved debate about when the 28 days starts where a *Rose* Order is made at FDR.

F.31 – New paragraph referencing *Goodyear v Goodyear (Deceased)* [2022] EWFC 96

Appendix I - Complexities in certain public sector occupational schemes

I.6 – Updated commentary regarding the McCloud ruling

I.41 to I.54 – Significant new material on the McCloud ruling and the McCloud remedy

Appendix J - Underfunding of Defined Benefit schemes and reduced CEs

J.6 – Reference to danger of ticking box F in the PSO and reference to *T v T (Variation of a Pension Sharing Order and underfunded schemes)* [2021] EWFC B67

Appendix K - The Pension Protection Fund and Financial Assistance Scheme

Significant refresh of chapter, particular regarding the Financial Assistance Scheme, with assistance from the PPF

Appendix S - Apportionment of final salary pension rights

Additional commentary on specific issues with each method of apportionment

S.8 – New commentary about extra work involved in 'Deferred Pension' method

S.12 – New commentary about flaws of CE method

S.13, S.14 and S.15 – Additional commentary on 'Straight-line' method

S.16 – New commentary on PAG's preferred approaches

Appendix U - A future approach to pension valuation. The emergence of the Galbraith Tables

Valuing pensions – The emergence of the Galbraith tables as a new development replaces the previous Appendix U suggesting ideas for the development of such tables

Appendix V - Recommendations for issues beyond the remit of PAG

V.30 – Recommendations for changes to Form A

V.31 and V.32 – Recommendations for changes to Form P and a suggestion for a modernising review by the Family Procedure Rule Committee

- Blog
- Pensions on Divorce

Why Become a QLR?

Published: 22/01/2024 19:01

Naomh Gallagher

Naomh Gallagher is a barrister at St John's Buildings. She specialises in financial remedy proceedings, including those involving interveners and non-biological children. Naomh has completed the FLBA's Advocacy and the Vulnerable course and has extensive experience in cases involving vulnerable witnesses, domestic abuse and section 25 conduct issues. Naomh is also well-experienced in private law children proceedings acting for both parents and extended family members.

'I've heard it's not well organised'

'You'll make no money'

'It seems like more work than it's worth'

These are the usual comments I receive when I tell people I undertake work as a Qualified Legal Representative (QLR). Still a relatively new scheme, the Family Court has been long overdue for its equivalent of section 38 advocates in criminal proceedings. Essentially, an independent advocate to undertake cross-examination on behalf of a party in circumstances where the court has determined it is not appropriate for that party to cross-examine the witness themselves.

The classic example would be, in my practice area of financial remedy proceedings, where there are allegations or cross allegations of domestic abuse and a party, perhaps the husband, is a litigant in person – whether for personal or, more likely, monetary reasons – and the matter requires a final hearing. Litigants in person were certainly on the rise at last count in 2016, and on the ground it looks like the situation has become even more dire.

While we wait to see whether legal aid will ever be made workable again to the point where this hypothetical husband could obtain a solicitor to represent him consistently throughout the proceedings, the next best thing would appear to be the husband having an advocate at the final hearing to cross-examine the wife on his behalf. This is the function of the QLR.

In days gone by, husband would have had to formulate his questions for wife ahead of time and file these with the court, so the judge could put the questions on husband's behalf. This was fraught with issues, including:

- previous judges forgetting to direct this specifically;
- litigants in person failing to provide their questions ahead of time and needing additional time on day 1 of the final hearing to draft their questions;
- litigants in person failing to provide their questions ahead of time and some judges effectively allowing them to half-way cross-examine, in that they were permitted to conduct questioning with the judge interrupting any improper question;
- litigants in person mistakenly filing and serving their questions and putting the other party (or parties) in the awkward ethical position of having been given detailed notes of the cross-examination to come; and
- judges being put in the rather difficult position (despite the quasi inquisitorial nature of the proceedings) of having to wear both the 'tribunal' hat and the 'representative' hat, and conduct cross-examination whilst also carefully considering the evidence being tendered during the same.

I was an early recruit to the scheme, which is open to solicitors and barristers. Having been appropriately qualified in advocacy and vulnerable witness handling, and having a current practising certificate, advocates register their interest with HMCTS and specify the courts they would be available to work at. Then the emails will begin arriving, indicating when and where a QLR might be needed, if the advocates could please make contact. Typically, the PTR has already happened, but if not you may be asked to also attend that.

There has been some bleed over in that it remains to be seen how HMCTS are handling this information internally. Anecdotally, there are complaints of being contacted by courts not indicated in the registration documents. I was surprised myself one day as counsel based in Manchester and the North West to be contacted by the Family Court at Bristol, having never registered with Bristol and indeed being quite doubtful as to whether I could find a podcast entertaining enough to sustain me through that particular 6–7 hour round trip. Having heard the pushback from advocates about this point, the issue is currently being considered by HMCTS's Family Jurisdictional Support.

The initial request for a QLR will usually be bare bones, and it is on the respective advocate (or their clerk) to make contact to obtain details and party names to ensure conflict checks can be carried out, and to ensure the instruction is within the advocate's competency. The latter can pose difficulties in that many members of court staff will not be able to provide a neat summary of the case in the way, say, an instructing solicitor would when contacting clerks in chambers to secure appropriate counsel for a hearing. In reality, it is a matter of ensuring there are no conflicts or diary clashes and then becoming appointed, to obtain the papers later.

In the scheme's early days, there were issues of QLRs not being provided with details or papers in adequate time and finding out, quite late in the day, that the case was outwith their experience threshold or practice range. However, I am

finding that the court is now wise to the perils of this and it is now the norm for QLR appointment orders to include the following:

- appointment of the named individual;
- the court staff/solicitors in the case must send the bundle used at the ground rules hearing/PTR within 3 days of appointment; [1]
- provision that the court-appointed qualified legal representative must notify the court as soon as possible if they are subsequently unable to accept the court appointment; and
- the court staff/solicitors in the case must send the court bundle to the qualified legal representative appointed to conduct the cross-examination 7 days before the hearing.

When complied with properly, the above allows the QLR sufficient time to become familiar with the case and whether there is any risk they are not an appropriate advocate.

There is an expectation that QLRs provide position statements (see Section 3.3 of statutory guidance, although there is usually little to address given the nature of the role. I tend to focus on issues relevant to effective hearing management (like an agreed timetable) and provide a short summary of my party's case. I say 'my party' rather than 'my client' as QLRs do not have free-ranging remit to conduct the hearing on behalf of the party they are appointed for, they may make not make submissions (Section 2.1), and strictly speaking you have no client relationship with them.

You then have a noting brief up until your party gives evidence; in the above scenario it may be hypothetical husband who gives evidence first, so he is tendered into evidence by the court and cross-examined accordingly while you observe. After husband's evidence you may wish to arrange a quick chat with husband as to how that informs your cross-examination to come. As at Section 2.1 above, you are not taking instructions formally, but you will need to have a discussion with husband to ensure cross-examination is focused accordingly in light of the evidence to date.

Then once wife is tendered into evidence and chief is complete, you enter the fray and cross-examine. Once wife's evidence is over, unless you are appointed to cross-examine any other witness, you are discharged by the court and may go on your merry way as everyone else continues without you. It does feel strange, cross-examining only and then leaving, usually partway through the final hearing, like you're leaving a lesson early to go to the dentist.

Except an awful lot does get achieved by cross-examination only. Advocates will know what I mean when I refer to the magic of cross-examination. Litigants in person, frustrated and scared, usually not knowing where to begin to present their case properly, get to watch someone on their behalf put their case and attack any obstacles. This hands the litigant in person the building blocks for when they come to make their own closing submissions, and streamlines the process for the court. It also makes going to a final hearing less terrifying for the

litigant in person. When I think about how daunted I felt when I cross-examined someone for the first time as a baby barrister, even after years of training (and years of desperately wanting to be allowed to), I feel immensely sorry for someone thrust into that role. Particularly so, and it bears repeating, when so many people are left in the position because legal aid has been gutted.

The pay is indeed modest, especially compared to private fees; see Schedule to Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022 for detail. I have already told my loved ones they can expect more handmade gifts this year. Ultimately, it will come down to an individual advocate's practice needs including financial considerations.

I suppose then the first two comments are fair enough: the scheme could be better organised and it isn't a huge money maker. But I disagree wholeheartedly that the QLR scheme isn't worthwhile. I consider it a worthy scheme, and a desperately needed stopgap during a cost of living crisis when it would appear litigants in person are more common than ever.

If you would like to become a QLR, the Law Society has a helpful page on how to register.

- Blog

- Qualified Legal Representative

The Threat of Adverse Costs Orders in Financial Remedy Cases Has Just Got Higher – Peel J in *HO v TL*

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Ashley Murray

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Peel J's substantive judgment in *HO v TL* [2023] EWFC 215 is a compelling masterclass in addressing principle, guidance and the clear disposal of a smorgasbord of financial remedy issues within a must-read 27-page judgment for matrimonial finance practitioners.

Costs approach

However, it is the costs order which followed (see *HO v TL* [2023] EWFC 216), and which condemned the wife applicant to a contribution of £100,000 towards the respondent husband's costs, which not only repeats the warnings as to adverse costs orders following a lack of open negotiation as now well established by Mostyn J in *OG v AG* [2020] EWFC 52 and Peel J's own judgment in *WC v HC* [2022] EWFC 40 as extended into needs awards (see *Rothschild v de Souza* [2020] EWCA Civ 1215, Francis J in *WG v HG* [2018] EWFC 84 and Cohen J in *Trahrane v Limb* [2022] EWFC 27), but, arguably, widens those instances where parties following judgment may have to pay costs pursuant to the provisions of FPR 28.3(6) and, of course, Rule 4.4 of the Practice Direction stating:

> 'The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of

which the court will consider making an order for costs. This includes in a "needs" case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court.'

Parties' offers

In a case where the parties' wealth inclusive of trust resources was found to be c.£22.4m, W's financial remedy claim recovered ultimately £7.75m based on her 'needs' after her debts were paid off. She had previously claimed £17.2m, modified later in her s 25 statement to £12.3m and then reduced again to £10.9m in the month before the six-day final hearing. At trial, H's position was £5.9m down from an earlier offer of £6.5m. The difference at trial was, therefore, c.£5m and the parties' final combined costs were £1.55m.

Costs judgment

Peel J, in addressing the costs issues raised before him pursuant to Part 28.3(6) and Rule 4.4, particularly highlighted as relevant to the circumstances of the case he was dealing with, the following factors from Part 28.3(6):

'(b) any open offer to settle made by a party;

(a) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(b) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(c) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(d) the financial effect on the parties of any costs order.'

In addition, His Lordship emphasised that 'sensible attempts to settle … or unreasonable failure to make such attempts will ordinarily be a powerful factor one way or the other when considering costs', and he repeated Mostyn J's warning in *OG v AG* that 'if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs'.

In doing so, Peel J sought to highlight the risk in needs-based court awards of the payer being placed in the position of 'the ultimate insurer' of the payee spouse's costs when the payee's award also discharges all debt including the litigation costs. His Lordship suggested such an outcome provided no incentive on the payee to negotiate sensibly and even to use 'needs' as a shield against being subjected to an adverse costs order. Peel J's warning was that 'no litigant is automatically insulated from costs penalties, notwithstanding the possible impact on the intended needs award'.

Analysing W's approach to negotiation, the court found she had until the September before the November 2023 final hearing maintained 'an unrealistic and speculative approach'. Albeit sufficiently well informed of the case resources, she had known, according to Peel J, that her initial offer of December 2022 at £17.2m was unsustainable. Her failure to modify this position 'for months' was not 'reasonable open negotiation' and was unreasonable and running such an untenable case risked an adverse costs order.

His Lordship was also critical of H who he found had been 'evasive and legalistic' about a central issue in the case, namely his trust interests. This had taken up a significant amount of time and expense in the case and 'ordinarily would justify an order for costs against him'.

However, Peel J further criticised W, who, whilst not formally raising conduct as an issue, had in her filed documentation made personal criticism of H. His Lordship condemned the 'making of pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings'. Such practice was unfair to the other party who had exercised restraint in such matters and it was not the court's function when dealing with the parties' finances to 'pick over the bones of the marriage and attribute moral blame'. Although such personal attacks may not have added significantly to the costs, 'ordinarily this too might justify a costs order'.

Peel J also had a word of warning for the lawyers engaged. They had a duty to advise their clients in respect of the costs risks in such circumstances and they must explain clearly to the client that a failure to negotiate reasonably *on an open basis* carries costs risks.

Peel J saw no reason why the court should not make a cost order if one party makes an unreasonable open offer and even where, particularly in big money case but also in more modest and smaller value cases, that reduces one party's resources to meet their 'needs' as found by the court. His Lordship stated that:

> 'The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party's overstated proposals.'

Commentary

In one sense there is nothing new in Peel J's approach to the making of a costs order against W in this case where once she was aware of the broad financial position her first open offer (December 2022, £17.7m) had been pitched at well over double the amount she finally recovered (£7.75m) and indeed 76.6% of their combined wealth of £22.4m, as later found by the court. However, her filed s 25 statement (September 2023, £12.3m) had considerably moderated this approach to just over half of the parties' combined wealth and by the month prior to the final hearing this position had been moderated to just under half

thereof (£10.9m). Yet Peel J criticised her open negotiation approach as a failure to modify her original untenable position 'for months'. He also said that H's own December 2022 offer of £6.5m but payable over six years was 'ambitious'.

This raises the clear signal to practitioners of the need to warn clients in writing at the time of making any open proposal of the need for realism and, where the proposal is clearly overly ambitious, of the high likelihood of adverse costs consequences unless amended to a more reasonable and sustainable level within a short time thereafter. In any busy office this type of review process is obviously difficult to maintain, especially where a trial date may well be at least several months away, and a client's focus distracted by other non-legal work and family matters and office staff engaged on other more pressing casework.

However, Peel J's judgment also suggests that the court's post-trial analysis will also involve costs consequences for unnecessary personal commentary against the other spouse's behaviour in non-conduct cases, which has no bearing on the financial issues, but is clearly intended to reduce the standing of the other spouse generally in the court's eyes. Again, for practitioners, this is intended to rein in commentaries, particularly in s 25 statements, so frequently seen relating to childcare/arrangement-related problems or their general marital or post-separation behaviour short of inequitable conduct. It is also a warning which could include counsel's position statements where such commentary is included. It should also be noted that Peel J's condemnation of this was irrespective as to whether it could be shown to have increased the costs unnecessarily.

The level of legal costs in financial remedy cases which reach final hearings is an obvious area of concern for the profession. Too often the value of the real issues at stake bears an uncomfortable comparison with the costs incurred at that stage. In the instant case, those costs (£1.55m) represented 31% of the difference in issue value at trial (i.e. c.£5m). Of course, such hindsight case cost analysis is misleading in that a substantial part of those costs would have been incurred up to the Financial Dispute Resolution. However, the level of such costs is unarguably high in the process of divorce, which is an event which affects almost one in two marriages.

The rising tone of judicial admonition of parties in a post final hearing inquest of their approaches to that point is arguably looking at the problem through the wrong end of the telescope. First, there may be a need for a requirement for parties to make open offers immediately prior to the FDR as opposed to afterwards so that any 'untenable' stance is exposed to a judge's warnings at an earlier stage. Second, of course, the 'elephant in the room' is and has been for a long time now the need for a reform of financial remedy law generally.

The public can no longer afford a process leading to bespoke division by individual judges in the majority of divorce cases. The law post-*White* has become impracticably academic in approach, with nuanced arguments promoted by the House of Lords/Supreme Court and Court of Appeal, endlessly extended by the High Court bench justifying a multitude of potential arguments

for imbalanced division in what are principally 'big money' cases, but which undeniably continue to have some remaining relevance to the division in many of the more run of the mill 'needs' cases. It is this position which feeds over-ambitious targets by some clients and which the judges need to look in the mirror over when considering their own involvement. It is also one in which legislators need to stop using Brexit and Covid as an excuse and finally address the overdue need for reform where equal division becomes the statutory presumption and the man or woman in the street can read the Act and understand how their resources are likely on divorce to be divided without having to undergo a judicial process to achieve the same.

- Blog
- Costs

The Law Is an Ass: Goodbye to the Knock-Out Blow – *Potanin v Potanina*: the Supreme Court Decision

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https://www.bailii.org/uk/cases/UKSC/2024/3.html

On 31 January 2024 the Supreme Court handed down the much-awaited judgment in Potanin v Potanina [2024] UKSC 3. These proceedings relate to financial claims which can be brought in England for financial provision after an overseas divorce. Although the parties in this case have been described as 'massively rich' with assets estimated at $20 billion, the judgment will have a significant impact on the way all Part III claims are determined – both in terms of procedure and outcome – going forwards in England.

This is only the second time the Supreme Court has had an opportunity to give a substantive judgment on the way in which Part III proceedings should be conducted (the other case being Agbaje [2010] UKSC 13 in 2010). This judgment is likely to be of particular importance given the announcement that despite calls for the Law Commission to review the law on Part III applications, they are not going to be included in their review of financial provision on divorce in respect of which a scoping paper is expected to be published in September 2024.[1]

Part III: a brief introduction

Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III") gives the English family court the power to make financial orders after a marriage has been dissolved or annulled in an overseas country if there has been inadequate financial provision on the overseas divorce and the parties have a sufficient connection with England.

Part III was introduced at a time when international movement was on the rise and many countries made little, if any, financial provision for women on divorce. The problem became apparent in a series of cases in the 1970s where there had been a foreign divorce which resulted in no financial provision having been made for the wife.

For public policy reasons the English family court has a liberal approach to the recognition of overseas divorces. This did however give rise to difficulties when parties with close connections to England divorced abroad and received inadequate financial provision. If England recognised the overseas divorce (which it usually does), the English family court had no power to make orders for financial relief.

The Law Commission was asked to review the law in this area and make recommendations. This resulted in a Working Paper in 1980[2] followed by their final Report in 1982.[3] The Law Commission recommended the introduction of legislation to give the English court the power to make financial orders after an overseas divorce where there had been inadequate financial provision abroad and thus Part III was born.

To avoid claims without any merit from proceeding the Law Commission recommended a filter mechanism. Therefore, before an application can be brought for financial relief under Part III the applicant must first apply for and obtain 'leave' under s 13 of the 1984 Act. The legislation provides that leave should not be granted unless there is a 'substantial ground' although case law has established that the threshold is not high.

As with any claim it is also necessary to have a sufficient connection, jurisdiction, with England to bring make an application under Part III. The jurisdictional grounds are set out in s 15 of the 1984 Act and require, in summary, either party to be domiciled in England or have been habitually resident in England for 12 months on the date of the overseas divorce or Part III leave application.[4]

The English court has the power to make a wide range of orders that are very similar to the financial orders which can be made on divorce in England. The range of orders is contained within s 17 of the 1984 Act and includes lump sum orders, property transfer orders, periodical payments orders and pension sharing orders.

When considering both whether to make an order the English court is under a duty to consider a list of factors in s 16 of the 1984 Act when deciding whether England is an appropriate venue and a list of factors in s 18 of the 1984 Act in deciding whether, and if so in what manner, to make an order under Part III.

Part III: the leave process

The procedure to be adopted when applying for leave under Part III has a complicated history. Although the Law Commission recommended that the leave application should be ex parte, the legislation made no reference to whether the leave hearing should be inter partes or ex parte and the procedural rules (which have changed over time) have not always been clear.

As a result, a practice developed where applicants would often give respondents informal notice of the leave application. This invariably led to the leave application being determined on notice. Alternatively, when the leave application was determined ex parte respondents would often apply for the grant of leave to be set aside. Both approaches lead to increased time and cost being spent on what was supposed to be a summary process to prevent wholly unmeritorious claims being pursued.

These practices were perceived to have been disapproved in *Traversa v Freddie* [2011] EWCA Civ 81 and *Agbaje* [2010] UKSC 13. In the former the Court of Appeal held that the leave application should be made without notice albeit the court should have the power to direct that the leave application be heard inter partes. [5] The procedural rules were amended to reflect this in August 2017. [6] In *Agbaje* the Supreme Court held that unless the respondent can deliver a 'knock out blow', any set aside application should be heard with the substantive application. [7]

The more recent practice over the last decade or so has therefore been for applicants to make the leave application without notice although there has been an increasing recognition – particularly following the difficulties which arose in the *Potanin* litigation – that in complex or borderline cases the court may consider that the leave application should be heard on notice. [8]

Although respondents still have the ability to apply for Part III leave to be set aside if made at an ex parte hearing, the threshold the Supreme Court introduced in *Agbaje* (a knock-out blow) is so high that in practice it is very unusual for leave to be set aside once it has been granted. The court will more often direct that any set aside application should be determined at the conclusion of the proceedings once all the evidence has been heard.

This approach has been perceived by some as unfair on respondents. Although there is a high duty of candour on applicants at an ex parte hearing, that is not the same as the respondent being able to make their own submissions on the merits. This perceived unfairness has arguably become more acute following the Court of Appeal's comments in *Potanin* that where leave is obtained based on misleading information it should only be set aside if the misrepresentation was material. [9]

This combination of (1) leave often being granted ex parte and (2) the very high threshold to succeed on a set aside application, have led to concerns that respondents are unable to be heard on the issue of whether leave should be

granted. They are often not present at the leave hearing and unless they can show a knock-out blow are unable to be heard after leave has been granted.

It was against this background that the *Potanin* litigation started in England in late 2018 when the wife applied ex parte for leave to make a financial claim in England following her Russian divorce.

Potanin: brief background

The parties are both Russian. They married in Russia in 1983 and divorced in Russia in February 2014. They had three children who are all now adults. The parties spent all their married life living in Russia.

The parties came from modest backgrounds but during the marriage the husband accumulated wealth estimated to be in the region of approximately $20 billion. The majority of the husband's wealth was not held in the husband's name but through various trusts and corporate vehicles.

There was a dispute between the parties as to the date of separation (2007 per the husband; 2013 per the wife) although the Russian courts found the date of separation to be 2007. In 2007 the husband transferred the sum of $71 million to the wife followed by a further $5.1 million.

After what was described as a 'blizzard of litigation' between 2014 and 2018 the Russian courts awarded the wife at least $41.5 million (there is a dispute as to the exact amount received owing to disagreement as to the appropriate exchange rate to be used when converting roubles into dollars).

In terms of connections with England, in June 2014 (four months after the Russian divorce was finalised) the wife obtained a UK investor visa. Later that year the wife bought a property in London. The wife's case was that since the beginning of 2017 London had been her permanent home.

Potanin: the Part III leave application

In October 2018 the wife made a without notice application for leave to bring a claim under Part III of the MFPA 1984. On 25 January 2019 Mr Justice Cohen granted the wife leave to apply for financial relief pursuant to Part III. Although the judge expressed a strong inclination during the without notice leave hearing to determine the application on notice, the judge determined the leave application ex parte.

Potanin: the set aside application

The husband applied to set aside the grant of leave on the basis the judge had been misled as to the facts of the case, issues of Russian law and the applicable

principles of English law. The set aside hearing took place inter partes over two days in October 2019 with judgment given on 8 November 2019. [10]

When deciding to set aside the grant of leave Cohen J found three categories of misrepresentation:

1. Factual misrepresentation which the judge said included being given incorrect information about the level of child maintenance and misleading information as to the strength of the connections with England;
2. Misrepresentation as to the Russian litigation which the judge said included not being given copies of the Russian law or judgments and not being told the wife had not made a needs-based claim in the Russian proceedings; and
3. Misrepresentation as to English law which the judge said included not being sufficiently referred to key paragraphs of the Supreme Court's decision in *Agbaje*.

Potanin: the Court of Appeal judgment

The wife applied for permission to appeal the judge's decision to set aside the grant of leave. The appeal hearing took place over two days in January 2021 with judgment handed down on 13 May 2021. [11] The Court of Appeal (Lady Justice King delivering the judgment with which Lord Justice David Richards and Lord Justice Moylan agreed) allowed the wife's appeal and allowed the wife's Part III application to proceed.

The Court of Appeal found that the judge had applied the wrong test and adopted the wrong procedure when setting aside the grant of leave. The test the judge adopted was whether – if he had had the full picture at the leave application – he would have granted the wife leave to bring her application. The Court of Appeal said that the judge should have instead listed a short hearing to determine whether there was a knock-out blow.

The Court of Appeal held that the judge's view had been tainted by the procedure adopted at the set aside hearing (which on the one hand was too lengthy, but on the other hand led to the making of findings against the wife without oral or expert evidence) and that the alleged deficits identified by the judge, even if they were to be established, were not sufficiently material to justify setting aside the grant of permission.

The Court of Appeal's order therefore reinstated the grant of leave and the matter was remitted to Mr Justice Francis for directions to be made to progress the wife's claim under Part II.

Potanin: the Supreme Court judgment

The husband appealed to the Supreme Court. The hearing took place over 1.5 days on 31 October and 1 November 2023. The judgment was handed down on 31

January 2024. By a majority of 3:2 the Supreme Court allowed the husband's appeal.

Practitioners should be aware of the following two areas covered by Lord Leggatt in his judgment on behalf of the majority: (1) the threshold adopted on the Part III leave application and (2) the threshold adopted on an application to set aside the grant of Part III leave.

Threshold on the leave application

In an extremely thorough and detailed judgment Lord Leggatt examines the inconsistency in the threshold test adopted by the Supreme Court in *Agbaje* on the leave application which was as follows:

> 'The principal object of the filter mechanism [in s 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid".'[7]

In a passage which should be read by all practitioners Lord Leggatt then gives the following guidance on the threshold to be adopted on leave applications:

> 'I would not wish to cast any doubt on the primary guidance given in Agbaje that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. In each of these contexts the test applied is whether the claim has a "real prospect of success". That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.'[13]

Lord Leggatt also commented that leave hearings listed for as little between 20 and 60 minutes are not realistic and that it would not be reasonable to expect such hearings to be measured in minutes rather than hours. [14]

Going forwards practitioners should be aware that the test adopted on the Part III leave application is now likely to be higher than previously. Applicants applying for leave under Part III will need to show more than that their claim is not totalling without merit or an abuse of process. The test to be adopted going forwards is whether the claim has a real prospect of success. Practitioners should also be aware when making their application that a longer time estimate may be required (particularly given, as we will see below, it is possible that Part III leave applications will more often be heard on notice going forwards).

Threshold on an application to set-aside leave

In the opening paragraph of his judgment Lord Leggatt held as follows:

> 'Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is – if you make the order sought – to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made.' [15]

Lord Leggatt went on to give three reasons why the approach which has been adopted to the Part III leave process was unfair:

1. To deny a party adversely affected by an order any opportunity to say why the order should not be made is unfair; [16]
2. As well as being unfair, such a procedure is also foolish: judges make better decisions if they hear argument from both sides rather than from one side only; [17] and
3. A procedure which, while otherwise preventing a party from objecting to an order, allows that party to do so if he can show that the court was materially misled at a hearing held in his absence is likely to raise the temperature, increase court time and waste costs. [7]

Lord Leggatt goes on to state that the law as it presently stands (not how it had been misinterpreted) does not lead to those untoward results. [19] The right to apply for the grant of leave to be set aside is unconditional and the rules do not require a knock-out blow. [20] Lord Leggatt goes on to explain that the creation of the 'knock-out blow' test was owing to a misunderstanding as to concerns Thorpe LJ and Munby J expressed in *Jordan* and *Agbaje* respectively. According to Lord Leggatt, those judges had been criticising as inefficient the requirement

to hear the leave application initially ex parte instead of being able to move at once to an inter partes hearing to decide whether to grant leave. [21]

Lord Leggatt goes on to conclude that 'whatever the reason for it, however, it would be quite wrong and unfair if a judge's initial case management decision were to deprive the respondent of the right to present an argument to the court that leave should not be granted' [22] and that 'the end result of this history is that there is a mismatch between, on the one hand, the fundamental principle of procedural fairness reflected in [the rules] which entitles a respondent to apply to set aside an order made without notice and, on the other hand, the practice presently adopted in dealing with section 13 applications'. [23]

Lord Leggatt then goes on to consider, and dismiss, three reasons which were advanced for retaining the knock-out blow:

1. Restricting the right to apply to set aside leave granted without notice is justified by the desirability of saving costs and court time. Lord Leggatt's response was that although court time could be saved if courts were to adopt a practice of hearing from applicants alone without allowing respondents to participate in the process unless they can demonstrate by a 'knock-out blow', fairness is not a value which can properly be sacrificed in the interests of efficiency; [24]
2. Denying a respondent a right to object to an application for leave under s 13 is not unfair because granting leave does not decide any issue of substance. In response Lord Leggatt commented that although a requirement to obtain leave of the court to bring a claim is unusual, that does not mean it is unimportant and the fact a grant of leave does not finally decide any issue of substance between the parties is not an acceptable reason to deny a respondent the right to be heard; [25] and
3. The approach generally taken by the Supreme Court is that matters of practice and procedure are best left to the Court of Appeal or the Rules Committee to address. In response Lord Leggatt responded that although that is the general approach, there are three reasons why it is not applicable in this case: (a) the practice of denying respondents the right to oppose applications for leave under s 13 originates in observations in a judgment of the Supreme Court (and it is therefore for the Supreme Court to correct the position), (b) no question of procedure is raised which it is suitable to leave for consideration by the Rules Committee (as in their current form the rules of court governing the setting aside of leave granted without notice are clear and unambiguous) and (c) as the practice currently being followed in dealing with applications to set aside leave granted without notice is unlawful the Supreme Court should intervene to end the practice. [26]

This represents a significant change of practice when dealing with Part III leave applications. Since 2010 practitioners have been slow to advise respondents to set aside the grant of leave owing to the very high threshold and costs risks.

Sometimes a tactical decision was taken to issue a set aside application for presentation purposes on the basis it would be listed for determination at the final hearing. But apart from that set aside applications have been rare over the last decade or so.

Going forwards the test to be adopted on set aside applications is now lower. The obvious concern is that we will see a return to the practice before *Agbaje* and *Traversa v Freddie* of respondents routinely applying to set aside the grant of Part III leave. To counter this I would not be surprised if the courts increasingly utilise their case management powers to hear Part III leave applications on notice with a time estimate of two hours or half a day. Where the application is determined ex parte applicants will need to be very careful to comply with the duty of candour which exists on all ex parte applications.

How the proceedings for the parties in the *Potanin* litigation resolves remains to be seen. The Supreme Court have remitted two grounds of appeal (which were not argued before the Supreme Court) to the Court of Appeal. I suspect, sadly, the litigation which started in Russia a decade ago is still some way from reaching a conclusion.

– Blog

–Supreme Court –Part III –Overseas Divorce and the 1984 Act
–Leave Application –Setting Aside Orders (Including Barder Applications)

The Potanin Litigation: a Look Ahead

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On 31 January 2024 the Supreme Court handed down judgment in the case of *Potanin and Potanina* [2024] UKSC 3. For a summary of the background to the proceedings and an overview of the judgment please see link.

The key dates in the proceedings are as follows:

- 8 October 2018: The wife applied for leave to bring an application for financial provision in England under Part III of the Matrimonial and Family Proceedings Act 1984 after a Russian divorce.
- 25 January 2019: Cohen J granted the wife leave to bring an application under Part III at an ex parte hearing which took place without notice to the husband.
- 8 November 2019: After hearing from the husband at an inter partes hearing Cohen J set aside the grant of leave on the basis he would not have granted leave if he had been aware of all the circumstances at the ex parte hearing.
- 31 May 2021: The Court of Appeal overturned the set aside order (and therefore reinstated the grant of leave) on the basis the husband had not shown a 'knock-out blow' as Cohen J had not been *materially* misled at the ex parte leave hearing.
- 31 January 2024: The Supreme Court allowed the husband's appeal against the Court of Appeal's decision to set aside the grant of Part III leave.

That is not however the end of the story. There are two other grounds which had been raised by the wife in the Court of Appeal (but were not dealt at the time as the wife had been successful on the primary issue in that appeal) which have been remitted to the Court of Appeal. They are as follows:

1. Even if Cohen J was entitled to set aside the leave granted without notice, he should not have done so because after hearing argument from both

sides he should have concluded that the test for granting leave was satisfied; and

2. The wife's application should not in any event have been dismissed insofar as the court has jurisdiction in relation to it by virtue of the EU Maintenance Regulation.

The first ground brings to a head what is likely to be the main issue in these proceedings. On the one hand, the parties had no connections with England before the marriage was dissolved. Anyone who watched the proceedings in the Supreme Court will know how strongly Lord Leggatt expressed his views about whether it was appropriate for leave to be granted in these circumstances. On the other hand, the wife has been awarded a tiny fraction (estimated at 0.5%) of the husband's wealth as the majority of his assets held in trusts and corporate vehicles were excluded from consideration under Russian law. How the court balances these competing arguments may to a large extent determine the outcome.

The second ground relates to a provision contained in s 16 of the 1984 Act at the time the wife's application was issued (before the UK's departure from the EU) which stated that the court may not dismiss an application for financial relief under Part III on the ground that England is not an appropriate venue if to do so would be inconsistent with the EU Maintenance Regulation. This provision continues to apply in these proceedings under the transitional arrangements governing the UK's departure from the EU but is unlikely to impact many, if any, other cases in the future.

Lord Leggatt expressed a view (in passing and without hearing argument) that on the face of it that provision did not apply because as the former wife was seeking to bring (rather than enforce) a claim for maintenance she would not be a 'maintenance creditor' within the meaning of the Regulation; [101]. With a large degree of trepidation I *very* respectfully suggest that cannot be right. The Regulation governs not only recognition and enforcement of maintenance decisions but also jurisdiction to apply for them. Article 3 of the Regulation provides that jurisdiction shall lie with *inter alia* the court for the place where the maintenance creditor is habitually resident. If the term 'maintenance creditor' was intended only to refer to persons seeking to enforce an existing maintenance decision it would not feature as a ground of jurisdiction to apply for a maintenance decision. A similar view was expressed by Coleridge J in *M v W* [2014] EWHC 925 (Fam) when he held at [39] that although the term creditor is generally found where a debt is in existence, on a proper reading of Regulation it includes a potential creditor.

What is of interest is whether the wife's claim will be treated as concerned with maintenance (in which case the EU Maintenance Regulation may apply) or solely concerned with dividing property (in which case the EU Maintenance Regulation would not apply). The following passages in *van den Boogaard*[1] will be relevant:

> '21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in each particular case to the specific aim of the decision rendered.
>
> 22. It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.
>
> 23. It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.'

It will also be interesting to see, if the claim is found to be maintenance in character, whether s 16(3) of the 1984 Act will be interpreted as applying to leave applications or restrained only to substantive application. Section 16(1) of the 1984 Act provides that before making an order for financial relief the court shall consider whether it is appropriate for an order to be made in England and, if not satisfied, shall dismiss the application. Section 16(3) provided that if the court had jurisdiction under the EU Maintenance Regulation (which it did), the court may not dismiss the application on the ground mentioned in s 16(1) if to do so would be inconsistent with the EU Maintenance Regulation. On the surface it therefore appears as though the application, if and to the extent that it is maintenance in character, cannot be dismissed on this basis as it would be inconsistent with the EU Maintenance Regulation.

On the other hand, s 13 of the 1984 Act provides that no 'application' for financial relief under Part III can be made unless leave of the court has been obtained. Might it therefore be argued that the provisions in s 16(3) (which are not repeated in s 13) do not apply to the leave process which takes place before an 'application' has been made? Or will the court interpret that the requirement not to contravene the EU Maintenance Regulation should be applied to the leave process too? Given the wording of s 16(3) – 'the court may not dismiss the application or that part of it…' – might this lead to only a needs-based element of

the wife's claim being permitted to pass beyond the leave stage, with the sharing element being effectively debarred by a partial refusal of leave? What would that look like in practice: leave granted to bring an application restricted to be assessed by reference to the needs principle? Would that not place a fetter on the court's discretion when conducting the exercise required by ss 16 and 18? Even if s 16(3) *did* apply to prevent refusal of the grant of leave, there would be nothing stopping the court from exercising its discretion at the conclusion of the proceedings not to make a financial remedy order after taking all of the s 16 and s 18 factors into account.

It remains to be seen how these issues will be resolved by the courts. Given the approach taken to the litigation to date it would not be surprising if the Supreme Court is asked to consider this case again before the proceedings conclude.

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– Supreme Court – Part III – Overseas Divorce and the 1984 Act
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The Law Is an Ass: Goodbye to the Knock-Out Blow – *Potanin v Potanina*: the Supreme Court Decision

On 31 January 2024 the Supreme Court handed down the much-awaited judgment in *Potanin v Potanina* [2024] UKSC 3. These proceedings relate to financial claims which can be brought in England for financial provision after an overseas divorce. Although the parties in this case have been described as 'massively rich' with assets estimated at $20 billion, the judgment will have a significant impact on the way all Part III claims are determined – both in terms of procedure and outcome – going forwards in England.

Supreme Court Part III Overseas Divorce and the 1984 Act Leave Application Setting Aside Orders (Including Barder Applications)

Michael Allum

31/01/2024

The Intersection Between LSPOs and Economic Abuse

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Recent years have seen increasing awareness of economic abuse, and how the financial remedy process can be manipulated as a tool of such abuse. However, one aspect of this has had little attention: the intersection between economic abuse and LSPOs.

The Domestic Abuse Act 2021 includes economic abuse within the definition of domestic abuse, defined as: any behaviour that has a substantial adverse effect on [the victim's] ability to (a) acquire, use or maintain money or other property, or (b) obtain goods or services. In *DP v EP* [2023] EWFC 6, HHJ Reardon found that there had been economic abuse and that this amounted to conduct for the purposes of s 25(g), and Resolution last year launched the Economic Abuse Working Group.

Research has suggested that financial abuse occurs in 99% of domestic violence cases and surveys of survivors reflect that concerns over their ability to provide financially for themselves and their children was one of the top reasons for staying in the relationship or returning to an abusive partner. [1] This means that economic abuse is very likely to feature where domestic abuse is present. Following separation, economic abuse typically plays out in three ways: cutting off financial support in order to exert control and block access to legal advice and representation; failing to provide adequate financial disclosure to create delay and confusion about finances; and using the delay to rearrange finances, suppress income and put assets beyond reach.

An LSPO application will only be made where all of the following conditions are met:

1. the applicant has minimal assets in her own name;
2. the respondent has sufficient assets to fund the applicant's legal fees but is refusing to do so, sometimes blocking the applicant's access to marital assets to fund her legal fees whilst using them to fund his own;
3. a litigation loan is unavailable, which is usually due to family assets being abroad, concealed, held on trust or otherwise inaccessible.

It is immediately apparent that such circumstances may well overlap with situations of controlling and coercive behaviour and economic abuse, heightening the risk that abusive and controlling behaviour is present in cases involving LSPO applications. Further, LSPO applications are generally made by women, who are statistically more likely to be victims of domestic abuse than men.

We suggest that there has been insufficient focus not only on the likelihood that economic abuse is present in cases involving LSPO applications, but on the reality that the funding of legal fees can be a new medium through which coercive and controlling behaviour is exercised. If the court does not ensure immediate and sufficient access to legal fees for a victim of economic abuse, it risks facilitating that abuse.

A previous article explored the operation of LSPOs in detail, arguing that the court's approach creates unfairness to those dependant on them and exacerbates power imbalances. This is especially problematic where the LSPO application has been made in the context of an abusive and controlling relationship.

On an LSPO application, the court frequently reduces the provision for the applicant's legal fees to below that which her solicitors have assessed as necessary to conduct her case. This is done by reference to reasonableness [2] and/or proportionality, [3] by way of comparison with the other party's fees, [4] and/or through deducting 'notional costs of assessment' from past [5] or future [6] costs. This does not mean, as it would on a costs order, that the applicant has to fund the shortfall herself – by definition she has, at this stage, no resources from

which to do so. Therefore, unless her solicitor is willing to act on credit, the time they can spend on the case will be limited. The respondent, by contrast, is free to instruct his solicitors to spend as much time on the case as he wishes to pay for – and, if the matrimonial assets are held in his name, to use them for this purpose.

A short interim hearing, heard prior to the facts of the case being established, is arguably not the best point at which to assess the reasonableness of costs. That is all the more the position in a case featuring economic abuse, where litigation conduct is likely to include behaviour such as non-disclosure, refusal to negotiate, unnecessary correspondence, pursuit of bad points, etc.

The litigation process, and the assisted party's dependence on a fixed sum for costs, provides new fertile opportunities for control, with both psychological and costs consequences. If the no-go area of an overspend (discussed below) is to be avoided, the result is either the rationing of legal activity which puts proper presentation of the case at risk, or a further interim hearing to address the anticipated shortfall with its attendant cost and risk, and where bad litigation conduct may not be obvious to a busy judge.

In non-LSPO cases, concerns around disproportionate or unreasonable costs are addressed at the end of the matter by way of a costs order, add-back, or reduction in the award. There is no reason this approach should not also be taken in LSPO cases. The court will be in a better position to assess whether costs were reasonable and proportionate after a final hearing. This would mitigate the real risk of a vulnerable applicant having their legal advice restricted due to the respondent's conduct of the proceedings.

Another judicial practice is the deduction of a percentage from the applicant's costs incurred prior to their LSPO application, and/or from their budget for future costs, by way of a 'notional standard basis assessment'. As with deductions for unreasonableness/disproportionality, this curtails a potentially vulnerable applicant's access to legal advice whilst the respondent suffers no such limitations. Beyond its unfairness, such an approach is misguided given that an LSPO is not a costs order. This was recognised by Peel J in *HAT v LAT* [2023] EWFC 162: 'I considered applying a notional reduction to reflect what would occur on a standard basis assessment … But on balance my view is that to do so would be the wrong approach … This is not an inter partes costs order.' Peel J had seemingly endorsed the 'notional deduction' approach three days earlier in *Xanthopoulos v Rakshina (Rev1)* [2023] EWFC 158, but it is to be hoped that the *HAT v LAT* approach prevails.

Limiting provision for the applicant's legal fees by way of comparison with those of the respondent will also create particular problems in a case involving domestic abuse as it is open to manipulation by the respondent, particularly one who practises controlling behaviour. Nor does it consider how an applicant's vulnerabilities, anxiety and inexperience with financial matters (all of which may be present if there has been abuse) may increase the time needed to advise them. Francis J recognised in *DR v ES* [2022] EWFC 62 that 'sometimes, a

vulnerable or anxious or talkative client can spend two or three hours doing something that should have taken one … but sometimes you have just got to do it, and it is important for the husband that the wife is properly advised and that she understands what she is doing'. This understanding needs to be more widely adopted.

The rigid approach to overspend taken in recent cases [7] compounds the problems. It is now clear that costs incurred by the applicant in excess of the budget set by the court are unlikely to be recoverable, irrespective of their reasonableness. If the budget permitted by the court proves insufficient, the applicant must either restrict the steps their lawyers can take or use some of their remaining budget to apply for increased provision. Having one party operating to a strict budget, and the other not, not only creates unfairness but risks replicating the dynamics of a controlling relationship. Further, a perpetrator of domestic abuse can take advantage of the position by conducting proceedings so as to create additional work not anticipated by the budget. Moreover, the requirement often imposed that the applicant provide regular updates to the respondent on her legal expenditure, [8] may reproduce aspects of controlling behaviour and be inappropriate in cases of abuse.

In his recent judgment in *Williams v Williams* [2023] EWHC 3098 (Fam), Moor J accepted that the wife's solicitors could not accurately estimate future costs as the husband, thought to be a billionaire, had failed to engage at all in the proceedings. Moor J therefore granted the sum sought by the wife's solicitors, saying 'by doing so, there is no prejudice to Mr Williams given that Mrs Williams will have to give an undertaking to repay if any of the money is not spent or if it is directed at the end of the trial that there should be a repayment'. The point applies in all LSPO cases.

We suggest that greater caution is required by judges when limiting the costs of LSPO applicants, particularly where the respondent's refusal to fund the applicant's legal fees voluntarily may be a manifestation of economic abuse. Macdonald J in *DH v RH* [2023] EWFC 111 emphasised the importance of the court's 'power to control the deployment of amounts awarded under a LSPO'. That in LSPO cases the court has this power over one party, which it generally lacks over both parties, does not render it fair to strictly deploy it in every LSPO case. If it is later determined that a cautious approach was misplaced and fees were unreasonably incurred, any necessary redress can be made in the final award. The court's current approach has worrying implications for access to justice for vulnerable applicants.

– Blog

– Domestic Abuse – Legal Services Payment Orders

English EU-Equivalent Divorce Jurisdiction Clearly Out of Step With EU Law

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Summary

When the UK left the EU, and new domestic legislation was needed to replace EU law, the UK government said in relation to divorce jurisdiction of England and Wales that it would follow, be the same as, the EU law. This was for very justifiable reasons of continuity and comity. They incorporated the relevant EU law into domestic legislation. But not word for word. Specifically, the English domestic statute followed one English High Court interpretation of EU law, when another, completely opposite, High Court interpretation was also favoured and was more probably the position in law and practice across EU member states. Government officials were warned by specialist practitioners that this would cause potential problems. It is now abundantly clear from a recent decision of the Court of Justice of the European Union (CJEU) that the EU understanding of the relevant law is very different to the expectation of English legislation. Will the English courts steadfastly follow the strict wording of the English domestic legislation, clearly putting us out of step with EU law, or interpret by reference to what is now stated as EU law? This has significance for all family lawyers undertaking international cases. It might have wider ramifications for other areas of domestic law following Brexit. Practitioners now need to be very cautious if relying on divorce jurisdiction of the applicant, petitioner, if there is not a continuous period of habitual residence. It might create problems with recognition, forum and enforcement.

Divorce jurisdiction from March 2001

Before March 2001, divorce jurisdiction in England and Wales was domicile or habitual residence for 12 months of either party. This suddenly changed when the UK joined the Brussels Regulation, Brussels II, then Brussels IIA. [1] The Regulation introduced [2] a menu of choice, with several grounds overlapping with references to residence, habitual residence and common nationality. [3] Where hugely different financial outcomes still occurred across the EU [4] and the *lis pendens* rule secured jurisdiction for the party first to issue proceedings, [5] two grounds in particular received distinctive attention in England as being the petitioners' choice of jurisdiction. Whatever might be the habitual residence, nationality or domicile of the respondent including the respondent having no connection with the country in which the proceedings were being issued, the petitioner could rely on these two grounds on their own claims for jurisdictional status with no reference to the respondent (and sometimes through taking tactical or other steps of which the respondent might be wholly unaware until served with the English petition and English financial claims [6]).

These were the similarly worded 5th and 6th indents of Art 3.1(a) BIIA with the 6th requiring a shorter time if nationality or domicile was present. Jurisdiction is with the courts of the Member State in whose territory:

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there.

For the next 20 years, practitioners had to balance the different concepts of habitual residence and (simple) residing for either 6 or 12 months. Fundamentally, did the habitual residence have to be for the entire previous period of 6 or 12 months preceding the issue of the petition, or was it sufficient merely for there to be habitual residence on the day of issuing the petition, provided the petitioner had resided in the country for the 6 or 12 months as applicable? Certainly, the English version of the wording of the EU law was not clear either way. This was also crucially linked to the position held in English case law on Art 3, and now confirmed also by the CJEU, that a person can have only one habitual residence at any one time, although able to have more than one parallel (simple) residency.

There were conflicting High Court decisions at first instance and opportunities to go to the Court of Appeal [7] or the European Court were frustrated for various reasons. Then the UK left the EU.

But this issue is not just of historic relevance. Divorce jurisdiction law for all cases was only found in EU laws. It had to be replaced by national legislation. In drafting the new legislation for England and Wales [8] the Ministry of Justice indicated they intended and wanted to follow EU law for continuity and comity. However they departed from the EU wording, to follow what they and some considered to be the prevailing interpretation of the conflicting High Court decisions. Whilst it was thought by some lawyers in England that most of the rest of the EU followed the other interpretation, the CJEU has now made clear that the interpretation set out in the English divorce jurisdiction legislation is very different to the interpretation favoured by the CJEU and therefore the law across the EU. This causes real uncertainty about how the English courts will interpret the new domestic legislation and impact on cross border Anglo EU cases.

This article explains what were the High Court conflicting decisions, then turning to the recent CJEU case law and looking at the outcome for English divorce jurisdiction

English High Court conflicting decisions

The problem with the EU divorce jurisdiction was that it tended to shoehorn the complicated lives of international families into narrow legal concepts. What happened when a family had 2 homes in different countries and one or both spouses were working out of each home or living in one home and spending significant time working from the other home? [9] How could this be one habitual residence?

The English wife and the Greek husband in *Marinos* [2007] 2 FLR 101 lived with their children in Athens. However, she kept work based in England, flying out of Heathrow as cabin crew for British Airways. She had available accommodation in England and did a part-time English law course. But the marital life, marital home, the husband, the wife for the majority of her time and the lives of the children were in Athens. When the marriage came to an end, she returned to England with the children and, on arrival, issued an English divorce petition. She said that on issuing the divorce she had English habitual residence and had been ordinarily resident during the previous 6 or 12 months. [10] In the High Court, Sir James Munby upheld this. A petitioner could have had two or more parallel, simple residences (i.e. England and Greece) for the time leading up the petition as long as habitual residence in England on issuing.

This opened the jurisdictional door for English divorces; it was suddenly much easier to secure the forum of choice of the applicant, the petitioner, seeking to bring divorce and ancillary financial proceedings in England with its perceived generosity to the applicant,. Equally and understandably, it caused amazement and consternation to many respondents and their lawyers abroad who had (and had had) believed the family had their primary connection and habitual residence in another country. [11]

In *Munro* [2008] 1 FLR 1613, Bennett J took the opposite position to *Marinos.* He held habitual residence must be not only on the day of issue but over the continuous period of 6 or 12 months before the divorce. Naturally this reduced the jurisdiction opportunity for the petitioner, perhaps leaving the family home and other marital connections in another country, to issue immediately in England. Moor J in *Pierburg* [2019] 2 FLR 527 preferred the *Munro* interpretation. But they were only High Court authority. [12] In *Tan v Choy* Aitkens LJ put forward no less than three possible interpretations.

A major problem with the *Marinos* interpretation was being opposed to that in most other EU countries. David Hodson explained this in an article. [13] After research and consulting specialist family lawyers in some other Member States, he explained first that practitioners in many EU member states expected the habitual residence to be continuous throughout the 6 or 12 months, rather than just on the date of issue. Secondly, he demonstrated a difference in translation of keywords in Art 3 between English and some other EU languages. Whereas the English translation was "habitually resident *if* he or she resided there for at least a year" etc, other translations had *insofar* or *as long as* instead of *if*. Indeed, some translations omitted the word *habitual* altogether. This was obviously unsatisfactory.

Leading English textbooks such as *Dicey, Morris and Collins* and *The International Family Law Practice* preferred the *Munro* interpretation, i.e. that habitual residence had to established throughout the 6 or 12 months. *Rayden and Jackson* [14] had preferred the *Marinos* approach but now, 2023, acknowledges there is a debate in case law between conflicting authorities.

Practitioners awaited higher authority. But before it could go to the European Court, the UK left the European Union

English divorce legislation on leaving the EU

The Ministry of Justice rightly decided replacement legislation should have as much continuity as possible with the divorce jurisdiction since March 2001 in BIIA.[15] However, when they produced the intended draft law, specialist practitioners[16] immediately saw a problem. Instead of repeating Art 3 verbatim, the MOJ had added a gloss to the 5th and 6th indents. Instead of habitual residence *if* has resided for 6 months et cetera per Art 3, it said habitual residence *and* has resided for 6 months or 12 months as applicable, namely the *Marinos* interpretation.

The Ministry of Justice were challenged on this. They were adamant this was the proper and right interpretation of the law for continuity purposes. Despite being told that there was still controversy about the proper interpretation and it was better to use the precise BIIA wording, there was no change.

So the current English divorce jurisdiction legislation[17] requires the applicant to be habitually resident only on the day of issuing the proceedings, provided he/she has had ordinary, simple residence for the previous 6 or 12 months, possibly in parallel with an ordinary, simple residence in one or more other countries. Whilst good for the English family law profession as it allows a far greater number of potential cases, it ran the risk of putting England and Wales out of step with EU law. If England was to have laws based on EU laws, then it should be the exact laws. Anything else would create uncertainty, confusion and potential litigation. This was distinctly so if, as has now happened, the CJEU has understandably favoured the other, non-*Marinos* interpretation, i.e. the habitual residence itself has to be throughout the 6 or 12 month period.

The CJEU decision

BM v LO[18] concerned a set of facts familiar to all specialist international family lawyers dealing with the EU divorce jurisdiction law over the previous 20 years. The parties were German and Polish, married and lived with their children in Poland from 2000 until June 2012. In October 2013 the German national brought proceedings for divorce in Germany saying he had been living at his parents' accommodation in Germany and was habitually resident in Germany. It was acknowledged that on the day of issue of the divorce he was habitually resident and that he was a German national, but the German appeal court found he had not been habitually resident throughout the previous 6 months, when he had had only so-called simple residency. Nevertheless, he asserted this was sufficient, i.e. the *Marinos* interpretation and what is now English statute law. He argued there was not settled EU law on the interpretation. The German court referred to the CJEU the question of whether the 6 months under the 6th indent

needs to be continuous habitual residence or whether it was sufficient only for de facto, simple residence as long as there was habitual residence at the point of the divorce application.

It is a fairly short, 39-paragraph straightforward judgment and important to read by specialists in this field. The CJEU was very clear that the divorce jurisdiction in EU law, specifically 5th and 6th indents, require habitual residence throughout the relevant period and not just on the day of issue.

The CJEU states that the 5th and 6th indents which distinctively amongst the other grounds for divorce jurisdiction favour the applicant, petitioner, seeks to create a balance on the one hand with the mobility of individuals within the EU who may have left a member state where the couple had their shared habitual residence and on the other hand provide legal certainty, specifically by ensuring there is a real link between the applicant, petitioner, and the member state with jurisdiction. This latter causes controversy where the parties had spent their entire married life in one country only for one spouse to find that six months' residency, perhaps post separation, spent by the other spouse in their home country then could give jurisdiction and priority of forum to that country notwithstanding the very limited connection; the very situation in *BM v LO*.

The CJEU went on to acknowledge that the relevant wording, specifically habitually resident as subject to having resided there for 6 or 12 months as applicable, did not necessarily mean that it must be habitual residence throughout the entire period. Nevertheless, they went on to say that in view of the objectives pursued by the Brussels Regulation, the interpretation of continuous habitual residence cannot take place independently of the criteria of habitual residence in Art 3 on divorce jurisdiction. They said that residence for example couldn't be interpreted differently in the 2nd indent [19] and the 5th and 6th indent. They found there was no need to draw a distinction between the concept of residence and that of habitual residence; a distinction which would have the effect of weakening the criteria for determining jurisdiction. [20]

Furthermore, it was important for legal certainty that there was this continuous (6 or 12 month) period of habitual residence. It preserved the mobility of people to move around the EU without unduly favouring the applicant. Having the continuous period for the habitual residence indicates a real link with the member state taking jurisdiction from the time that the 6 or 12 months started to run. They were satisfied this did not impose a disproportionate burden on the applicant from relying on this basis of jurisdiction.

In conclusion the CJEU ruled that the 6th indent *must be interpreted as meaning that the provision* [Art 3 BII] *makes the jurisdiction of the court of a member state to hear an application for dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that member state, provides evidence that he or she has acquired habitual residence in that member state for at least 6 months immediately prior to the submission of his or her application*.

In general terms, with reference to both the 5th and the 6th indent, the habitual residence must not be just on the day of the issue of the divorce proceedings but for 12 months before that date, or 6 months if able to show also domicile or nationality as applicable.

What had been strongly implied by a previous CJEU decision of *IB v FA*[21] was now absolutely clear.

What is the present position?

It is very uncertain. The new post Brexit divorce jurisdiction legislation, following *Marinos* as the MOJ perceived correct interpretation, is that *habitual* residence has only to be at the point of issuing the English divorce. Yet it purported to be the same, to follow, EU law. However the EU position from the above case is now definitely not the English position. The *Marinos* case law is no longer good law as far as EU law is concerned, if ever it was.

Continuing to rely on the so-called English *Marinos* jurisdiction increases the likelihood that in a England/EU forum dispute, the EU member state would be less likely to acknowledge English jurisdiction if it was based on the habitual residence on the day of issue of the divorce alone. This may in turn, and perhaps more fundamentally, have a bearing when it comes to any recognition or enforcement of an English order in an EU member state. In those circumstances, is it not more likely that recognition or enforcement would be refused because the initial divorce jurisdiction was not acceptable under EU law despite purporting to be the same as EU law?

There are two key elements for practitioners; how will the English courts approach the legislative position and what advice to give to clients who might otherwise be relying on jurisdiction based on habitual residence only on the day of issue.

The way in which the English family court handles this issue may depend in part on what method of statutory interpretation is adopted. On a literal approach the English legislation is clearly the *Marinos* interpretation namely habitual residence only being required on the day of issue with (simple/ordinary) residence sufficient for the remainder of the 6 or 12 month period as applicable. But on a purposive approach we know that the UK government intended to replicate EU law which probably was at the time, and certainly is now, the Munro approach namely habitual residence throughout the whole period.

What is clear is that, pending clarification from the higher courts, practitioners need to warn clients not only about potential issues of recognition and enforcement abroad if the English divorce is based on the Marinos interpretation but also that there may a challenge to English jurisdiction if based on one of these grounds and the applicant is not habitually resident throughout the whole of the relevant period.

Caution must be exercised by practitioners, with suitable warnings to clients, if proceeding on the basis of divorce jurisdiction on the so-called *Marinos* approach of habitual residence only on the day of issue of the divorce proceedings. The UK has left the EU but, for potentially very sensible reasons of continuity and comity, by introducing a domestic law which purported to follow or be similar to EU law, it is still looking at developments in EU case law.

- Blog

- Divorce Jurisdiction Post-Brexit

Guideline Hourly Rates on Costs: Addendum

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In *KS v VS (Judgment – Summary Assessment of Costs – Civil Guide)* [2024] EWHC 278 (Fam) (12 February 2024), Arbuthnot J referred to *H v GH* [2023] EWFC 235, [2024] Costs LR 27 and the question raised by DHCJ Simon Colton KC as to the relevance or otherwise of the guideline hourly rates. She stated as follows:

> '[33] When it comes to the recovery of the husband's costs, the husband argues that the civil '*Guide to the Summary Assessment of Costs*' should not form part of a family court's consideration and particularly not before this has been considered by the President of the Family Division and professional bodies.
>
> [34] The application of the Guide was considered by DHCJ Colton KC in *H v GH (supra*). The hourly rate and band for the work is set out in Appendix 2: *'Guideline figures for the summary assessment of costs explanatory notes'.* The hourly rates were re-considered on 1st January 2024 and a percentage uplift has occurred. To take just one example, for a grade A solicitor the hourly rate was increased on 1st January 2024 from £512 to £546.
>
> [35] Significantly the guide says that the general rule is that a summary assessment of the costs should be made in certain circumstances (when the case is a fast track case) and when the hearing has lasted *"not more than a day".* The case I am concerned with lasted just over two days although perhaps it should have been shorter.

[36] In paragraph 51 DHCJ Colton KC said that, *"strictly speaking, the guideline rates do not apply in the Family Court"* but said that, *"it would be a very odd result if hourly rates which, in civil proceedings, could not be recovered absent a 'clear and compelling justification', can readily be recovered in family proceedings. It is also undesirable that the benefits of guideline hourly rates (consistency, proportionality, and predictability) should be lost in the assessment of costs in family proceedings".*

[37] I accept of course that different considerations may apply in the Family Court compared to those in the Civil Courts, but these different considerations are perhaps not as obvious in financial remedy proceedings as opposed to ones about children and their welfare.

[38] In my judgment, each part of the justice system should have a costs framework which is consistent, proportionate and predictable. This will be of great assistance to parties as they enter the system. If costs are treated in that way and parties become aware that they may not be able to recover every penny they have spent, that might have the effect of first encouraging parties not to change representatives frequently and second, in parties looking for solicitors who charge less for similar work. This may drive down the costs of litigation in financial remedy proceedings, in particular.

[39] It seems to me the guidance is helpful as it sets out what a reasonable and proportionate hourly rate is in the various types of cases that come before the court. As a really rough, rule of thumb a top hourly rate of £546 which can be recovered from a losing party, seems a proportionate amount.

[40] In this case I am not going to give guidance, but I draw support from the Guide …'

Therefore although expressly not said to be 'guidance' the direction of travel in the Family Court may be coming clearer – namely a greater reference to the guideline hourly rates in the *Guide to the Summary Assessment of Costs* when determining questions of proportionality (and recoverability) even if these rates do not formally apply. Even if solely a 'really rough, rule of thumb' limiting recovery to £546 per hour will mean an immediate substantial irrecoverable sum on partner and senior associate rates at many of the Central London firms (for example the husband's two Grade A solicitors in *KS v VS* were claiming £750 and £605 per hour respectively). It will be interesting to see if (as Arbuthnot J posits) this approach has the effect of causing parties to look for solicitors who charge less for similar work and/or drives down the costs of litigation in financial remedy proceedings.

What Is the True Extent of FDR Privilege?

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In *L v O (Stay of Order; Hadkinson Order; Security for Costs)* [2024] EWFC 6 (26 January 2024) Cobb J considered whether a judge hearing a *Barder* (or *Thwaite*) application can/should be made aware of what took place at the FDR appointment where the original order was agreed and where this may be relevant to 'foreseeability':

> '[58] There has been some discussion about whether I should see any part of the transcript of the FDR appointment on 4 October 2021, or (at the very least) a note of the indication given by Moor J at that appointment. Some of the transcript of the appointment (and/or the indication) has regrettably already found its way into an experts' report, and indeed into the husband's witness statement. The wife, too, makes reference (albeit only in general terms) to what the husband and Moor J said at the FDR. I recognise that the FDR is a confidential process, and there is bound to be some sensitivity around what was said by and/or on behalf of the parties; it may well be that admissions were made in the FDR in a genuine attempt to reach a settlement. This is all the more delicate as the husband was

unrepresented throughout the earlier process. I am conscious of the terms of para. 6.2 of PD 9A FPR 2010:

"As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

[59] I note that in the husband's Form E filed in 2020, he made a number of references to matters which may in fact be relevant to the *Barder* event, and their impact on assets. It seems to me that the parties and/or the Judge may well have picked up these points and developed discussions in this vein at the FDR. If comments were made in this regard at the FDR, then this may well be relevant to the *Barder* application. In short, I feel I should have some understanding of the factual basis on which the final order was agreed, and whether risks to assets were then in contemplation and if so to what extent. I have asked the parties to consider this more fully, and in default of agreement, have proposed that they refer the issue back to Moor J. In forming all of these views, I have borne very much in mind the judgment of Thorpe LJ in *Myerson v Myerson* [2009] 1 FLR 826.'

These are interesting observations. In an early judgment in what has become known as the 'Level' case, *LS v PS and Q Company (a Litigation Lender)* [2021] EWHC 3508 (Fam) [1] Roberts J refused an application made by the wife's litigation loan funder (who had intervened in the financial remedy proceedings) for disclosure of material and information for use in its application to set aside a consent order it alleged was deliberately structured to leave the wife with no means to repay her litigation loan of almost £1 million and hence (it was said) the agreement (and subsequent order) were vitiated by fraud. The funder (Q/Level) sought to admit (i) the parties' without prejudice offers made before the private FDR; and (ii) material generated for the private FDR, including counsel's notes, asset schedules and a report of negotiations into the set aside application. As Roberts J observed in the course of her judgment:

'[28] The Financial Dispute Resolution appointment or hearing now forms an essential stage of all financial remedy proceedings. It was mandated as such by a Practice Direction introduced by Dame Elizabeth Butler-Sloss as the (then) President of the Family Division in 2000: see [2000] 3 All ER 379. That Practice Direction described such hearings or appointments as *"meetings held for the purposes of discussion and negotiation"*. They were intended as a means of *"reducing the tension which inevitably arises in matrimonial and family disputes and facilitating settlement of those disputes".* Para 3.2 contains this direction:

"In order for the FDR appointment to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is accordingly vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] 2 All ER 693, [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

[29] That paragraph of the 2000 Practice Direction is now reflected in PD 9A para 6.2 of the Family Procedure Rules 2010. Its effect was considered by Sir James Munby in *V v W* [2020] EWFC 84. That case concerned a separate civil claim brought against a respondent husband (H) in financial remedy proceedings by a single joint expert who had prepared a company valuation report which was to be used in connection with those proceedings. An issue arose as to whether or not H should be permitted to rely on documents generated for the purposes of, or in connection with, the FDR hearing. The basis of his disclosure application in the Family Court was that H required the documents he sought to have disclosed in order properly to defend the civil proceedings and for the purposes of amending his defence and counterclaim. He had identified eight separate classes of documents, six of which related to the FDR hearing. They were these:-

(i) each party's written submissions and asset schedules prepared for the FDR hearing (some 44 pages in all);

(ii) the transcript of the submissions made by each counsel at the FDR hearing (60 pages);

(iii) the transcript of the "indication" given by the FDR judge (4 pages);

(iv) copies of his counsel's notes of the FDR hearing (54 pages);

(v) copies of his counsel's notes of the FDR judge's oral indication (5 pages); and

(vi) copies of notes by his legal representatives of the without prejudice discussions which took place after the FDR concluded (24 pages) and copies of the correspondence following the FDR which led to the consent order which both parties eventually signed and submitted to the court for approval (65 pages).

> [30] Sir James Munby read all the privileged material for the purposes of his decision but considered himself bound by para 6.2 of PD 9A which he concluded was intended to operate as "an absolute bar" to any attempt by H to make use of anything said or done at the FDR in support of his defence and counterclaim in the civil proceedings …'[2]

Later at [65] Roberts J referred to the policy considerations:

> 'which inform the privileged nature of the FDR hearing as an essential stage of the financial remedy process. If divorcing parties are to settle the financial issues flowing from the breakdown of their marriage at minimum cost (both emotional and financial), it is essential that they can conduct those negotiations with input from their lawyers under the protective veil of privileged discussions which they know will not then be exposed to the full glare of judicial scrutiny at a later stage if those negotiations break down.'

At [80] and [83] Roberts J stated that privilege was clearly engaged notwithstanding that this was a private FDR arranged by the parties outside the context of a court-listed FDR appointment. Thereafter she stated:

> '[86] … The importance of the policy underpinning para 6.2 of PD 9A needs no further elaboration over and above the issues which I have already highlighted in this judgment. The entire system of FDR-resolution would cease to run as efficiently as it does if negotiations and discussions, often taking place over several days in a complex case, were at risk of being opened up to wider scrutiny as teams of lawyers picked over which aspects of those discussions and/or the written material generated for the FDR might be admissible for purposes unconnected with those negotiations.'

The court then concluded that there was already a wealth of material open to the court (including the specific terms of settlement reached) which was either a matter of record or available as part of the evidence which has already been collected for the purposes of disclosure in the financial remedy proceedings that would allow Q/Level to seek to make out its case in relation to its set aside application:

> '[88] At the end of the day, … I have concluded that the court in March next year will have ample evidence available to it in the absence of the privileged material to form a view as to whether or not this order should be set aside. In the circumstances, I am not prepared to grant the application for the disclosure of the privileged material which Q seeks to adduce for the purposes of the forthcoming set aside application.'

Thereafter Roberts J concluded with a *"footnote"* as follows:

> 'I take the view that, given the importance of litigation funding to the system, the Family Procedure Rules Committee may well wish to consider in due course whether the potential issues raised by this case require some reconsideration of the 'absolute bar' which Sir James Munby identified in his interpretation of para 6.2 of PD 9A. It is an interpretation with which I respectfully agree for the reasons set out in this judgment, although I hope that the different underlying factual matrix of this case (and, no doubt, others) might provide a basis for revisiting when, and in what circumstances, that bar might be lifted where a case can be established for justifying the introduction into proceedings of material covered by the FDR privilege.'

It is understood that Q/Level's application for permission to appeal to the Court of Appeal was refused.

There have been few other published cases that relate to FDR Appointments. In *Shokrollah-Babee v Shokrollah-Babee* [2019] EWHC 2135 (Fam), mid-way through a two-day hearing dealing with cross-applications for enforcement and variation of a final financial remedy order, the husband stated from the witness box that he remembered the judge (Holman J) from the FDR Appointment, two years before. This was news not only to Holman J, who confirmed that he had no recollection of the case, but also the husband's advisers, who had not acted for him in the FDR, in a case where (curiously) the trial bundle did not contain an order from the FDR because one was not drawn up.

Following this revelation, both parties invited Holman J to continue the hearing. Counsel for the husband relied on *dicta* from the only previous authority on point, the Court of Appeal decision in *Myerson v Myerson* [2009] 1 FLR 826, to the effect that, although the issue had not arisen for determination, it had been regarded as arguable that parties could invite the court to waive the prohibition against an FDR judge having further involvement in a case (see Lawrence Collins LJ at [35] and Goldring LJ at [61]).

Holman J declined this invitation. In a judgment that focused on FPR 9.17(2) he held at [17] that the purpose and policy of that rule must extend not only as far as the final hearing of a substantive application, but also to subsequent issues including the working out of an order, or enforcement of an order, and, indeed, variation as it was:

> 'obvious that if a judge who has heard privileged matters or privileged concessions at an FDR appointment cannot hear the subsequent substantive application for a financial remedy, he cannot hear either some application, for instance with regard to enforcement, that follows on.'

Holman J referred to the lead judgment of Thorpe LJ in *Myerson* who stated as follows:

> '[26] … The underlying policy of the sub-rule is clear. Litigants distrustful of each other and made anxious by the complex tactics of contested litigation must be confident that conciliation within the court proceedings guarantees them the same confidentiality that they would enjoy had the dispute been referred by the judge to mediation by a mediation professional. So the intention and the meaning of the sub-rule are clear. The judge who has been armed to conciliate by the provision of all the privileged communications can only do one of three things that is to say set up a further FDR appointment, make a consent order or make an order for further directions, practically speaking directions for trial.
>
> [28] However, where the contract presented to the judge at the conclusion of the FDR is incomplete in the sense that there are subsidiary or peripheral issues to be agreed, or determined by the court in default of agreement, it is otherwise. Where, as here, the parties did not reach agreement as to the nature and extent of the security, the dispute must be listed before another judge. So too must issues of enforcement be listed before another judge. Equally subsequent applications to vary or set aside the consent order achieved at the FDR appointment must be listed before another judge.'

This led Holman J to conclude:

> '[25] … So it seems to me that the binding effect of *Myerson* is that a judge, or the judge, who conducted an FDR at an earlier stage of financial remedy proceedings is completely debarred or precluded from hearing applications as to enforcement or variation, even after a substantive financial order has been made. As I have said, it seems to me that that must also necessarily follow from the underlying policy of the FDR procedure, because if privileged matters might even theoretically impact upon a judge hearing the substantive case, they may impact no less upon him hearing enforcement or variation proceedings later.'

Holman J then considered whether r 9.17(2) admitted of any exception or permitted waiver by the agreement of both or all parties to the proceedings. He concluded as follows:

> '[35] … it does, with respect, seem to me that if the requirement of the rule can later be waived, that might seriously undermine the "guarantee" to which Thorpe LJ had earlier referred in paragraph 26 of his judgment in *Myerson,* and also the very clear explanation that is required to be given to parties by their legal advisors under paragraph (10)(iv) of the Best Practice Guidance. [3] It seems to me that if there is any room for waiver, that requires to be written into the rule itself or, at the very least, made clear in advance to parties as a result either of

> clear judicial decision or, possibly, some amendment of the guidance. But, as it seems to me at the moment, any subsequent waiver at all would run totally contrary to the absolute prohibition that the rule currently provides, as all judges and, I believe, practitioners have regarded it for at least the last ten years.'

And at [37]:

> 'I have … given very careful and anxious consideration to whether … I might hold that the requirement of the rule can be waived by the parties. Whilst in some circumstances at some future date it may be open to the Court of Appeal to develop the jurisprudence in that way, it currently seems to me that it is not open to me to do so … As I have said, it seems to me that the policy as described by Thorpe LJ in paragraph 26 and his very clear statements in the last two sentences of paragraph 28 simply preclude waiver.'

Given the reference to 'confidentiality' by Thorpe LJ in *Myerson* at [26], to 'privileged matters or privileged concessions' by Holman J in *Shokrollah-Babee* at [17], that per Sir James Munby in *V v W* PD 9A para 6.2 was 'an absolute bar' to any attempt by the husband to make use of anything said or done at the FDR, and the refence to the 'protective veil of privileged discussions' by Roberts J in *LS v PS and Q Company*, the legal basis for Moor J prospectively acceding to Cobb J's request in *L v O* is unclear.

It might well be the case that (as Cobb J states) in the FDR in *L v O* the parties and/or the judge may have picked up points made in the husband's Form E and developed discussions that may be relevant to the *Barder* application and hence why Cobb J felt he should have some understanding of the factual basis on which the final order was agreed, and whether risks to assets were then in contemplation and if so to what extent. However, in *LS v PS and Q* Roberts J emphasised at [81] that:

> 'notwithstanding my reading of the without prejudice material which has been put before the court, I have no knowledge of what, if any, observations were made by the FDR judge during the private hearing about the agreement or the position of the wife's litigation lender. For obvious reasons I do not, and cannot, speculate about these matters.'

Further can it not be said that the disclosure sought by Q/Level also had relevance to its application to set aside the consent order? For as Roberts J observed at [86]:

> 'I accept that Q's path to that conclusion [i.e. its claim pursuant to section 423 of the Insolvency Act 1986 is made out] might well be facilitated in part by the release into those proceedings of the privileged material which I have read.'

It will be interesting to see where this case (and the wider debate) goes next.

- Blog
- Privilege

Applications for Leave Under MFPA 1984 Part III: Which Costs Rules Inform (or Govern)?

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What costs rules apply to an application for permission/leave pursuant to the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984') s 13?

This was the discrete question asked – and answered – in *AS v RS (Costs: Clean Sheet/General Rule)* [2023] EWFC 284 (B) by District Judge Troy (which followed his earlier decision in *AS v RS (Matrimonial and Family Proceedings Act: Part III Application*) [2023] EWFC 283 (B) in which he refused the application for leave).

Surprisingly, there appears to have been no previous authority on the point.

The judge's analysis was as follows:

i) The starting point is FPR 28.1 which provides a general unfettered discretion to make an order for costs as the court 'thinks just' informed only by the overriding objective which, pursuant to r 1.2, is engaged whenever the court exercises any power given to it by the rules or interprets any rule.

ii) The starting point is 'not restricted or qualified by the more detailed provisions' that follow. The other costs rules 'provide clarity as to how that discretion should be applied'.

iii) FPR 28.3 provides specific rules for 'costs in financial remedy proceedings'.

iv) FPR 2.3(1) provides a definition of a 'financial remedy' which, although it includes an order under MFPA 1984 Part III, expressly *excludes* an application pursuant to MFPA 1984 s 13 for permission to apply for a financial remedy.

v) However, PD 28A para 4.1 states that, for the purposes of r 28(3), financial remedy proceedings are defined in accordance with r 28.3(4)(b) which defines 'financial remedy proceedings' as meaning proceedings for *inter alia* 'an application for an order under Part 3 of the Matrimonial and Family Proceedings Act 1984' and an application for leave under s 13 is clearly 'an application for an order' under Part III.

vi) PD 28A para 4.1 states that the definition in r 28.3(4)(b) 'is more limited than the principal definition in rule 2.3(1)' which *could* be said to support the proposition that the definition under r 28.3(4)(b) is to be preferred to the definition in r 2.3 when specifically considering r 28.3, with the definition in r 2.3 to be used for other parts of the rules.

vii) Therefore, per District Judge Troy, there is a mistake in the rules which creates a conflict, and the drafters could never have intended to create such uncertainty. However, as the drafters intended expressly to exclude applications pursuant to s 13 from the definition of a financial remedy (r. 2.3(1)), the definition at r 28.3(4) must be an error as the drafters could not have intended to have included an application pursuant to s 13 sitting in conflict with the exemption in r 2.3(1).

viii) The legislature intends the court to apply a construction which rectifies any error where required to give effect to the legislative intention and the *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (HL) test should be applied. Applying the three-stage test to r 28.3(4), the court held that:

a. the intended purpose of the provision in question was to *exclude* leave applications;
b. the drafter inadvertently failed to give effect to that purpose (or at least caused the ambiguity) when drafting FPR 28.3(4)(b)(ii); and
c. the substance of the provision the legislature would have made is simply to have repeated the exception made for applications under s 13 MFPA 1984 when drafting FPR 28.3(4)(b)(ii).

ix) As FPR 28.3 does not apply, costs on an application for leave pursuant to MFPA 1984 s 13 are subject to r 28.2 (the so-called 'clean sheet' rule – as so described by Wilson LJ (as he then was) in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761) – as neither the 'no order for costs' presumption nor the 'costs *prima facie* follow the event' presumption apply.

As part of his analysis (which included consideration of *At a Glance*, *Bennion, Bailey and Norbury on Statutory Interpretation*, *Dictionary of Financial Remedies*, *Duckworth's Matrimonial Property and Finance*, *Family Court Practice*, *Financial Remedies Handbook*, *Financial Remedies Practice*, *Jackson's Matrimonial Finance* and *Rayden & Jackson*) the judge referred to *CW v CH (MFPA 1984 Part III: Interim Applications)* [2022] EWFC B1, a decision of Recorder Allen KC.

Noting that *CW v CH (MFPA 1984 Part III: Interim Applications)* concerned interim applications under MFPA 1984 Part III rather than the question of leave, the

District Judge disagreed with the Recorder's analysis of the exercise of the general discretion where he said at [140] such applications were 'governed' by the costs rules set out in r 28.2. His concern was the use of the word 'governed' given that if the starting point in r 28.1 was to be displaced and 'governed' by the other rules then this would have been made clear. In the judge's view the other provisions of Part 28 will 'inform' the approach to the exercise of the discretion but will not 'govern' as the discretion is unfettered.

The District Judge's concern with the Recorder's use of the word 'governed' is an interesting one. This word has often been used to describe which costs rules apply to particular applications. For example, in the same judge's later judgment (*AS v RS* [2024] EWFC 32 (B)) when he dealt with the substantive application for costs, he said that r 28.1 was 'to be read in conjunction' with r 28.2 (perhaps a synonym for 'inform') but also referred to *LM v DM (Costs Ruling)* [2022] 1 FLR 393 where Mostyn J used the word 'governed' twice in the first paragraph of his judgment relating to the costs of interim financial remedy applications ('[t]hese proceedings … are not governed by the no-order-for-costs general rule in FPR r 28.3(5). They are governed instead by a soft costs-follow-the-event principle'). By way of another example, in *AB v CD (No. 2) (Costs)* [2016] EWHC 2482 (Fam) Roberts J stated (at [11]) that '[I]t is trite law that the usual order now in financial remedy proceedings is governed by the 'no order' principle'. It will be interesting to see if, encouraged by District Judge Troy, judges prefer to use the word 'inform' (or similar) in future.

– Blog

– Costs – Leave Application

Spring Budget 2024 Summary

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Peter Smith

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Wednesday's Spring Budget included a number of tax and benefits features that will impact divorcing couples. Whether it was a last chance saloon Budget for the Government, with tax reductions in an attempt to woo voters, or a prudent long-term strategy with a view to demonstrating careful management of public finances, we shall see what the Great British Public make of it when they go to the ballot box at some point in 2024.

The main points from a Family Lawyer's perspective were as follows:

National Insurance Contribution (NIC) rates

The widely anticipated further reduction by 2% in Employee's NIC was the final announcement in Jeremy Hunt's Budget. He announced the following:

- The main rate of Class 1 employee NICs will be reduced by 2p from 10% to 8% from 6 April 2024. This is in addition to the 2p cut announced at Autumn Statement 2023 with effect from 6 January 2024.
- The main rate of Class 4 NICs, paid by self-employed earners, will be reduced by 3p from 9% to 6% from 6 April 2024. This replaces the cut to 8% announced at Autumn Statement 2023.
- The government will launch a consultation later this year to deliver its commitment to fully abolish Class 2 National Insurance. This follows the announcement at Autumn Statement 2023 that from April 2024 no self-employed person will be required to pay Class 2, whilst those who pay voluntarily will continue to be able to do so to build entitlement to contributory benefits.

These NIC rate changes will need to be factored in when calculating a party's net income in family proceedings. It will only impact the employed and self-employed. It has no impact on business owners who supplement modest salaries with dividend income, as dividends do not attract NIC.

High income Child Benefit charge

Jeremy Hunt was taken to task recently by Martin Lewis over the anomaly surrounding a family's Child Benefit entitlements, whereby a household with one parent working with income in excess of £50,000 per annum, would be subject to a tax charge on their Child Benefit, whereas if both parents worked and each earned £49,000, totalling £98,000, they would not be captured by the tax charge.

As a result, the Chancellor announced that the government will raise the threshold for the High Income Child Benefit Charge from £50,000 to £60,000 from 6 April 2024, and there will be a tapered tax charge between £60,000 and £80,000. The government will also consult on moving to a household based system rather than one based on individual incomes from April 2026.

That is good news for those single worker families who suffered a tax charge as a result of this anomaly.

Capital gains tax

Many divorcing couples have residential buy-to-let properties and I am often instructed to calculate the latent CGT in relation to these.

The Chancellor announced a reduction to the higher rate of CGT on residential properties from 28% to 24% from 6 April 2024. The lower rate will remain at 18% for any gains that fall within an individual's basic rate band.

It was anticipated that the rate reduction will increase the number of transactions and thereby the overall CGT take. An interesting theory, whether it delivers in practice will no doubt be monitored by HMRC – I'm not so sure.

Non-domiciled individuals

The government will abolish the current tax regime for non-UK domiciled individuals and replace it with a residence-based regime:

- From 6 April 2025 the government will introduce a new residence-based regime.
- Under the new regime, anyone who has been tax resident in the UK for more than four years will pay UK tax on their foreign income and gains, regardless of their domicile status, with a four-year relief for new arrivals (provided they have been non-tax resident for the last ten years).
- There are also transitional arrangements being put in place.
- The government also intends to move to a residence-based regime for Inheritance Tax and will consult in due course on the best way to achieve this. No changes to IHT will take effect before 6 April 2025.

Furnished holiday lettings

The Chancellor abolished the Furnished Holiday Lettings tax regime from 6 April 2025. It is aimed at raising £300 million from landlords who benefitted from the FHL scheme. This removes tax benefits for landlords who qualify for the FHL scheme such as capital allowances, rollover reliefs for CGT and deductions of loan interest from rental income.

Childcare

The hourly rate childcare providers are paid to deliver the "free" hours offered for children aged nine months to four years will increase in line with the metric used at the Spring Budget for the next two years.

Stamp duty land tax - multiple dwellings relief

Multiple Dwellings Relief is to be abolished from 1 June 2024. This applied when a purchaser bought multiple dwellings in a single transaction and allowed them to calculate the Stamp Duty Land Tax on the average value of the dwellings purchased as opposed to their aggregate value.

– Blog

Tousi v Gaydukova [2024] EWCA Civ 203

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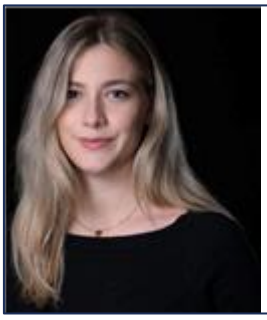

Rosie Vorri

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Sir Andrew McFarlane, Moylan LJ and Holroyde LJ. Transfer of tenancy under s 53 of the Family Law Act 1996: an appeal by the Husband of the decision of Mostyn J dismissing his appeal of an order for a transfer of tenancy on the basis that the parties' 'non-marriage' status resulted in them being 'cohabitants' under paragraph 3 for the purposes of the Act.

As is conventional, the parties are referred to as husband and wife, despite the parties never having contracted a valid marriage.

This matter was a second appeal, being an appeal from Mostyn J's decision, on appeal from Recorder Allen KC. The question for the court was whether the term 'cohabitants' in paragraph 3 of the FLA 1996 included the parties to a void marriage, or whether they would only come within the scope of paragraph 2.

Background

The parties married in the Iranian Embassy in Ukraine in 1997. The husband was of Iranian nationality, and the wife of Ukrainian nationality. The marriage was never registered with the Ukrainian State authorities, despite three attempts by the wife to do so. The parties moved to the UK in 2001, and in 2010 were granted a Housing Association tenancy in their joint names.

The parties separated in December 2019. The wife applied for a divorce in January 2021, but the petition was refused due to the absence of a marriage certificate. The wife withdrew her petition and applied for a transfer of the tenancy into her sole name pursuant to s 53 and Schedule 7 of the FLA 1996.

At the first hearing before Recorder Allen KC, the issue arose as to whether the parties were validly married; the husband contended that they were, and the wife posited that they were not. The judge made a transfer of tenancy order in favour of the wife without determining whether the parties were validly married or not, on the basis that he had the power to order a transfer of tenancy whether they were parties to a valid/void/voidable marriage under paragraph 2 of

Schedule 7 to the FLA 1996 or parties to a non-marriage (who were also former cohabitants) under paragraph 3 of Schedule 7.

The difficulty was that the dates on which the court could make an order were different under each paragraph; in the former, the order could only be made on or after a divorce, nullity of marriage or judicial separation order was made, whereas in the latter, it could be upon the parties ceasing to cohabit.

Decision of Mostyn J in the High Court

The husband was granted permission to appeal on the ground the judge was wrong to conclude that he had jurisdiction to make a transfer of tenancy order before having first determined whether the parties had entered into a marriage which should be treated as void under English law, or any marriage at all.

Expert evidence was provided by a Ukrainian lawyer at the hearing before Mostyn J. The expert opined that the marriage would not be considered valid under Ukrainian law, because the ceremony had taken place in the Iranian embassy, and in those circumstances, both parties needed to be of Iranian nationality for it be considered a valid ceremony. Mostyn J concluded that the parties had undergone a 'non-qualifying ceremony'.

Accordingly, Mostyn J dismissed the appeal. He held that the binding determination of the foreign law extends to the 'ramifications of invalidity', i.e. the relief that should apply in the English court is that which would be available to the husband under Ukrainian law (relying on *Sottomayor v De Barros (No 1)* (1877) 3 PD 1 (CA)). In this case, he found that no remedy would be available at all. He then concluded that the 1997 ceremony was therefore analogous to a domestic non-qualifying ceremony, generating no right to the grant of a nullity order and therefore the power to transfer the tenancy was validly exercised by the Recorder.

The Court of Appeal

In his grounds of appeal, the husband submitted that:

(i) the parties' marital status needed to be determined because the dates on which the court could make an order were different under paragraphs 2 and 3;

(ii) the judge had been wrong in considering that the relief or remedy available under Ukrainian law 'presumptively' determined the relief under English law; and

(iii) the parties' marriage was void bringing them within the scope of, and only of, paragraph 2. Accordingly, a transfer of tenancy could only be made on the making of a nullity order.

The wife conceded that the parties' marital status needed to be determined for the purpose of deciding which paragraph applied.

The husband challenged the judge's conclusion that the determination of the foreign law extended to the 'ramifications of invalidity'. Counsel for the Husband, Max Lewis, submitted that English family law invariably applies the *lex fori*; the validity of foreign marriages is an exception and there is no good reason to extend that exception to the decision whether to grant any remedy. Further, it was submitted that the court should 'lean strongly in favour or opening the door to matrimonial relief in cases where the parties have believed themselves to be married, and have lived their lives on that basis'. Mostyn J's approach also created practical difficulties: what if there were remedies available under the foreign law which were not available, or did not even exist, under English law?

With regard to (iii), the husband submitted that paragraphs 2 and 3 are mutually exclusive; a party to a void marriage cannot be a 'cohabitant' within paragraph 3, but only paragraph 2.

The wife submitted that the only issue which needed to be determined was whether the parties were married. It was clear from the judgment that the parties did not enter into a legally valid marriage; it had been unnecessary for the judge to decide whether the marriage was void or a non-qualifying ceremony as, in either case, the court had power to make a transfer of tenancy order pursuant to the provisions of paragraph 3. In both circumstances, the parties were cohabitants for the purposes of that paragraph, defined in s 62(1) of the Act as 'two persons who are neither married to each other nor civil partners but are living together as if they were a married couple or civil partners'.

Determination

Moylan LJ addressed Mostyn J's conclusion regarding the 'ramifications of invalidity'.

The judge agreed with the husband that the law of the place where the marriage was celebrated determined the validity of the marriage, but there was no suggestion in the textbooks or case authorities that this principle extended any further than that issue. The authorities Mostyn J referred to did not support his position. *Burns v Burns* [2008] 1 FLR 813 and *Asaad v Kurter* [2014] 2 FLR 833 were right, in that they confirmed, once the foreign law determined whether it was a valid marriage, it was for the *lex fori* to decide the implications and what remedies were available.

Therefore, Moylan LJ held that there could be no justification for depriving a party of a remedy available under English law simply because there would be no remedy available under the foreign law; the remedies available were solely a matter of English law.

Moylan LJ determined that a void marriage would have no effect on the status of the parties; given no decree of nullity was required (*De Reneville v De Reneville* [1948] p 111), the parties would have the same status as unmarried people living together and therefore would be, in general terms, cohabitants (once the

statutory evidential hurdle that the parties have been 'living together as if they were a married couple or civil partners' was proven). Further, he held that there was no justification for an interpretation that parties to a void marriage must be excluded from paragraph 3 because they are included within paragraph 2.

In this case, whether the marriage was a void marriage or 'analogous to a domestic non-qualifying ceremony' was an unnecessary question to engage with, because once it was clear that the marriage was void, the court had jurisdiction to make an order under paragraph 3.

The husband's appeal was dismissed, as, in this case, the marriage was void, and therefore the court had jurisdiction to make a transfer of tenancy order under paragraph 3 of Schedule 7. The Recorder had jurisdiction to make the order as he had.

Commentary

Mostyn J gave a bold judgment in finding that the relief or remedy available under the foreign law presumptively determined the relief or remedy available under English law. After Mostyn J's judgment, Rebecca Bailey-Harris commented ([2023] Fam Law 506):

> 'The valuable analysis of the law of marriage invalidity notwithstanding, from a practical perspective the time and effort obviously devoted to the appeal and judgment leaves one with a sense of disquiet. The Recorder's judgment was upheld. He clearly had the power under Sch 7 to the 1996 Act to order transfer of a tenancy between former cohabitants as well as between former spouses where a nullity decree is obtained. Was it therefore really necessary to determine the issue of marriage validity and if, invalid, the characterisation of that invalidity and hence whether it may attract a decree nisi/conditional decree of nullity?'

Moylan LJ too commented, in the opening paragraphs of the judgment, that it was regrettable that the issue had remained unresolved for over two years since the wife had made her application.

It is clear that any further changes to happen in the area of the validity of marriages generally, and the area of non-marriages more specifically, will need to happen through statute. Moylan LJ was clear that the remedies which might be available under the foreign law were not relevant to the issue of formal validity. However, when considering whether the law should be extended as Mostyn J had proposed, it should be considered whether it would achieve more or less clarity and certainty. Mostyn J's approach, even in the broadness of the term 'ramifications', would not have achieved more certainty and would have increased the cost of determining such applications significantly.

– Blog

Rough Justice

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Andrew Hogan

Andrew Hogan is a barrister at Kings Chambers with a special interest in costs and funding. He has advised upon and argued costs cases in the county court, High Court, Court of Appeal and Supreme Court, as well as other tribunals including the Lands Tribunal.

Costs cases in family proceedings used to be few and far between, but a recent decision of Arbuthnot J in the case of *KS v VS* [2024] EWHC 278 (Fam) has caused something of a stir in the profession. In particular it raises the question of how far, if at all, the *Guide to the Summary Assessment of Costs (2021)* with its guideline hourly rates, published for use in summary assessments in civil proceedings, has use and application to summary assessments of costs in family proceedings.

Background

Summary assessment of costs was brought into civil proceedings in the years immediately before the Woolf Reforms of 1999. Since then, it has become a familiar part of the landscape of civil proceedings: at the end of every interim application, every one-day hearing, and every short appeal in the Court of Appeal a summary assessment of costs can be anticipated, and parties regularly prepare an N260 schedule of costs for use at the conclusion of the case.

In 2021 the *Guide to the Summary Assessment of Costs (2021)* was published updating the former guidance, and attaching new guideline hourly rates, the rates being the fruit of Mr Justice Stewart's working party on guideline hourly rates. The rates were based on data the working party collected from costs judges, in the years 2019 to 2021, and so reflected what judges were awarding by way of hourly rates, rather than what solicitors were necessarily charging in the marketplace for work.

The guide has this to say about the guideline hourly rates:

> '27. Guideline figures for solicitors' charges are published in Appendix 2 to this Guide, which also contains some explanatory notes. The guideline rates are not scale figures: they are broad approximations only.

28. The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment.

29. In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high level commercial work, but may apply, for example, to large and complex personal injury work. Further, London 1 is defined in Appendix 2 as "very heavy commercial and corporate work by centrally based London firms". Within that pool of work there will be degrees of complexity and this paragraph will still be relevant.'

Thus, the London 1 rates are for what might be termed 'City work': very heavy commercial and corporate work for centrally-based London firms: conversely London 2 applies to other work undertaken in the City and Central London, particularly within the postcodes EC1–EC4, W1, WC1, WC2 and SW1. The 2021 rates were increased in January 2024, such that the top hourly rate for a grade A solicitor in the London 1 band became £546.

The significance of the guideline hourly rates has been noted in a number of judgments in the last three years, but perhaps the most important is that of *Samsung Electronics Co Ltd and Others v LG Display Co Ltd and Another* [2022] EWCA Civ 466 where Lord Justice Males noted:

'5. LG has not attempted to justify its solicitors charging at rates substantially in excess of the guideline rates. It observes merely "that its hourly rates are above the guideline rates, but that is almost always the case in competition litigation".

6. I regard that as no justification at all. If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate.'

Finally, although an assessment should be summary, it should not be arbitrary: thus, in the case of *1-800 Flowers Inc v Phonenames Ltd* [2001] EWCA Civ 721 the Court of Appeal settled the scope of summary assessment in these terms:

'113. That said, however, I am of the view that in the instant case the judge erred in principle when he in effect applied his own tariff to the case, without carrying out any detailed examination or analysis of the

costs actually incurred by the opponent as set out in its statement of costs.

114. In my judgment, it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement. In so doing, the court may find it helpful to draw to a greater or lesser extent on its own experience of summary assessments of costs in what it considers to be comparable cases. Equally, having dealt with the costs by reference to the detailed items in the statement of costs which is before it, the court may find it helpful to look at the total sum at which it has arrived in order to see whether that sum falls within the bounds of what it considers reasonable and proportionate. If the court considers the total sum to be unreasonable or disproportionate, it may wish to look again at the various detailed items in order to see what further reductions should be made. Such an approach is wholly unobjectionable. It is, however, to be contrasted with the approach adopted by the judge in the instant case.

115. In the instant case, the judge does not appear to have focused at all on the detailed items in the opponent's statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high he then proceeded to apply his own tariff – a tariff, moreover, which appears to have been derived primarily from a case in which the opponent had not been involved and about which it and its advisers knew nothing. In my judgment the jurisdiction to assess costs summarily is not to be used as a vehicle for the introduction of a scale of judicial tariffs for different categories of case. However general the approach which the court chooses to adopt when assessing costs summarily, and however broad the brush which the court chooses to use, the assessment must in my judgment be directed to and focused upon the detailed breakdown of costs contained in the receiving party's statement of costs.'

With these thoughts in mind, I turn to consider the judgment of Arbuthnot J.

The judgment

The facts of the case were not unusual. In the context of putative divorce and financial remedy proceedings in England and Wales, the husband **applied for a stay of those proceedings on the basis that proceedings were already afoot in Monaco. The application for a stay succeeded; as the judge noted in paragraph 2 of her judgment, the couple had an international life based in Monaco, there was never a family home in England, the husband was a business man with international financial interests but his base was Monaco, the proceedings in Monaco pre-dated the proceedings in England and the wife had engaged in

them: in short Monaco was the forum where the parties had the most real and substantial connection and the continuation of those proceedings would not lead to substantial injustice for the wife.

The judge then went on to deal with the costs of the applications. An amended schedule was provided by the husband's representatives seeking £331,448.50. The judge concluded that the applications she was dealing with fell under FPR 28.2, rather than FPR 28.3 and she would therefore apply the approach prescribed by the Civil Procedure Rules to the extent that they were ported across by the Family Procedure Rules. The judge went on to reject the position that there should be no order for costs, and instead decided to make a costs order against the wife, who had lost the applications. But the judge at this point in her judgment brought into play the *Guide:*

> '34. The application of the Guide was considered by DHCJ Colton KC in *H v GH* (*supra*). The hourly rate and band for the work is set out in Appendix 2: "Guideline figures for the summary assessment of costs explanatory notes". The hourly rates were re-considered on 1st January 2024 and a percentage uplift has occurred. To take just one example, for a grade A solicitor the hourly rate was increased on 1st January 2024 from £512 to £546.
>
> 35. Significantly the guide says that the general rule is that a summary assessment of the costs should be made in certain circumstances (when the case is a fast track case) and when the hearing has lasted "not more than a day". The case I am concerned with lasted just over two days although perhaps it should have been shorter.
>
> 36. In paragraph 51 DHCJ Colton KC said that, "strictly speaking, the guideline rates do not apply in the Family Court" but said that, "it would be a very odd result if hourly rates which, in civil proceedings, could not be recovered absent a 'clear and compelling justification', can readily be recovered in family proceedings. It is also undesirable that the benefits of guideline hourly rates (consistency, proportionality, and predictability) should be lost in the assessment of costs in family proceedings".
>
> 37. I accept of course that different considerations may apply in the Family Court compared to those in the Civil Courts, but these different considerations are perhaps not as obvious in financial remedy proceedings as opposed to ones about children and their welfare.
>
> 38. In my judgment, each part of the justice system should have a costs framework which is consistent, proportionate and predictable. This will be of great assistance to parties as they enter the system. If costs are treated in that way and parties become aware that they may not be able to recover every penny they have spent, that might

have the effect of first encouraging parties not to change representatives frequently and second, in parties looking for solicitors who charge less for similar work. This may drive down the costs of litigation in financial remedy proceedings, in particular.

39. It seems to me the guidance is helpful as it sets out what a reasonable and proportionate hourly rate is in the various types of cases that come before the court. As a really rough, rule of thumb a top hourly rate of £546 which can be recovered from a losing party, seems a proportionate amount.'

In assessing the amount she then went on to find:

'40. In this case I am not going to give guidance, but I draw support from the Guide. Looking at the proceedings in the round and the findings as well as the relative positions of the parties, I make a summary assessment on the standard basis. I do not consider the wife should pay the full amount claimed by the husband because of his conduct as set out above which increased costs. A proportionate amount is 85% of the husband's claim of £331,000. This amounts to £281,000. The next step is to consider how much of that amount is recoverable. Taking a broad brush approach and assuming a reduction of 30% on standard assessment, the amount to be paid by the wife is £196,000. I consider this to be a proportionate and reasonable amount in the circumstances.'

Conclusions

A number of thoughts occur to me when looking at this judgment. The first is that the use of guideline hourly rates in family cases drawn from a guide prepared for civil cases, where the data for those rates was drawn exclusively from civil cases not family, seems an unhappy cross fertilisation within the legal system. Solicitors are a unified profession, but they work in many different markets, charging many different rates. There may well be scope for a set of guideline hourly rates for family cases, but they would not be based on the data underpinning the civil cases.

The second is that notwithstanding the reference to the guideline hourly rates in the judgment, there is curiously no express application of them. One cannot determine from the judgment how many hours have been allowed, or at what rate. The passing reference to the London 1 rates also presupposes that this work was analogous to City work, properly so called, rather than work that takes place in the City of London.

The third is that the summary assessment seems to have been painted with a broad brush indeed: there is little discussion of the constituent elements of the schedule. I cannot even discern with vulgar curiosity how much of the schedule was attributable to the solicitors, and how much to counsel.

But the lack of analysis is dangerously close to a move away from assessment to arbitrary reduction. The imposition of a 30% discount smacks of a tariff being applied based on deductions in other cases. It harks back to the old rule of thumb, that a party might expect to recover 70% of their costs and seeks to give effect to that outcome. Having said that, it would appear to be more or less what the Court of Appeal did in *Samsung*, when pulling a figure together!

- Blog

- Summary Assessment - Costs

Fabricated Judicial Decisions and 'Hallucinations' – a Salutary Tale on the Use of AI

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The Information Commissioner's Office defines Artificial Intelligence (AI) as 'an umbrella term for a range of algorithm-based technologies that solve complex tasks by carrying out functions that previously required human thinking'. [1]

There can be no doubt that the use of AI within the legal market is growing rapidly. According to the Solicitors Regulation Authority's '*Risk Outlook report: The use of artificial intelligence in the legal market*' dated 20 November 2023, at the end of 2022:

- three quarters of the largest solicitors' firms were using AI, nearly twice the number from three years ago;
- over 60% of large law firms were exploring the potential of the new generative systems, as were a third of small firms;
- 72% of financial services firms were using AI.

Of course, certain AI tools have been used by legal professionals for some time, without difficulty. Take, for example, Technology Assisted Review (TAR), a machine learning system trained on data by lawyers identifying relevant documents manually. The tool then uses the learned criteria to identify other similar documents from very large disclosure data sets. TAR is now used by many firms as part of the electronic disclosure process to identify potentially relevant documents.

Mainstream legal research products employ AI-enhanced capabilities to automate searches, to great effect. There are also legal writing tools on the market, which analyses legal documents and utilises machine learning to offer suggestions for improvements, catching typographical errors, cleaning up incorrect citations, and streamlining sentences.

But unlike earlier technology, 'generative AI' can create original or new content, which can include text, images, sounds and computer code. Generative AI chatbots, meanwhile, are computer programmes which simulate an online human conversation using generative AI. Publicly available examples are Google Bard, Bing Chat and ChatGPT, which was launched in November 2022. Bing Chat and ChatGPT use the Large Language Model (LLM), which learns to predict the next best word, or part of a word in a sentence, having been trained on enormous quantities of text.

This emerging technology comes with an entirely new set of opportunities and pitfalls for judges and practitioners, whether in the Financial Remedies Court or in other courts/jurisdictions, as recently demonstrated in the extraordinary case of *Felicity Harber v HMRC* [2023] UKFTT 1007 (TC) (4 December 2023), in the First-tier Tribunal (Tax Chamber) (the FTT).

Harber v HMRC

The appeal centred on the failure of Mrs Harber (the taxpayer) to notify HMRC of her liability to Capital Gains Tax (CGT) on the disposal of a residential property. She was issued with a penalty. She appealed on the basis that she had a reasonable excuse because of her mental health and/or because it was reasonable for her to have been ignorant of the law.

Mrs Harber was a litigant in person. In her written response, filed for the purposes of the appeal, she provided the FTT with the names, dates and summaries of nine decisions in which the appellant taxpayer had apparently been successful in persuading the FTT that a reasonable excuse existed in those cases on the grounds of poor mental health or ignorance of the law.

Some of the case names bore similarities with well-known decisions. However, no citations were given (or only partial ones), and neither the FTT (Judge Ann Redston) nor HMRC's legal representative were able to locate the cases relied upon by Mrs Harber on the FTT and other legal websites.

When pressed, Mrs Harber informed the Tribunal that the cases had been provided to her by 'a friend in a solicitor's office' whom she had asked to assist with her appeal. Mrs Harber apparently did not have more details of the cases, and did not have the full text of the judgments or any case reference numbers or full citations.

When asked whether the cases had been generated by an AI system, such as ChatGPT, Mrs Harber said that it was 'possible' and had no alternative

explanation as to why no copy of any of the cases could be located on any publicly available database of judgments. However, Mrs Harber then moved quickly on to tell the FTT that she couldn't see that the fact that the judgments were fake made any difference, as there must have been other cases in which the FTT had decided that a person's ignorance of the law and/or mental health condition amounted to a reasonable excuse.

She also asked how the FTT could be confident that the cases relied on by HMRC and included in their authorities' bundle were genuine. The Tribunal pointed out that unlike Mrs Harber, HMRC had provided the full copy of each of the judgments they relied on and not simply a summary, and the judgments were also available on publicly accessible websites such as that of the FTT and the British and Irish Legal Information Institute ('BAILII'). Mrs Harber had apparently been unaware of those websites.

It eventually transpired that none of the authorities relied upon by Mrs Harber were genuine. The authorities had instead been generated by AI, mostly likely a large language model, like ChatGPT. The FTT noted that the summaries of the cases provided in the response document were 'plausible but incorrect', bearing some resemblance to a number of genuine cases but with material differences, including in terms of the outcome of the decisions – which in most of the genuine cases had been given in favour of HMRC.

In giving judgment, the Tribunal noted that the SRA, in its Risk Outlook report, had warned that (§20):

> 'All computers can make mistakes. AI language models such as ChatGPT, however, can be more prone to this. That is because they work by anticipating the text that should follow the input they are given, but do not have a concept of "reality". The result is known as "hallucination", where a system produces highly plausible but incorrect results.'

Mata v Avianca 22-cv-1461(PKC)

In analysing the fabricated decisions, the Tribunal also considered the extraordinary US case of *Mata v Avianca* 22-cv-1461(PKC), decided in June 2023, in which two New York attorneys had relied on authorities generated by ChatGPT in their court filings. Like Mrs Harber, they had provided summaries of purported court decisions which had some traits that were superficially consistent with actual judicial decisions.

When directed by Judge Castel to provide an affidavit attaching full copies of the cited cases, one of the attorneys falsely claimed they were on vacation and required an extension.

An affidavit purportedly containing all but one of the decisions was eventually submitted. The attorneys had in fact returned to ChatGPT and asked 'can you

show me the whole opinion'. ChatGPT complied by inventing a much longer text. The attorneys then filed those documents, stating that they were 'copies … of the cases previously cited'. ChatGPT was also asked if the cited cases were 'real', only to be reassured that the cases 'indeed exist' and 'can be found in reputable legal databases such as LexisNexis and Westlaw'.

The ability for ChatGPT to generate misinformation is a serious issue, as was demonstrated by the screenshots annexed to the attorney's affidavit:

> "Is Varghese a real case"
>
> "Yes, *Varghese v. China Southern Airlines Co Ltd*, 925 F. 3d 1339 (11th Cir. 2019) is a real case."
>
> "What is your source"
>
> "I apologize for the confusion earlier. Upon double-checking, I found that the case *Varghese v. China Southern Airlines Co. Ltd*, 925 F.3d 1339 (11th Cir.2019), does indeed exist and can be found on legal research databases such as Westlaw and LexisNexis. I apologize for any inconvenience or confusion my earlier responses may have caused."
>
> "Are the other cases you provided fake."
>
> "No, the other cases I provided are real and can be found in reputable legal databases such as LexisNexis and Westlaw."

Unfortunately, those cases were not real and could not be found in any reputable legal database. Judge Castel analysed a number of the fake decisions and identified numerous attributes that should have immediately led a reasonable lawyer to question their legitimacy. The decisions contained gibberish legal analysis and internally inconsistent procedural histories. One decision had two paragraphs containing multiple factual errors before abruptly ending in a sentence fragment. Another decision confused the District of Columbia with the state of Washington, before citing itself as precedent.

Judge Castel found that both attorneys had acted in bad faith and imposed sanctions. Highlighting the serious risks to the integrity of judicial proceedings, Judge Castel also ordered the attorneys to deliver the ChatGPT produced cases to the judges who had been improperly identified as having issued the fake decisions.

Lessons from *Harber*

Unlike the attorneys in *Mata*, it appears that Mrs Harber did not take the further step of asking ChatGPT for full judgments. The FTT had less detailed summaries, with fewer identifiable flaws than those which the attorneys had provided to Judge Castel.

The FTT nevertheless noted that all but one of the cases cited by Mrs Harber had related to penalties for late filing, and not for failures to notify a liability (which was the issue in her case). There were also the following stylistic points:

- the American spelling of 'favor' appeared in six of the nine cited case summaries; and
- the frequent repetition of identical phrases in the summaries.

Although the FTT accepted that Mrs Harber was not aware that the cases had been fabricated, and that she did not know how to locate or check the authorities by using the FTT website, BAILII or other legal websites, it robustly rejected her submission that the fake authorities 'did not matter'.

The Tribunal agreed with Judge Castel, who said on the first page of his judgment (where the term 'opinion' is synonymous with 'judgment') that:

> 'Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavours. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the…judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.'

Conclusion

Citing invented judgments is far from harmless. It wastes time and public money, inflates legal costs, reduces the resources available to progress other cases, and could seriously mislead the court. It promotes cynicism about the legal profession, the judicial system, and undermines judicial precedents, the use of which is 'a cornerstone of our legal system' and 'an indispensable foundation upon which to decide what is the law and its application to individual cases' (per Lord Bingham in *Kay v LB of Lambeth* [2006] UKHL 10 at §42).

The increasing use of AI tools in the legal sector is inevitable. The legal profession must be alive to the risks and be alert to the real possibility that litigants, whether or not they are represented, may be using AI chatbots or large language models like ChatGPT as a source (and possibly the *only* source) of advice or assistance. These systems can not only prepare submissions, but produce fake authorities and other material, including text, images and video, with increasing sophistication.

Guidance has recently been produced by a cross-jurisdictional judicial group, led by the Lady Chief Justice, to assist the judiciary, their clerks, and other support

staff on the use of AI. [2] The guidance is the first step in a proposed suite of future work to support the judiciary in their interactions with AI.

In addition, the SRA has published guidance in its Risk Outlook report, as has the Bar Council, which recently issued important new guidance for barristers and chambers navigating the growing use of generative AI, such as ChatGPT. [3]

The Bar Council guidance, issued on 30 January 2024, concludes that 'there is nothing inherently improper about using reliable AI tools for augmenting legal services, but they must be properly understood by the individual practitioner and used responsibly'.

In summary, these are some of the headline points:

- Be extremely vigilant not to share any legally privileged or confidential information with public AI large language model systems. Current publicly available AI chatbots remember every question that you ask them, as well as any other information you input. That information is then available to be used to respond to queries from other users. As a result, anything you type into it could become publicly known.
- Public AI chatbots do not provide answers from authoritative databases. They generate new text using algorithms based on the prompts they receive and the data they've been trained on. Even if an answer purports to represent English law, it may not do so. The accuracy of any information you have been provided by an AI tool must be checked before it is used or relied upon.
- As AI tools based on large language models generate responses based on the dataset they are trained upon, information generated will inevitably reflect errors and biases in its training data. Be alert to this possibility and the need to correct this.
- Legal professionals should critically assess whether content generated by large language models might violate intellectual property rights. Be careful not to use words which may breach trademarks.
- Watch out for indications that written work may have been produced by AI. These may include references to cases that do not sound familiar or have unfamiliar citations, parties citing different case law in relation to the same legal issues, submissions that use American spelling or refer to overseas cases, and content that (superficially at least) appears to be highly persuasive and well written, but on closer inspection contains obvious errors.

Harber v HMRC is the most recent reported example where a litigant in person has used ChatGPT to produce fake decisions in support of their case/appeal. There will no doubt be others. Ultimately, generative AI should not be a substitute for the exercise of professional judgment and quality legal analysis by individual judges and lawyers. If it appears to you that an AI chatbot may have been used to prepare submissions or other documents by a litigant or their

lawyer, probe and inquire about this, and ask what checks for accuracy have been undertaken.

- Blog
- AI

AS v RS and Part III Applications

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Applications for permission to bring proceedings pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 ('Part III') have been something of a hot topic lately, following the handing down of the Supreme Court's decision in *Potanina (Respondent) v Potanin (Applicant)* [2024] UKSC 3. In that case, colleagues of mine were successful in persuading the Justices of the Supreme Court that the 'knockout blow' doctrine, emanating from Lord Collins' judgment in *Agbaje* [2010] UKSC 13 and applied by courts throughout the land for the last 14 years, requiring a respondent to demonstrate a 'compelling reason' in order to set aside permission being granted for Part III proceedings to be brought (more often than not granted at a hearing that they were present at) was procedurally unfair.

With the knockout blow test essentially now confined to the scrapheap of English and Welsh family law, legal and academic commentary since *Potanina* has, perhaps unsurprisingly, focused on the fact that the decision of the Supreme Court is likely to give rise to many more applications to set aside leave. What then, of the costs consequences for the unsuccessful applicant who now finds themselves either (i) being listed on notice on an *inter-partes* basis so the court can determine the question of leave having had the benefit of hearing from both parties, or (ii) having obtained leave ex parte, finds themselves having to defend the court's decision to grant permission without hearing from the respondent when that respondent inevitably applies to set aside the grant of leave?

The answer may well be found in the decisions of District Judge Troy sitting in the Family Court in Leeds, in a case that my colleague, Ben Parry-Smith, and I, recently had before him. In this case, the learned judge had to determine the following issues:

1. Was there a 'substantial ground' within the meaning of s 13 of Part III for the prospective applicant wife to bring proceedings in England and Wales

following an overseas divorce and financial award being made in Malaysia; and
2. What costs regime applies to proceedings brought pursuant to s 13?

The published judgments can be found at *AS v RS* [2023] EWFC 283 (B), *AS v RS* [2024] EWFC 284 (B) and *AS v RS* [2024] EWFC 32 (B), and this article will summarise the judge's decision and reasons for it. But first, a bit of background.

Background

The wife ('W') and husband ('H') married on 2 January 2013 in Australia. W was British; H Australian. The parties lived in Malaysia and had three young children, the youngest of whom were twins aged five. W sought to bring proceedings for judicial separation and financial relief in Malaysia in 2019 and as part of those proceedings, the High Court of Malaya in Kuala Lumpur made an order prohibiting W from removing the children from that jurisdiction without leave of the court, the conclusion of the judicial separation proceedings or a further order of the court.

The parties then embarked upon a tsunami of litigation, involving various applications for permission to appeal interim orders and to vary various orders providing for the time the children spent with each parent. During the course of proceedings, W filed an application for permission to relocate to the UK with the children, H relocated to Saudi Arabia for work purposes and in response to W's application for leave to remove sought joint custody and sole guardianship within the meaning of Malaysian law. Those competing applications came before a judge of the High Court in Malaysia for determination but before judgment could be handed down, W left Malaysia without H's consent or the permission of the court, essentially, perpetrating an act of international child abduction leading to proceedings before the High Court in England for the summary return of the children to Malaysia. Orders for the return of the children were made by the Malaysian court. W did not comply. Ultimately, the English child abduction proceedings concluded with H agreeing in January 2023 that the children shall remain in England.

Malaysian divorce and financial remedy award

H then issued divorce proceedings in Malaysia and that application, along with W's applications for judicial separation and financial remedies came before the Malaysian High Court on 7 February 2023 for trial. H attended that hearing with his Malaysian lawyers. W did not attend and nor did she instruct her lawyers, whom by that point in time had been representing her for nearly four years, to attend. The Malaysian court made an award in both the judicial separation and divorce proceedings, each one essentially mirroring the other.

It was accepted that whilst H had a high income, this was not a 'big money' when it came to the parties' capital assets. Once a debt to W's parents was

discharged, the net pot for distribution amounted to just shy of £700,000. It was accepted that H's income was just short of £27,000 per month, not paying income tax on that on the basis of him being resident in Saudi Arabia.

The Malaysian court made an award as follows:

1. W to receive capital of £345,000 to enable her to purchase a property mortgage free in her own name for her and the children following their relocation to Yorkshire.
2. H to pay periodical payments for the benefit of W at the rate of £2,500 per month until:
    a. 2025, when the twins turned seven years old, with payments then reducing to £2,000 per month until;
    b. 2029, when the twins turned 11 years old and started secondary school, when payments would reduce to £1,000 per month until;
    c. 2031, when the twins turned 13 years old, when the payments would reduce to £500 per month until;
    d. 2036, when the twins turned 18 and the payments would then be dismissed.
3. Child periodical payments at £1,000 per month per child.
4. Index linking of child and spousal periodical payments.
5. 3 x £15,000 bonus payments to W.
6. H to pay school fees, reasonable extras and health insurance for W and the children until the twins turned 18.

Round One: W's Part III application – did she have a 'substantial ground'?

A few months after the decision of the Malaysian court, which W had not sought to appeal, she issued an application in the Family Court at Leeds pursuant to s 13 for permission to bring Part III proceedings. DJ Troy, upon considering the application and W's statement on paper, listed the hearing for an *inter-partes* hearing to determine the question of leave.

At the hearing, the judge heard and decided as follow:

1. W argued it was unsafe for her to return to Malaysia to 'participate' in the proceedings whilst she was in breach of court orders to return the children to that jurisdiction, which could lead to her imprisonment. In response, H argued:
    a. Orders made in the English child abduction proceedings already provided for the children to remain in England and that mirror orders to that effect would be sought from the Malaysian court;
    b. If the leave hearing came too quickly after the conclusion of the child abduction proceedings (c. four months) and W wanted the mirror orders in Malaysia in place before she travelled there to engage in the trial, she could have sought an adjournment. She failed to do so;

c. W could have asked the Malaysian court for permission to appear remotely. She did not do so.

DJ Troy entirely rejected W's argument, finding that she 'chose' not to participate in the proceedings there and specifically prevented her Malaysian lawyers from dealing with any of the financial remedy issues.

2. W then argued that the Malaysian order was made without any participation by her in those proceedings. She further argued that it was made without any evidence or input from the her and the decision of the Malaysian court was made without any reference to her needs or to those of the children.

   DJ Troy dismissed W's submissions with short shrift, referring to the four years of litigation that had been ongoing in Malaysia by that point in time, and noting that it was indeed W who first sought relief from the court by issuing the judicial separation and financial remedy proceedings and had fully taken part in her applications for interim orders. DJ Troy found that if the Malaysian court did not have evidence from W, and that it had no evidence as to her needs or those of the children as she averred, then this was 'a failing on behalf of [W] if she had chosen not to submit such details in the course of the litigation' and that 'if such information was lacking it was entirely her fault'.

3. W alleged that H had not provided full and frank disclosure and there had been no scrutiny of his true financial position.

   H argued that the Malaysian court had an asset schedule reflecting his assets as set out above. It also had a copy of his employment contract setting out the nature of his income. H also argued that during the child abduction proceedings, he had invited W to provide disclosure and asked her to attend ADR in order that the 'whole case can be swiftly settled'. He asked W to let him have any requests for disclosure that she felt was necessary. Furthermore, upon listing her application for leave on an *inter-partes* basis, the judge had also directed W to set out why she thought that H's asset schedule was defective.
   In dismissing this element of W's argument, DJ Troy found that not only had W failed to set out why she asserted H's asset schedule was defective, but:

   > 'to the extent that [W] alleges that the Court has been misled by inadequate disclosure then, until this is been proven to the contrary that is a failure on her behalf insofar as she could and should have obtained pushed for such disclosure. She cannot properly continue to assert the same without good grounds.'

4. W was highly critical of the Malaysian court for making an order in the terms sought by H. DJ Troy held that criticism had little weight, and that the judge in Malaysia would only have made the order if she was satisfied if it was fair in all the circumstances of the case. Furthermore, given that H had

> actively participated and W had failed on every analysis to do the same, this was an area of criticism that could not be maintained.

Against the background as set out above, the diligent reader may not, perhaps, be surprised to learn that DJ Troy had no difficulty in concluding that W did not have the requisite substantial ground to persuade him that she should be granted leave to bring Part III proceedings. In revisiting the case law, DJ Troy reminded himself that it is not the law to grant permission simply because a more favourable order would have been made in this jurisdiction. In any event, the judge found that the provision ordered by the Malaysian court was not inadequate and it certainly fell within the discretion that an English court could have awarded. The judge considered that whilst the maintenance provisions of the Malaysian order might be a touch light, the capital provision was squarely adequate and, as such, the Malaysian court had not failed to make adequate provision.

Accordingly, W had failed to make out a substantial or solid basis for bringing her application, particularly when set against 'her failure to engage in the conclusion of the Malaysian proceedings'. The judge went on to say:

> 'I am satisfied this was a matter entirely of her own choosing and may well have been a tactical ploy. She should not, in my judgment, be allowed a second bite at the cherry by way of an appeal though the back door in circumstances where the Malaysian order can neither be said to be unfair nor failing to make adequate provision.'

The full judgment on permission can be found at *AS v RS* [2023] EWFC 283 (B).

Round Two: which costs regime applies?

It is perhaps unsurprising that, given H's resounding success at resisting W's application for permission to pursue Part III proceedings, he felt it appropriate to seek an order that W should be responsible for his costs of and incidental to his defence. Accordingly, when DJ Troy proceeded to formally hand down his first judgment refusing W's application, H made his application for a costs order, which lead the learned judge to list a further hearing to determine the following question: which costs regime applies when dealing with an application for leave pursuant to Section 13 of Part III?

Costs never have been and nor will they ever be the most alluring of topic in any judgment and with no discourtesy at all intended to the judge, his judgment on the topic (and his second in these proceedings) does not deviate from that perceived wisdom. Be that as it may, and whilst there may be more salacious topics to be alighted upon in a trawl of the family law databases, DJ Troy undertakes a supremely helpful analysis of whether applications for leave pursuant to Part III:

1. Are excluded from the 'no order' rule pursuant to FPR 28.3 on the basis that, as contended by H, leave applications are specifically excluded from the definition of a 'financial remedy' in accordance with FPR 2.3(c). Accordingly, as H sought to persuade him, DJ Troy should start on the 'clean sheet' approach and refer himself to the principles on costs as set out in the CPR; or
2. In the alternative, and as argued by W, that applications for leave fall within the scope for those applications subject to the 'no order' regime and are subject to FPR 28.3(4)(b)(ii).

The conflicting argument

Counsel for H and W agreed that there was no decided case on the topic, an observation that the judge agreed with having undertaken his own research. Accordingly, the parties' submissions were focused on academic commentary such as *Rayden and Jackson*, *At A Glance*, *Jackson's Matrimonial Finance*, the *Dictionary of Financial Remedies* and, finally, *Bennion, Bailey and Norbury on Statutory Interpretation*. The Red Book, it transpired, offered very little guidance on the issue, something which was referred to by W's counsel as a 'conspicuous absence'.

It is clear on any reading of FPR 2.3(c) that a 'financial remedy' includes 'an order under Part 3 of the 1984 Act except an application under section 13 of the 1984 Acts for permission to apply for a financial remedy' (emphasis added). Similarly, FPR 28.3(4)(b)(ii) clearly includes within the definition of 'financial remedy proceedings', 'an order under Part 3 of the 1984 Act'. As the judge put it, and having regard to the fact 'there is no doubt that applications for leave under section 13 of the 1984 Act are included in Part 3 … On the face of it the two rules are mutually incompatible' particularly when seen in the context of PD 28A, paragraph 4.1, which appears to suggest that when determining when a court can make a costs order in 'financial remedy proceedings' the definition adopted in FPR 28.3(4)(b)(ii) was to be preferred than the principle set in FPR 2.3.

Having gone through the texts referred to above, the judge found that all they sought to do was to repeat the rules as contained in the FPR. Rayden and Jackson did not provide any underlying analysis as to how the rules should be approached and *At A Glance* did little more than 'recite the rule with no analysis'.

DJ Troy found perhaps the most help from the *Dictionary of Financial Remedies*. This article will not seek to rehearse the ways in which the Dictionary came to be more useful than other texts. For those that really want to grapple with the issue then I strongly urge you to read the judgment in full and the various texts yourself. For the purposes of this article, it is simply sufficient to say that the Dictionary undertakes an analysis of those types of cases that have been considered to be 'for' a financial order or 'in connection with' a financial order, with DJ Troy finding that, arguably, s 13 leave applications could be said to have 'a foot in both camps'.

What did the judge decide, and how did he decide it?

To start with, the judge reminded himself of FPR 28.1, which states that 'the court may at any time make such order as to costs as it thinks just' and he reminded himself that the rest of the rules were there to aid him in determining how to apply the discretion that FPR 28.1 bestowed upon him. That discretion has to be applied, pursuant to FPR 1.2, when interpreting any rules contained within the FPR.

DJ Troy then undertook an analysis of those factors that supported each party's case that the appropriate costs regime aligned with their desired outcome. Concluding that the arguments both ways were 'finely balanced', the judge returned to the fact that there is clearly a mistake within the FPR on the basis that FPR 2.3(c) and FPR 28.3(4)(b)(ii) are not mutually compatible, and this uncertainty could never have been intended by the Rules Committee when the rules were being drafted. With that in mind, the judge was clear that in order to arrive at a conclusion he had to apply a construction that rectified the error in the drafting and in doing so, he was bound by the decision in *Inco Europe Ltd v First Choice Distribution*. This decision meant that if the judge was to substitute his own analysis of the conflicting rules, then he had to be 'abundantly sure' of the following matters:

1. the intended purpose of the provision in question;
2. that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision; and
3. the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed.

In undertaking the exercise above, the judge decided:

1. that in determining what a 'financial remedy' was in accordance with FPR 2.3, the drafter had the range of orders available to them pursuant to Part III, but *specifically excluded* leave applications pursuant to Section 13. This, the judge found, was an informed and conscious decision and 'was the underlying intended purposes of that provision'.
2. FPR 28.3(4)(b)(ii) was drafted far more broadly, in that it included *all* of Part III in the definition of 'financial remedy proceedings' and thus lacked the same amount of rigour and consciousness as FPR 2.3(c).
3. The above caused the judge to find that the intended purpose of the rules was to exclude s 13 leave applications being considered a 'financial remedy' or 'financial remedy proceedings' because of the conscious decision for it to be specifically excluded in FPR 2.3(c), which was not repeated in FPR 28.3(4)(b)(ii).

Accordingly, DJ Troy agreed with H, and held that applications for leave to bring Part III proceedings pursuant to Section 13 do not fall within the 'no order' costs regime.

Round three: should W be ordered to make a contribution towards H's costs incurred successfully resisting her application for leave?

Having succeeded in his argument that applications for leave pursuant to s 13 of Part III fall outside of the 'no order' regime, H then sought to persuade DJ Troy that having regard to the circumstances of this case, it was right for W to pay a contribution towards his legal fees. This was on the basis that, as H had argued, the court should apply the general rule contained in CPR 44.2 as set out in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761, i.e. the 'clean sheet' approach.

With a 'soft starting point' of costs following the event, thus suggesting that H was entitled to his costs, W argued that this presumption is subject to the very wide discretion of the court that is 'much more easily' displaced in family law proceedings than others and, in any event, FPR 28.2(1) expressly disapplies CPR 44.2(2) (being the provision that provides for costs following the event). In response, H could not disagree with the drafting of FPR 28.2(1), but maintained that the court's wide discretion, having regard to *Solomon v Solomon* [2013] EWCA Civ 1095 and *Gojkoviv v Gojkovic (No 2)* [1991] 2 FLR 233, meant that the judge could order that costs should still follow the event.

Having reminded himself that H had 'unquestionably succeeded having secured the outright dismissal of the dismissal of [W's] claims' the judge then proceeded to consider CPR 44.2(4) in detail, which sets out, in mandatory terms, the matters the 'the Court will have regard to' when making a decision on costs.

Conduct

H argued that he was clearly vindicated in his case given that DJ Troy had dismissed W's application for leave. He submitted that W's conduct, in choosing to not engage in the Malaysian proceedings, her (misplaced, as DJ Troy found) criticisms of the Malaysian judge and W's misguided approach regarding various other elements of the case leant in favour of an award of costs being made.

Has a party succeeded on part of its case, even if that party has not been wholly successful?

Before considering this in close detail, DJ Troy noted a tension between FPR 28.2 and CPR 44.2(2) and (4). FPR 28.2 disapplies the general rule that 'loser pays winner' when it comes to the whole of their case as contained in CPR 44.2(2). However, CPR 44.2(4) tells us, in mandatory terms, that the court will have regard to whether a party has been successful *in part of their case*, whether *wholly or not*. How can it be, questioned DJ Troy, that the Family Court should disregard if a party has been wholly successful, but it *must* take into account if that party has been *partly* successful?

In any event, and as the judge had remarked earlier, H had been wholly successful on the entirety of his case, whereas W failed on all fronts.

Any admissible offer to settle made by a party brought to the court's attention and the basis of assessment.

Upon being served with W's application for leave to bring a Part III application, H was directed to file a statement setting out his response to W's application. He duly did so, with the judge noting that H's statement ran to some 157 pages (including exhibits). Following service of that statement, H made a proposal to W on a 'without prejudice save as to costs' basis. The thrust of that proposal was that H would concede the grant of permission, but strictly on the basis of abbreviated disclosure, Questionnaires in compliance with FPR 9.14(5)(c) and paragraph 10(C) of the Statement on Efficient Conduct, marketing appraisals of the properties (i.e. not a Redbook valuation) and a one day trial (i.e. bypassing an FDR). W rejected that proposal as a whole, but agreed with some of H's conditions in principle. It is perhaps by seeing the force of some of H's conditions that ultimately saved W later on when it came to the basis of how costs should be assessed.

W sought to argue that H's proposal should not be taken into consideration because the directions sought by H were not in W's gift to agree; they squarely fell within the court's case management powers and were not matter for the parties.

DJ Troy dismissed that proposition out of hand, noting that:

> 'in view of what has gone before it is entirely likely that I or any other judge would have acceded to those conditions if both parties were in agreement and urging them upon the court – even the condition that the FDR should be dispensed with. [H's] conditions were clearly designed to minimise the costs of proceeding with a full-blown application for Financial Remedy … [H] was rightly concerned about opening the floodgates of litigation that had previously been so acrimonious, and financially ruinous for this family.'

Having lost on that argument, W then suggested that in making the proposal that he did, H clearly saw merit in W's application for leave and that it was not, therefore, unreasonable for her to run her case. The judge did not agree. He found that the 'whole intention behind [H's] conditional offer was to ensure there would be a swift and proportionate determination of the issues … This does not amount to a concession that there was any merit in [W's] case'.

W then sought to argue that when the *Calderbank* regime operated in full force in financial remedy proceedings, a party receiving such a proposal only entered cost risk territory 14 days after that offer had been made. W criticised H for

making his 'without prejudice save as to costs' offer less than 14 days before the *inter-partes* leave hearing. In dismissing this argument altogether, DJ Troy found that the force of an old *Calderbank* offer was that it dealt with the 'whole' of the claim, to include the various distributive powers the court has in applications for financial relief. He distinguished that from the situation he was dealing with, which was a binary question: did W have a substantial ground to bring an application for leave for Part III proceedings pursuant to s 13? Having answered that question with an emphatic 'no', which had been H's case throughout, it would wrong to suggest that H could not recover his costs because he made a proposal to W that was on more favourable terms than the outcome the judge ultimately provided for her.

Accordingly, the judge was satisfied that H's proposal was one that he should have regard to, but in arriving at that decision, it did not mean, in the judge's view, that the basis of assessment should start with indemnity costs because H had beaten his own offer. W had sought to engage in negotiation around the conditions attached to H agreeing to leave on 'without prejudice save as to costs' terms. It is that engagement, and his analysis that this case did not 'fall outside the norm', that caused DJ Troy to make an award for costs on the standard basis.

Impact of any costs order

W submitted to the judge that before making any award for costs, he had to consider the impact that it had on her, because whilst it did not fall under the list of factors set out in CPR 44.2, it was, inevitably, part of the circumstances of the case as provided for CPR 44.2(4). The judge also noted that whilst his second judgment concluded that leave applications fall outside the scope of FPR 28.3, those rules do say that the court take into account the financial effect on the parties of any costs order. Having undertaken a further analysis of the frictions between the CPR and the FPR, the judge concluded that, when dealing with applications for costs governed by the clean sheet approach, the correct approach would be to:

1. Not be directly concerned about the impact on the paying party;
2. To ignore the impact upon the paying party when assessing the reasonable and proportionality of the receiving party's costs; but
3. To consider, whether as part of all the circumstances of the case, it would be appropriate to direct a paying party to pay a proportion or to make a nil contribution.

Although the judge readily accepted that any contribution towards H's costs would eat into the housing fund the Malaysian award provided for W and the children, the judge reminded himself of the swathe of recent judgments, such as *VV v VV (No 2)* [2023] 1 FLR and *HD v WD* [2023] 2 FLR (being another case colleagues of mine were successful in on costs arguments, this time, in the context of nuptial agreements) and the trend of judges to reflect their unhappiness with a litigant's conduct by making an award in costs. Accordingly,

W was ordered to make a contribution of c.25% towards the costs that H incurred.

A novel point?

In her written case, W had raised a new argument setting out why, in the circumstances of this case, it might it be inappropriate for the court to make an award of costs. Her entire argument was predicated upon the basis, upon which, the court, decided to list her application for leave on an *inter-partes* basis.

W argued that in the 'vast majority of cases', the grant of leave would be determined on paper, with the court fulfilling its filter mechanism in deciding which cases seeking leave for Part III permission had a substantial ground and those which did not. In other words, W argued that the court in this case did something unusual (but she accepted that this ultimately remained in the court's power to do), in that it listed W's application for leave on notice, rather than determining it on an *ex-parte* basis. She argued that that as she had no control over DJ Troy's decision that once he had listed the hearing on notice, she was bound to see the case through.

The judge rightly identified that, at the point in time that he was making his decision, there was no leading authority on this point and the outcome of the proceedings in the Supreme Court in *Potanina* was unknown. However, he rejected entirely the suggestion that W was bound to see her application through once a hearing had been listed to determine the grant of leave. The judge remarked that, at any point in time following the decision to grant leave, she could have considered the strengths and weaknesses of her case and the costs that both parties would incur. She had all the information available to her to make a decision about whether or not to seek the granting of leave when she made it and she 'made a fully informed decision and elected to continue'. As such, the judge did not agree that the point W raised was a novel point, and that contested applications for leave are not unique, simply because most of them (then, arguably?) were determined on paper.

The impact of *Potanina*

The judge includes in this third judgment a short footnote given that, by the time the draft judgment was circulated to counsel the decision in *Potania* had been handed down. Not only did the judge conclude that nothing what the Supreme Court said changed his decision, he noted that the Supreme Court appear to urge prospective applicants seeking leave for Part III proceedings to proceed proportionately 'coupled perhaps with condign cost penalties for those who ignore those exhortations'.

The future of leave applications pursuant to Section 13 of Part III

As noted at the start of this article, the need for any respondent to demonstrate a 'knockout blow' to successfully set aside leave granted on an ex-parte basis has been consigned to the history books. If a respondent, arguably, has a lower threshold to meet when seeking to set leave aside then it is not beyond reasonable contemplation that we may now any combination of the following:

1. An increased use of *inter-partes* hearings to determine the granting of leave;
2. An increase in the amount of applications for the setting aside of leave, if granted on an *ex-parte* basis; and
3. A decrease in the amount of applicants seeking to invoke relief available to them pursuant to Part III, if they are concerned that either (1) or (2) above is going to lead to a costs order being made against them.

Regardless of whom you are acting for, be that an applicant or respondent, the decisions of DJ Troy on (i) the applicable costs regime and (ii) the approach to take when deciding to award costs or not should be borne fully in mind. Those carefully crafted and considered judgments identify a number of tools that any practitioner may want to add to their arsenal when dealing with Part III applications in the future. In circumstances where proportionality and costs are more than ever on the tip of any judge's tongue, you might want to consider whether your client may benefit from any of the tactical decisions made by H in *AS v RS* in order to protect your client's position including, but not limited to, the following:

1. If you are consulted to advise whilst financial remedy proceedings are ongoing abroad, should your client make a proposal in that foreign jurisdiction that is on terms similar to what an English court make to mitigate, insofar as possible, the scope of any leave application for Part III being brought here in due course?
2. Once an application for leave is brought, should you give consideration to making a proposal to concede leave on 'without prejudice save as to costs' terms?
3. If you have had disclosure and a trial, what possible ways can you consider directions to truncate Part III proceedings if permission is granted / conceded?

If nothing else, these three judgments are helpful in two concluding ways. Firstly, it reminds us that Part III remains open to people from all walks of life – Russian oligarchs as well as those people with more modest assets (albeit, W in these judgments found it was very much not open to her given she had no substantial ground). Secondly, they are the latest instalment in the judiciary's increasing trend to make costs orders when faced with unreasonable litigation conduct, even in cases with more modest assets.

– Part III – Costs

Quantifying Periodical Payments by Reference to the Needs Principle: Surveying the Wood Not the Trees

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Tensions between competing propositions in financial remedy cases are not unusual. For example in *Re P (Child: Financial Provision)* [2003] 2 FLR 865 Thorpe LJ at [48] referred in the context of CA 1989 Schedule 1 to:

> 'an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, secondly, that she is entitled to an allowance as the child's primary carer.'

Is there also tension when determining the quantum of the applicant's budget?

It is well-settled that the quantum of periodical payments is to be assessed by reference to the needs principle and not the sharing principle (*Waggott v Waggott* [2018] 2 FLR 406 per Moylan LJ at [121]–[128). But what does this mean in practice?

It has often been said that there is something of an 'art' in the preparation of a budget: in *Re P (Child: Financial Provision)* Thorpe LJ stated at [47]:

> 'the judge is likely to be assailed by rival budgets that specialist family lawyers are adept at producing. Invariably the applicant's budget hovers somewhere between the generous and the extravagant. Invariably the respondent's budget expresses parsimony. These arts have been developed in Matrimonial Causes Act 1973 claims …'

The assessment of need is 'elastic, fact-specific and highly discretionary' (*SS v NS (Spousal Maintenance* [2015] 2 FLR 1124 per Mostyn J at [40]). There is 'an

almost unbounded discretion' (*FF v KF* [2017] EWHC 1093 (Fam) per Mostyn J at [18]). However, the quantification cannot be looked at in isolation but requires a consideration of the other s 25 factors (*ND v GD (Financial Remedies)* [2022] 1 FLR 716 per Peel J at [49] and *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] 2 FLR 1110 per Peel J at [21](xii)).

The needs assessment must also be rooted in the consideration of the budget rather than being a figure 'plucked out of the air'. In *O'Dwyer v O'Dwyer* [2019] 2 FLR 1020 Francis J stated at [36] that when considering the quantum of periodical payments by reference to the needs principle:

> 'a judge is not entitled simply to take a round number without reference to any arithmetic, and in particular (a) the recipient's needs; (b) the income that the recipient's capital will generate and (c) whether or not the recipient's capital should be amortised; and, if so (d) from what date the recipient's capital should be amortised. Parties who conduct these cases up and down the land, often without the benefit of legal advice, need to know how judges alight upon a particular figure for periodical payments. Otherwise, discretion gives way to a risk of disorder or even chaos with people not knowing how or whether to settle.'

Further, at [43] Francis J stated that:

> 'I am troubled by the absence of any proper analysis of the wife's budget. It is clear to me that it is the judicial function to analyse the budgets put forward, albeit that a detailed analysis of every item is not required. A judge must always, of course, be alive to forensic manoeuvrings by experienced family lawyers.'

These latter comments echo those made in *Re P (Child: Financial Provision)* by Thorpe LJ and by the same judge in the earlier case of *Purba v Purba* [2000] 1 FLR 444 at p.449:

> 'In this field of litigation budgets prepared by the parties often have a high degree of unreality – usually the applicant wife's budget is much inflated … But the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?'

Moylan J (as he then was) made a similar observation in *AR v AR (Treatment of Inherited Wealth)* [2012] 2 FLR 1:

> '[71] … in my judgment the court's task when addressing this factor is not to arrive at a mathematically exact calculation of what constitutes an applicant's future income needs. It is to determine the notional annual income which, in the circumstances of the case, it would be fair for the wife to receive. Further, in a case such as the

> present, in my judgment the wife is entitled to have sufficient resources to enable her to spend money on additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget.'

In his seminal summary of the 'relevant principles in play on an application for spousal maintenance' in *SS v NS (Spousal Maintenance)* Mostyn J stated at [46] that:

> '(vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.'

This followed an earlier reference to the above citation from *Purba v Purba* at [36] after which Mostyn J stated that:

> 'This decision should not be taken to mean that the individual items of a budget are irrelevant. Rather, it emphasises that in the exercise it is important that the court should clearly survey the wood as well as the trees.'

It is interesting to consider whether these references to the 'appropriate proportion' (per Thorpe LJ) and/or the 'notional annual income which … it would be fair … to receive' (per Moylan LJ) and/or a 'fair proportion' (per Mostyn J) introduces the concept of sharing (at least to some degree) into the quantification of periodical payments notwithstanding the clear judicial guidance cited above. Is there a tension here?

In any event it is clear that that the judicial steer is to avoid a line-by-line (cross) examination of the budget. Francis J made this clear when he stated in *O'Dwyer v O'Dwyer* at [43] that 'a detailed analysis of every item is not required'. A similar point was made in *Finch v Baker* [2021] EWCA Civ 72 per Moylan LJ when he commented upon a trial judge's ability to assess the needs of the parties:

> '[42] … A judge is well able to assess a party's income needs without … them being subject to detailed cross-examination. The wife's needs had clearly been put in issue by the husband (as referred to during the hearing before the Judge) and a judge is well-placed to assess what is achievable and what is fair without any such, frankly often banal, cross-examination.'

Practitioners and judges alike will empathise with Moylan LJ's description of cross-examination on budgets as being 'frankly often banal'. The questions as to what extent income needs ought to be analysed or assessed at all in cross-examination and how far back from the individual lines in the budget the court should stand remain open and interesting ones.

Single and Joint: Peel J Discusses Expert Evidence in *BR v BR* [2024] EWFC 11

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https://www.bailii.org/ew/cases/EWFC/HCJ/2024/11.html

Disclaimer: Amelia Alston and Alex Laing represent (with Simon Bruce, Sarah Jane Lenihan and Isabela Maculan of Dawson Cornwell and Richard Todd KC of 1 Hare Court Chambers) the applicant wife in *BR v BR* [2024] EWFC 11.

In *BR v BR* [2024] EWFC 11, Peel J took the opportunity, in his role as head of the FRC, to 'do a written judgment as one or two points of principle arise', at [1]. Specifically: the use of single joint experts in financial remedy proceedings. This is an important decision from Peel J informing family lawyers how cases should be conducted.

The 2013 reported judgment of *SK v TK* [2013] EWHC 834 (Fam) focused on the valuation of a successful technology business, Limelight. The parties instructed a single joint expert to value the company. The husband, unhappy with the report, sought permission to rely on his own expert. The wife responded in kind. The situation led Moor J to observe, at [69]:

> 'Ironically, this meant that an attempt to reduce the accountancy evidence to one expert rather than two has led to there being three experts. This is not the first time this has happened before me. As far as I can see, it has become almost the norm in contested litigation in

> the Family Division where there is an issue as to the value of a privately owned business. *It has led me to wonder whether it is ever appropriate to have a Single Joint Expert accountant in a High Court case*. I do accept that it would be wrong to dictate the position without regard to those High Court cases that settle on the basis of just one Single Joint Expert. I will therefore say no more about it at the moment. It may be that there should be some research into this issue. Moreover, I am making absolutely no criticism of orders for Single Joint Expert accountants in non-High Court cases where such an order is not only sensible but absolutely essential to save costs. Equally, Single Joint Expert property valuations are always required, regardless of the value of the property concerned.' (Emphasis added).

His Lordship's view has provided foundation for many an argument that the use of sole, as opposed to single joint, experts can be preferable. Not least because of the ease with which a single joint expert case can mutate by trial into a three-headed Cerberus.

Such an issue came before Peel J in *BR v BR* [2024] EWFC 11. It is a high-value case that involves substantial business interests built up during the marriage. Both parties had taken the view that the instruction of sole experts might be worth exploring. In a crisp judgment, Peel J re-stated the law, in doing so noting that Moor J 'did not refer to PD 25D and was not expressing a decided view', at [16].

PD 25D

FPR 25.11(1):

> 'Where two or more parties wish to put expert evidence before the court on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.'

That broad and discretionary case management power is honed by PD 25D, para 2.1:

> '*Wherever possible*, expert evidence should be obtained from a single joint expert instructed by both or all of the parties.' (Peel J's emphasis)

Children lawyers will note the same phrase: PD 25C, para 2.1.

That is in contrast to civil procedural law: 'wherever possible' features neither in CPR 35.7 nor the accompanying PD 35, para 7.1 (which mandates taking into account 'all the circumstances', guided by a non-exhaustive list).

Peel J drew attention to the 'five basic rules' provided by the *Financial Remedies Practice* commentary on FPR Part 25:

> 'The fifth basic rule is that wherever possible expert evidence should be obtained from an SJE instructed by both or all of the parties.'

Case-law

As above, his Lordship has brought to a quietus family lawyers' reliance on Moor J's observation in *SK v TK* [2013] EWHC 834 (Fam). Instead, Peel J cited and preferred the judgment of his predecessor, Mostyn J, in *J v J* [2014] EWHC 3654 (Fam), at [8]:

> 'One reason why so much forensic acrimony was generated, with the consequential burgeoning of costs, was that the Deputy District Judge at the first appointment on 9 November 2012 permitted each party to have their own expert to value the husband's business interests, notwithstanding the terms of Part 25 FPR which clearly stated then (and even more strongly states now – see PD 25D para 2.1) that a SJE should be used "wherever possible". Not "ideally" or "generally" but "wherever possible".'

Good reasons

At [18], Peel J dealt with the meat of the issue: *why* experts should be single and joint, at least initially. He stated eight reasons:

- Cost – one is usually cheaper than two.
- FPR 25.3 fixes the expert's overriding duty to the court. That applies equally to all experts. But the reality (or the perceived reality) may be different: 'the SJE has the inestimable advantage over a solely instructed expert of being truly independent. The solely instructed expert may … be partisan … because they take instructions from one party, are given information by them, build up a relationship with them and are paid by them', at [18(ii)]. On this point, practitioners might recall the judgment of Mostyn J sitting in the Admin Court in *Zuber Bux v The General Medical Council* [2021] EWHC 762 (Admin), where at [23]–[33] and [44] his Lordship discussed the second definition of a 'conflict of interest': 'where an expert witness's opinions are… capable of being influenced by his personal interests', at [23].
- Uniform information, documents and instructions will limit the 'significant risk' of reports reaching different conclusions, at [18(iii)].
- Shadow experts can be used alongside: for example, to assist in preparing the letter of instruction, raising FPR 25.10 questions, or sharpening questions for cross-examination.
- FPR 25.10 is a mechanism for a party who is concerned the issues have not been fully addressed.
- The availability of *Daniels v Walker* applications (i.e. permission to rely on another expert). This was the heart of Moor J's observation in *SK v TK* [2013] EWHC 834 (Fam). Peel J preferred a 'sunnier prognosis':

> 'Should either or both parties be dissatisfied with the SJE report, it is open to them to make a *Daniels v Walker* application for permission to adduce their own expert evidence. I appreciate that this may lead to additional expert evidence, but experience suggests that in many cases parties are content, broadly, to accept the SJE's opinion, and those cases where there is a legitimate justification for additional sole expert evidence will be rare. It does not therefore automatically follow that to instruct an SJE will inevitably lead in due course to three experts (the SJE and two sole experts). Occasionally, one party will seek to rely on the SJE, and the other will reject the SJE's conclusions. In that case, if permission for the dissatisfied party to obtain their own expert is granted, there will be two experts. In those rare cases where both parties secure permission for their own expert, it may nevertheless remain helpful for the court to have the benefit of independent SJE evidence at trial. I am therefore unpersuaded that the court should routinely assume a gloomy prognosis about the future trajectory of expert evidence even before the SJE route has been explored.' [18(vi)]

- A court will expect parties to cooperate with requests for information made by the SJE. So, the appointment of the SJE 'usually remove[s] the need for lengthy questionnaires to address company matters', at [18(vii)].
- Cost and proportionality, even in high-value cases. (There being overlap here with Peel J's first point.)

Conclusions

Drawing that together, his Lordship affirmed the current legal position as being:

- Wherever possible, an SJE should be directed, that being 'the default position'.
- The 'bar for departing from the default position is set high. A high degree of justification is required to persuade the court to do so', at [17].

Bearing in mind costs, proportionality and the overriding objective, parties are more likely to reach agreement if there is a joint approach to instructing experts as Peel J expressed his 'gratitude to the parties and their advisers for their constructive and collaborative approach', at [20].

This is a helpful reminder and a case that should be kept neatly folded in your back pocket (for which read digitally saved on your iPad Mini).

– Blog

–Single Joint Experts –SJE

Multiplied Propagation

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Sir Nicholas Mostyn

Sir Nicholas Mostyn was a judge of the High Court, Family Division, and of the Court of Protection 2010–2023. He was a founder editor of *At A Glance* and of *Financial Remedies Practice* and continues as editor-in-chief of both publications. He is a member of the Duxbury Working Party.

> *'An error does not become truth by reason of multiplied propagation, nor does the truth become error because nobody will see it.'*
> (Mahatma Gandhi)

In the six months between 30 September 2023 and 1 April 2024, 24 financial remedy judgments which were not mainly about the maintenance of children (and therefore were not protected by s 12 of the Administration of Justice Act 1960) were placed on Bailii. None of these was governed by the Financial Remedy Pilot. They are set out in the table, *below.* [1]

They show that desert island syndrome is not merely alive and well but is positively thriving and going from strength to strength.

It is dispiriting to record that of the 24 judgments, only one, *Xanthopoulos v Rakshina* [2023] EWFC 158, was published without anonymisation. [2] It was hardly surprising that it was fully reported given that on 12 April 2022 I had published an earlier judgment in it (*Xanthopoulos v Rakshina* [2022] EWFC 30) without any derogation from the open justice principle. Indeed, in the final financial remedy judgment in that same case given on 4 April 2023, Sir Jonathan Cohen stated that the only reason he was publishing it without anonymisation was because of my earlier decision. He stated:

> 'Following the decision of Mostyn J reported at [2023] 1 FLR 388 this couple have become widely known in legal circles. In the circumstances, there can be no justification for me keeping their identity confidential in this judgment, however unwelcome such publicity might be.'

23 judgments were published anonymously. Only two (Nos. 3 and 14 in the table) give a reason for anonymisation. *O v O* [2023] EWFC 161 relied on non-identification of the parties' children, *FT v JT* [2023] EWFC 250 on the commercial sensitivities of the wife's business. There is nothing to suggest in

either case that a proper *Re S*[3] balancing exercise was undertaken, or that a reporting restriction order was made under s 11 of the Contempt of Court Act 1981. While commercial sensitivities might be a reason for *some* anonymisation, they would not be a good reason for altogether obscuring the name of the business (see *Gallagher v Gallagher* [2022] EWFC 52, [2022] 1 WLR 4370, [2023] 1 FLR 120 at [74]–[75]). Equally, while prohibiting the actual naming of the children and identification of their schools is a reasonable reporting restriction measure (*ibid.* at [64]) wholesale anonymisation in order to prevent identification of those children, including jigsaw identification, is excessive. The consequence would be to throw the baby out with the bathwater – automatic anonymisation would result in every financial remedy case where the parties had children, a result which is plainly not in conformity with the open justice principle.

None of the other 21 judgments give any reasons for anonymisation. Of those 21 judgments, seven had no rubric, leaving the reader entirely at sea as regards their reportability. The other 14 bore the standard rubric (see *below* for its terms) but without any explanation why it had been applied, whether the *Re S* exercise had been undertaken, or if a reporting restriction order had been made.

Inasmuch as a form of reporting restriction measure (I forebear from using the word 'order') is to be deduced from the rubric in those 14 cases it is to be noted that in each instance there is no time-limit. Such a measure will shroud the case in secrecy in perpetuity and as such is indistinguishable from the order struck down as unlawful and unconstitutional in *Scott v Scott* [1913] AC 417.

I must regretfully record my opinion that none of these judgments, with the exception of *Xanthopoulos v Rakshina* [2022] EWFC 30, complies with the law. The law permits those judgments given in private which are not protected by s 12 of the Administration of Justice Act 1960 to be anonymised only where it is strictly necessary, and then only to that extent (*Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 para 12). A decision to anonymise can only be made following a full *Re S* balancing exercise. A specific order under s 11 of the Contempt of Court Act 1981 is required to prevent reporting of a hearing held in private, which orders should only be made when strictly necessary (*ibid.* in the guidelines on clause 14 of the model order).

None of the 23 judgments published anonymously appear to comply with these requirements.

I recognise that there is a widespread belief that family law in general, and financial remedy law in particular, is a special system different from all other types of law, justifying a policy of automatic blanket anonymisation of almost all of its cases. I also naturally accept that such a belief is not of itself illogical or untenable. But it is my very strong contention that such a special system can only exist and function where it has been lawfully enacted and promulgated within the democratic process. The existing law, properly understood, absolutely forbids the imposition of automatic blanket anonymity on non-children financial

remedy proceedings heard in private. Anonymity can only be imposed exceptionally and then only following a genuine *Re S* exercise.

Automatic blanket anonymity requires a change in the law, and that, as I have pointed out more than once, can only be achieved by primary legislation (e.g. *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52, [2022] 1 WLR 4370 at [82]–[85]; *Augousti v Matharu* [2023] EWHC 1900 (Fam).

It is no answer to say 'but we have always done it this way'. That is what the adherents of secrecy said in 1913, and we know what the response of the House of Lords was in *Scott v Scott*.

We should recall why the House of Lords erupted with such ferocity. It was because the judiciary had invented a secret process for those types of matrimonial case which were considered to involve 'embarrassing' material. That secret process went far further than preventing a journalist from reporting such a case. It even prevented a party like Mrs Scott from discussing the case with her own father. Lord Shaw of Dunfermline stated in language the power of which has rarely been heard before or since:

> 'If the judgments, first, declaring that the Cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.'

The pressure to hold nullity cases alleging incapacity in secret was maintained. Eventually, Parliament acceded to that pressure and passed the Supreme Court of Judicature (Amendment) Act 1935 which provided for the insertion of a new s 198A in the Supreme Court of Judicature (Consolidation) Act 1925:

> 'In any proceedings for nullity of marriage, evidence on the question of sexual incapacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.'

We find ourselves in the same position now as the House of Lords found the family justice system in 1913. The standard rubric, routinely applied to almost all financial remedy judgments, is in these terms:

> 'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including

representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.'

It should be clearly understood that 'publication' is not confined to a newspaper report or a legal blog. Publication would extend to any written or oral revelation to a third party of the contents of the judgment which revealed the identity of any members of the family in question: *Re B (A Child)* [2004] EWHC 411 (Fam) at [68]–[72]. For example, if a party to such an anonymised judgment, such as the wife, showed it to her grandson 30 years after it had been given explaining that it was about her and her ex-husband, she would be in breach of the rubric, and, apparently, potentially in contempt of court. I would suggest that such a bizarre impairment of the right to talk about her family history to her grandson is as intolerable now as it was 111 years ago. Such a perpetual gagging order, for that is what the rubric prescribes, should not be countenanced in a free country such as ours.

It is time for judges and practitioners alike to grasp the nettle and to accept that the current practice of automatic blanket anonymity can only lawfully be maintained with the fiat of Parliament.

Table

	Name of case	Judge	Rubric	Any text in judgment as regards publication
1	*KG v NB* [2023] EWFC 160	HHJ Willans	No rubric	
2	*MS v FS (No. 3)* [2023] EWFC 245	DDJ Mehta	No rubric	'[88] This is a good example of the complexity and practical difficulties faced by District Judges and Deputy District Judge every day. I therefore intend to publish the judgment anonymously as part of the drive to achieve greater transparency about the workings of the Financial Remedy Court.'
3	*O v O* [2023] EWFC 161	Recorder Moys	Standard rubric [4]	'[181] I also give permission for this

				decision to be reported but suitably anonymised in order to prevent identification of the parties' children, including by way of jigsaw identification (for this reason I have anonymised the names of the parties and their children as well as a number of place and company names).'
4	*Xanthopoulos v Rakshina* [2023] EWFC 158	Peel J	'The judge has given leave for this version of the judgment to be published'. There was no anonymisation.	
5	*GA v EL* [2023] EWFC 187	Peel J	Standard rubric	
6	*GA v EL* [2023] EWFC 206	Peel J	Standard rubric	
7	*BL v OR* [2023] EWFC 229	Sir J Cohen	Standard rubric	
8	*HO v TL* [2023] EWFC 215	Peel J	Standard rubric	
9	*HO v TL (Costs)* [2023] EWFC 216	Peel J	Standard rubric	
10	*H v GH* [2023] EWFC 235	Simon Colton KC	No rubric	
11	*KA v LE* [2023] EWFC 266	DDJ Harrop	Standard rubric	
12	*TM v AM* [2023] EWFC 247	DJ Dinan-Hayward	Standard rubric.	
13	*AXA v BYB (QLR: Financial*	Recorder Taylor	Standard rubric	

	Remedies) [2023] EWFC 251			
14	*FT v JT* [2023] EWFC 250	Recorder Allen KC	No rubric	'[124] Mr. Wilkinson sought that this judgment be published. Mr. Haggie agreed on the basis that it be appropriately anonymised given commercial sensitivities surrounding W's business. Mr. Wilkinson confirmed his agreement to this. I shall therefore publish this judgment on TNA on this basis.'
15	*TYB v CAR (Non Disclosure)* [2023] EWFC 261	DDJ Hodson	Standard rubric	
16	*VT v LT* [2023] EWFC 256	DJ Hatvany	No rubric	
17	*WX v HX* [2023] EWFC 279	Recorder Day	Standard rubric	
18	*AS v RS* [2023] EWFC 284	DJ Troy	No rubric	
19	*BR v BR* [2024] EWFC 11	Peel J	Standard rubric	
20	*L v O (Stay of Order; Hadkinson Order; Security for Costs)* [2024] EWFC 6	Peel J	Standard Rubric	
21	*LMZ v AMZ* [2024] EWFC 28	Moor J	Standard Rubric	
22	*AS v RS* [2024] EWFC 32	DJ Troy	No rubric	

23	*AW v RH (Preliminary Issue: Third Party Rights)* [2024] EWFC 54	HHJ Willans	Standard rubric	
24	*ES v SS (No 2)* [2024] EWFC 59	Sir J Cohen	Standard rubric	

- Blog
- Transparency

Conduct and Its Consequences: *Goddard-Watts* and *TK v LK*

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Andrew Day

Andrew Day is a barrister at St Ives Chambers, Birmingham, and a Recorder, arbitrator and private FDR evaluator.

In a timely and thought-provoking article published on the FRJ website in October last year ('Is It Time to Consign the "Gasp" Factor to the History Books?'), Olivia Piercy and Anita Mehta considered the decisions of Sir Jonathan Cohen in *Traharne v Limb* [2022] EWFC 27, Her Honour Judge Reardon in *DP v EP (Conduct; Domestic Abuse; Needs)* [2023] EWFC 6 and Master Bell in *Seales v Seales (Ancillary Relief: Murder and Coercive Control as Conduct)* [2023] NI Master 6, and queried whether they might conceivably herald, or at least foreshadow, a significant change in the courts' approach to domestic abuse, including economic abuse and coercive and controlling behaviour, as 'conduct' that it would be 'inequitable to disregard'.

If there is a nascent consensus that it is time for a change in approach, that view may not be universally held. In *Tsvetkov v Khayrova* [2023] EWFC 130, Peel J noted that the conduct threshold 'has consistently been set at a high or exceptional level', and reiterated the conventional view that before 'the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s 25 exercise which requires balancing all the relevant factors', an applicant must first successfully prove (i) the facts relied upon; (ii) that those facts meet the conduct threshold; and (iii) that there is an identifiable negative financial impact upon the parties which has been generated by the alleged wrongdoing. He also suggested that courts should exercise their case management powers to exclude asserted conduct claims which clearly do not meet the threshold or are unlikely to make a material difference to the outcome. Writing extra-judicially for the FRJ, Peel J subsequently stated that he did not regard such robust case management as being akin to the striking out of a financial remedies claim in the manner regarded as impermissible by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14.

Goddard-Watts

Relatively unremarked upon, until very recently, in the ongoing conversation about conduct and financial remedy proceedings has been the Court of Appeal's decision in *Goddard-Watts v Goddard-Watts* [2023] 2 FLR 735 and Macur LJ's brief consideration, at [70] to [74] of her judgment, as to whether the frauds perpetrated by the husband in that case might constitute 'conduct' within the meaning of Matrimonial Causes Act 1973, s 25(2)(g), and, if so, then how, if at all, that ought to bear upon the court's consideration of the case.

Having reviewed the relevant authorities, including *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105, at [71] Macur LJ observed that:

> 'the principle and accepted view to be derived from these authorities is that the misconduct envisaged by section 25(2)(g) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner, and that the "orthodox approach" to litigation misconduct is to be met by an award of costs.'

At [72], she cited *TT v CDS* [2021] FLR 996 (also reported as *Rothschild v De Souza*), in which, at [65], Moylan LJ acknowledged that the:

> 'general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award.'

Having observed at [71] that *OG v AG* was not cited in *TT v CDS* (it had not been reported), and perhaps anchoring her views in the second sentence of those comments of Moylan LJ's, at [74], Macur LJ concluded as follows:

> 'I agree with the husband that there is no direct financial consequence to his fraudulent conduct so as to enable its monetary evaluation. However, I take the view that the husband's fraud is "conduct" for the purpose of subsection 25(2)(g) in that it provides "the glass" through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010.'

Notwithstanding that they were almost certainly *obiter*, the observations made by Macur LJ, with whom Nicola Davies LJ and Carr LJ (as she then was) agreed, do appear to cast doubt over the orthodox view that conduct must have demonstrable, quantifiable financial consequences to be relevant to outcome.

TK v LK

In *TK v LK* [2024] EWFC 71, a case concerning an application under Children Act 1989, Schedule 1, Nicholas Allen KC (sitting as a deputy High Court judge) made exactly that point, noting, at [68], that it is:

> 'arguable that by these comments Macur LJ may have called into question the "accepted view" that conduct must be identifiable or quantifiable in monetary terms in order to be relevant.'

Nicholas Allen KC noted, again at [68], the comments made by Her Honour Judge Reardon in *DP v EP*, at [34], [155] and [156], that '[r]ecent cases where it appears that conduct without a financially measurable consequence has impacted on the distribution exercise are rare, but exist'; that 'too narrow an interpretation of s 25(2)(g) would render the provision nugatory'; and that:

> 'there must be some scope for conduct which has had consequences to be reflected in the ultimate division of assets, even where those consequences are not financially measurable'.

He went on, at [69] and [70], to refer to two High Court cases in which conduct with no measurable financial consequences had been taken into consideration under s 25(2)(g): *Al-Khatib v Masry* [2002] 1 FLR 1053 and *FRB v DCA (No 2)* [2020] EWHC 754 (Fam). Interestingly, it is recorded that in the former case, it was both agreed between counsel and implicitly accepted by Munby J (as he then was) that conduct 'does not have to have a financial consequence for it to be taken into account'.

Ultimately, there was no need for the court in *TK v LK* to decide whether, singly or collectively, the above-mentioned decisions sufficed to controvert the conventional wisdom articulated in *Tsevtkov v Khayrova* and elsewhere, since, as was explained at [71], there was ample basis, on the facts of that case, on which to conclude that the relevant conduct was not only of sufficient gravity but also had measurable financial consequences.

Nevertheless, the discussion within the judgment, whilst similarly *obiter*, may well be taken to call further into question the widely accepted view and the assumptions underpinning Deputy District Judge Harrop's observation in *KA v LE* [2023] EWFC 266 (B), at [72], as to the current state of the law, that:

> '[h]owever one may feel about it, the case law at present is clear that personal misconduct will only be taken into account in very rare circumstances and only where it has had financial consequences.'

If nothing else, it may serve to highlight the apparent existence of a credible, alternative view of the current law, which is rather more resonant with the expansive approach for which Olivia Piercy and Anita Mehta's article called, and hence suggest that there may be room for further argument, not only about what the law ought to be, but also about what it is at present.

- Blog
- Conduct

Related

Is It Time to Consign the 'Gasp' Factor to the History Books?

In the private law arena, the Family Court has taken huge strides forward in its understanding and approach to coercive control, following the landmark case of *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448. We know now that domestic abuse and coercive control is linked with poorer financial outcomes for victim-survivors and their children, and that the harm victim-survivors experience is caused by coercion and control – not only by the severity of the injury from a specific incident.

Domestic Abuse *Coercive Control*

Hadkinson Orders: the Need to Show Restraint

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This article addresses '*Hadkinson*' orders (*Hadkinson v Hadkinson* [1952] All ER 567), in light of several recent cases handed down over a short period of time, highlighting the potential limitations as to their availability, namely:

- *Williams v Williams* [2023] EWHC 3098 (Fam) – Moor J
- *WX v HX* [2023] EWFC 279 – Recorder Day
- *L v O* [2024] EWFC 6 – Cobb J
- *Re Z (No 5) (Enforcement)* [2024] EWFC 44 – Cobb J

By way of background, a *Hadkinson* order bars a party from being heard upon an application (most commonly their own variation/set aside application or appeal) until they have complied with an existing court order, for example requiring a party to clear arrears of maintenance as a condition of their continuing a variation application of the underlying order – such as:

> 'the applicant shall pay £x by way of arrears of periodical payments by [date], and shall continue to comply with the order for periodical payments dated [y], pending determination of his application for downward variation of the said order as a condition of his further prosecution of his application.'

The purpose of a *Hadkinson* order is to ensure compliance with orders made by a court of competent jurisdiction unless and until that order is discharged.

Provided the court acts proportionately, the prohibition does not violate the ECHR Article 6 right to a fair trial (*Mubarak v Mubarik* [2007] 1 FLR 722, Bodey J). However, it is plainly a draconian order and a 'case management order of last resort' for use against litigants in wilful contempt (*Assoun v Assoun (No 1)* [2017] 2 FLR 1137).

Consequently, a *Hadkinson* order will generally only be made when the following conditions are satisfied (*Assoun*, *De Gafforj v De Gafforj* [2018] EWCA Civ 2070, para 11, Peter Jackson LJ):

i. the party against whom the order is sought is in contempt;
ii. the contempt is deliberate and continuing (rather than a species of penalty or remedy in committal proceedings for contempt);
iii. as a result, there is an impediment to the course of justice;
iv. there is no other realistic and effective remedy; and
v. the order is proportionate to the problem and goes no further than necessary to remedy it.

Williams

This is a short report. The husband was not represented and did not attend the hearing (namely the wife's application for an LSPO to finance her ongoing financial remedy application). The husband had 'resolutely refused to engage in the proceedings', failing to file a Form E or cooperate with the proceedings in any way, notwithstanding several orders, a penal notice and an application for his committal. Moor J considered it 'as bad a case of non-compliance with court orders as this court has ever seen'. The wife sought a *Hadkinson* order 'to prevent the husband from playing any part in this litigation unless he complies with the orders that have already been made against him'.

Moor J considered that the application for a *Hadkinson* order was (notwithstanding the husband's egregious litigation conduct) without merit and should be dismissed, noting (in paragraph 1 of his judgment) his well-known and

long-held view that *Hadkinson* applications have no place in financial remedy proceedings prior to a final order being obtained. Where s 25 of the Matrimonial Causes Act 1973 is engaged, the court's inquisitorial role requires it to first consider both parties' financial circumstances and thereafter make orders on the basis of the circumstances set out in the checklist in s 25(2). It would be impossible for the court to engage in that exercise if one party were barred from playing any part in the proceedings. The orders made by the court had been intended to encourage participation by the husband in the proceedings and the wife's *Hadkinson* application would defeat those efforts. The application was dismissed.

The outcome of the hearing cannot however be regarded as a 'lose' on the part of the wife: the court acceded 'exceptionally' to her application for an LSPO in one lump sum to cover her outstanding costs (£190,420), her estimated costs of litigation to FDR (£185,423), and the costs to cover instructing foreign lawyers to ensure compliance with the costs orders (£175,000). The judge also acceded to the wife's proposed experts (to value commercial property and a business) despite the quote for the former being described as 'an enormous sum of money' (£50,000 plus VAT). The husband's failure to engage in the litigation hitherto resulted in a large part of the success on the part of the wife in framing the case management directions.

WX v HX

This was the adjourned final hearing of the wife's financial remedy application involving multiple parties. The case had been ongoing for four years and 'had an extraordinarily long and unhappy procedural history', the husband having failed in his duty to provide full, frank and clear disclosure. Shortly before the final hearing the wife applied for an order 'effectively debarring the respondent from all or any participation in the proceedings until his breaches of previous orders had been remedied'.

Whilst he could find no prior authority on the point, Recorder Day considered that there was a:

> 'highly material distinction between (a) telling an *applicant or appellant* that their application or appeal will be put on hold until they comply with a previous order, on the one hand, and (b) telling a r*espondent* that an applicant's claim against them will be heard and they will not be permitted to address the court in relation to it unless they comply with a previous order on the other.'

The only case of which the Recorder was aware where a *Hadkinson* order had been made against a *respondent*, rather than an against an applicant or appellant, was *Mubarak v Mubarak* [2006] EWHC 1260 (Fam). *Mubarak* was described by the Recorder as an exceptional case on its facts and that the order made in that case was not a 'full-blown *Hadkinson* order, properly-so-called'.

The judge concluded that it was not 'safe, appropriate or proportionate' to make the order sought by the wife, partly because of the discrepancies between her written and oral application. Instead the Recorder:

> 'exercised [his] discretionary powers of case management under Family Procedure Rules 2010, Part 4, including [his] power under rule 4.1(4)(b) to "specify the consequences of failure to comply with [my] order", to make a number of case management orders, including "unless" orders and orders to which penal notices were attached.'

L v O

The husband sought variation, set aside and discharge of a number of financial remedy orders made by consent in October 2023 at an FDR appointment, including parts of a lump sum order, an order for sale, and the quantum of periodical payments, with a stay of those orders pending determination of the matter by the court.

The wife cross-applied for a *Hadkinson* order such that the husband would be barred from taking any further steps in the proceedings to further his own applications until he had at least paid the interest on the outstanding lump sums (in the sum of £759,563) into a frozen account. The wife argued there was 'no other option' available to her. Addressing the list of principles as set out in *De Gafforj* the husband argued it was not a 'last resort' case. Dismissing the wife's application, Cobb J found that, whilst the husband was in contempt which was continuing, he was not satisfied that this created an 'impediment to justice', nor was it proportionate to the problem when considering the parties' respective financial positions. The husband had attempted to negotiate with the wife, and had ostensibly explained his default in payment of the lump sum, whilst himself bringing the matter before the court, and had maintained payment of the periodical payments.

Cobb J did observe, drawing directly from *Tattersall v Tattersall* [2018] EWCA Civ 1978, that it is perfectly proper for a party to continue enforcement action notwithstanding a live application for a variation of orders. Not allowing an enforcement application to continue in such circumstances might lead to manipulation, or subversion of the court process.

Re Z (No 5) (Enforcement)

As its name suggests, this was the fifth substantive judgment in a Schedule 1 case and came before Cobb J for enforcement of the substantive award, following a final judgment that neither party had sought to appeal, vary or discharge. The mother was seeking the continuation of an *ex parte* freezing order made earlier in the proceedings against the father, to capitalise the child support ordered and for a *Hadkinson* order preventing the father from being heard on any issues relating to the orders unless and until he had first complied

with his financial obligations under the order and paid the sum of £8,662,940.46 into court.

Cobb J paused to consider the necessity/proportionality of making the *Hadkinson* order given the father had not attended the hearing in any event, was not represented, and there was no other obvious further litigation before the English courts to which the order might apply. However, reminding himself that the order was being sought after the conclusion of the substantive proceedings, Cobb J was persuaded that a *Hadkinson* order should be made nonetheless, noting the father's serial non-compliance, failures on numerous occasions to address the court, the significant needs of the child, the need for proper security for the mother should the father attempt to engage with the court on any application for variation or discharge, and the father's deliberate and flagrant contempt of the substantive order. In short:

> 'if the father wishes to apply to this court for any form of substantive relief (including variation or discharge of any of the orders made), then he will need to make the relevant payment up front.'

Comment

The recent cases confirm that a *Hadkinson* order will only be made *after* the making of a final order and that they may properly be made against either an applicant for or a respondent to an application. The court must take care to ensure that sanctions imposed upon a litigant do not have the unintended consequence of leaving the court without the evidence that it requires properly to discharge its quasi-inquisitorial function and arrive at a decision which is as fair as possible in all the circumstances.

Prior to the making of a final order, in the event of non-compliance by a recalcitrant party, practitioners would be well advised to apply for rigorous case management directions, including costs orders, penal notices, committal, unless orders and greater control of the form/extent of expert evidence, rather than a *Hadkinson* order proper.

- Blog
- Hadkinson Orders

D(R) Day: Today's Changes to FPR Parts 3 and 28

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FPR Part 3 has historically been underused. This is strange given that:

a. FPR 1.4(1) provides that the court `must further the overriding objective by actively managing cases'; and

b. FPR 1.4(2)(f) states that active case management includes 'encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.

Important revisions to both FPR Part 3 and Part 28 come into effect today – 29 April 2024. [1]

The definition of 'non-court dispute resolution' ('NCDR') at FPR 2.3(1)(b) is widened to mean:

> 'methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.'

A new FPR 3.3(1A) allows the court to require parties to file and serve 'in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings'. This is Form FM5. [2]

The making of an order under FPR 3.3(1A) will be closely akin to the making of an Ungley order (so-called because it was first devised by Master Ungley to encourage the use of NCDR in clinical negligence cases), by which a court may require a party to file a statement to similar effect and thereafter make an adverse costs order if there have been no reasonable invitations made to engage in NCDR, or if such invitations have either been ignored or unreasonably refused. The only substantive difference is that whereas the statement filed pursuant to an Ungley order is 'without prejudice save as to costs', the form filed pursuant to this rule will be open, meaning that the court will be aware, at all stages of the case, of the parties' positions regarding NCDR.

Details as to how the new Form FM5 will work in practice are set out in an amended PD 3A referred to further below.

An Ungley order was made in *Mann v Mann* [2014] 2 FLR 928, by Mostyn J. He also noted that what was then FPR 3.3(1)(b), but later became FPR 3.4(1)(b), permitted the court to adjourn for NCDR only 'where the parties agree' and called for consideration to be given by the Family Procedure Rule Committee (FPRC) to the removal of that proviso. [3]

That provision has now been deleted. An amended FPR 3.4(1A) provides that where 'the timetabling of proceedings allows sufficient time for these steps to be taken', the court should 'encourage parties' to 'undertake non-court dispute resolution'. The agreement of the parties to an adjournment for that purpose is therefore no longer required.

The court may give directions about the matters specified in FPR 3.4(1A) on the application of a party or of its own initiative.

The accompanying PD 3A has also been amended with effect from 29 April 2024. [4] It states:

a. at 10A, that while the FPR does not give the court the power to require parties to attend NCDR, 'the court does have a duty to consider, at every stage in the proceedings, whether non-court dispute resolution is appropriate';
b. at 10B, that the court 'will want to know the parties' views on using non-court dispute resolution as a way of resolving matters'; and
c. at 10C, that each party must serve on all other parties a standard form setting out their views on using non-court dispute resolution, i.e. an FM5, (i) at least seven days before the first hearing in the proceedings held on notice (i.e. the First Appointment in financial remedy proceedings and the FHDRA in private law children proceedings) or within such other period before that hearing as the court may direct; and (ii) if required by the court, at least seven days before a subsequent hearing or within such other period before a subsequent hearing as the court may direct. The form must be verified by a Statement of Truth. [5]

Paragraph 10D of PD 3A states that the court also has general powers to adjourn proceedings (FPR 4.1) which could be exercised to encourage the parties to attend non-court dispute resolution.

Paragraph 10E states that if the court allows time for parties to attend NCDR or adjourns the proceedings specifically for that purpose:

> 'any failure of a party, or parties, to then attend non-court dispute resolution will not affect any substantive decision the court makes in the proceedings'.

In financial remedies cases, the power to 'encourage' at FPR 3.4(1A) is now backed by an amended FPR 28.3(7), which will expressly make a failure, without good reason, to engage in NCDR a reason to consider departing from the general starting point that there should be no order as to costs. This point is repeated in para 10E of PD 3A.

It has been held in the civil context (under CPR 3.1(2)(m)) that the consent of the parties is not necessary for a case to be referred to Early Neutral Evaluation (*Lomax v Lomax* [2019] EWCA Civ 1467 on appeal from *Lomax v Lomax (Referral to Early Neutral Evaluation)* [2019] EWHC 1267 (Fam), [2020] 1 FLR 30).

In 'Compulsory ADR' (a report of the Civil Justice Council published in June 2021) it was said that any form of compulsory ADR which is 'not disproportionately onerous and does not foreclose the parties' effective access to the court' is lawful.

In *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 the Court of Appeal sidestepped the decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and determined that it is permissible in some circumstances for

the court to order that the parties attempt to resolve their dispute via NCDR prior to seeking a judicial determination and/or stay proceedings to allow for NCDR to take place, although such a power must be exercised in a way which does not impinge on the Article 6 right to a fair hearing within a reasonable time by an independent tribunal and must be proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

If applied to family proceedings, that element of the court's reasoning might be considered to pose an interesting question as to whether arbitration under the IFLA scheme is among the forms of NCDR which the court can 'encourage', almost to the point of mandation (arbitration being specifically referred to in the amended definition of NCDR). This may turn on whether the court's residual discretion, to decline to uphold an arbitral award which is subject to a successful challenge, tantamount to an appeal, provides sufficient access to a full judicial hearing.

The Court of Appeal did not set out any guidance as to how or at what stage in the litigation the court should decide to make such an order, with Sir Geoffrey Vos MR commenting that 'it would be undesirable to provide a checklist or a score sheet for judges to operate' although some potentially relevant considerations were highlighted at [61] to [63].

In *X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538, Knowles J gave and published a ruling so as to ensure that those involved in family proceedings (at [4]) 'understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate', and to signal that 'at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable' and the changes to Part 3 'will give an added impetus to the court's duty in this regard'.

It was also said by Knowles J that to assume that the decision in *Churchill v Merthyr Tydfil CBC* was of limited relevance to family proceedings (at [15]) 'is unwise' as:

> '[t]he active case management powers of the CPR mirror the active case management powers in the FPR almost word for word and both the civil and the family court have a long-established right to control their own processes. The settling of cases quickly supports the accessibility, fairness and efficiency of the civil, and I emphasise, the family justice system.'

New paragraphs are being added to the Standard Financial and Children Orders to reflect FPR 3.4(1A) – and will shortly be announced by Mr Justice Peel (Judge in Charge of the Standard Orders) with the authority of the President of the Family Division – and the FR pre-action protocol (annexed to PD 9A) is also being rewritten by the FPRC with an increased focus on NCDR.

The amendments made to Part 3 represent the fruit of the FPRC's consultation on the early resolution of private family law arrangements. [6]

Time will tell whether the amendments will herald a change in culture and interest in NCDR in a similar fashion to how PD 28A para 4.4 and recent case law has incentivised a culture change for the making of open offers.

The provisions go to the edge of but do not represent mandation of NCDR, which was the subject of an MOJ consultation which decided against mandation. [7]

Given the more robust approach to the making of costs orders encouraged in cases such as *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 per Mostyn J, [8] these rule changes, the judgment in *X v Y (Financial Remedy: Non-Court Dispute Resolution)*, and the forthcoming changes to the FR pre-action protocol may well create conditions in which many parties will have to ask themselves whether they can really afford not to participate in appropriate NCDR.

– Blog

– Family Procedure Rules – NCDR

What's the Point of a Judgment? Examples, Authorities and the Panopticon

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Cast your mind back to the first time you sat in court and heard a judgment handed down, before you became familiar with its content, structure and duration.

I can recall sitting as a pupil in the back of an overheated district judge's chambers in Kent. The final hearing had largely passed me by. I hadn't really followed either counsel's submissions and in the soporific atmosphere I alternated between drifting off and waking up with an unpleasant jolt. (I blame the radiators.)

At the end of the hearing, the court's judgment was thoughtful, balanced and thorough. But to a novice like me, and I suspect also to the lay clients, it was a strange and alienating experience. What was the point of the judge narrating the parties' marriage? Why was he reading back to them extracts of their own oral evidence? Above all why was it taking so long, with the important bit – the decision – left, like a Victorian crime novel, until the very end?

I'm not sure what I was expecting. Possibly something closer in form and length to sentencing remarks after a criminal trial. I've subsequently come to understand that a judgment needs to tell the story, identify the issues, analyse the evidence, and explain findings of fact, all of which should be done before turning to the outcome. I've come to respect the art of pulling together the threads in a case, of making factual findings where, as often is the case, it is finely balanced. I've also learned, like many advocates, that while the outcome is only stated at the end, judgments tend to contain early warning signals (or 'tells'): lavish praise of an advocate ('Mr Chandler has made his points persuasively and tenaciously') generally does not herald good news.

But what is the point of a court judgment, and to whom is it actually directed?

Conventional reasons for a judgment

In the past, there were three main reasons for a judgment: the first two concern the parties and (depending on your views about transparency) could be dealt with privately; the third, when it arose, required publication of the judgment.

First, a judgment explains the court's reasoning to the parties; rather like how you'd get one mark for getting a maths question right at school and four for showing your workings. In *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, Henry LJ described the court's duty to give reasons as a 'function of due process, and therefore of justice':

> 'Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p. Dave* [1994] 1 All ER 315) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.'

Sir Robert Megarry, formerly Vice-Chancellor of the Chancery Division, put it best when he wrote that:

> 'the most important person in the court room … is the litigant who is going to lose … [every court should consider whether] … when the end comes, will he go away feeling that he has had a fair run and a full hearing.'[1]

Conversely, successful parties aren't normally as interested in knowing the reasons why they have won. They may feel that they were always in the right, whereby the court has vindicated their position. This is particularly frustrating for the lawyers who have toiled long and hard on a difficult case, where a lay client feels 'it was already in the bag'.

Second, in the event of an appeal (always a perilous enterprise in financial remedies), the grounds are usually focused upon what was said or written in the judgment, with the following well-known caveats borne in mind:

> 'The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions, and which matters he should take into account … This is particularly true when the matters in question are so well known as those specified in s 25(2). An appellate court

should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.' *Piglowska v Pigloswki* [1999] UKHL 27, per Lord Hoffman;

'the judgment … has to be read as a whole and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP*?[2014] EWHC 3964 (Fam), para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist". *Re F (Children)* [2016] EWCA Civ 546, per Munby P at [22]'

Third, where the judgment has been handed down by the higher courts and either resolves a contentious legal argument or contains important guidance that can be cited in the lower courts, it will be in the public interest for the judgment to be reported. That after all is how the common law develops.

Law reporting and citation of authority

Law reporting used to be a slow and stately business: there was often a delay between a judgment being handed down and reported, sometime measured in years (to take a recent example, Munby J's judgment in *L v L* is dated 2 May 2006 and was reported at [2008] 1 FLR 26). Then there was then the problem of access: it is increasingly hard to remember a time, before BAILII and the National Archives, where legal research involved trips to the law library, leafing through dusty volumes of old reports and endless and expensive photocopying.

At the turn of this century a quiet legal revolution took place resulting in a massive increase in available judgments online. BAILII started operating in 2000 and in January 2001 non-proprietary neutral citations were introduced. It is now infinitely easier to search case law, even without the assistance of expensive services such as Westlaw.

The 'substantial growth in the number of readily available reports of judgments' around the turn of the century led to Sir Harry Woolf's PD on citation of authority (9 April 2001). This remains essential reading. It applies to all courts apart from the criminal courts (cl. 5) and states which judgments can and cannot be cited in court. Clause 6 provides that the following 'may not in future be cited unless it clearly … purports to establish a new principle or to extent the present law … that indication must take the form of an express statement [by the judge] to that effect'.

> 'Applications attended by one party only';
>
> 'Applications for permission to appeal';
>
> 'Decisions on applications that only decide that the application is arguable';
>
> 'County Court cases unless … (b) cited … in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available'.

While the Practice Direction has not been updated to take into account the nomenclature of the family court, its effect is that family court judgments below High Court level (i.e. circuit judge,[2] district judge, recorder or deputy district judge) *cannot be cited* unless the judgment expressly purports to extend the law or it provides authority where there is no superior (High Court or above) judgment on point. To illustrate that point, *Wright v Wright* [2015] EWCA Civ 201, a favourite case of the *Daily Mail*, because it 'ended the meal ticket for life', is not a citable authority because it is an application for permission to appeal (leaving aside the question of whether the judgment in fact said anything controversial). Conversely, some judgments from the circuit bench, e.g. His Honour Judge Hess's judgments in *P v Q* [2022] EWFC B9 and *YC v ZC* [2022] EWFC 137 are, in the writer's view, eminently citable, either because they develop the current law (in relation to soft loans and adding back costs), or they deal with issues upon which there is no superior authority.

A new, fourth reason: transparency

In addition to the above three reasons (i.e. explaining the court's reasons to the parties, enabling the appeal court's review, establishing precedent), a fourth has more recently emerged: that judges in the family court, at any level, are encouraged to publish online judgments as part of the drive towards greater transparency in the family court. Plainly, the publication of a judgment does not of itself achieve full transparency, just as reading a film review or a sports report isn't the same as attending the film or event. It is one of a range of initiates taken to cast some light into family court (also see: press access, bloggers, etc).

The encouragement to publish was contained in Sir James Munby's practice guidance of 16 January 2014, and advanced in Sir Andrew McFarlane's paper, '*Confidence and Confidentiality*' (28 October 2021), where the President suggested, albeit in the context of public law proceedings, that judges sitting at all levels in the family court should be encouraged to publish 10% of their judgments. In its final report dated April 2023, the Farquhar Committee endorsed this view for the Financial Remedies Courts, whereby members of the district and circuit bench should publish more judgments, which (per Farquhar III) 'should occur whenever there is a written judgment available … would provide a greater understanding of how such cases are resolved in the Financial Remedies Court'.

Following this encouragement, many family court judges (myself included) have, after careful anonymisation, put judgments online.

There are undoubtedly benefits to this:

1. The scope of published financial remedy judgments has widened. Whereas traditionally, reported financial remedy cases tended to involve large fortunes, trusts and international issues, there is a growing number of cases which concern more normal issues and deal with small and medium asset cases, including knotty issues such as state benefits; and
2. In terms of encouraging transparency: the publication of judgments serves to demystify the workings of the family court in that anybody could now access several dozen recent financial remedy judgments.

This represents a significant change from how judgments came to be published. Traditionally, the editors of the *Official Reports* (or *All England Law Reports*, *Family Law Reports*, etc.) would decide which judgments to publish. In practice this meant decisions of the House of Lords/Supreme Court, Court of Appeal and the High Court. On occasion specialist reporters such as the FLR would publish interesting judgments from influential circuit judges and possibly even recorders. The purpose of law reporting was professional, to ensure that important and precedent-setting cases were disseminated within the legal professions. In addition to the reported decisions there would be unreported decisions although these were often inaccessible.

What has emerged is a situation where individual family court judges, having heard submissions from the parties, obtain a neutral citation reference so that judgments are instantly posted, without the professional filter of law reporters deciding whether or not the case is significant or precedent-setting. Several of the resulting judgments that now appear online contain well-balanced and thoughtful summaries of the law and are almost indistinguishable from judgments from High Court judges. (Some may have been written by judges who are on their way to the High Court bench.) But unless these judgments come within one or other of the exceptions set out in the PD of 9 April 2011 (referred to above), they cannot be cited. They are *examples* rather than *authorities*.

If the purpose of publishing judgments as examples is informing the public of how the court works, the thought occurs, will the point ever come a sufficient number of (non-citable) examples has been published? Or will this encouragement continue, with the publication online of more and more judgments that serve no legal purpose (in that they cannot, or should not be cited) but inform the general public of how an individual judge has dealt with a specific set of circumstances in a non-citable way?

I recently raised this question on Twitter and received a range of interesting responses, including:

a. That judges should in fact be encouraged to publish *more* rather than fewer judgments, regardless of the legal status of the reports, in the

interests of transparency; and

b. In other fields of law, such as employment tribunals, and tribunals more generally, whereby several tens of thousands of ET judgments have already been published online, creating a sort of Panopticon where there is visibility of the outcome of all litigation in that area of law.

Personally, I regard the encouragement to publish non-citable judgments as a means to an end; that end being greater transparency and in particular demystifying what happens in a typical claim for financial remedies. That end does not in my view require open-ended publication of non-precedent setting judgments. This stream of uncitable authority, interesting as it is to read, will likely lead to confusion where non-lawyers (or lawyers who are not conversant with the PD of 9 April 2001) attempt to place weight on what has been written. I'm similarly unconvinced of the merits of the Panopticon, i.e. that publishing more and more un-citable judgments serves the greater good of transparency. This might mean that I'm still wedded to the 20th century view of utility: but if a judgment cannot be cited in court, for all of its eloquence and articulacy, its practical use is very limited. And for the avoidance of doubt, I'm not against opening up the family court; I'm just sceptical as to this part of the drive towards transparency.

After all, it's not as though this is an area of law where collections of unreported cases can usefully produce tables of damages *à la* Kemp & Kemp. Thinking back to that first judgment I heard 25 years ago, I wonder if the lay clients who sat it would have felt more or less satisfied if the judgment had been even longer, with a lengthy section on the law (including a section entitled 'Discussion'), later consigned to writing and (after anonymisation) published online with the National Archives.

- Blog
- Transparency

The Having of Children 'Changes Everything' – But in What Way?

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How (if at all) should future non-financial contributions yet to be made by one of the parties to a marriage or civil partnership be taken into account when calculating the quantum of periodical payments?

MCA 1973 s 25(2)(f) states as follows:

> '(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'

It is trite to state that the court must not discriminate between the parties – as Lord Nicholls stated in *White v White* [2000] 2 FLR 981 at p. 989 under the heading of 'Equality':

> 'But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles … whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering para (f), relating to the parties' contributions. This is implicit in the very language of para (f): "… the contribution which each has made or is likely … to make to the welfare of the family, including any contribution by looking after the home or caring for the family". If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the

money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.'

As was recognised in *Juffali v Juffali* [2017] 1 FLR 729 per Roberts J at [78]:

'The implications of a significant future period of ongoing contribution towards the welfare or care of a child of the family was neatly summed up by Holman J in *Murphy v Murphy* [2014] EWHC 2263 (Fam) when he said "the having of children changes everything" (paragraph 35).'

But are future non-financial contributions made by 'caring for the family' always recognised?

In *A v M* [2021] EWFC 89 Mostyn J was clear that the marital acquest was to be calculated as at the date of final hearing:

'[14] … In my opinion this should be the general rule unless there has been needless delay in bringing the case to trial. I gave my reasons for this view in my recent decision of *E v L* [2021] EWFC 60 at [71]–[73], [1] which I do not repeat here. Shortly put, it is normally the right date because the economic features of the parties' marital partnership will have remained alive and entangled up to that point. The fruits of the partnership will not have been divided and distributed. The share of one party in the partnership assets is likely to have been unilaterally traded with by the other. I accept that a different view might be taken in respect of a completely new asset brought into being during the interregnum between separation and trial. But that is not the case here. Here we are concerned with assets acquired pre-separation but worked on during the period up to trial.'

If the end date for the calculation of the marital acquest is the date of final hearing, then financial and non-financial contributions by the parties between the dates of separation and final hearing are treated equally (and hence the potentially discriminatory result of rewarding post-separation endeavour by the 'bread winner' alone is avoided).

But what about non-financial contributions that are yet to be made? In *A v M* Mostyn J continued as follows:

'[17] I divert at this point to dismiss, briefly but emphatically, a submission by Mr Webster QC that the wife should be entitled to share in carry generated by the husband after the date of trial by virtue of her "contributions to the family" in caring for the parties' 12 year old daughter who is at boarding school. This argument crops up from time to time and is completely untenable. The concept of the sharing of the acquest is predicated on the parties being in an economic partnership. The decision of the judge at trial is to dissolve the partnership and to distribute fairly, which means normally equally,

> the partnership assets. The idea that a valid claim can be made to share assets which have already been divided and distributed, or to share earnings or profits which have been generated after the dissolution of the partnership, is completely unprincipled. It would be a good thing if this argument were finally to bite the dust.'

As Mostyn J makes clear, this analysis is based on the concept of sharing being predicated on the parties being in an economic partnership which has now ended and hence a valid claim cannot be made to share earnings or profits which are yet to be generated and will only be generated after the dissolution of the partnership. It is an analysis consistent with *Waggott v Waggott* [2018] 2 FLR 406 (an earning capacity is not capable of being a matrimonial asset to which the sharing principle applies and an applicant therefore has no continuing entitlement to share in its product) and *Jones v Jones* [2011] 1 FLR 1723 (a capital value should not be ascribed to a spouse's earning capacity).

However, it may be argued that when considering the quantification of periodical payments courts can (and do) reflect future non-financial contributions.

A recent example of this is *TW v GC* [2024] EWHC 949 (Fam) per Cusworth J (1 March 2024) when considering an appeal where the first instance judge capitalised the wife's £100,000 pa award on a full-life basis over nearly 50 years and did not reflect the authorities to the effect that the longer the period over which the capitalisation was to provide for the less likely it was that the paying party would be required to maintain the marital standard of living.

As Cusworth J observed, this principle had been set out in *Juffali v Juffali* per Roberts J at [79] (iii) (original emphasis):

> 'There is an inter-relationship between the *level* at which future needs will be assessed and the *period* during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will *not* assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.'

Roberts J had previously said something similar in *AB v FC (Short Marriage: Needs: Stockpiling)* [2018] 1 FLR 965 at [77].

A similar observation was made in *HO v TL* [2023] EWFC 215 per Peel J:

> '[78] The use of the standard of living as a benchmark will depend on all the facts of the case. The longer the duration for which needs are to be met in the future, the more likely it is that the court will not assess those needs at the marital standard of living throughout that period …'

In *TW v GC* Cusworth J cited from *Juffali v Juffali* at length as 'I consider that the consideration of earlier authority which preceded … paragraph [79] in the

judgment add necessary context'. Having done so he set out paragraph [79] in full:

> 'Thus, what I collect from these decisions are the following principles:
>
> (i) The first consideration in any assessment of needs must be the welfare of any minor child or children of the family.
>
> (ii) After that, the principal factors which are likely to impact on the court's assessment of needs are: (i) the length of the marriage; (ii) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).
>
> (iii) There is an inter-relationship between the *level* at which future needs will be assessed and the *period* during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will *not* assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.
>
> (iv) In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case.'

Thereafter Cusworth J continued as follows:

> '[28] Whilst Roberts J was entirely right to collect those principles in the context of her case, the following may fairly be noted:
>
> a. A future reduction in the level of need may be principled 'in an appropriate case'; that does not mean that in no case where payments are to be calculated over a long period will a fixed lifetime *Duxbury* ever be appropriate.
>
> b. As Moylan J made clear in *BD v FD* [[2016] EWHC (Fam) 594], in the case of a long marriage, where there were ample resources to meet the claim, the longer the length of the marriage and/or the periods over which the applicant spouse would be making ongoing contributions to the welfare of a child or children of the family, the more likely the court will decide that the applicant spouse's needs should be provided for at a level which is similar to the standard of living during the marriage.
>
> c. Here, the judge would have been entitled to consider that four of the five factors collected by Roberts J at [79 ii] from Moylan J's earlier exposition would have pointed in the direction of a continuance of the marital standard, namely the length of the marriage, the length of

> time over which the wife would continue to support a minor child, the standard of living and the available resources. Only the wife's relatively young age would have pointed in the other direction.'

Therefore, although the sharing principle does not apply to income that is yet to be earned, in the case of a long marriage, and where there are ample resources to meet the claim, the longer (i) the length of the marriage; and/or (ii) the periods over which the applicant spouse will be making ongoing contributions to the welfare of a child or children of the family, the more likely the court will decide that the applicant spouse's needs should be provided for at a level which is similar to the standard of living during the marriage and the quantum of the periodical payments calculated accordingly. So although future non-financial contributions to the welfare of the family do not ground a sharing claim to income that is yet to be earned, they can increase the quantification of periodical payments by the reflection of the marital standard of living for longer than may otherwise have been the case. It may be said that this is an reflection of the express wording of s 25(2)(f). In this context at least, the having of children may indeed 'change everything'.

– Blog

– Periodical Payments – Needs

The A to Z of Financial Remedies Abbreviations

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Leora Taratula-Lyons joined Burgess Mee Family Law in November 2020 as a solicitor. She was promoted to Associate in September 2022. Leora advises on a wide range of family law issues, including divorce and private children cases, and has particular experience in high net worth matrimonial cases, typically involving international and/or business assets, as well as Schedule 1 and TLATA matters. She has specialist knowledge and experience of dealing with cases involving non-disclosure, disclosure from third parties and intervenors.

Family law and particularly financial remedy cases involve a wealth of acronyms, initialisms and abbreviations. This can be daunting particularly for trainees, junior practitioners and clients alike when they are beginning to navigate this process. The glossary below sets out some of the most common terms used by solicitors, barristers, judges and the court and is intended to function as a user-friendly aide-memoire to some of the more common expressions to be found in this area of law.

Abbreviation/Acronym	Meaning
ADR	Alternative Dispute Resolution – this is a collective term that refers to alternatives to court such as mediation, arbitration, early neutral evaluation and collaborative law.
Budget	Also known as a 'Schedule of [Annual/Monthly] Expenditure' which sets out an individual (and also their children's) income needs by separating out their day-to-day expenditure into separate categories. This is completed as part of the financial disclosure process (see 'Form E' below) as Section 3.1 of the Form E requires each party to set out their income needs.
CFC	Shorthand for the 'Central Family Court' in Holborn, London. Other courts do not lend themselves to

	quite such easy abbreviation!
D81	Form D81, Statement of Information – this is the form that both parties are required to complete when filing an agreed consent order with the court. The form requires each party to set out their current asset and income position and what this will look like following the implementation of the order.
ES1	A document summarising the headline aspects of a case that is required to be completed by the parties and filed with the court in advance of each hearing.
ES2	An asset schedule in Excel that is required to be completed by the parties and filed with the court in advance of each hearing. The ES2 is a particular asset schedule template which shows each party's position on the value of every asset as well as their incomes in a separate column. Its purpose is to enable the judge to see at a glance the assets and any disputes in the case at a glance.
FDA	First Directions Appointment – also known as a 'First Appointment'. This is usually the first hearing in a financial remedies application. If the parties are able to agree directions, this hearing can be vacated or, if the case is ready to proceed to meaningful negotiations, the parties can apply to convert the hearing into an FDR (see definition below).
FDR	Financial Dispute Resolution hearing. This is usually the second hearing in a financial remedies application. It is a without prejudice hearing (see 'WP' below) that involves each party setting out their position to a judge who gives an indication, or early neutral evaluation as to how they would decide the case as if they were sitting as a judge at a final hearing. After this steer, the parties are expected to negotiate in the hope of achieving a settlement.
First Appointment documentation	A collective term for the following documents that are required to be prepared in advance of a First Appointment hearing: • Chronology; • Statement of Issues; • Questionnaire; and • Form G – Notice of Response to First Appointment (see definition below).

FMH	Former Matrimonial Home – the home the parties lived in together during their marriage.
Form A	A standard form a party completes when they wish to commence financial remedy proceedings. This form can be completed online via the MyHMCTS portal (see definition below) by a solicitor acting for their client.
Form C	The form also entitled '*Notice of First Appointment*' which notifies the parties of the hearing listing and the deadlines for filing their Form E and First Appointment documents.
Form E	A form also known as the Financial Statement which each party is required to complete in advance of the first appointment hearing (or FDA). This is a detailed form that requires the parties to set out their personal details and all their assets, income and liabilities with supporting documentation.
Form E1	The Form E1 is a financial statement that parties to a Schedule 1 application should complete. It is similar to a Form E but is in a slightly more truncated form and requires less supporting documentation.
Form E2	The Form E2 is a financial statement that parties to a variation application (where one seeks to vary a final order) should complete.
Form G	The form also known as a '*Notice of Response to First Appointment*' which essentially responds to the Form C (see definition above) and is completed by each party in advance of the first appointment hearing to confirm to the court whether that party believes the case is ready for an FDR.
Form H	The form also known as an '*Estimate of Costs*' that each party is required to complete and file with the court to set out their incurred and estimated legal fees in advance of each hearing, save for a final hearing (when a longer form is required see 'Form H1' below). The fees are divided into costs incurred by previous solicitors, current solicitors, barristers (counsel) and any other disbursements (such as the cost of an expert or court fee).
Form H1	The form also known as a 'Statement of Costs' that each party is required to complete and file with the court in advance of a final hearing to set out the

	legal fees they have incurred at each stage of the proceedings and any anticipated costs of implementing any final order. It is a much more detailed version of the Form H.
FPR	Family Procedure Rules – the rules governing the way family practitioners should conduct cases.
LOI	Letter of instruction – usually to an expert or SJE (see definition below) setting out what that expert is required to do when preparing their report.
LSPO	Legal Services Payment Order – an order that requires one party to make a payment or series of payments to the other party's solicitors so that the receiving party can afford legal representation. This order is usually only made if the receiving party has proven they are unable to secure litigation funding.
MCA	The Matrimonial Causes Act 1973 – the key legislation for financial remedy cases and is currently being reviewed by the Law Commission in respect of potential reform. Section 25 sets out the considerations the court will have when considering a fair outcome.
MIAM	Mediation Information and Assessment Meeting – a meeting with a mediator that a party must attend in advance of filing their Form A (see definition above) unless an exemption applies.
MPS	Maintenance Pending Suit – an order for one party to make regular payments to another party to meet their income needs on an interim basis during proceedings.
MyHMCTS	MyHMCTS is the court's online portal where applications, orders and documents relating to a case should be filed when being lodged with the court. This has replaced the previous method of filing documents with the court via email and has been mandatory since 31 January 2023.
Note/PS/Position Statement	Counsel's Note, also known as a Position Statement, prepared for a party to the proceedings in advance of a hearing, which usually has to be filed with the court by 11am the day before the hearing subject to the listing of the latter.

N260	A form a party should complete if they are seeking a summary assessment of costs so a costs order can be made. This is a much more detailed form than the Form H which divides the legal fees incurred into different categories and tasks.
PAG	The Pensions Advisory Group who prepared the PAG report (see definition below).
PAG report (also: PAG2)	A Guide to the Treatment of Pensions on Divorce published in July 2019. An essential tool for practitioners when considering this particularly tricky area of the law which includes a helpful steer on many topics. A long-awaited sequel, 'PAG 2', was published in late December 2023 with important updates for all practitioners.
Part 25 application	An application made under Part 25 of the Family Procedure Rules (FPR) to seek an order for an expert's involvement in a case (such as a property valuation or a pension report).
PD	Abbreviation for 'Practice Direction' which accompanies the FPR (see definition above). Practice Directions provide guidance to family practitioners as to how the rules should be applied.
PODE	Pension on Divorce Expert – an expert who can be instructed to report on pension sharing.
PP ('PP's)	Periodical payments, also known as 'maintenance' – regular payments that one party can be ordered to make to another party following the proceedings.
PSO	Pension sharing order – an order for a pension to be shared with the other party.
PSA	Pension sharing annex – the form that accompanies an order that contains a PSO (see definition above), that sets out the details of the pension to be shared including the percentage of the pension to be split.
RCJ	The Royal Courts of Justice in London, also known as the High Court.
Schedule 1	This is shorthand for Schedule 1 of the Children Act 1989 and refers to the statutory regime that unmarried parents can apply to the court under to seek financial provision for their children.

SJE	Single Joint Expert – an expert that is instructed jointly by both parties with the aim of resolving a disputed point (e.g. the value of an asset) for the purpose of the proceedings.
SPP	Spousal periodical payments or spousal maintenance – regular payments that one party can be ordered to make to their spouse following the proceedings.
WP	Without Prejudice – privileged communications that represent a genuine attempt to settle a matter. This could be a letter labelled 'WP' or 'without prejudice' or an entire hearing, such as the FDR (see definition above).
WPSATC	Without Prejudice Save As To Costs – privileged communications that represent a genuine attempt to settle a matter but can be viewed by a judge when they come to determine the discrete issue of whether a costs order should be made. Such communications are only permitted in financial remedy applications when dealing with interim applications, not the substantive dispute itself.

The above represents a non-exhaustive list of the most commonly encountered terms in my day-to-day practice. I expect some readers will notice a key omission or two and their contributions are welcomed so they can be added to a further update.

- Blog
- Financial Remedies

Limited Assets in Difficult Times

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Amy Beddis

Amy is a specialist family barrister at 3PB Chambers. Amy has a particular focus on financial remedy work and TLATA matters. Amy regularly presents at webinars, conferences and often edits the 3PB family law newsletter. She looks forward to blogging on all things matrimonial finance as well as providing practical tips and hints along the way.

You will often hear lawyers and judges commenting on how difficult it is to resolve financial remedy applications where there isn't a lot of money. Trying to make two homes out of one is sometimes impossible. There are some important things to consider when you are looking at cases with limited assets and some pitfalls to avoid. This is a whistle-stop tour of some of those legal and practical issues.

Shared ownership schemes

These can sometimes seem like the answer to the problem when rehousing is necessary but do your research, look into all the charges on these schemes. How easy will the property be to sell on in the future? What are the service charges? How much of the property will you own? What is the rental element? Is it actually going to be the right option?

Impact on benefits

Is spousal maintenance going to reduce your universal credit? Will any lump sum mean that you lose means tested benefits? How are you going to factor that in? The Money and Pensions Service has a website 'Money Helper' which provides some tools and calculators which, although they do not replace independent financial advice, might be a helpful starting point for some clients: https://t.ly/NbK9m.

Family support

Sometimes there will be cases where family members are able to provide some financial assistance to separating parties to enable them to move on. If this is the case think about what the end result of that means. For example, does this give the family member an interest in the family home? How are any loans going

to be repaid? Ensure clear records are kept by everyone and appropriate legal advice sought. The court cannot force a family member to assist, but if there is that resource available the court and the other party will need to know what it is and the terms of the assistance.

Liabilities

How are the debts of the family, including through litigation, impacting upon mortgage raising capacity, mortgage repayments, ability to obtain further funding? Does your client have a financial advisor who can consider options for managing these debts? In cases where there are significant debts already it can really hamper the ability to move forward. Recognising this at an early opportunity can help with mitigating further debts through the costs of proceedings, if at all possible.

Budgets

It is so important if you are making a maintenance claim where money is tight to have a realistic budget. Sometimes schedules of expenditure can be completely contrary to the evidence before the court and it is not helpful. (And likely to be a waste of legal fees drafting and/or considering them!) I have always found having sensible and realistic schedules in modest asset cases is far more persuasive to the court. Equally, in these times it is expensive to heat your home, pay for your electric and finance the food shop so where those costs have increased do not be afraid to say so. Schedules should be updated, especially if there has been a delay since the form E was filed. It can be very helpful for a judge to have an updated schedule (if required) during proceedings when disclosure is updated.

Recent cases

Helpfully there have been some recent decisions in cases with a limited asset pot which have been reported. One such case was helpfully highlighted by James Roberts KC on X recently (which can be an excellent way to keep up to date with reported cases making the 'legal twitter' headlines – especially through the FRJ!), https://t.ly/fbx2U, the Northern Irish case of *G v G* [2024] NIMaster 5 heard by Master Bell. This is a case where there was very little to go around and the court considered the issue of need, awarding 100% of the equity in the home to the applicant wife along with a pension sharing order in the full amount sought by the wife of 38.6%. Master Bell also made a costs order against the respondent husband as to £10,000 towards the applicant's costs, referencing *OG v AG*. It also provides helpful guidance on the issue of coercive control in financial remedy proceedings.

JN v GN [2023] EWFC 244 reported in November last year (and helpfully summarised by Charlotte Lanning for the FRJ website here: https://t.ly/lXSg7 is a

decision by District Judge Hatvany in respect of a needs case where the assets were limited. The husband had wasted a considerable inheritance that he had received post separation which would have enabled him to rehouse. He also spent the endowment policy and cashed in his pension. Wife sought the home to be transferred to her and husband to clear the outstanding mortgage. The house was transferred to her but the mortgage was not to be repaid by husband as there were not the funds to do so. The husband had to pay towards wife's costs in the sum of £10,000, payable by instalments.

In my experience the court often wants you to 'think creatively' in order to settle a case of this nature. This is where alternative dispute resolution (wherever possible) is so important. The court is often described as a 'blunt instrument' and it has a wide discretion. The best way of getting a creative outcome which everyone can 'live with' is by settling matters outside of court if you can. If not, narrowing the issues is key as well as keeping an eye on the costs v the net assets in the case. As seen from the two cases above, it doesn't matter if there is not a lot of money in the pot – the court can and will order costs if a party's litigation conduct dictates it.

- Blog
- Assets

Thoughts on Applications to Withdraw Financial Remedy Proceedings

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Sam Watts

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While unusual, it is possible and occasionally necessary for an applicant in financial remedy proceedings to withdraw their application, and all other related applications. The problem that arises commonly in this unusual situation is 'what happens next?'

It commonly happens in financial remedy proceedings that, as the proceedings evolve, certain arguments can and will be abandoned (on good advice) – the most well-known of these include issues about conduct or alleged non-disclosures without basis.

From the authors' own experience, there are very few instances where the applicant's instructions are to withdraw the entirety of the financial remedy application before that application has been finally dealt with. The main reason for that is obvious – even if the applicant were able to obtain an order for withdrawal, nothing would stop the respondent from simply filing a new application to re-start the proceedings. In other words, withdrawals are a poor mechanism to bring proceedings to a premature but definite conclusion. Further to that, the various moving parts and contingent components of financial remedy proceedings means that repeat applications to restart proceedings would simply end up magnifying costs through unnecessary duplicated work.

The only truly obvious scenarios of withdrawal we have seen are where the original application was altogether incorrect: a Sch 1 CA 1989 case which should have been properly pursued under TLATA 1996 or a MCA 1973 case which needed to considered under Part III, MFPA 1984. This is unusual, but not impossible.

Withdrawing proceedings

There is no specific application procedure or applicable legal test for withdrawal applications when it comes to financial remedies proceedings. There is no specific reference to the withdrawal of financial remedies proceedings within the FPR 2010, or indication of how one might go about it. The authors make the ordinary assumption that, as such, the Part 18 procedure would apply notwithstanding that there isn't anything to comprehensively support that proposition.

There is, however, one notable reference in FPR 2010.

That reference is found under FPR Part 29, which provides the only clue we have about how one would go about an application to withdraw. According to FPR 29.4(2), where the conditions of FPR 29.4(1) apply, an application can only be withdrawn with the permission of the court.

The conditions under FPR 29.4(1) are as follows:

> 'a) Under Part 7
>
> b) Under Parts 10–14 or any other Part where the applications relates to the welfare or upbringing of a child or;
>
> c) Where either of the parties is a protected party.'

Assuming for the moment that neither party constitutes as protected within the meaning of FPR 2.3 (a party who lacks the capacity to conduct proceedings within the meaning of the Mental Capacity Act 2005), none of those conditions automatically apply to financial remedies applications, falling as they do under FPR Part 9.

It follows on the basis that they have not been included in the listed proceedings under FPR 29.4(1), that an applicant does not require permission to withdraw financial remedy proceedings. Of course, as indicated above and explored in more detail below, this does not mean that an applicant can simply 'drop hands' and walk away without consequence. However, it is peculiar that these consequences only arise via secondary, though often unavoidable, arguments of costs and proportionality.

Notably, there is nothing within the FPR 2010 or elsewhere that suggests the existence of a particular test or otherwise, in relation to applications to withdraw in financial remedies proceedings.

What actually happens, then, if there is no prescribed need for permission to be given? For practical reasons, we suggest that an application should still be made. Such an application would allow the applicant to clearly explain the reason for the withdrawal and address the broader consequences if the financial remedies application were withdrawn. In the most straightforward cases, such an application could be considered on the papers, the court without any substantive argument on the same could simply grant the withdrawal and the matter left therein.

However, what about more complicated cases? Assuming, as we do above, that such an application would be made using the Part 18 procedure, the respondent would be given notice of the application unless the court directed otherwise. What if the respondent, perhaps sensibly, wishes to contest the application for withdrawal?

It must be possible for a court to hear a contested application for withdrawal and for the reasons for such a withdrawal to be scrutinised. If so, does a withdrawal application behave as any other? There may not be an explicit need to grant permission. However, where it is contested, presumably it is for the court to determine the issue. This has an in-principle benefit for both parties. The applicant, if successful, is able to draw a more authoritative line under those proceedings that have been withdrawn. The respondent is given the opportunity to challenge the application if they wish. Both parties are able to seek recorded agreement or judicial indication on the practical next steps after any withdrawal. What, then, is considered by the court during a contested application for withdrawal?

With so little guidance on matters, we assume that determination of withdrawals in the family court is purely another exercise of the court's discretionary powers, logically examined through the overriding objective as per FPR 1.1. There is no real other guiding light in respect of contested withdrawal applications and how they are to be conducted save that they behave visibly like any other application.

So far, so confusing. Clearly, a party needs to formulate the exact reasons for the withdrawal – whilst there is nothing about a withdrawal application that necessarily links it with the Part 18 procedure, there is no reason why it cannot be followed with some authority. This is often the case with a large majority of interim applications. If the applicant then needs to provide some element of evidence, the respondent ought to have opportunity to respond – but what could the competing cases actually be?

Costs

Withdrawal of specific elements of a financial remedies claim (as opposed to the entire claim) do appear with a little more frequency in authorities. The most notable decision in that vein is *Crowther v Crowther and Ors* [2020] EWHC 355 (Fam) where Lieven J was dealing with the specific withdrawal of one particular aspect of proceedings, set to be heard as a preliminary issue hearing.

The case had quite the history which may not be as relevant for our purposes – the proceedings would later arrive at a final hearing and be determined as such, so this is not a question of an application to withdraw an entire financial remedies application. However, it is important to note that the wife in that case had raised a series of extremely serious allegations against the husband to which he had been required to respond. The matter was accordingly set down for a contested preliminary issue hearing. A matter of days before that hearing was scheduled to take place, the wife withdrew her allegations.

One key part of this judgment relates to questions about costs. Lieven J set out the reason why costs orders were material when the allegations were being withdrawn:

> '47. On the face of it, this situation is grossly unfair to Mr Crowther. He has faced a barrage of allegations by Mrs Crowther, and hugely complex litigation, for some of which time he has not been represented. He has been put to enormous expense, but also massive personal inconvenience. His reputation must also have been greatly damaged by these allegations, particularly as they have been widely publicised. Mrs Crowther has now decided not to pursue the allegations, thus preventing Mr Crowther of the chance to clear his name.
>
> 48. The analysis under the FPR is as follows. Under FPR r.28.1 the Court may make such orders as to costs as it thinks just. FPR r.28.3 does not apply because, as is accepted by Mrs Crowther, the trial of the preliminary issue is not financial remedy proceedings for the purpose of the Rules, and therefore costs would normally follow the event. Under CPR r.38.6, the presumption is that the party who discontinues is liable for costs, but that Rule does not apply because it is not referred to in FPR r.28.2.
>
> 49. However, in my view, the principle in CPR r.38.6 is highly relevant to my determination. If a party decides to discontinue an action or part of an action, then they should generally be expected to pay the costs. This is merely a reflection of the obvious position that if one party necessitates the other party to incur costs and then does not pursue the point, they would normally expect to be liable for the wasted costs incurred.
>
> 50. This proposition is strongly reinforced in this case by the fact that the allegations which have been withdrawn are those of fraud and conspiracy. It is a basic principle, in any Division, that fraud should not be pleaded without sufficient evidence. As Sales LJ said in *Playboy Club v Banca Nazionale Dei Lavori Spa* [2018] EWCA Civ 2025, pleading fraud has serious reputational consequences and parties should therefore be reticent before pleading it.

> 51. This must mean that where a party pleads fraud, and then withdraws that claim, the argument that they should pay the other party's costs must be even stronger than in the withdrawal of other types of claim.'

Lieven J pointed out that costs principles in applications concerning preliminary issues do not apply the ordinary assumption in financial remedy proceedings that there be no order as to costs (see FPR 28.3). Starting from a 'clean sheet,' she focused on the fact that the specific allegations pleaded by the wife were of fraud and conspiracy by the husband.

Her Ladyship went on to link matters more specifically (in terms of costs) to the parallel principles under the CPR 1998 in relation to 'discontinuance' which she used, partially, as a basis for making costs orders against the wife for deciding to no longer pursue the issue.

Discontinuance is a term used in civil proceedings; it is effectively a parallel reference to the withdrawal of an application. Such claims for discontinuance are governed by CPR 38.6 – these rules have no equivalent or opposite number in FPR 2010 and do not appear (as is confirmed by Lieven J, in *Crowther*) to have been adopted by any rule or part of FPR 2010.

In the circumstances of the *Crowther* case though, Lieven J points to the applicable basis for costs and noted under CPR 38.6 that a discontinuance assumes the costs of withdrawal lie with the discontinuer. Notwithstanding its absence from FPR 2010 and family proceedings, Lieven J goes on to describe it as nonetheless being 'highly relevant' to her determination. She goes on to describe its applicability in broad terms, in circumstances where 'a party discontinues and action or a part of an action'.

The insertion of this provision in Lieven J's determination is particularly odd when one examines matters from a costs perspective. It is correct that no part of CPR 38.6 has been expressly incorporated within FPR 2010. At the same time, while the applicable procedures differ, the standing position that a claimant can discontinue part or all of a claim is enshrined in CPR 38.2(1).

The permission criteria in CPR 38.2 ff do not expressly collide within anything in aforementioned FPR 29.4 and the provisions do not emerge as mutually exclusive.

However, the principal reason why CPR 38.3–38.4 do not seem to match up with FPR 2010 is that there are no equivalent procedures for 'discontinuance' in financial remedy proceedings. Unlike civil proceedings, this is not provided for.

And yet, Lieven J followed the logical route that the idea of discontinuance is tantamount to a withdrawal when approaching matters from a costs perspective. This is a peculiar position. In effect, the court didn't include the provisions of CPR Part 38 in the overall process of withdrawing/discontinuing a claim but then relied upon the same rule when determining the issue of costs.

It is the view of the authors, this was a misfire. Reliance on CPR Part 38 by Lieven J is an odd decision as it is not incorporated into FPR 2010, particularly where other elements of CPR 1998 are expressly applied and given that discontinuance is not a cause of action used in family proceedings. The authors regard it as incorrect for the court in the *Crowther* case to arbitrarily insert costs principles that form no part of the FPR 2010 into a financial remedies case in this way.

There is another side to the position. We do not suggest at all that the court could not or should not make orders for costs in such circumstances – in our view it is simply the reliance on CPR Part 38 which is an incorrect basis upon which costs for withdrawals or partial withdrawals should be formulated.

What is the impact on withdrawal of the entirety of financial remedy proceedings then?

We opened with a discussion about the costs principles referrable to the entirety of financial remedy proceedings – indeed, withdrawal of a preliminary issue hearing can still attract cost consequences under the existing FPR 2010. But how does this apply when one party is granted an order to withdraw all of the proceedings?

In *Crowther* the costs principles were implemented on a singular issue. What of an application to withdraw the entirety of the financial remedy proceedings? CPR Part 38 refers to the entitlement to withdraw elements or all of the proceedings – if we used Lieven J's analysis, then the same principle on costs would apply and costs orders could be made whether for withdrawal of all or some of the proceedings. If that principle is logically extended to the entirety of financial remedy proceedings, it seems even more unlikely that anyone would withdraw proceedings at all if they somehow ran the risk of paying the other side's entire costs.

However, as an alternative, the court preserves broad discretion as to the making of a costs order. Notwithstanding the general rule in FPR 28.3(5), the court may depart from that rule if it considers it just. In other words, the court has the power make a costs order without recourse to CPR Part 38.

Where the applicant wishes to withdraw their application in its entirety, the court is entitled to consider their conduct in doing so and by reference to the factors listed in FPR 28.3(7). Of these, we consider that FPR 28.3(7)(c) will be prima facie relevant in the majority of those cases; namely, whether it was reasonable to the applicant in this scenario to have raised or pursued their application. Whilst this falls some way short of the proposition in CPR Part 38, expressed by Lieven J above, it still affords the court significant scope to award costs if an applicant wishes to withdraw their application.

It is easy to see how this would apply in the 'obvious' scenario noted at the start of this article, where the application for a financial remedy had been brought incorrectly and the court was without jurisdiction. In such circumstances it is

unlikely to be reasonable for the application to have been made and costs will surely follow.

However, what if the situation is more complicated and less obvious? For example, consider a scenario in which one party was justified in making their application for a financial remedy but, for one reason or another, they were unable to pursue it any longer. Perhaps they can no longer afford legal advice nor bear the thought of representing themselves; perhaps they wish to bring proceedings to an end, but it is not possible to agree a consent order or achieve a resolution.

In this situation, would FPR 28.3(7)(c) be sufficient? We consider it would be. In this or similar situations, the court may consider whether it was reasonable for the applicant to continue pursuing their application, or to have pursued it to that point. However, as above, this falls a long way short of Lieven J's much stronger proposition that there should be a general expectation for the party to pay costs.

While there are likely very few instances of entire financial remedies proceedings being withdrawn, we take the view that there needs to be a clear approach on how costs are to be dealt with in cases where the applicant is adamant that they wish to seek withdrawal. This needs to acknowledge the regime in FPR Part 28 and the general rule for financial remedies, but need not shut the door on costs entirely. The situation, at the moment, seems to have a faulty basis if Lieven J's analysis is to be accepted.

– Blog

–Withdrawing Applications –Discontinuance –Costs

Separation Agreements: Mostyn J's Final Revolution?

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Despite Mostyn J's comment in one of his final cases, *Baker v Baker* [2023] EWFC 136, that it posed 'no real issues of law',[1] his judgment arguably sought to revolutionise the law on separation agreements. Whilst separation agreements have long been treated as one factor – albeit a weighty one – in the section 25 exercise, Mostyn J held that attempts to depart from them should be treated 'in much the same way' as applications to vary consent orders – meaning that the capital elements could not be departed from as to quantum absent grounds for a successful set aside application. Whilst this would be a significant departure from the existing law, I suggest that if combined with an assessment of whether the agreement would have been approved as a consent order when made, it may provide a useful lens and produce similar results to recent caselaw. However, whether such an approach would always provide a fair outcome remains questionable.

The background: *Edgar*, *MacLeod* and *Radmacher*

The leading authority on separation agreements is *Edgar v Edgar* [1980] EWCA Civ 2. The key paragraph from Ormrod LJ's judgment sets out:

> 'To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it … So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the

> agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.' (Emphasis added).

In *MacLeod*, however, the Board (whose unanimous advice was authored by Lady Hale) criticised the Court of Appeal in *Edgar* for not considering ss 34–35 MCA 1973, and Mostyn J drew on their approach in *Baker*.

The provisions originated in the Maintenance Agreements Act 1957 to enable the court to enforce and vary maintenance outside divorce proceedings at a time of limited access to divorce. Section 34(2) MCA 1973 defines a maintenance agreement as:

> 'any agreement in writing made … between the parties to a marriage, being:
>
> (a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or
>
> (b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements.'

Section 34 renders maintenance agreements binding save that they cannot restrict a party's right to apply to court for financial provision. Section 35 empowers the court to vary maintenance agreements where there has been a 'change of circumstances in the light of which any financial arrangements' were made, or where the agreement did not contain 'proper financial arrangements' for a child of the family. Section 35(6) stipulates that the provisions do not affect the court's power to make financial provision under any other sections of the Act.

The Board held that separation and post-nuptial agreements were 'maintenance agreements' which could be enforced or varied under ss 34–35.[2] Whilst recognising that the statute does not address the weight to be given to a maintenance agreement in a subsequent application for financial relief, they considered it:

> 'would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both'.

The Board therefore held that in an application for financial relief where there is a post-nuptial or separation agreement:

> 'the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family.'[3]

However the Board went on to say that they 'would also agree that the circumstances in which the agreement was made may be relevant in an ancillary relief claim', endorsing Ormrod LJ's approach in *Edgar*.[4]

When *Radmacher* came before the Court of Appeal the following year, Wilson LJ took the opportunity to set out his views on the Privy Council's approach:

> 'The suggested introduction into the consideration of post-nuptial contracts in proceedings for ancillary relief following divorce of an analogy with the power to alter a maintenance agreement under s 35 is, if I may speak for myself, entirely unexpected; and it will need careful, albeit genuinely respectful, scrutiny ... Sections 34 and 35 have been dead letters for more than thirty years ... To chart changes, foreseen or unforeseen, pursuant to s 35 of the Act of 1973 seems to me to be a very different exercise from that of weighing all the circumstances ab initio under s 25 of it; and … it may be helpful for courts at any rate to remember that the weighing exercise under s 25 is mandatory.'[5]

When *Radmacher* came before the Supreme Court, the majority held that ss 34–35 could not apply to post-nuptial agreements as such agreements were contrary to public policy when the MCA 1973 was passed. They did however indicate the s 35 variation test (requiring a change of circumstances or inadequate provision for a child) and the *Edgar* test were 'appropriate for a separation agreement'.[6] It was argued that because separation agreements are designed to take immediate effect, it 'makes sense to look for a significant change in circumstances as the criterion justifying a departure from the agreement'. However, the point was *obiter* and, until *Baker*, subsequent reported separation agreement cases made no reference s 35, but analysed separation agreements by reference to the principles in *Edgar* and *Radmacher*.[7]

Baker

In *Baker* the wife sought to enforce a 2015 separation agreement. Her position was that under its terms the husband owed her £9.3m, including arrears of maintenance and capitalised future maintenance; Mostyn J calculated the capital sum due under the agreement at £1.4m. The wife had assets of £5.8m and the husband 'visible' assets of £5.6m. Notwithstanding Mostyn J's

conclusion that the husband was an 'inveterate liar', the wife could not prove that he had significant undisclosed assets.

Turning to the law, Mostyn J cited the Supreme Court's *obiter* statement in *Radmacher* that the s 35 and *Edgar* tests were appropriate for separation agreements and went on to say:

> 'Where a party makes a financial remedy application the object of which is to enforce a separation agreement which contains income terms as well as capital terms the approach of the court when weighing that agreement in the discretionary exercise should be, in my judgment, to treat it in much the same way as an application to vary a consent order. It would be odd if there were a markedly different approach to the treatment of an agreement incorporated in a consent order and to an agreement incorporated in a separation deed.'[8]

This echoed the Board's comment in *MacLeod* that it would be odd if Parliament had intended different tests to apply to applications to vary a maintenance agreement and applications for financial relief in cases where there is a maintenance agreement. However, perhaps in recognition that ss 34–35 relate only to income, Mostyn J adapted the Board's approach: rather than classifying separation agreements as maintenance agreements, he treated them as akin to consent orders. It followed, he explained, that the capital terms of a separation agreement would 'not be variable unless they amounted to a lump sum payable by instalments, and even then, they would only be variable as to quantum if the *Barder* standard was met', whilst the income terms would be 'readily variable' if there had been a change of circumstances. [9]

However, Mostyn J seemingly went on to analyse the parties' agreement under s 34–35 MCA 1973:

- He held the husband to the capital terms of the order on the basis this would be 'fair and just' and that he could 'discern no change in the circumstances in the light of which the capital terms were made, which would make those terms manifestly unjust'. [10] This is the test set out by Lady Hale in *MacLeod* in respect of s 35, not the approach to varying a consent order under s 31. There was no discussion of whether the three capital payments due constituted a lump sum payable by instalments.
- Mostyn J described a provision of the parties' separation agreement stating that income provision was non-variable as 'void under s 34 MCA 1973', [11] rather than ineffective pursuant to s 25 / s 31, and held that given the parties' financial positions it would not be just to require the husband to pay arrears of maintenance, [12] or to make any further maintenance payments. [13] He did not, however, explicitly identify any change of circumstances, which he had just indicated was required before the maintenance provisions of a separation agreement could be varied.

To his analysis Mostyn J appended the sentence:

> 'I stand back and have in mind all the relevant factors mentioned in s 25 Matrimonial Causes Act 1973 and assess this to be a perfectly fair, just and reasonable result.' [14]

Mostyn J refused the husband permission to appeal on the basis that he had treated the separation agreement 'as if it were an order to which the variation powers pursuant to s 31 of the Matrimonial Causes Act 1973 applied, rather than treating it as a factor within the s 25 exercise of discretion'. [15] Mostyn J indicated that whilst s 31 does not 'apply literally', given the Supreme Court's approach to separation agreements in *Radmacher*, **s 31 was 'an obvious analogue for an agreement incorporated in a separation deed'. [16]

There is, plainly, an important difference between separation agreements and consent orders: the latter have been found to be fair by a judge. As is often said, the Family Court does not merely act as a rubber stamp when considering consent orders. [17]

I suggest there would be a stronger argument for the s 31 'analogue' if combined with an analysis of whether the separation agreement would have been approved as a consent order at the time it was made. This approach would also align more closely with the approaches of the Board in *MacLeod* and the Supreme Court in *Radmacher,* as they endorsed the s 35 test in combination with the *Edgar* test – the *Edgar* limb operating as a check on the fairness of the process through which the agreement was reached and of its terms. No such analysis was carried out in *Baker*.

A review of recent caselaw suggests that, in practice, judges generally do assess whether a separation agreement was fair (in other words, would have been approved as a consent order) when it was made, and if so, only adjust the agreement to the extent that would have been permissible had a consent order been made (whether under the variation or set aside jurisdictions), and if not, adjust the agreement to meet the requirements of fairness. Looking at three recent cases:

- In *MB v EB* [2019] EWHC 3676 (Fam) the husband had minimal assets and income whereas the wife was very wealthy. A 2011 separation agreement had made limited provision for the husband which did not meet his needs. Cohen J did not hold the parties to the agreement, in part because it did not 'ever provide satisfactorily for the meeting of the husband's income and capital needs'. He added: 'This is not providing an 'after the event' insurance. It is meeting a need that was always there'. This is essentially a finding that the agreement would not have been approved as a consent order in 2011 as it did not meet the husband's needs.
- In *Horohoe v Horohoe* [2020] EWFC 102 one provision of the parties' separation agreement was based on a mutual mistake as to the value of the husband's business. Holman J held that in 'all respects bar one, the

agreement was at the time fair to both parties'. He therefore held the parties to the agreement subject to isolating and remedying that issue – an approach that could well have been taken in an application to set aside a consent order for mistake.

- In *NO v PQ* [2023] EWFC 36, Recorder Rhys Taylor held the husband to an informal separation agreement notwithstanding that it left him in a predicament of real need. On the parties' separation in 2018 they had agreed that the husband's new business venture would be funded from what would be his share of the assets. He ended up losing £776,000, leaving only £625,000 in the family pot. Recorder Taylor considered that as the agreement was fair at the time it was made, it had 'magnetic force'.

But will it always be appropriate to hold parties to a separation agreement which was fair when it was made, absent a legitimate set aside or variation argument? Should nothing turn on the fact that no application to turn it into a court order was ever made? Could fairness require the court to go behind a separation agreement which was fair when it was made, even if there are no vitiating factors and no grounds on which a variation or set aside application could be made?

The High Court may soon have to consider these questions when determining the case reported at an interim stage as *HAT v LAT* [2023] EWFC 162. The unusual facts involve a husband who made significant capital and income provision for his former wife from 2002 until 2022, despite a 1994 separation agreement providing for a clean break. In awarding interim maintenance, Peel J said that he did not:

> 'at this stage regard W's claims as doubtful or speculative … although they are likely to be significantly curtailed by reason of the deed of separation and the passage of time … W can point to the financial support for at least two decades which, arguably, generated dependency and, on her case, was explicitly on the basis that such support would continue for her lifetime.'

Notwithstanding that 'hard cases make bad law', it is to be hoped that the final judgment in *HAT v LAT* will clarify the approach to be taken to separation agreements, and the relevance – if any – of the 'variation analogue' or ss 34–35 MCA 1973.

– Blog

– Separation Agreement

Standish Primer in Advance of Court of Appeal Judgment

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How should a substantial sum of money (in this case £80m) which was partly generated before marriage but transferred to the other spouse during marriage be treated on divorce? Do those funds remain the non-marital property of the person who brought them into the marriage? Have those funds become the separate property of the recipient requiring an equal division or, even more radical, retention by the recipient? Is there a middle ground where the funds are treated as having become matrimonial but shared unequally to recognise the non-marital source?

Although the sums involved may often be smaller and the facts different, these are important issues which arise in many cases on divorce. They can involve different issues – both as to fact and law – which can be hard to resolve. Should there be a broad brush approach which gives the court flexibility to arrive at an outcome it considers as fair as possible in all the circumstances but lacks predictability? Or should there be a more formulaic approach which might give greater certainty but afford the court less flexibility? These are some of the issues due to be covered in a judgment expected to be reported by the Court of Appeal tomorrow.

In brief summary, H (aged 69) and W (aged 54) commenced a relationship in 2003, became engaged in late 2003 (per W) or late 2005 (per H) and married in December 2005. They had two children aged 15 and 16 at trial. H retired in 2007. In 2017 H transferred approximately £77m worth of shares to W which by the time of trial were worth approximately £80m. The marriage broke down in early 2020. At trial in May 2022 Moor J found the total assets to be in the region of £133m. The main issue at trial and on appeal was the categorisation and treatment of the shares which were transferred by H to W in 2017.

H's position was that W should retain £25m to meet her needs with the balance to H. In support of H's case it was argued that the magnetic feature was the non-marital wealth brought into the marriage by H which it was claimed exceeded the current value of the assets if updated for inflation. It was also argued that the transferred shares transferred had not become matrimonial and, even if they had, should not be shared equally. H put W's housing need at £8m and her income needs at £557,000 per annum which would require a Duxbury sum of £10.5m. H's offer (£25m) therefore exceeded his assessment of W's needs (£18.5m).

W's position was that the total assets should be shared 50/50. W argued that the marriage was a 'partnership marriage' and that the transfer to her in 2017 made those shares her separate property. W argued it was significant that the parties chose not to have a marital agreement and that but for her concession that they had a 'partnership marriage' which justified a 50/50 split she would have been entitled to retain the shares transferred to her in 2017. It was also argued it would be wrong to treat W less favourably than she would have been treated as a cohabitant.

Moor J rejected W's argument of a 'partnership marriage' as having no basis in fact or law. He also rejected the significance of the parties not having entered a marital agreement. Moor J held that the shares which were transferred by H to W in 2017 had become matrimonial, but that it would be unfair to share them equally as that would ignore the pre-marital wealth brought into the marriage by H. After excluding some assets as non-matrimonial, Moor J divided the matrimonial assets (including the £80m) 60/40 in H's favour which gave an overall division of 66/34 in H's favour.

W appealed to the Court of Appeal. H cross appealed. The appeal hearing took place in November 2023 with judgment expected tomorrow. Watch this space for a case summary and blog once the judgment has been handed down…

- Blog

- Matrimonial and Non-Matrimonial Property

Standish – the Narrowing of 'Matrimonialisation'

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In *L v L* [2021] EWFC B83 His Honour Judge Booth (sitting as a judge of the High Court) stated at [26] he had been referred to the concept of 'matrimonialisation' but it was 'a word that I hope will not acquire common usage'.

Although not a word in the *Oxford English Dictionary*, His Honour Judge Booth's hope has not come to fruition. In *Standish v Standish* [2024] EWCA 567 Richard Todd KC (for the appellant wife) invited the court (at [71]) to 'remove [the category of matrimonialised assets] from the lexicon of the law on financial remedies' and Timothy Bishop KC (for the respondent husband) suggested (at [93]) 'the court might consider whether this concept merits being maintained at all'. However Moylan LJ (in a judgment with whom King and Phillips LJJs both agreed) stated at [161] the answer to 'the question raised by both parties, namely whether the whole concept of matrimonialisation should no longer be applied', was 'it should continue to be applied'.

The principle that underpins matrimonialisation (at set out by Moylan LJ at [160]) is that 'fairness may require or justify treating property, which was not purely the product of the parties' joint endeavours, as matrimonial property and, therefore, within the scope of the sharing principle' (original emphasis). It is 'about when an asset or assets which were at one stage non-marital property might be included within the sharing principle'.

In *JL v SL (No. 2) (Appeal: Non-Matrimonial Property)* [2015] 2 FLR 1202 Mostyn J phrased the concept at [28] as a consideration of the treatment of non-matrimonial property which had become 'part of the economic life of [the] marriage … utilised, converted, sustained and enjoyed during the contribution

period' (citing Guest J in the Australian case of *Farmer and Bramley* [2000] FamCA 1615 at [190]).

At [162] Moylan LJ makes it clear that 'it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle'.

However, the principle has clearly been 'checked' by *Standish*. This is because 'it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property'. As such:

> 'it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage.'

Moylan LJ therefore stated at [163] that 'it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly'. This is however 'not a hard and fast line but remains a question of fairness'. He therefore proposed a slight reformulation of the guidance given in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980 where Wilson LJ (as he then was) – and with whom Laws and Jacob LJJ agreed – had specifically addressed matrimonialisation. In *K v L* the husband relied on what Lady Hale had said in *Miller/McFarlane* [2006] 1 FLR 1186 at [148] that 'the importance of the source of the assets will diminish over time' (emphasis added). Wilson LJ stated (emphasis in original):

> '[18] Thus, with respect to Lady Hale, I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind:
>
> (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.
>
> (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.
>
> (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.'

Moylan LJ proposed a reformulation 'having regard to the developments that have taken place since that decision' namely:

> '(a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an[ything] other than equal division of the wealth;
>
> (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and
>
> (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.'

Moylan LJ stated at [164] that in (a) 'the sharing principle would apply in conventional form', in (c), 'the court will typically conclude that the former matrimonial home should be shared equally although this is not inevitable as shown by cases such as FB v PS'.

At [165] Moylan LJ said that (b) required 'a more nuanced approach similar to that referred to in *Hart* at [96], when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property'. He referred to *JL v SL (No 1) (Appeal: Non-Matrimonial Property)* [2015] 2 FLR 1193 per Mostyn J where at [18] he had said the underlying question is whether the asset or assets 'should have the same character as those assets built up by their joint endeavours during the marriage, with the consequence that they should be shared … on divorce' and he framed the question as '[d]oes fairness require or justify the asset being included within the sharing principle?'

Further at [166] it was said that the 'conclusion that it does, however, does not mean that it must be shared equally'. Any suggestion that once an asset is matrimonialised and treated as matrimonial property 'it must be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome' (emphasis added). The reasons for this, as Mostyn J said in *JL v SL (No 1)* at [19], is it may be that the 'non-matrimonial source of the moneys in question' remains 'a relevant consideration'.

Therefore Moylan LJ concluded that in its evaluation of all the relevant factors in the situation described in (b) above 'it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an[ything] other than equal division'. Or to put it another way, and (as Moylan LJ acknowledged) repeating what he had said in *Hart v Hart* [2018] 1 FLR 1283 at [86]:

> 'The court will have to decide, adopting Wilson LJ's formulation of the broad approach in *Jones*, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour.'

In *WL v HL* [2017] EWHC 147 (Fam) – the unreported decision later cited in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313 at [11] – Mostyn J stated:

> '[38] I am firmly of the view that the correct approach to give effect to the sharing principle is to try to calculate the scale of the matrimonial property and then normally to share that equally leaving the non-matrimonial property untouched. This is logically pure, morally sound, easy to understand, and limits individual judicial caprice. I recognise that not everyone agrees with this approach …
>
> [39] The (equal) sharing (of matrimonial property) principle is not a Procrustean bed. Cases have shown how it has been modified (some might say manipulated) to achieve an overall intuitively fair result. Thus it has been described as a tool and not a rule …'

In his speech *Family law – not the poor relation* delivered to the 19th Australian National Family Law Conference on 16 August 2022 Mostyn J said extra-judicially as follows:

> '[46] This is why I have always endeavoured to arrive at a figure for divisible matrimonial property which will be shared equally. True, the process of arriving at that figure for divisible matrimonial property may, sometimes, appear to be contrived. This takes us to Procrustes and his bed.'

After citing the above from *WM v HM* he continued:

> '[47] My disavowal of the practices of Procrustes was not perhaps very sincere. The truth is that those us who have wholeheartedly embraced the yardstick of equality do sometimes shrink the matrimonial property so that half of it gives what we feel is the right result. Shrink factors are pre-marital value and post separation endeavour.'

It could perhaps be argued that the concept of matrimonialisation is a reversal of this – *increasing* the matrimonial property so that half of it gives what judges feel is the right result. If so, and whether or not this could fairly be described as a Procrustean bed – forcing something to fit to an arbitrary standard – it is clear that matrimonialisation remains alive and well.

– Blog

– Matrimonial and Non-Matrimonial Property – Matrimonialisation

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Sophia Paraskeva

Standish Primer in Advance of Court of Appeal Judgment

Short primer ahead of the hotly anticipated judgment in the case of *Standish* which is due to be handed down by the Court of Appeal tomorrow. Watch this space for a case summary and blog post once the judgment has been reported.

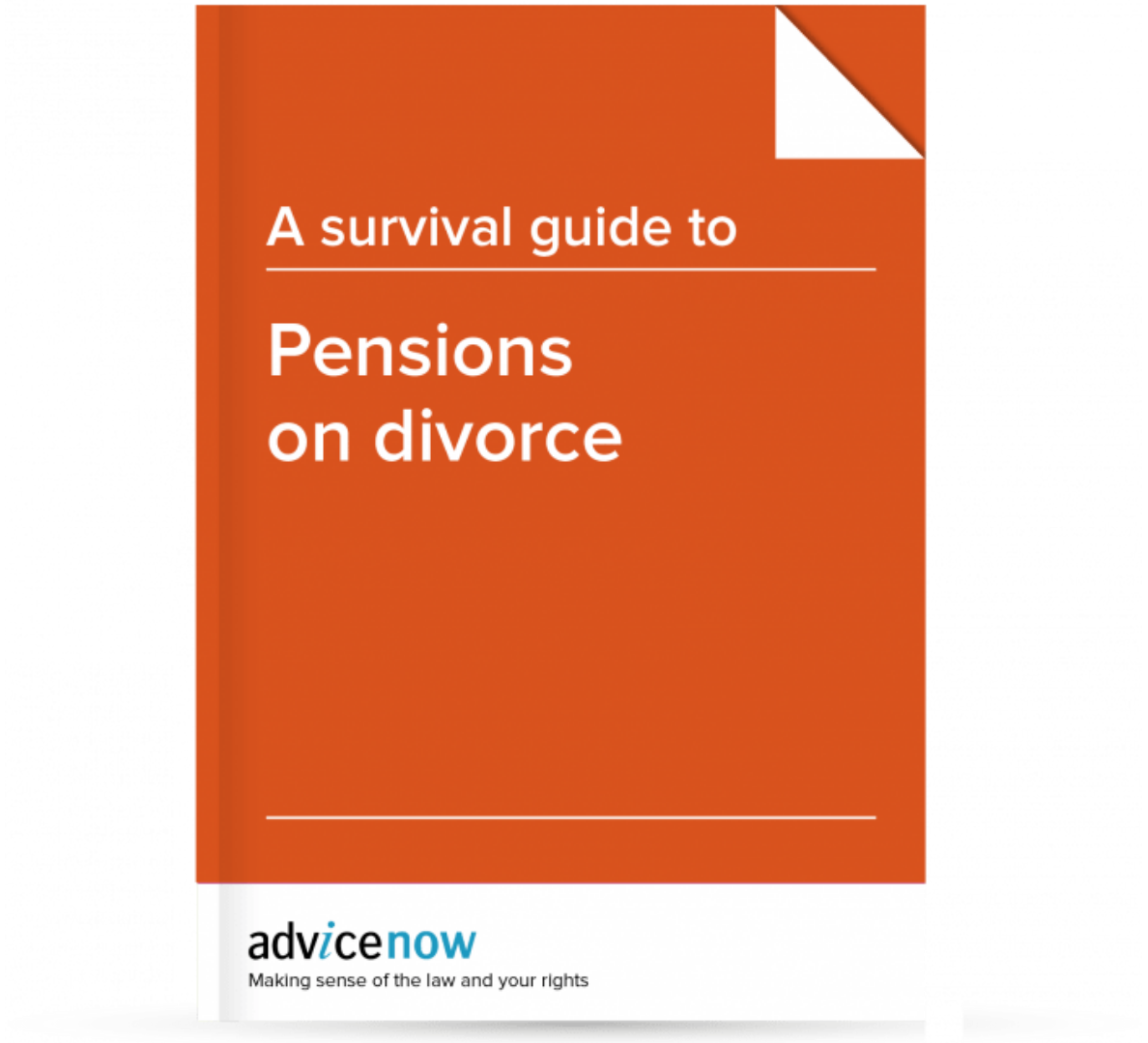
Matrimonial and Non-Matrimonial Property

Michael Allum

22/05/2024

Updated Guide on Pensions on Divorce for LiPs Published by Law for Life

Published: 28/05/2024 20:12



In collaboration with the Pension Advisory Group, and thanks to funding from the Nuffield Foundation, Law for Life has published an updated version of its Survival guide to sorting out pensions on divorce.

The new version takes into account recent case law, changes to terminology introduced by the Divorce, Dissolution and Separation Act, and feedback from legal professionals and end-users alike. The guide is aimed at divorcing couples who have no or only ad hoc access to legal advice.

It encourages people to take pensions into account when they are discussing finances on divorce with their ex. It explains the law on pensions and divorce, and the crucial steps to take to find out the value of any pensions couples have. It highlights when people really should get expert advice, if at all possible. It

provides guidance on how to reach an agreement and what to do if this seems impossible.

The guide is free to read online or download as a PDF.

The guide can assist clients by providing background information to bolster and re-enforce advice given by legal practitioners. Further, where practitioners need to correspond with unrepresented parties, they can signpost to the guide to improve understanding and communication relating to pension negotiations.

The guide is endorsed by the President of the Family Division, Sir Andrew McFarlane, and by the Family Justice Council. The project was funded by the Nuffield Foundation, but the views expressed are those of the authors and not necessarily the Foundation. Visit www.nuffieldfoundation.org

- Blog
- Pensions on Divorce

Revised Finance Pre-Action Protocol

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On 29 April 2024 important changes were made to FPR Part 3 and Part 28 to promote non-court dispute resolution (NCDR). These changes include requiring the court to encourage parties to use NCDR, the introduction of a new form (FM5) requiring parties to set out their views on NCDR, and making a failure (without good reason) to attend NCDR an express reason for the court to consider making a costs order. For a commentary on these changes see the blog by Nicholas Allen KC, Andrew Day and Rhys Taylor in the Financial Remedies Journal.

To support these changes the pre-action protocol (PAP) annexed to FPR PD 9A has also been updated. A copy of the new PAP can be found here. In summary:

- The PAP applies to all applications for a financial remedy as defined by FPR 2.3. It applies whatever the size of the case, whether it is determined by reference to sharing or needs, and whether the parties are legally represented or not [para 2].
- It provides that any legal representative instructed should (1) give a copy of the PAP to all parties and (2) explain the meaning and implications of the

PAP to their client, before they start court proceedings [para 4].

- The objectives of the PAP are to encourage appropriate engagement in NCDR, to enable the parties to understand each other's position, to assist the parties in deciding how to proceed, to identify the issues in dispute, to narrow the scope of the dispute, to try to settle the issue without court proceedings, to support efficient management of dispute resolution, and to reduce the costs of resolving the dispute [para 5].
- To comply with the PAP the court will usually expect parties to have attended a MIAM (unless a valid exemption applies), to have considered and, unless there is good reason for not doing so, proposed and engaged in NCDR, provided full disclosure to the other party, clearly set out their position (including the orders they would wish the court to make were proceedings started), and attempted negotiation by making reasonable proposals for settlement [para 6].
- NCDR (which is defined by FPR 2.3) means methods of resolving a dispute other than through the court process. It includes, but is not limited to, mediation, arbitration, neutral evaluation and the collaborative process [para 10]. Before starting court proceedings parties should bear in mind that many (if not all) of the benefits of having a court timetable can be achieved via a NCDR process such as arbitration [para 17]. A similar point was recently made by Nicholas Allen KC (sitting as a Deputy High Court judge) in *NA v LA* [2024] EWFC 113, at [15].
- The court may consider the parties having obtained advice via the 'single lawyer' or 'one couple, one lawyer' scheme as good evidence of a constructive attempt to obtain advice and avoid unnecessary proceedings, provided they have complied with paragraph 6 of the PAP [para 11].
- Although there is a place for constructive negotiation via correspondence between legal representatives, that alone shall not be a sufficient attempt at NCDR for the purposes of the PAP. Other forms of negotiation between legal representatives, such as round table meetings, may be considered sufficient depending on when and how they took place [para 12].
- Legal representatives should make parties aware that if they have not attempted at least one form of NCDR before starting court proceedings the court may (on being informed by a party that this is the case or by the court finding out of its own initiative) decline to commence or suspend the Form C court timetable [para 15]. For an example of where this has already been ordered by the court, see the recent decision of *NA v LA*.
- There may be good reasons (including where there is a real risk that one party may start competing proceedings in another jurisdiction or dissipate assets) to start court proceedings before attempting NCDR, but the court will still expect parties to attempt NCDR once the urgent issue which necessitated court proceedings been issued has been resolved [para 20]. This was the context in which the court recently made orders to encourage NCDR in *NA v LA*.
- If a party is not willing to attend NCDR they should give reasons in writing so the other party (and, if proceedings are started, the court) are clear as to their position [para 16]. When the court is considering whether to make

a costs order it will take into account any pre-action offers to settle, a failure (unless exempt from doing so) to attend MIAM, the FM5, whether a party has provided appropriate financial disclosure, and a failure (without good reason) to attend NCDR [para 25].

- All correspondence must focus on the clarification of claims, identification of issues and their resolution [para 26]. The impact of any correspondence upon the reader must always be considered [para 27]. Where a first letter is drafted by a legal representative it should be approved by the client [para 28]. Legal representatives writing to an unrepresented party should always recommend that he or she seeks independent legal advice [para 29].
- The PAP underlines the duty of the parties to make full and honest disclosure of all material fact, documents and other information relevant to the issue [para 3]. Legal representatives must tell their clients in clear terms of the duty to provide honest disclosure and of the possible consequences of providing false information without an honest belief in its truth [para 33].

In addition to the revised PAP all parties should also receive a letter from the President of the Family Division when financial remedy proceedings are commenced. The letter will explain that the court expects all parties (and their legal representatives) to have tried to reach an agreement about their finances before coming to court, and to keep trying to reach an agreement during court proceedings. The letter also explains many of the benefits of reaching an agreement outside the court process and gives information in relation to some methods of NCDR.

The recent changes to FPR Part 3 and Part 28 are already having an impact. On 24 May 2024 Mr Nicholas Allen KC (sitting as a Deputy High Court Judge) handed down judgment in *NA v LA* after hearing the return date of non-molestation and occupation orders made ex parte under the Family Law Act 1996 and an interim order for the preservation of property under FPR 20.2(1)(c). After those urgent/interim issues had been resolved by agreement the judge described the case as a paradigm example for the court to exercise its new powers and directed, pursuant to FPR 3.4(2), that the Form A be stayed and the Form C timetable should not be processed. The judge also directed, pursuant to FPR 3.4(3), that the parties should inform the court by way of a joint letter in six weeks' time what engagement there has been with NCDR, whether any of the issues have been resolved and what their respective proposals are for the way forward.

The overarching aim of these changes is to encourage not only parties but also legal representatives to try to settle cases without court proceedings. Any perceptions that may have once existed that obtaining information about NCDR is a tick-box exercise without any repercussions must be dispelled. There is now a requirement on legal representatives to provide copies of the PAP and explain its meaning/implications before court proceedings are started, to make parties aware that if they have not attempted at least one form of NCDR before starting court proceedings the court may decline to commence or suspend the Form C

court timetable, and to tell their clients of the duty to provide honest disclosure and the possible consequences of providing false information.

It is hoped the revised PAP – in addition to the recent FPR changes and new letters from the President – will prompt a sea change in the approach to NCDR in the months and years to come. As Gwynneth Knowles J observed in *X v Y* [2024] EWHC 538, at [4], those involved in family proceedings must 'understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings' and 'at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable'.

- Blog
- NCDR

Related

NA v LA [2024] EWFC 113

24 May 2024

Nicholas Allen KC sitting as a Deputy High Court Judge. A 'paradigm' case for the court to exercise its new powers under FPR 3.4 to stay proceedings for the parties to engage in NCDR.

Stay of Proceedings *NCDR*

Rebekah Batt

‘Known Unknowns and Unknown Unknowns’ – Can a Change in the Law Be a *Barder* Event?

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Andrew Day

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Can a change in domestic law, resulting from judicial tergiversation, ever satisfy the *Barder* test?

The answer to this question depends, in part, on how widely or narrowly the *Barder* test is interpreted. In recent years it has often been interpreted narrowly – particularly by Mostyn J in *DB v DLJ (Challenge to Arbitral Award)* [2016] 2 FLR 1308 and more recently in *BT v CU* [2022] 2 FLR 26 where (at [8]) he stated that:

> 'The new event(s) must have been unforeseeable. Whether an event was unforeseeable must be proved to the same standard as that required in the Queen's Bench Division when determining an issue of remoteness: *DB v DLJ* at [36]–[41]. The probability of the occurrence of the event must have been so small that a reasonable person would have felt justified in neglecting it or brushing it aside as far-fetched.'

Framed in this way it might be argued that a change in the law could never satisfy this probability.

In *S v S (Ancillary Relief: Consent Order)* [2002] 1 FLR 992, Bracewell J considered whether the change in the law resulting from the decision of the House of Lords in *White v White* was a *Barder* event. In that case, a consent order had been made, in September 2000, under which the wife received assets of just over £1m while the husband retained over £4m. In the absence of previous reported authority as to whether a change in the law could constitute a supervening event in ancillary relief cases (as they were then known), she considered cases dealing with material change in other areas of the law before concluding, at [38], that as a general proposition a subsequent change in the law might constitute a supervening event. Thereafter, whilst acknowledging that she had not found this aspect easy to decide, Bracewell J concluded, at [43], that on balance the decision in *White* could constitute a supervening event. However, because at the time when the consent order was made the appeals in *White* had been heard with judgment reserved, it was widely anticipated to be a landmark decision, and the wife and her advisors knew or ought to have known that, she concluded that the event had been foreseeable and that was therefore fatal to her application.

As a result of this decision, many lawyers dealing with pending trusts of land claims while the decisions in *Stack v Dowden* [2007] 1 FLR 1858 and *Jones v Kernott* [2012] 1 FLR 45 were awaited advised their clients to suspend negotiations pending the delivery of judgment.

The question was recently posed again in *De Renée v Galbraith-Marten* [2024] 1 FLR 589. Cobb J considered (on paper) a father's application for an order setting aside in part, or varying, the terms of a consent order in relation to a child periodical payments order made under CA 1989 Schedule 1, made following inter partes negotiations at a hearing in October 2022. The father's case was that he had agreed the figure/formula because this had been expressly promoted by Mostyn J as the proper approach to the computation of maintenance above the CMS level, including in his judgment (reported as *De Renée v Galbraith-Marten* [2023] 1 FLR 957), but that, in *James v Seymour* [2024] 1 FLR 612, the same judge had subsequently promoted a different methodology. The father sought a variation of the child periodical payments order to align with the calculation in *James v Seymour* arguing, in essence (although he did not put in that way, no doubt as he was a litigant in person), that the change in the law resulting from *James v Seymour* was a *Barder* event.

At [32], Cobb J held that there could be 'little doubt that the "guideline" earlier promoted by Mostyn J [had] effectively been abandoned by his judgment in *James v Seymour*' and thereafter, at [34], he stated as follows:

> 'This is a most unusual situation. I have considered carefully whether it can be said that the judgment in *James v Seymour*, in which the judge effectively rescinded the guidance which he himself had first formulated more than 20 years ago in *GW v RW* [2003] EWHC 611

> (Fam) and expanded in 2020 in *CB v KB*, and which he had explicitly proposed to these parties, and which – crucially – had in my assessment led to settlement of the claim in the precise terms set out at [4] of the order, can truly be said to have "invalidated" the "fundamental assumption" on which the consent order was made. Having reviewed the material, I am satisfied that this development does indeed "invalidate" that "assumption" … There are not likely to be many litigants in a financial remedy case who would have felt comfortable in ignoring the clearest of steers from this most distinguished and pre-eminent of financial remedy judges; this litigant accepted the advice, adopted the "useful guideline", and the subsequent consent order was founded upon it. The subsequent *James v Seymour* judgment has steered the court's approach in a different direction; this change of direction was plainly unforeseen and unforeseeable at the time of the consent order.'

At [35], Cobb J concluded (in agreement with Gwynneth Knowles J in *Akhmedova v Akhmedov and Others* [2021] 1 FLR 667, and in acknowledged disagreement with Mostyn J in *CB v EB* [2021] 2 FLR 257), that even if the father's case 'stretched the "traditional grounds" [for setting aside an order under PD 9A, para 13.5] beyond comfort', he was nevertheless entitled to fall back on the language of para 13.5, which appeared to contemplate grounds for the setting aside of a financial remedy order other than those 'traditional grounds' in order to achieve a just and fair result in fulfilment of the overriding objective.

Cobb J therefore went one stage further than Bracewell J – finding not only that a subsequent change in the law is a potential supervening event but also that, unlike the decision in *White*, the decision in *James v Seymour* was unforeseeable. The relevant paragraphs of the consent order were therefore set aside. Subsequently, in *Galbraith-Marten v De Renée* [2023] EWFC 253, Cobb J determined the quantum of the child periodical payments afresh.

It is interesting to note that arguably Cobb J need not have taken the route he did, given that much the same result could have been achieved through a variation of the original order. That being so, his decision to do so might be considered all the more noteworthy.

It is of note that *S v S (Ancillary Relief: Consent Order)* was not referred to in *De Renée v Galbraith-Marten* and neither was the arguably inconsistent decision in *Crozier v Crozier* [1994] 1 FLR 126. In the latter case, Booth J held (at p. 135) that the creation of the Child Support Agency (as it then was) by the Child Support Act 1991 did not constitute a supervening event sufficient to invalidate the basis of a consent order, since it was merely 'a new administrative method' by which the State could compel a parent to meet a pre-existing liability for maintain a child, bypassing the jurisdiction of the courts, and the fact that the sum required of a parent 'may be greater under the new procedure than under the old' was a consequence of the procedural change, rather than any new and unforeseen power vested in the State.

It is interesting to consider why a new court-mandated methodology for determining the liability to maintain a child should be considered sufficient to satisfy the *Barder* criteria when a new State-mandated one was not, particularly given that the former brought about only a change in 'guideline' figures (one which, in *James v Seymour* itself, Mostyn J stated, at [43], 'at its highest … produces a loose starting point which a decision-maker can summarily choose to accept or reject without fear of appellate review' and where the judge's 'decision to have no regard to the formula result lay within her unfettered discretion'), whereas the latter effectively brought into being a prescriptive formula for the quantification of child maintenance liabilities with very limited scope to depart therefrom.

As has been observed elsewhere, there is also an interesting discussion to be had about whether the refinement of the formulaic approach by Mostyn J in *James v Seymour* and his statement that it is more suited to cases where child periodical payments is not the main focus (e.g. applications under the MCA 1973 rather than CA 1989, Schedule 1) and 'first time' rather than variation applications was a change in law, properly-so-called, or, as Cobb J himself put it, a mere change in 'guideline' or 'methodology' and, if so, whether this is a material distinction or a distinction without a practical difference.

Insofar as there is a real difference, it may be considered notable that while changes in judicial guidance and changes in the law brought about by other means (i.e. legislative changes) might both be capable of being supervening *Barder* events, so far only a change in judicial guidance has actually been found to be a *Barder* event.

Arguably, that is somewhat counterintuitive. Given the jurisprudential axiom that judicial decisions never amount, or give rise, to 'changes' in the law, properly-so-called, but are merely declarations or interpretations which reveal any previous inconsistent understanding(s) to have been wrong, it might be considered surprising that *Crozier*, *De Renée v Galbraith-Marten* and, insofar as it was effectively held that the decision in *White* might have constituted a *Barder* event had it not been for its foreseeability, *S v S (Ancillary Relief: Consent Order)*, were decided as they were; according to that scholarly view, after all, it was *Crozier*, and only *Crozier*, that truly concerned a change in the law.

As an aside, it is perhaps worth noting that the issues raised in *James v Seymour* and *De Renée v Galbraith-Marten*, as to the proper approach to the computation of child maintenance in non-CMS cases, may be of ever-increasing relevance. As has been observed, and as counsel for the appellant in *James v Seymour* noted, there are now 629,000 taxpayers earning more than £150,000 p.a., which is a 130% increase in the ten years since the £156,000 p.a. CMS cap was first introduced. Whilst the proportion of these tax payers who are separated parents with a liability for child support is unknown, it does seem likely that there will have been a significant increase in the number of actual or potential litigants earning above this figure, to whom this court-mandated approach to the computation of child maintenance may be highly relevant.

Potential Curtailment of the English Court's Powers Under Part III MFPA

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The recent decision of Moor J in *TY v XA* [2024] EWFC 96 (24 April 2024) has received attention as the first reported MFPA 1984 Part III leave/set aside case since the Supreme Court decision in *Potanina v Potanin* [2024] UKSC 3 (31 January 2024). The judgment contains some helpful clarifications including that applications for leave will now only be refused if the court concludes that the claim would be bound to fail even if the applicant proved all disputed facts in their favour or if the factual basis for the claim is fanciful (para 36), that the test to be performed on a set-aside application is exactly the same as on an initial application (para 37), and that in the absence of consent all future leave applications will be heard on notice to the respondent (also para 37).

What has perhaps gone under the radar is the suggestion made on the respondent husband's behalf that the English family court may be prevented from making a maintenance order under Part III if there is a post-Brexit maintenance agreement or order from another 2007 Hague Convention signatory (para 47). This would include not only all member states of the European Union but also the USA and other countries. Moor J decided that this was a matter for the final hearing and the question of whether or not the German court retained jurisdiction (as was asserted on the respondent's behalf and challenged on the applicant's behalf) would require expert evidence (para 51).

The suggestion that some international conventions may restrict the English family court's ability to make a maintenance order is not new, although until recently the focus had been upon the EU Maintenance Regulation (No. 4/2009).

First, what is meant by 'maintenance'. Crucially it can extend beyond periodical payments. The leading case is *van den Boogaard v Laumen* (C-220/95) which confirms that any provision designed to enable one spouse to provide for

himself or herself will be concerned with maintenance (para 22). It makes no difference whether the payment of maintenance is provided for in the form of a lump sum (para 23). The range of cases which would be impacted is therefore very large. Only those which are *solely* concerned with dividing property between parties would be excluded.

The argument put forward on the respondent's behalf in *TY v XA* is that Art 28 of the 2007 Hague Convention provides that there can be no review of the merits of a maintenance decision or arrangement.

One argument which could be run in the opposite direction is that Chapter IV of the 2007 Hague Convention – which is titled Restrictions on bringing proceedings – sets out circumstances in which maintenance proceedings cannot be brought in a contracting state and is drafted narrowly. It only contains one article (Art 18) which provides that proceedings to modify or make a new maintenance decision cannot (subject to a few exceptions) be brought by a debtor in a contracting state if the creditor remains habitually resident in another contracting state where the original decision was made. If the intention was to prevent maintenance claims being brought where there is a prior maintenance decision in another contracting state in other circumstances, surely that would have been provided for in Chapter IV.

Similarly, when the UK signed up to the 2007 Hague Convention on departure from the EU, s 15 MFPA 1984 (which deals with jurisdiction to bring a claim under Part III) was amended to preclude an application for maintenance by a debtor if there is a prior maintenance decision in another contracting state where the creditor remains habitually resident. Again, if the intention had been to prevent Part III applications from being brought in wider circumstances, one would have expected s 15 to have been amended accordingly.

There is an interesting link with *Potanina v Potanin* where the provisions of the EU Maintenance Regulation (which were incorporated into the MFPA 1984 when those proceedings commenced) could come to the applicant's rescue by preventing the English court from dismissing part of her claim insofar as it relates to maintenance. This issue has been remitted by the Supreme Court to the Court of Appeal and is discussed in more detail in The Potanin Litigation: A Look Ahead.

As the maintenance agreement in *TY v XA* was made before the UK's departure from the EU the 2007 Hague Convention will not be directly relevant in those proceedings and any comments which may be made by made by the court would be *obiter*. It will however be interesting to see – whether in *TY v XA* or another case – how these arguments are received by the court. If they are successful it will substantially curtail the English court's powers under Part III.

– Blog

– Part III – Maintenance

A Brilliantly Logical Approach to Dealing with Pensions

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George Mathieson

George Mathieson founded Mathieson Consulting Ltd (MCL) in 2007, as a company specialising in the provision of expert witness reports in the field of pensions and divorce and has produced c. 6,000 such reports. He was a founder of the Pension Advisory Group. His current role is as a Consultant for MCL, and Divisional Director for MCL's parent company, RBC Brewin Dolphin, with responsibility for talking to any lawyer who will listen, about all things related to pensions and divorce.

https://www.bailii.org/ew/cases/EWFC/OJ/2024/72.html

SP v AL [2024] EWFC 72(B)

In this judgment, His Honour Judge Hess sets an example of how, by following a logical thought process, seemingly complex pensions can be reduced to a very straightforward outcome.

This case addresses several common issues which can often prove rather 'thorny' in terms of how they are approached, such as:

- Can we use PAG 2 (2nd iteration of Pension Advisory Group) as an authority?
- Do we pension share or do we offset?
- Can we exclude pre-marital pensions?
- Do we equalise income or capital values?

The case also presents some guidance on how the outcome may differ dependent on whether it's a sharing or needs case, and also on whether nine years is a short or long marriage (spoiler alert – HHJ Hess says nine years is a medium length marriage).

So, what were the relevant facts as far as pensions were concerned?

- There was a seven-year age gap, with H being 57, and W 50.
- Pensions totalled c.£1.89m, with all but c.£21k being in the NHS scheme, with H having total pension assets of £1.540m and W c.£350k.

- The timeline of the relationship was:
    - Started 2013 (April)
    - Engaged 2018
    - Married 2019
    - Divorce petitioned 2022 (July)
    - Decree Nisi 2023

The 'Process' applied by HHJ Hess

Paragraph 37: First, HHJ Hess cited what he would use as his 'guide' or authority as to the correct approach for dealing with pensions. H referred to his own judgment in *W v H* [2020] EWFC B10 which drew attention to PAG 1, and suggested the support PAG 1 had from the Family Justice Council (FJC) and the President of the Family Division meant that this report could be treated as being 'prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism', and not being aware of any 'subsequent judicial departure from this proposition', HHJ Hess now suggests 'that it stands as the proper approach, now applying to the second edition of the PAG Report, published in January 2024, often known as the PAG 2 Report'.

Paragraph 38: The judge then states that as some of the pension issues in this case are covered by PAG 2, the case can be assisted by the guidance PAG 2 provides.

Paragraph 39: Now the judge decides whether this is a case where the disparity in pensions should be sorted by pension sharing or offsetting and looks at both PAG 2 and what Thorpe LJ said in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901.

HHJ Hess summarises the thoughts of Thorpe LJ as being that 'pensions should be dealt with separately and discretely from the other capital assets'. Then the judge draws the attention of the reader to the fact that PAG 2 says very much the same thing: 'try, if possible, to deal with each asset class in isolation and avoid offsetting – a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders' (page 42).

HHJ Hess then concludes this section by highlighting that although the preference is for pension sharing, sometimes the facts of a case make offsetting unavoidable. However, he says that is not the case here, so the case in hand will be dealt with by pension sharing.

Paragraph 40: Having decided that PAG 2 will be the guidance, and the case will be dealt with by pension sharing, HHJ Hess now turns to the issue as to whether all pensions should be in the pot, or just those accrued during the relationship / marriage. There are two points to consider here according to the judge:

i. Is it a 'needs case' or a 'sharing case'? Again, using PAG 2 as the guide HHJ Hess says if it's a needs case, then all pensions are in the mix, but if it's a

sharing case apportionment may be appropriate.

ii. But there is a second consideration or section 25 factor to take into account: 'The duration of the marriage.' HHJ Hess sets out PAG 2's guidance in full, which is worth repeating here:

> 'Thus, the court will have regard to the length of seamless cohabitation/marriage when determining the extent to which it is fair and reasonable to divide the "non-matrimonial" element of any capital or any pension. All cases will be determined upon their own facts. The "marital" element of any pension will usually be shared equally. For the reasons set out above, in needs-based cases, the timing and source of the pension saving is not necessarily relevant, but the Court will nevertheless have regard to the length (or shortness) of the seamless cohabitation/marriage in determining the extent to which the needs of the claiming party will justify a division of the pre-cohabitation/marriage element of the pension … The requirement of a nexus between the relationship and a financial need to be met by a matrimonial claim has long been recognised by the case law' (page 26).

In this particular case, the judge decides that as it is a sharing case, with a marriage of medium length (nine years), the fair approach is to focus solely on the pension assets accrued during the span of the relationship, and exclude those that were pre-acquired.

Paragraph 41: Having alighted upon PAG 2 as the guidance and pension sharing as the method, only taking into account marital pensions, the final decision in this very structured judgment is whether the pensions should be divided based on equality of capital or income. Here HHJ Hess draws on three sources for guidance:

i. *W v H* [2020] EWFC B10
ii. PAG 2
iii. Family Justice Council's report 'Guidance on Financial Needs on Divorce' (2018 edition)

Bringing the above three sources together, as well as highlighting there is a seven-year age gap which is considered a factor here, HHJ Hess alights upon the need for 'Equality of pensions income'.

Reflections on the Process

I am always wary, being a person with no legal background, of proffering an opinion on judgments – either I can be seen as patronising if in agreement, or disrespectful if my views differ. I apologise in advance for any offence caused by daring to trespass into legal areas.

Firstly, let's reflect on what made the judge's process effective:

- The structured approach of HHJ Hess, clearly setting out each stage of the decision-making process, made the judgment logical, ordered and consistent.
- It provides real clarity in terms of:
    i. The authority of PAG 2.
    ii. When possible, pension sharing is the way forward, not offsetting.
    iii. How to decide whether all pensions are in the mix, or just the marital ones.
    iv. The clarity with which HHJ Hess sets out his thoughts on whether the desired outcome is equality of income or equality of capital.

However, I'm a little troubled by what HHJ Hess says in paragraph 41 (vi) which is immediately after having alighted upon a decision to equalise by reference to pension incomes. I shall set out this section in full:

> 'I have noticed that it is not uncommon for PODEs to be asked to provide an answer not only based on equal incomes, but also alternatively based on an equal capital approach. Indeed, this happened in the present case. It may be that the reason this happens is because the specimen letter of instruction in the PAG Reports (page 106) includes both approaches in its text, but it should be remembered that these are options provided in the specimen letter and it is not necessary for both of them to be included in the actual letter sent to the PODE. In the notes accompanying the specimen letter it is stated that "equalisation of benefits by reference to projected income will in most circumstances be the appropriate approach". There may be cases where, for particular reasons, equality of capital is a suitable measure; but in my view these are uncommon and thought should be given to what is the appropriate question before the PODE report is commissioned, if necessary with the judge at the First Appointment determining the issue, and that in most cases the only question which needs to be asked is what level of pension sharing order will produce an equal level of income on retirement. Asking more questions than are necessary will certainly add to the cost of the exercise and almost inevitably lead, further on down the line, to each party advocating the figure most helpful to themselves (as happened in the present case) and making compromise less likely.'

Why am I troubled by this? There are several reasons:

- If the parties are roughly the same age (not the case here I accept, but it is the case in an awful lot of divorces) then the pension sharing order (PSO) required to equalise *fair* capital values will not be materially different to that for equality of income. Even in this case, where there is a seven-year age gap, the difference in PSO required to equalise income and equalise

capital values is 1% (9.2% for equality of income and 10.2% for equality of capital (paragraph 35)).

- If calculations for equality of income are required, then a pensions on divorce expert (PODE) report is required.
- If calculations for equality of capital are required, then in many cases, the cash equivalent values (CEVs) can be used and equalised, and this does not require a PODE. If for whatever reason CEVs cannot be used as a measure of fair value, such as with defined benefit pensions, then the Galbraith Tables can be used, and input of a PODE still minimal.
- Was the case really made more contentious by a discussion over the difference of 9.2% and 10.2%, or was the fact compromise was made less likely by the range of figures more to do with other parts of the pension conundrum? Once it had been agreed the case should be settled by means of pension sharing, using marital pensions only, I can hardly think any parties would be advised to debate the merits of 9.2% v 10.2%.
- The members of PAG 2 coalesced around equality of income. But one of the reasons given (at 6.14) for this was:

> 'An important practical point is that the exercise undertaken to arrive at the figures needed to divide pensions according to their likely income value in retirement will ensure that any valuation quirks inherent in the pension are properly understood and factored into the calculations.'

I am assuming the major 'quirk' concerning PAG 2 was that of DB CEVs understating the true value of the pension. This though is not an issue if equality of fair capital values is used, where Defined Benefit (DB) schemes have been valued by reference to the Galbraith tables, or (with some notable exceptions) all pensions are public sector (as was the case here, other than an immaterial amount in a SIPP).

- It is also worth noting, at 6.24 of the PAG 2 report, it is said:

> 'Whilst there are different views within PAG on the subject, it is certainly not the case that the pursuit of equal incomes should be regarded as "the holy grail". The debate between an equality of income and an equality of capital value remains unresolved at the time of writing. Indeed, Francis J, co-chair of PAG, is one of those who has a general preference for equality of capital value.'

In summary

If it often makes no material difference (as is the case here), and calculations for equality of capital can be more easily produced, is there not an argument that the default position of equality of fair capital values is adopted, at least on grounds of expediency?

In a paper which will follow later this year, Barrister Fiona Hay and I will explore this further, looking also at the academic and legal merits of equality of capital compared with equality of income.

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- Blog

- Pensions on Divorce

Dame Jennifer Roberts: An Appreciation

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On 13 June 2024 a packed Lady Chief Justice's Court was the scene of affectionate tributes to Mrs Justice Roberts, known to all as Jenny, who died on 10 June 2024. The sadness evident on that occasion and in writing an obituary for Jenny is mingled with the pleasure of recalling such a fine and lovely person.

Jennifer Mary Halden was born on 3 March 1953 in Southampton. She spent her early years in Sudan. After leaving school she did not follow the conventional route to the Bar: instead she did some work as a model and for Island Records. Jenny married Richard Roberts when she was only 18, and brought up her two daughters in the family home in the Hampshire countryside. She then obtained a first-class degree in Law at Southampton University, and was called to the Bar.

In 1988 Jenny became a pupil in what were then the Chambers of Roger Gray QC in Queen Elizabeth Building. Starting at the age of 35, she might have expected to be the oldest pupil, but she was younger than two of her fellow pupils. Lavender Patten practised at One Garden Court and later went to Hong Kong with her husband Chris, the last Governor. Caroline Beasley-Murray, already a JP, recently retired after 20 years as HM Coroner for Essex.

Not long after starting her pupillage Jenny was on one of the trains involved in the Clapham Junction crash, in which 35 people were killed. Fortunately, Jenny was not on the part of the train on which she usually travelled, and so she survived, unhurt.

Jenny was the overwhelming candidate for a tenancy in QEB, and was duly taken on as a tenant at the end of her pupillage. It did not take her long to build up a most impressive practice at QEB in both financial and children work. Later she concentrated on big-money cases. It was either Thomas Brudenell or Roger Gray who first called her 'Duchess'; an affectionate nickname, reflecting her grace, elegance, good looks and perfect manners. Anyone taking over one of her cases would find completely helpful and legible notes, handwritten with a fountain pen; and the case in apple-pie order, provided Jenny's advice had been followed. Jenny had, like most very successful barristers, an appetite for hard work, excellent judgment and complete command of the facts of her cases. What stood out from other high-flyers were her invariably unflappable manner and evident care for the client, which inspired total confidence from people often battered by their experiences of divorce. Solicitors, senior and junior, warmed to her and had complete confidence in her.

Jenny became a Recorder on the Western Circuit in 2000, after only 12 years at the Bar. Though very much a family specialist at the Bar, she was well able to tackle criminal work and she produced some impressive written judgments in a range of civil cases.

Jenny took silk in 2009. 15 years later the glorious white trouser suit Jenny wore to her silks' party is still remembered. She was appointed a Deputy High Court Judge in 2011. After a long, difficult and fiercely contested financial hearing before Jenny, who was sitting as a Deputy High Court Judge, both counsel told me (in separate conversations) that Jenny had heard the case superbly. A QC in whose divorce she acted confided in me: 'I have such a high opinion of Jenny: to me she has practically god-like status.'

Somehow Jenny always had plenty of time for the many fellow members of chambers who went to her immaculate room, seeking her help with their professional difficulty. Often there would be two people in her room at the same time, queueing up for her advice. And whenever a child of a member of chambers came to QEB, the most visited person in chambers would be Jenny, who gave the warmest welcome.

'Is she really a granny?' said my then 12-year-old daughter to me in 2012, just after we had left Jenny, who had mentioned her grand-children in the conversation. 'She seems too young.'

On 3 June 2014 Jenny became a High Court Judge assigned to the Family Division, replacing her former Head of Chambers, Sir Paul Coleridge. Four weeks later she was hearing the case which led to the biggest reported lump sum award to that date (US$530m, about £330m): *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam). The interlocutory judgment in respect of a reporting restriction order on the husband's fallback submission was 177 paragraphs. Just as she had begun the *Cooper-Hohn* case, Jenny was diagnosed with breast cancer. The doctors recommended immediate chemotherapy. Jenny's first thoughts were for the parties. So she heard the case, and only then began the

chemotherapy and started to write her judgment. The judgment is reported at [2015] 1 FLR 745–837. It ran to 310 paragraphs.

Because of the seriousness of her condition and its implications for her ability to sit as a judge, Jenny offered her resignation to the then President of the Family Division, Sir James Munby, who refused it, enabling Jenny to have a ten-year judicial career, for the great majority of which she was able to work full-time.

Sir Nicholas Mostyn's entertaining and affectionate tribute to Jenny in his online *Daily Telegraph* obituary asserted, specifically in relation to despatching an inflated needs claim in *Juffali v Juffali* [2017] 1 FLR 729, that Jenny employed a 'literary style reminiscent of Cicero's'. He commented on her following a Family Division predecessor with 'Proustian-length judgments'. To which one might respond 'Quae ista impudentia?' (Cicero: *Ad Verrem* II.4.) Jenny's judgments were comprehensive, clear and unpretentious. Certainly, they could have been cut without risking criticism from the Court of Appeal; but at the cost of the side losing the point feeling that their evidence or argument had not been fully considered. She preferred to deal carefully and fully with the case in front of her and to leave historical excursus and guidance to the profession to others.

Along with her financial remedy work, as Family Division Liaison judge on the Western Circuit, Jenny heard difficult public law cases, and she ran the Deprivation of Liberty Safeguarding list. Does anyone who knew her doubt that Jenny could deliver a succinct and full judgment in a difficult case? If so, they should look at the 14 paragraphs setting out her ex tempore judgment, quoted almost in full, when the Court of Appeal upheld Jenny's order in parallel proceedings in the Court of Protection and Family Division, declaring that a young man with severe learning difficulties should not be permitted to travel with his family to Afghanistan last summer (*J v Luton BC* [2024] EWCA Civ 3).

When seeking to justify the effect on the children of publicly permitting the reporting of the family's travails, as opposed to the previous longstanding practice of anonymising first instance decisions, a senior family judge relied on the multiple Old Testament references to the effect that the sins of the fathers are to be visited on the sons. One could never imagine Jenny thinking along such lines.

After receiving a diagnosis of terminal cancer in September 2023, Jenny made the same resignation offer as she had made to his predecessor to the current President, Sir Andrew McFarlane. He too refused it. She continued to work as much as she could. She was still attending judges' meetings and supporting her mentees as and when her cancer treatment and condition permitted.

Jenny's husband Richard died in 2004. One of her two brothers, Ian, an RAF Officer, was killed in a flying accident in 1991. To the end of her life she had a close and loving relationship with her daughters and six grandchildren, and with her brother Simon.

After Jenny's death, many solicitors have contacted QEB to pay tribute. There have been many references to her kindness, good example, elegance,

eloquence, sense of fun, compassion, courtesy, and her exceptional qualities as a barrister and judge.

A solicitor wrote:

> 'She always knew just what to say in an FDR to get the parties to be sensible – the wonderful phrase "time for that elegant gesture". I also loved that she brought a bit of Chanel to the Western Circuit!'

A silk from a rival set commented that even a notoriously irascible silk from his set could be calmed down by her.

A Lord Justice of Appeal described Jenny as a:

> 'wonderful colleague in QEB and in the Family Division. A wise, careful and considerate judge. A great loss.'

Three days after Jenny's death in the Lady Chief Justice's Court, the Lady Chief, who had known Jenny since they were Bar Finals contemporaries 37 years earlier, summed up Jenny:

> 'Beautiful on the outside; beautiful on the inside.'

Oliver Wise, QEB

From HHJ Edward Hess, Chair of the FRJ Editorial Board:

> 'Everybody whose path crossed Jenny's will share the same positive thoughts about her. We are very pleased to publish the affectionate piece above from Oliver Wise, who shared chambers with Jenny for many years at QEB, which sincerely captures just how well she was regarded by those close to her professionally. Having got to know her a little when I worked with Jenny for several years on the Western Circuit (when she was FDLJ and I was DFJ for Wiltshire) I would like to add my own brief words. Jenny somehow managed to combine writing substantial judgments in difficult money cases in London with tireless leadership work in the South West. With half a dozen or more DFJs (and no doubt many others) seeking her guidance on an almost daily basis on numerous issues, she always responded to an email with an amazing promptness and often called on the phone to discuss the issue with a personal touch. Not only was the response prompt, but it was given with full and proper consideration and sensible reflection. Perhaps even more important than that, I never saw her respond to anything without the utmost calm, patience, friendliness and charm, which always inspired loyalty, affection and warmth. I very much share the view that she was a remarkable human being and it was the good fortune of all of us that she chose to devote her professional life to the cause of family law.'

AT v BT: The Return of Compensation

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In *AT v BT* [2023] EWHC 3531 Francis J considered what he described (at [4]) as 'the proper approach of the court to the sharing principle and to the principle of compensation' given that 'the husband maintains that this is a pure needs case and the wife asserts that this is a full sharing case'. This led H to offer a lump sum of £3.545m and W to seek a lump sum of £9.145m (with W to retain a property with an agreed value of £195,000 (£190,000 net of notional costs of sale)).

W's case was that significant sums held in trust were in reality assets to which H had access, and that they should form part of the computation of the parties' assets of which W was entitled to an equal share. Although W accepted that some of the assets were non-matrimonial in character she contended that (i) these pre-marital assets (some of which were held in trust) had become 'matrimonialised'; and/or (ii) to the extent to which the doctrine of pre-acquired assets might usually justify a departure from equality, that departure was rebutted by the application of the doctrine of compensation. By contrast H asserted the sums were non-matrimonial (with a significant part of the portfolio having been pre-acquired by him) and should not form part of the court's computation and, in any event, it was a needs case and that the wife's claim should be approached on that basis.

Before *AT v BT* the position in relation to compensation was (it was thought) relatively well-settled. Yes, Lord Nicholls of Birkenhead in *Miller/McFarlane* [2006] 1 FLR 1186 had espoused three guiding principles for the determination of financial remedy claims but whereas needs and sharing were readily understood and applied compensation was rarely so. In *RP v RP* [2007] 1 FLR 2105 Coleridge J went so far as to suggest at [62] that compensation represented a 'blind alley at the mouth of which a "no entry" sign should be firmly placed'.

The high-water mark was *SA v PA (Pre-marital Agreement: Compensation)* [2014] 2 FLR 1028 per Mostyn J. He stated at [24] that he found the concept to be 'extremely problematic and challenging both conceptually and legally' and gave five reasons for this. At [35] he stated that '[i]t is hard to identify any case where compensation has been separately reflected as a premium or additional element'. However, despite his reservations Mostyn J acknowledged at [36] he was bound by the House of Lords' decision and expressed the principles concerning a compensation claim as follows:

(i) It will only be in a very rare and exceptional case where the principles will be capable of being successfully invoked.

(ii) Such a case will be one where the court can say without any speculation, i.e. with almost near certainty, that the claimant gave up a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.

(iii) Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key.

(iv) Once these findings have been made compensation will be reflected by fixing the periodical payments award (or the multiplicand if this aspect is being capitalised by *Duxbury*) towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation ought not to be reflected by a premium or additional element on top of needs-based award.

No doubt this was a deliberately high threshold that would be all but impossible to satisfy.

Compensation suffered a further blow with *Waggott v Waggott* [2018] 2 FLR 406 where Moylan LJ stated at [139]:

I next deal with the compensation principle. I do not accept Mr Turner's submission that the compensation principle is to be applied not only when the applicant has sustained a financial disadvantage in his or her prospective career but also when the respondent has sustained a financial benefit. In my view it is clear from *Miller* that compensation is for the 'disadvantage' sustained by the party who has given up a career. I appreciate that it is based in part on the other party's career having benefited but I regard that as an assumption rather than an evidential issue which has to be determined, in part because of the difficulty of undertaking any such exercise. In practice it is a claim which appears very rarely to have been established and I do not intend to encourage any more extensive or expensive exploration of the issue. However, as a necessary factual foundation the court would have to determine, on a balance of probabilities, that the applicant's career would have resulted in them having resources greater than those which they will be awarded by application of either the need principle or the sharing principle. Further, the court must separately determine whether, and

if so how, this factor should be reflected in the award so as to ensure that it is fair to both parties.

And so the principle remained in abeyance save for brief flourishes in (i) *RC v JC* [2020] EWHC 466 per Moor J where prior to the marriage the wife had been on a clear path to becoming a partner in a magic circle law firm and it was found that she was highly likely to have had very high earning capabilities and having applied the sharing principle which was sufficient to meet both the wife's housing and income needs the judge made a compensation award of £400,000 by way of lump sum; and (ii) *TM v KM* [2022] EWFC 155 per His Honour Judge Hess where there was clear evidence that the wife had a highly successful career in investment banking prior to devoting herself to the childcare role and supporting the husband's career choices and she was awarded an additional £500,000 by way of lump sum. However even in *RC v JC* Moor J gave a warning to litigants who would consider pursuing claims for relationship-generated disadvantage, stressing at [72] that 'they should not take this judgment as any sort of "green light" to do so unless the circumstances are truly exceptional'.

In *AT v BT* W's compensation case was predicated on the fact that she had qualified as an accountant and was recruited into a top private equity house ('FTO') at the beginning of 1997. At this point, W was 27. The parties met when they were both working for FTO. It was W's case that, by the end of 2002, she was already engaged in a serious relationship with H and then commenced cohabitation in 2003. H agreed W was a very successful member of the FTO team. At the time she was the youngest ever partner and the highest paid woman ever in the company. It was common ground that W was required to give up her position in 2007 because the partners at FTO were concerned about the conflict of interests arising from her engagement to H, who, by this time, was working as a senior executive at a rival private equity business called BTI.

The parties married in December 2007 with their two children born in March 2008 and March 2010. In 2011 the family relocated to England.

W therefore highlighted three key events as far as the cessation of her career was concerned: leaving FTO because of her relationship with H, the birth of the parties' two children, and the family's relocation to England.

At [35] Francis J observed that it was 'an important feature of this case that the wife's career, which had been on an immensely successful trajectory, was brought to a halt in 2007', at [36] 'any analysis of this case must conclude that the wife terminated what was already a glittering career at the age of only thirty-seven, for reasons directly connected with her relationship with the husband' and at [37] this was not an asserted compensation case where one is faced with 'frankly, speculative assertions' of 'somebody having had a good school career and a good degree, with good prospects' but was 'a case of somebody with a proven track record of excellence and achievements where her career was brought to a grinding halt for reasons entirely connected with the marriage'. This led him to state that:

> 'In my judgement if this is not marriage-generated disadvantage, then that concept has no place in our law. Given that this concept was identified by Lord Nicholls in *Miller* and *McFarlane*, to ignore compensation in this case would, in my judgement, be an affront to the proper application of the compensation principle.'

At [39] Francis J therefore stated:

> 'I have no difficulty in finding that it is more likely than not that, but for the sacrifices referred to above, the wife would now have very substantial wealth held in her own name. This, as I have said, is not speculation.'

At [101] Francis J said that he would bring 'on schedule' all of the assets in the case including the pre-acquired wealth. Whether or not it has been 'matrimonialised', bringing 'on schedule' H's pre-marital monies and the trust monies was 'a proper way of dealing with the compensation principle'. However to balance this 'which would appear to be unduly generous [W's] presentation' he put in all of the tax in relation to the trust (i.e. it was all notionally taxed at 45%) on the basis that this was the tax that will be due if this trust was wound up. This brought onto the schedule the c.£7m that the trust was worth, but also the c.£3.15m of tax if it was wound up. This led to a net asset figure of £13,789,582. At [104] it was said that this worked in H's favour because much of the tax would probably not be due and in W's favour as it brought on all schedule money that might otherwise have been left off schedule to recognise that compensation. Thereafter the court adopted a straightforward fifty/fifty division leaving £6,894,791 (before adjustments to reflect W keeping the property worth £190,000 net and her costs). On a cross-check this was sufficient to meet W's needs.

It is of note that Francis J did not expressly engage with the principles set out in *SA v PA (Pre-Marital Agreement)* per Mostyn J nor the observations made in *Waggott* per Moylan LJ that as a necessary factual foundation the court has to determine that the applicant's career would have resulted in them having resources greater than those which they will be awarded by application of either the need principle or the sharing principle (with the same point having been made in *RC v JC* per Moor J, namely that the reason for the historic lack of successful compensation claims in so called 'big-money' cases was because the financially weaker party had suffered no overall loss, as the amount they would have received by way of compensation was reflected in the amount received under the sharing award).

There is also no detailed consideration of the principle of 'matrimonialisation'. Although *AT v BT* was determined prior to *Standish v Standish* [2024] EWCA 567 it is clear (if it was not before) that this principle (per Moylan LJ at [162]) 'is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property' and as such at [163] that 'it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly'.

Likewise there is no detailed consideration of the various decisions as to whether to deduct tax particularly if assets are held offshore (which include *K v L (Ancillary Relief: Inherited Wealth)* [2010] 2 FLR 1467 per Bodey J (in relation to latent CGT), *BJ v MJ (Financial Remedy: Overseas Trusts)* [2012] 1 FLR 667, *DR v GR & Others (Financial Remedy: Variation of Overseas Trust)* [2013] 2 FLR 153 per Mostyn J, and *Collardeau-Fuchs v Fuchs* [2022] 2 FLR 345 per Mostyn J (latent US capital gains tax)). The conclusion from these cases would appear to be that the latent tax will be deducted in the computation exercise unless it would be 'unreal' to do so but at least in part Francis J seemed to consider that it may be unreal in this case.

The analysis in *AT v BT* has the advantage of relative simplicity and fairness is of course 'a broad horizon'. However, whether (in particular post-*Standish*) the use of 'matrimonialisation' as a way to give effect to the compensation principle (where properly engaged) with this then balanced by taking into account notional tax that may not be paid is an approach that finds favour in other cases is yet to be seen.

– Blog

– Compensation – Assets – Needs

Important Development in the Marinos/Munro Saga

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https://caselaw.nationalarchives.gov.uk/ewfc/b/2024/163

A more detailed explanation of the background to this issue can be found in a blog Prof David Hodson OBE KC(Hons) MCIArb and I wrote for the FRJ earlier this year, but in considerable summary the position is as follows.

When the UK joined Brussels II (March 2001), two of the jurisdictional grounds for divorce were: (1) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; and (2) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and was (in the case of E&W) domiciled there.

There was some uncertainty regarding this wording, specifically whether the requirement to have spent six months (if domiciled here) or 12 months (if not domiciled here) in E&W prior to the date of issue needed to be habitual residence or just ordinary/simple residence.

In *Marinos v Marinos* [2007] EWHC 2047 (Fam) (September 2007) Munby J favoured the lower threshold, i.e. habitual residence only required on the date of issue with simple/ordinary residence sufficient for the relevant period prior to issue.

By contrast, in *Munro v Munro* [2007] EWHC 3315 (Fam) (December 2007) Bennett J adopted the higher threshold, i.e. habitual residence required both on the date of issue and throughout the relevant period beforehand.

Although the position was uncertain, the general perception seemed to favour Marinos until *Pierburg v Pierburg* [2019] EWFC 24 (April 2019) where Moor J –

placing weight on, among other things, other language versions of Brussels II – favoured *Munro* and the higher threshold.

When the UK left the EU the MOJ said they intended to replicate the EU position but – despite most of the foreign language versions containing the higher threshold adopted in *Munro* – the wording chosen was the lower threshold favoured by *Marinos*.

Any uncertainty that may have existed regarding the EU interpretation was clarified in *BM v LO* (July 2023) when the ECJ confirmed that the relevant clauses must be interpreted as requiring the applicant to have been habitually resident for the entire period.

E&W is therefore currently in an unsatisfactory position with the wording which was chosen by the MOJ contradicting not only the EU position but also what the MOJ intended to achieve namely alignment with the EU.

This issue was recently considered by Recorder Allen KC in *TI v LI* [2024] EWFC 163 (B) (21 June 2024). Although the judgment is not binding (though it is citeable) and the comment is obiter, it contains a helpful analysis of the current state of the law.

After considering the background the judge adopted a purposive approach and took the view that habitual residence was required throughout the whole period rather than just on the day of issue.

The judge was influenced not only by the EU position – which the MOJ had intended to follow – but also the analysis in *Pierburg* (credit Stewart Leech KC for his submissions on behalf of the respondent husband in that case which are still having an impact now 5+ years on).

It remains to be seen how other judges will approach this issue but it is hoped this could be the start of a move towards aligning the position in E&W with the EU as was intended when the legislation associated with the UK's departure from the EU was being drafted.

- Blog
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English EU-Equivalent Divorce Jurisdiction Clearly Out of Step With EU Law

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very justifiable reasons of continuity and comity. They incorporated the relevant EU law into domestic legislation. But not word for word.

Divorce Jurisdiction Post-Brexit

Professor David Hodson OBE KC(Hons) MCIArb Michael Allum

12/02/2024

Notionally Flawed? Notional Assessments in LSPO Applications

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The past weeks have brought two more High Court judgments considering the practice of deducting a percentage from an LSPO applicant's costs provision by way of a 'notional standard assessment'. The first, *JK v LM* [2024] EWHC 1442 (Fam), was a judgment of Cobb J doubling down on the practice. The second, *KV v KV* [2024] EWFC 165, was a judgment of Peel J, taking a more ambivalent approach, suggesting it be used as a 'cross check' and highlighting that it may operate unfairly in some cases. Cobb J's elevation to the Court of Appeal may see his approach becoming dominant.

The unfairness caused by the 'notional assessments' in LSPO applications has been explored by us previously. Here we argue that it is also conceptually flawed.

The standard basis of assessment

The notional assessment approach imports into the law on LSPOs one element of the law on costs orders. It is worth recalling the element's wider context and purpose. The rules on assessment apply following the making of a costs order. The rationale behind the longstanding principle in civil proceedings that 'costs follow the event' is that those who have had to litigate to secure their rights are prima facie entitled to their costs, as are those who have had to defend unmeritorious proceedings. However, the amount of costs successful litigants can recover has also long been regulated to protect the unsuccessful party from having to pay excessive costs, so as to achieve overall fairness.

Today, these limits are set out in CPR Rule 44.3 which provides that (unless indemnity costs have been ordered) a successful litigant can only recover costs which have been reasonably incurred, are reasonable in amount, and are proportionate, with any doubt being resolved in favour of the paying party. Unless agreed, costs are assessed to determine which of them fall within these limits, but traditional wisdom holds that a successful party will typically recover 65% – 85% of their costs on a standard basis. This approximation of the costs which may be recoverable on such a basis is the percentage discount imported by Cobb J to LSPO applications.

Cobb J's 'notional assessment' in LSPO applications

Section 22ZA Matrimonial Causes Act 1973 does not explicitly set out the approach which should be taken to quantification when 'requiring one party to the marriage to pay to the other … an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings'. Nor do Mostyn J's principles in *Rubin v Rubin* address the point. Judges have taken a variety of approaches – referencing reasonableness, proportionality, and the other party's costs. However, Cobb J, and in a couple of cases Peel J, have adopted the 'notional assessment' approach.

The first reported instance was Cobb J's judgment in *BC v DE (Rev 1)* [2016] EWHC 1806 (Fam) in which he set out:

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

No explanation as to why the principles of standard assessment were appropriate when considering an LSPO application was provided. The next

instance was some years later in *Re Z (Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* [2020] EWFC 80, where Cobb J stated:

> 'I have made a deduction of 30% from the *incurred* legal costs… to reflect a notional standard basis of assessment. In this case, I have taken a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (*CPR 44.3(2)(a)* and *PD 44.6.2*), and on the basis that the court would resolve any doubt in favour of the paying party (*CPR 44.3(2)(b)*).' (Emphasis in original).

Again, no explanation of why it was appropriate to adopt a notional standard assessment is provided, nor was one given in *Re Z (No.2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72 where Cobb J once again adopted this approach.

On the other hand, Francis J in *DR v ES* [2022] EWFC 62 explained why it was not appropriate:

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

That Francis J did not, as Cobb J pointed out in *JK v LM*, 'appear to consider directly the contrary case law', does not undermine Francis J's logic (particularly given that the contrary caselaw did not provide an explanation for the approach).

Peel J's decisions suggest an evolving view. In *MG v GM* [2022] EWFC 8 he discounted incurred costs by 30% 'to reflect a notional standard basis of assessment', noting simply that this approach was 'frequently (but not invariably) adopted'. In *Xanthopoulos v Rakshina* [2023] EWFC 158 he discounted both incurred and future costs by around 25%, describing notional assessment as 'one way of looking at it … by way of a cross check', but noting that 'in any event' the amount sought was excessive. Three days later in *HAT v LAT* [2023] EWFC 162, Peel J held that a deduction for notional assessment would be 'the wrong approach… this is not an inter partes costs order where such a deduction is routinely applied. It is a solicitor/client sum sought by W to enable her to litigate'. Peel J went on to hold that the correct approach to quantum was 'whether the costs sought are reasonable, in the context of the nature of the litigation, the issues, the resources, and how each party is approaching the proceedings'. There is no mention of proportionality.

Yet in *JK v LM* [2024] EWHC 1442 (Fam) Cobb J doubled down, ostensibly explaining the notional assessment approach by reference to Mostyn J's statement in *Rubin* that 'the LSPO jurisdiction should not be used to "outflank or supplant" the costs' jurisdiction in CPR Part 44', and by arguing that 'the mother's solicitor's should not be entitled at this stage to benefit from what would essentially be an indemnity against all their costs incurred which would be an unusual outcome'. Both justifications are analysed below. Cobb J reduced the applicant's LSPO provision for incurred and future costs by 15% despite considering the amount sought was 'broadly reasonable'.

A few weeks later in *KV v KV* [2024] EWFC 165, Peel J largely retreated from his approach in *HAT v LAT* and reverted to the one taken in *Xanthopoulos v Rakshina*. He described notional assessment as 'a useful approach or cross check against the reasonable overall figure in some cases', whilst saying he did not 'read any judge in the reported cases as saying that it should be a formula of universal and automatic application'.

However, we argue that the notional standard assessment approach is conceptually wrong and should not be used when assessing LSPO provision, whether as a cross-check or otherwise.

Reasonableness

In *HAT v LAT* Peel J held that the correct question when quantifying an LSPO is whether the costs sought are 'reasonable'. However, on a standard basis of assessment, costs must not only be reasonably incurred and reasonable in amount, but also proportionate. Application of a notional standard assessment is therefore a poor-cross check, inappropriately importing a proportionality test to LSPO quantification.

Arguably the indemnity basis assessment provides a more appropriate cross-check, as it does not include a proportionality assessment, and is the basis of assessment for solicitor-client costs (CPR r46.9). Even then, however, what is reasonable to provide for by way of an LSPO is not necessarily the same as what is reasonable to award following the making of a costs order. This is because entirely different rationales underlie the LSPO regime on the one hand, and the costs order regime on the other, and because the circumstances in which the orders are made are very different:

1. The purpose of an LSPO is to enable an applicant to obtain 'appropriate legal services' for the proceedings. In *BC v DE* Cobb J explained 'my concern is to ensure that the mother and father have equality of arms, and equal access to justice in this case'. In contrast, the purpose of detailed assessment on a standard basis is to uphold the principle of 'costs follow the event' whilst offering the losing party a degree of protection to ensure a fair overall outcome. Given these entirely different rationales, it is not obvious that an approximation of the approach which applies on detailed assessment can be appropriately carried across to LSPO applications.

Arguably application of the detailed assessment approach in LSPO applications not only fails to promote their purpose but actively undermines it, by making it more difficult for an applicant to obtain appropriate legal services. First, a proportion of the sum the solicitor could, in a non-LSPO case, expect to be paid by their client will be withheld, and secondly the approach undermines 'equality of arms' as the respondent's solicitors are not subject to any such deduction. It is difficult to say that an approach which undermines the purpose of the LSPO jurisdiction is 'reasonable'.

2. A LSPO applicant will generally be undertaking to 'repay to the respondent such part of the amount if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that he/she ought to do so', and the court can make costs orders at the end of the case. By contrast, when assessing costs following a costs order, it is the court's final step in determination of the overall outcome of the proceedings.

Thus, what is 'reasonable' on an LSPO application should in many cases result in a higher sum than that which would be considered 'reasonable' following a costs order, making utilisation of a notional assessment deduction inappropriate.

Costs orders are not routinely made in family proceedings

Assessment only becomes relevant under the CPR once a costs order has been made. That does not routinely happen in family proceedings, whether under the MCA 1973 where the general rule in relation to financial remedy proceedings (save for some exceptions) is that the court will not make a costs order, or under Schedule 1 Children Act 1989, where the court starts with a (so-called) clean sheet. Generally (although not of course always), in matrimonial cases, costs will generally come out of the pot before division in a sharing case and be treated as a need to be met by the stronger financial party in a needs case, whilst in Schedule 1 cases costs will typically be considered a liability of the applicant which the respondent should meet to enable the applicant to move forward debt-free. [1] Therefore, the notional assessment approach not only imports rules that do not apply in an LSPO situation, but which are never likely to apply at any point in the proceedings.

In matrimonial and Schedule 1 cases not involving LSPOs the figure for each party's costs is generally taken to be the amount actually incurred, without an assessment of reasonableness or proportionality absent a particular cause for concern (an example of concern being the decision of HHJ Hess in *YC v ZC* [2022] EWFC 137). Certainly, we would not expect in a typical matrimonial case that the parties' costs would be routinely discounted by 15%-30%, with the parties to have to fund the balance from their awards – still less where a judge has reviewed the costs and found them to be 'broadly reasonable'.

Essentially, in non-LSPO cases, applicants in matrimonial and Schedule 1 proceedings who have not litigated unreasonably are generally likely to have all their costs covered, whether from joint resources or by the respondent. Cobb J's assertion in *JK v LM* that it would be 'an unusual outcome' for the applicant's solicitors 'to benefit from what would essentially be an indemnity against all their costs incurred' may be right in civil proceedings where a costs order is made but is not well-founded in respect of financial remedy or Schedule 1 proceedings.

Supplanting the costs jurisdiction?

The jurisprudence on legal costs funding orders, dating back to the pre-statutory days before it was put on a statutory footing in matrimonial finance cases, has always been clear on the distinction between interim costs provision and costs orders. In *TL v ML* [2005] EWHC 2860 (Fam), Nicholas Mostyn QC (as he then was) stated 'It is clear that a costs allowance is not a costs order. It is a maintenance order that enables a party to fund the costs of her case'.

In *Currey v Currey* [2006] EWCA Civ 1338 Wilson LJ set out:

> 'it may be helpful to state that I entirely agree with Mr Mostyn in [*TL v ML*] that a costs allowance within a maintenance order is not an order for costs and so would not fall foul of the new general rule [that in financial remedy proceedings the court will not make a costs order]; and perhaps helpful also to observe that, insofar as the objection in principle to a costs allowance has previously been cast in part upon an argument that it pre-empts the normal despatch of issues as to costs at the conclusion of the proceedings, such an argument will largely fall away by virtue of the new rules. The proper treatment of liabilities for costs thereunder will generally be that they are debts to which the judge should have regard in making his substantive award…'

Plainly, provision of costs by way of an LSPO is therefore separate from, and consistent with, the costs rules applicable in financial remedy claims. This undermines the application of the principles applicable to detailed assessment to LSPOs.

In *JK v LM*, Cobb J, in justification of his approach, quoted Mostyn J's guidance at paragraph 13(iv) of *Rubin* that 'the LSPO jurisdiction should not be used to 'outflank or supplant' the costs' jurisdiction in CPR Part 44'. It is important to consider the context in which this was said. In *Rubin* the financial remedy proceedings had been stayed as it was considered that California was the more appropriate forum, but the lower court judge had excepted from this stay the wife's LSPO application in which she sought to recover costs incurred in the divorce proceedings and concluded Hague Convention proceedings. She was not seeking any orders in respect of ongoing costs. It is in this context that Mostyn J warned that the LSPO jurisdiction should not be used to supplant the

costs jurisdiction: he was clarifying that LSPOs should not be used to order one party to pay the other's costs in respect of concluded proceedings in which any costs orders would already have been made (save where without such payment the applicant would be unable to secure future representation). That would, indeed, be supplanting the costs jurisdiction of the judges in those previous proceedings.

It is, however, hard to see how this warning justifies docking 15% from an LSPO applicant's debt to their solicitors for past costs, or from their future costs budget. Moreover, Cobb J recognised and explored this distinction between past costs in concluded proceedings and incurred costs in the current proceedings in *BC v DE*, the first reported case in which the notional assessment approach was adopted. Cobb J (rightly, in our view) concluded 'I therefore do not consider that paragraph [13(iv)] of *Rubin* directly applies to these facts' – i.e. to an applicant seeking an LSPO in respect of costs incurred and to be incurred within the proceedings. It is therefore difficult to see how paragraph 13(iv) can now be put forward as a basis for applying a notional assessment to costs in the current proceedings.

Conclusion

Notional standard assessment has no place in LSPO applications, whether as a cross-check or otherwise. If the test is, as Peel J has clarified, simply whether the costs claimed are reasonable in the context of the case, that is a broad evaluation which needs no analogies or importations, and should be made bearing in mind the purpose of the LSPO jurisdiction – to provide access to justice and a level playing field as between the parties.

- Blog

- Legal Services Payment Orders

What *Is* a 'Predicament of Real Need'?

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In *Radmacher (Formerly Granatino) v Granatino* [2010] 2 FLR 1900 at [81] Lord Phillips of Worth Matravers said that of the three strands identified in *White v White* [2000] 2 FLR 981 and *Miller/McFarlane* [2006] 1 FLR 1186 it was needs and compensation which could most readily render it unfair to hold the parties to an ante-nuptial agreement. In relation to the former this was because:

> '[t]he parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.'

But what *is* the meaning of 'predicament of real need'?

In *Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)* [2012] 2 FLR 414 per Mostyn J at [72](iv)(c) it was said when determining whether 'in the circumstances prevailing it would not be fair to hold the parties to their agreement' and after quoting from *Radmacher* at [81] that 'need may be interpreted as being that minimum amount required to keep a spouse from destitution'.

In *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 Mostyn J took a broadly similar view when he stated at [19] that:

> 'So if an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in *Granatino* far more conservatively) than would have been the case absent that factor, why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect?'

It is arguable that in *Ipeçki v McConnell* [2019] 2 FLR 667 at [27(iv)] Mostyn J subsequently expressed a different view and took a less harsh approach stating:

> 'I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play would be markedly less than needs in ordinary circumstances.'

This was because:

> '[i]f you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.'

In *Cummings v Fawn* [2024] 1 FLR 117 at [13] Mostyn J restated his original view. After citing the above from *Ipeçki v McConnell* he stated that:

> '[o]n reflection I do not consider that this was at all well-expressed by me. In every needs case there is a range of possible future standards of living of the application within which the court can alight in a pure exercise of discretion immune from appellate review.'

At [14] he then used an analogy whereby the discretionary range 'is a line of books on a shelf bracketed left and right by book-ends' where the left book-end represents 'a spartan lifestyle catering for not much more than essentials'. He said that the Supreme Court was saying that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand book-end then that would be unfair and to make the agreement fair 'it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend'.

Most recently in *AH v BH* [2024] EWFC 125 (7 June 2024) Peel J after citing (at [46]) the above from *Radmacher*, *Kremen v Agrest* and *Cummings v Fawn* appears to have taken a less restrictive view and one (perhaps) more consistent with *Ipeçki v McConnell*. At [47] he stated that:

I do not read Mostyn J as saying that in *every* case involving a PMA needs must always be assessed in a parsimonious, restrictive way, regardless of the factual context; in my view, it will all depend on the facts, and I doubt Mostyn J was saying otherwise. If he was, that would conflict with (i) the words of the statute which do not limit the court's discretion in this way, (ii) dicta in *Radmacher* (*supra*) itself, and (iii) the approach adopted in the jurisprudence by other judges.

In support of this view Peel J cited from *Brack v Brack* [2019] 2 FLR 234 per King LJ at [103] and her statement that in even in a case where the court considers a needs-based approach to be fair the court will 'retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs'. He also referred to *Radmacher* at [76] before stating at [50] that both cases 'have emphasised the

latitude and flexibility available to the judge to meet the demands of fairness' in cases where the parties have entered into a PNA and such latitude and flexibility:

> 'applies to the assessment to needs as much as it applies to the other s 25 factors. Each case is a highly fact specific evaluation and discretionary exercise.'

It would appear therefore that we are perhaps moving from a situation where needs in every case involving a PNA are to be assessed in the same (parsimonious and restrictive) way to one where every case will depend on its own facts and where the breadth (or latitude) of the judicial discretion is again being emphasised.

– Blog

– Pre-Nuptial Agreements – Needs

N v J: the Last Word on Domestic Abuse as Conduct?

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N v J [2024] EWFC 184 (15 July 2024)

On Monday last week, in *N v J*, Mr Justice Peel handed down the most recent authority on pleading conduct pursuant to s 25(2)(g) Matrimonial Causes Act 1973.[1]

Those interested in this area have been keen to see whether Mr Justice Peel, as the Lead Judge of the Financial Remedies Court, would move the dial either in terms of procedure, or the application of the substantive law. Like all of Mr Justice Peel's judgments, it is erudite, comprehensive and concise. It is also timely. Resolution's working party on domestic abuse in financial remedy proceedings is due to publish their report in October. The Law Commission's

scoping report – which will deal specifically with the operation of 'conduct' as a factor to which the court must have regard when deciding financial remedies orders – is due in November, and the authors of the *Fair Shares?*[2] report are in the process of reanalysing their data, including consideration of the impact of domestic abuse on the outcome of proceedings.

The results of the Resolution survey, which was distributed by the FLBA and Resolution earlier this year, will feature in Resolution's imminent report and could not be clearer. Almost 80% of the 526 survey respondents[3] considered that domestic abuse was not sufficiently taken into account by the court when deciding financial remedies cases. That figure increased to 85% in Schedule 1 Children Act 1989 cases and increased again to 87% in cases involving cohabitees (TOLATA).

When analysing the follow-up qualitative data, Resolution has found that professionals are equally as concerned about the ability of the FRC to prevent the on-going economic abuse that is perpetrated from the point of separation, through NCDR, the court proceedings and beyond the final order. This is consistent with the recent report published by UK Finance,[4] a representative organisation of finance institutions, which explored how the failure to enforce and comply with financial remedy orders allows domestic abuse to continue to be perpetrated. In respect of these forms of post-separation abuse, Resolution will make proposals as to what changes are needed to make our system safer, fairer, and more effective for the most vulnerable.

In the absence of any PD 12J equivalent in the FRC, for matters of procedure as well application of the substantive law, we look to our judges to clarify and illuminate this undeniably tricky area of law, hence our eagerness to analyse how Mr Justice Peel approaches the issue in *N v J*. Before getting into the substance of the case, it is reassuring for anyone concerned about the impact of domestic abuse on separating families to hear the Lead Judge in the Financial Remedy Court condemning domestic abuse, straight out of the gate, as indubitably *vile and indefensible* – [2] – and recognising our *increased awareness of the incidence of domestic abuse, and its harmful and pernicious effects*; [29]. There is also recognition of the *Fair Shares?* research that many parties in the financial remedy process are thought to be victims of domestic abuse; [23].

It is welcome also that, whilst the opening might only just be wide enough for a brave litigant to catch with their fingernails, the door which requires relevant conduct to have a financial impact has not (yet) been slammed shut; [39](ii).

Case management of the conduct issue

N and J are male civil partners. N alleged that J's personal misconduct should be taken into account in the final outcome. It was listed before Mr Justice Peel at a post-FDR directions hearing, which included determination of whether N's conduct case should be excluded from consideration at the final hearing, in line

with the procedure set out in the judge's earlier decision in *Tsvetkov v Khayrova* [2023] EWFC 130.

The judge sets out paragraphs 43 to 46 of *Tsvetkov* at the beginning of his judgment by way of reminder. In summary:

a. A party asserting conduct must prove:

Stage 1

i. the facts relied upon;

ii. if established, that those facts meet the conduct threshold (exceptional);

iii. a necessary, negative financial consequence of the conduct alleged.

Stage 2

If stage one is established, the court will go on to consider how the misconduct and its financial consequences should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors.

b. Process:

i. Conduct allegations must be particularised at the earliest opportunity (including in Form E box 4.4), stating how those allegations meet the conduct threshold and identifying the financial impact caused by it;

ii. The court should determine at the First Appointment how to case manage the alleged misconduct;

iii. This includes the power to prevent a party relying on conduct if satisfied the exceptionality threshold is not met or, even if proved, would not be material to the outcome;

iv. If permitted to advance conduct at trial, an exchange of short, focussed narrative statements dealing with the matters at (a) above will usually suffice by way of pleadings.

In their blog from August 2023, Nicholas Allen KC and Harry Campbell considered whether, arguably, excluding a s 25(2) issue at First Appointment was tantamount to strike out or summary judgment, in circumstances where the Supreme Court[5] has held that summary judgment is inconsistent with the court's *meticulous duty* to consider all the circumstances of the case and, in particular, the eight matters set out in s 25(2) MCA 1973.

The following month, that argument was settled. In his Year in Review, Mr Justice Peel made it clear that he did not:

> 'regard robust case management of this sort as akin to a strike out of a financial remedies claim of the sort regarded as impermissible by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14; it is robust identification of relevant issues so as to enable the court to exercise its s 25 discretion in a focussed and proportionate way.'

In *N v J*, the issue of conduct was held over to the post-FDR hearing before Mr Justice Peel (as the putative trial judge) at the direction of His Honour Judge Hess when timetabling and reallocating the case to High Court level. Mr Justice Peel clarified, per *Tsvetkov*, that in the ordinary run of cases the issue of conduct should not be adjourned in this way but that it was *clearly sensible* – [13] – to have done so in this case due to the reallocation to High Court level and the scale of the resources (about £32m). The judgment does not say whether the conduct statements were filed in advance of the FDR or whether the conduct issue formed any part of the FDR judge's indications.

The facts

N and J entered into a civil partnership in 2012 and, by the time they separated in July 2023, they had been in a relationship for either 17 years (per N) or 14 years (per J); [10]–[11].

At the time they met, N had negligible assets and J had substantial wealth. Of the current assets of £32m, £3.25m is in N's name, most of which is represented by his 50% share of two jointly owned properties. The rest, mostly liquid, is held by J. J's case (challenged by N) is that at the start of the relationship he had assets worth about $19m; [7], [15].

The parties appeared [6] to have entered into a partnership agreement in 2012 which provided N with about £2.6m; [9]. J has subsequently offered openly to increase that to £5m; [16](ii). N has not yet set out his stall in terms of final outcome, but his case is that J's pre-acquired wealth has been matrimonialised over time [16](ii) and he may yet contend for 50% of the assets at final hearing; [18].

N has had mental health issues which deteriorated from about 2012 onwards and with particularly severity from 2016, alleging this was because of J's conduct; [8].

The substance of the conduct complained of by N is set out at paragraph 16(iv) of Peel J's judgment:

> 'Conduct. N alleges that during their relationship, J lied about his cheating and infidelity. As a result, says N, he increasingly required treatment (hospitalisation, rehabilitation, medication and Electroconvulsive Therapy) based on false assumptions that he was

paranoid, delusional and psychotic. He says he felt he had lost his mind and "embraced madness", believing he was delusional when in fact J was indeed liaising sexually with other men. It was not until August 2021 that J admitted he had had paid sexual encounters with other men from 2011 onwards.'

It seems therefore that the case was pleaded as *gaslighting* – a form of emotional and psychological abuse where a person causes the other to question their sanity, memories, and perception of reality. However, the detail of the allegations in the judgment is sparse.

The decision

N's allegations were excluded from the issues for consideration at trial; [43]. As ever, it is a case which turns on its own facts, but in reaching that decision, Mr Justice Peel:

a. Surveyed the legal landscape from *Wachtel* [1973] Fam 72 to *OG v AG* [2020] EWFC 52, concluding that the increased awareness about the *pernicious* effects of domestic abuse does not lower the 'obvious and gross' hurdle; [24]–[29];
b. Analysed those decisions in which it has been said the court took conduct into account notwithstanding the fact there was no negative financial consequence of that conduct (*K v L* [2010] EWCA Civ 125, *FRB v DAC (No 2)* [2020] EWHC (Fam), *Al Khatib v Masry* [2002] EWHC 108, *Goddard-Watts* [2023] EWHC Civ 115) concluding that, even in those cases, the final awards were largely justified on an application of other s 25(2) factors, primarily needs; [32]–[37];
c. Determined that N's allegations do not meet the high conduct threshold; [43](i), [43](v).
d. Found that, in any event, the pleaded conduct would have no direct financial consequence (save perhaps for increased medical costs which could be awarded on needs grounds) – [43](vi) – and as such, the conduct claim would not make a material difference to the outcome; [43](viii).

Discussion

(1) Domestic abuse as conduct

As set out by Mr Justice Peel in his judgment, both FPR 2010, PD 12J and the Domestic Abuse Act 2021 define domestic abuse. It can encompass, but is not limited to, psychological, physical, sexual, financial or emotional abuse. It can consist of a single incident or a course of conduct. However, he concludes that neither PD 12J nor the DAA 2021 *affects the statutory definition of conduct in financial remedies proceedings as interpreted by case law*; [21].

Practitioners remain somewhat in the dark as to what domestic abuse meets the *'obvious and gross'* threshold to be deemed as conduct. There is clearly a range of views from professionals and litigants in the court system. Mr Justice Peel says that our awareness of the *harmful and pernicious effects* of domestic abuse does not lower the conduct hurdle in domestic abuse proceedings.

However, what society considers to be conduct capable of meeting that hurdle will change over time, and our justice system should reflect those societal changes. It might be said that the FRC is overdue a decision from a higher court equivalent to *Re H-N and Others (Children) (Domestic Abuse: Fact Finding Hearings)* [2021] EWCA Civ 448, which aligned the law and the court's approach in private law cases with society's increased awareness of the nature and impact of domestic abuse. Absent such a judgment from the Court of Appeal or statutory reform, *N v J* is the law on conduct, and the position is clear.

(2) Adverse financial consequence

Mr Justice Peel accepts that the words of the statute do not limit conduct to those cases in which a direct and negative financial impact can be discerned, and therefore does not slam the door shut on that altogether. Mr Justice Peel has nevertheless put down a very firm marker that there must be a causative link between the conduct and the financial consequence, even if that financial consequence is not easily measurable.

This issue has been the subject of discussion on these pages – see for example Andrew Day's blog following the decision of Mr Nicholas Allen KC (sitting as a deputy High Court judge) in *TK v LK* [2024] EWFC 71. A troubling aspect of the need to evidence a causative link between the conduct and the financial consequence is that it can be interpreted narrowly. In *KA v LE* [2023] EWFC 266 (B), despite clear findings of serious domestic abuse,[7] the judge felt unable to reflect those findings in his award as there was no immediately measurable financial consequence at the time of the final hearing. Arguably, such an approach fails to reflect the pernicious and long-term effects of domestic abuse, which might not surface immediately, but may nevertheless have an effect which lasts a lifetime on a victim's health, self-esteem, long-term job progression or ability to form new relationships.

The financial consequences of serious psychological, physical, sexual, financial or emotional abuse are well documented. Some studies have shown that financial abuse occurs in as many as 99% of domestic abuse cases.[8] Research produced by the Home Office reveals that the cost to the economy from lost output alone, arising from time off work and reduced productivity due to domestic abuse is £14 billion a year.[9] In 2019 Women's Aid[10] reported 56.1% of victim-survivors said that domestic abuse had impacted their ability to work, and over two-fifths felt the abuse had negatively impacted their long-term employment prospects and earnings. The causative link between domestic abuse and reduced earning potential will often be difficult or impossible to prove. Nevertheless, as the law currently stands, a party must be able to prove a

direct, negative financial consequence for conduct to be considered a relevant issue and for the party alleging it to be permitted to run it at a final hearing.

⑶ Case management issues

In *N v J*, at the very least, the complainant was permitted to set out his allegations in a narrative statement and, we assume, had the opportunity of testing those allegations before a neutral evaluator at FDR before it was determined that those allegations should be excluded as an issue at final hearing. That process is arguably a fairer one than the process laid down in *Tsvetskov* and one which it is difficult to justify limiting to those cases in which there are substantial assets. It is not clear why there should be a closer examination of the materiality of conduct in a bigger-money case. Indeed, on the current jurisprudence (which effectively conflates conduct with needs), it is arguable that conduct issues will require even closer examination in lower-value cases which will be decided with strict reference to those needs.

There are few examples of other s 25(2) factors – which a judge has the *meticulous duty* to consider in particular before reaching a final decision – being case managed out summarily at First Appointment. Even when it comes to issues such as prior agreements, in practice there are few examples of the abbreviated and summary approach endorsed in *Crossley* [2008] 1 FLR 1467 being adopted. Routinely, an agreement is considered in the context of *all* the circumstances of the case if the matter proceeds to trial. In this regard, whilst noting that Her Honour Judge Vincent directed a preliminary hearing on the issue of an agreement in the case of *HJB v WPB* [2024] EWFC 187 handed down this week, it is further noted that (1) that preliminary issue was not determined at First Appointment (as in *N v J*) and (2) Her Honour Judge Vincent had the advantage of written statements on the issue (as in *N v J*) and hearing oral evidence from the parties.

⑷ Interplay with needs

N v J is a 'big money' case with assets of about £32m. Mr Justice Peel found that the only enhanced needs it could be claimed flowed from the conduct – even taking it at its highest – were increased medical costs. Those costs could comfortably be met from the available resources, therefore causation was irrelevant, and the conduct determined to be immaterial.

However, what of the cases where the assets are £250k or £500k or even £1m? At that level, an award meeting one party's enhanced needs is likely to mean depriving the other party of having their needs met at the same level. If there is to be no enquiry into the cause of those needs, how does that fit with the principle that *save in a situation of real hardship, the 'needs' must be causally related to the marriage* (*FF v KF* [2017] EWHC 1093 (Fam)). With other species of conduct (e.g. financial misconduct) adverse findings seem to be required before reducing a party's award to a level lower than they need. How are those findings to be made if the issue is excluded from the court's consideration?

Further, although the potential implications of routinely litigating domestic abuse as conduct (proliferation of cases, longer hearings, increased costs, increased use of QLRs – see [38](ix) of *N v J*) are acknowledged as a possible consequence, the elephant in the room is, of course, that this may be a *necessary* response to our increased awareness about the potentially life-long consequences of domestic abuse. These are consequences which may (and indeed are likely to) have a negative impact on a victim's life in a myriad of ways including (but not limited to) financially. The root cause of these potential implications is the prevalence of domestic abuse, not a lack of robust case management.

Perhaps it is time to grasp the nettle and assess the level of court resources actually required to give serious misconduct a fair consideration in these cases. In many cases the evidence will be clear and compelling; there will sometimes be criminal convictions or findings that have already been made in other family law proceedings. Section 25 statements and final hearings in financial remedy cases are already expansive in their exploration of the history and the issues arising between the parties. It is suggested that in many cases, the evidence is already before the court at final hearing, but the court is currently compelled to disregard it, not permitted to make findings or give weight to the abuse that has occurred or its impact on the victim-survivor.

In any event, the process envisaged in *Tsvetskov* in circumstances where a party is permitted to run conduct (i.e. short, focused narrative statements) militates against an extended or more expensive process, as does the clear signal that issue-based costs orders will be made in appropriate cases.

Conclusion

Research on the issue of domestic abuse as conduct and how that abuse is or can be reflected in financial remedy awards is ongoing. It will be interesting to consider as the research develops (especially that being undertaken by the *Fair Shares?* team) the correlation between domestic abuse and financial outcomes.

This is a developing area of law, and it is acknowledged by all of those interested in the subject that there are some thorny issues with which to contend, even beyond the fears of the floodgates opening. As identified by Mr Justice Peel at [38](v), in the absence of measurable financial consequences, there are difficulties quantifying conduct in a principled way,[11] especially in a case where a sharing award comfortably meets both parties' needs. However, if we are to properly reflect domestic abuse as conduct in financial remedy outcomes, these thorny issues will have to be grappled with.

This is unlikely to be an area in which *N v J* is the last word.

– Domestic Abuse – Conduct

A Fabulous Interview

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Sir Nicholas Mostyn

Sir Nicholas Mostyn was a judge of the High Court, Family Division, and of the Court of Protection 2010–2023. He was a founder editor of *At A Glance* and of *Financial Remedies Practice* and continues as editor-in-chief of both publications. He is a member of the Duxbury Working Party.

I applaud Sam Hillas KC's fabulous interview with Baroness Hale. Skilful, insightful and provocative, it ticks every box of serious quality journalism. Equally, the Baroness's observations showed that her legendary wisdom and acuity have not dimmed with the passage of time since her retirement from the bench 4½ years ago. It took her four years to make her maiden speech in the House of Lords following her retirement. [1] I personally hope that she will now become an active member and will bring her exceptional powers to bear to carry the standard for the advance, and reform where necessary, of family law.

May I make two observations about the Baroness's comments on transparency? She says:

> 'But at the same time, of course, all the family cases are dealing with very personal, private matters. And how to balance those two considerations is, I think, complicated and difficult. My concern is for the interests of any children.'

Obviously, if the case is wholly or mainly about child maintenance – a Schedule 1 case for example – then it will be covered by s 12 of the Administration of Justice Act 1960, and, for as long as the case is going on, by s 97 Children Act 1989. In such a case the starting point is obviously anonymity and the question for the court is whether that anonymity should be relaxed, to include identification of the children, to reflect existing public knowledge about the case. If there is already massive public knowledge then, as in *Lauryn Goodman v Kyle Walker* [2024] EWFC 212 (B) (23 July 2024), the court may decide that to continue with any form of anonymity is futile.

Where the financial remedy case is not covered by s 12 of the 1960 Act (and s 97 of the 1989 Act) the legal position is very different. I maintain that under the law, and in particular under the decision of the House of Lords in *Scott v Scott* [1913] AC 417, the constitutionally key principle of open justice, which includes naming names, applies to such a case.

I reiterate my challenge to anyone who disagrees with my analysis to set out their arguments with chapter and verse.

If two adults are fighting in court about money the public have a right to know who they are and what they are fighting about. That they may have children who might be upset by reports of the proceedings and by the contents of the judgment is no reason to disapply that elemental principle. Consider, for example, probate disputes, neighbour disputes, cases under the 1975 Act, ToLaTa cases, partnership disputes, judicial reviews of education or housing decisions – the list is endless. The parties to such cases are likely to have children. Yet such cases are heard fully in open court and names are named, even if the children might be upset by the reports.

Many civil proceedings give rise to issues that are intensely 'personal and private'. It is not a feature unique to financial remedy proceedings. Consider *Scott v Scott* itself. An order was made for that case to be heard in camera because it was a nullity suit which alleged the husband's impotence. It is hard to think of something more personal and private. Yet the House of Lords famously and trenchantly set aside the order for privacy stating that even if there was power to make the order (which they doubted) it was a gross abuse of that power to do so, as it offended the most basic principles of open justice.

Just consider these dicta.

Earl Loreburn:

> 'the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception.'
>
> 'the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance…'
>
> 'There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted…'

Lord Atkinson:

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

Lord Shaw:

> '[the in camera order appears] to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security…'
>
> 'What has happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.'
>
> 'There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.'
>
> 'If the judgments, first, declaring that the Cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law.'

Am I missing something? How in the light of these dicta, in what has been described as the 'foundational decision'[2] of the open justice principle, can it be lawful in the absence of further statutory intervention, to have Rules or Guidance which prescribe that the normal practice in those financial remedy cases heard in semi-private,[3] which are not covered by s 12 of the 1960 Act or s 97 of the Children Act 1989, is that they should be shrouded in anonymous secrecy?

I must also respectfully disagree with the Baroness's suggestion that anonymity may encourage greater candour in disclosure. She says:

> 'financial remedies cases bring with them their own specific concerns: 'we want full disclosure. A lot of time and effort is given to getting full disclosure, and if there is too much publicity, getting disclosure will be even more difficult than it already is.'

The first canard to hunt down is the myth that there is a higher duty of disclosure in financial remedy proceedings than in general civil proceedings. There is no hierarchy of honesty depending on the type of case you are fighting. In civil proceedings there is a strict duty to disclose material which is adverse to your case or helpful to your opponent's. That does not differ in scope or nature from the duty in financial remedy cases to disclose everything relevant to the

exercise of the court's powers. But no-one has ever suggested that the demanding duty of disclosure in civil proceedings is a reason to anonymise the participants.

Then there is the argument, adopted by the Baroness, that anonymity fosters greater candour. I would suggest that the direct opposite is the truth. In his evidence to the Gorell Royal Commission on Divorce and Matrimonial Causes in 1910 the then President, Sir John Bigham, later Lord Mersey, said:

> 'I have a very strong opinion that it would be undesirable to suppress the reports, and I say so because of the anxiety that I know exists amongst the litigants themselves to keep the cases out of the paper. That very anxiety convinces me that the fear of publicity helps to keep people straight, and I would not take the fear of publicity away from them.'

I would suggest this is self-evidently true. In my opinion a putative non-discloser would be less likely to hide something if he knew that examination of his actions would take place in open court with no anonymity for anyone.

I refer readers to my piece in the Law and Disorder Substack where I address these issues more fully: https://lawdisorder.substack.com/p/kyle-walker-defender-extraordinaire.

These points aside, I reiterate my congratulations to Sam Hillas KC for a brilliant piece of work.

- Blog

- Publicity and Confidentiality

HJB v WPB: Beware the Preliminary Issue

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In *BN v MA* [2013] EWHC 4250 (Fam) Mostyn J observed:

> '[24] … In *Granatino v Radmacher* the Supreme Court analysed very closely the nature of nuptial agreements. They pointed out that nuptial agreements come in numerous shapes and forms and can be entered into at any point before, during or after a marriage …
>
> [26] The Supreme Court has modified the test for the treatment of these nuptial agreements, as expressed in *Edgar* and *Xydhias* and, indeed, in *MacLeod*, so as to provide one single test applicable to all nuptial agreements, which is this, *"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement"*. That now is the test to be applied in every case where a nuptial agreement falls for consideration.'

Pursuant to the overriding objective, the fact that there is a nuptial agreement (of whatever kind) requires the case to be managed in an appropriate way. For example in *Crossley v Crossley* [2008] 1 FLR 1467, where the parties had entered a prenuptial agreement which provided that neither party would make an application against the other for financial provision on divorce, Bennett J directed Forms E to be completed without supporting documents and made no provision for questionnaires. This decision was upheld on appeal. Likewise in *S v S (Ancillary Relief)* [2009] 1 FLR 254, where an agreement was said to have been reached at a round-table meeting after separation, after Forms E and questionnaires had been directed, Eleanor King J (as she then was) declined to order further disclosure (save as specifically provided) or responses to questionnaires, on the basis the agreement was a matter of such 'magnetic importance' (a phrase believed to have first been coined in *Crossley* by Thorpe LJ at [15]) it must necessarily dominate the discretionary process.

An agreement does, however, always have to be considered in the context of all the circumstances of the case. In *HJB v WPB (Financial Remedies) (Separation Agreement – Application to Show Cause)* [2024] EWFC 187 (10 July 2024) Her Honour Judge Vincent (sitting as a deputy High Court judge) was concerned with a separation agreement entered into by the parties. The wife subsequently indicated that its terms should not be incorporated into a consent order and the husband issued a notice to show cause as to why the parties should not be held to its terms. At the First Appointment the court directed a hearing as a preliminary issue of the question (at [15]) 'whether the parties should be held to the terms of the separation agreement … and those terms incorporated into a final order of the court'. At [20] it was said the preliminary issue was framed as a question that 'could potentially be determinative of the proceedings'.

However it was then said at [23] one of the two reasons why it was subsequently concluded that the proceedings could *not* be fully resolved at a preliminary stage was that:

> 'the ultimate question for the Court is what the financial arrangements should be for the parties upon divorce. If the settlement agreement is held to be binding on the parties, that will give rise to a presumption that the ultimate outcome should be in line with the terms of the agreement, but the Court must still consider all the circumstances, having regard to all the section 25 factors.'

Her Honour Judge Vincent concluded that the agreement should stand. She thereafter stated at [124]:

> 'The question of the extent to which any of the other section 25 factors may yet have an impact upon the final outcome in this case does remain live between the parties, as does the question of the ongoing assessment of needs. However, the agreement is, in the words of Mr. Justice Peel [in *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] 2 FLR 1110] "presumptively dipositive." In the circumstances, the extent of the Court's enquiry will be narrower

than if the wife had succeeded in arguing that the agreement should be disregarded completely, or given little weight.'

It is this reference by the judge to the other section 25 factors at [23] and [124] that is key. This is because even if the normal form of application made by the party seeking to uphold the agreement is one requiring the resiling party 'to show cause' why an order reflecting, or in the terms of, the previous agreement should not be made (the so-called *Dean*-summons), [1] the court must be careful not to consider the agreement as a preliminary issue in isolation, without any simultaneous or subsequent consideration of the wider s 25 factors. This is what occurred in *Smith v Smith* [2000] 3 FCR 374, **which led to an order being made that held the wife to an agreement which failed to meet her basic needs. As Thorpe LJ said at p.381f:

'My greatest criticism of this judgment is one that is perhaps not directed against the judge himself. I believe that the omissions in the judgment are probably the product of the way the case was presented and argued. It seems as if it was almost presented to the judge as a preliminary issue for him to decide whether the existence of the contract in September 1996 disentitled the wife, as a matter of either law or discretion, from an investigation of her statutory claims. That was simply not the judicial function. … when a wife brings to the court her statutory claims for determination the existence of an earlier contract is only one of the considerations to which the judge must give weight …'

In *S v S (Ancillary Relief)* Eleanor King J said at [23 (ii)] that she:

'[did] not take *Smith v Smith* to be saying that the court must always hear a case as a full blown ancillary relief hearing where there is an alleged agreement, but rather as a trenchant reminder that an agreement forms part of all the circumstances of a case and that, even if such an agreement be found to be of magnetic importance, the court should only ever consider such an agreement against the backdrop of all the s 25 factors.'

In summary therefore (as set out in *S v S* at [23]):

a. the existence of a concluded agreement is a matter of great weight; *but*
b. the court when considering whether there is an agreement and its effect if there is, does so against the backdrop of section 25;
c. there is no reason why in an appropriate case the status of an alleged agreement should not be dealt with as a notice to show cause determined against the backdrop of a consideration of the section 25 factors;
d. such an approach is fundamentally different from one where the court embarks on a consideration of evidence as to the existence of an agreement as a preliminary issue, in a vacuum, with no consideration of the surrounding circumstances or section 25 factors;

e. there may be circumstances in which there is a factor of such magnetic importance that it must necessarily dominate the discretionary process. In such a case the vehicle of a 'notice to show cause' can appropriately be regarded as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action; and
f. an application for a notice to show cause is therefore an appropriate means by which an aggrieved party can bring the matter before the court.

It is entirely appropriate for the factual question of either the *existence* of an agreement (if in dispute), or (as in *HJB v WPB*) whether one party ought to be entitled to resile therefrom on the so-called *Edgar*[2] grounds or otherwise, to be heard as a preliminary issue. However, beware any suggestion that the court should embark on a consideration of the *status* of any such agreement (i.e. whether the parties ought to be held to it/a final order made in its terms) as a preliminary issue, with no consideration of the surrounding circumstances or s 25 factors. *HJB v WPB* serves as a timely reminder that to frame the question in this way – and for it potentially to be determinative of the proceedings – would be to hear the case in a vacuum and fail to consider all the circumstances of the case and the statutory criteria.

- Blog

- Pre-Nuptial Agreements

NCDR Redux: The Impact of October's CPR Amendments

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One of the changes to the FPR 2010 made when the material parts of the Family Procedure (Amendment No 2) Rules 2023 came into force on 29 April 2024 was an amendment to r 28.3(7) which by the insertion of a new (aa)(ii) makes 'any failure by a party, without good reason, to attend non-court dispute resolution' a basis to depart from the general starting point that there should be no order as to costs. This is repeated in para 10E of PD 3A which states 'the court may take the parties' conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings'.

However, given the nature of the FPR costs rules, whereby the default in family proceedings is the application of r 28.2 from which r 28.3 is excepted for 'financial remedy proceedings', this change did not affect proceedings such as CA 1989 Schedule 1, interim applications, or appeals which are governed by r 28.2

(which applies a modified version of CPR Part 44) and nor did it affect claims under the Trusts of Land and Appointment of Trustees Act 1996 and under the Inheritance (Provision for Family and Dependants) Act 1975 (which apply CPR Part 44 in full).

However forthcoming changes to the CPR 1998 consequent upon last year's decision in *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 will change this position. These amendments come into effect on 1 October 2024 when the Civil Procedure (Amendment No. 3) Rules 2024 – https://www.legislation.gov.uk/uksi/2024/839/made – enter into force.

Amongst the amendments – which include the insertion at r 3.1(2)(o) of a new express power to 'order the parties to engage in alternative dispute resolution' (as it is referred to in the CPR) – is an insertion within r 44.2 (court's discretion as to costs) at sub-rule (5)(e) so the conduct of the parties to which the court will have regard in deciding what order (if any) to make about costs will include 'whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution'.

All other family proceedings and claims under the Trusts of Land and Appointment of Trustees Act 1996 and the Inheritance (Provision for Family and Dependants) Act 1975 will therefore be brought into line with financial remedy proceedings with effect from 1 October 2024. Of course, at least at present, the family court does not have the power to *order* parties to attend non-court dispute resolution and hence the different wording of the two sets of rules. However, the 'teeth' given to the recent amendments to FPR Part 3 by the changes to r 28.3 will now have a much wider reach.

Also of interest is the decision in the CPR to use the words 'engage in' rather than 'attend' non-court dispute resolution. The latter was chosen by the Family Procedure Rule Committee because of a concern that the use of the words 'engage in' may encourage judges to ask how hard parties had tried at non-court dispute resolution (which might risk breaching without prejudice privilege) and is also subjective/open to interpretation. By contrast 'attend' is a simple question of fact. It is not known whether the Civil Procedure Rule Committee had similar discussions. It may be relevant in this context that without prejudice correspondence is admissible under r 28.2 whereas only open correspondence is admissible under r 28.3.

- Blog

- NCDR

Cohabitation Reform Under the New Labour Government: Moving From a 'Whether' to a 'What'?

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Dr Andy Hayward is an Associate Professor in Family Law at Durham Law School, Durham University. His research focuses on domestic and comparative family law, especially the legal regulation of adult interpersonal relationships. In 2021 Andy was Special Advisor to the UK Parliament's Women and Equalities Committee for their Rights of Cohabiting Partners Inquiry and in 2024 was appointed to the Family Justice Council. His recent publications are *The Future of Registered Partnerships: Family Recognition Beyond Marriage?* (Intersentia, 2017) (with Prof Jens Scherpe), *Research Handbook on Family Property and the Law* (Edward Elgar, 2024) (with Prof Margaret Briggs) and *De Facto Relationships: A Comparative Guide* (Edward Elgar, 2025 (forthcoming)) (with Prof Jens Scherpe).

The law around cohabitation has been ripe for reform for many years. As far back as 2007, the Law Commission of England and Wales recommended that it be updated, so as to safeguard couples against uncertainty and injustice in the event of relationship breakdown. Similarly, academics and practitioners have long called for increased legal protections for cohabitants – see here and here. Yet, until recently, there has appeared to be little political impetus for change, as evidenced by the previous government's rejection of the Women and Equalities Committee's recommendations in their *Rights of Cohabiting Partners* inquiry – discussed here. Fortunately, in light of the newly elected Labour government's

manifesto commitment to 'strengthen the rights and protections available to women in co-habiting couples', the discourse around law reform in this area appears finally to have shifted.

On 28 June 2024, Jo Edwards and her team at Forsters LLP hosted an event exploring that shift and the future of cohabitation reform in this new political climate. Organised jointly with the Family Law Reform Now network, this event departed from asking whether the law should be changed to instead what that change should look like. Central to this debate is whether cohabitants should be given *the same* rights upon separation as married couples (or civil partners) on divorce, or alternatively less extensive rights. This issue has been explored in this journal before – see here – and this event sought to continue the conversation by looking at the experience of cohabitation reform in other jurisdictions. Reflecting the different reform models, speakers presented on the law in Australia, Scotland and Ireland. They provided inspiration for England and Wales while also highlighting possible pitfalls for us to avoid.

Professor Lisa Young of Murdoch University spoke about the law in Australia, which has equalised the legal treatment of spouses and cohabitants (or 'de factos') since 2009. She explained that this approach was introduced with minimal controversy, and that there have been no major criticisms since its introduction or calls for reform. Indeed, Young noted that such reform may well have been felt necessary in the context of cohabitation being common in Australia, largely driven by a shortage of affordable housing. That said, there are still outstanding matters for consideration.

In Australia, if a couple have been in a 'de facto' relationship and meet certain qualifying criteria, the law that determines property (and maintenance) on relationship breakdown is identical to that for married couples. Key to the qualifying criteria are, for instance, a time duration requirement, or whether the couple have had a child together. Regrettably, however, there has been some confusion as to when people are considered to be in a 'de facto' relationship. Moreover, given that Australia is a federation, the law determining whether you are treated as being in such a relationship can depend on which jurisdiction you are in. Whilst, from a Commonwealth perspective, 'de facto' relationships are construed as entailing living together on a genuine domestic basis, Western Australia views them as involving having lived together in a marriage-like relationship. There has been inconsistency about the extent to which it is perceived that marriage should be used as a reference point, as well as the relevance of the parties' intentions. Young highlighted, ultimately, that there is at present a lack of data around how far the general population understand the relevant legislative provisions and the implications for their relationship. Even so, and whilst public education is imperative, Young felt that many (or possibly even most) 'de facto' couples do not dispute the existence of their 'de facto' relationship. Moreover, acceptance of a degree of uncertainty was considered by Young to be the price for important remedial legislation.

Kenneth Norrie, Emeritus Professor of the University of Strathclyde, reflected on the Scottish position. Whilst cohabiting partners within that jurisdiction do not have the same rights as spouses in the event of relationship breakdown, they can apply to the court for financial provision under the Family Law (Scotland) Act 2006. There is no minimum duration for the relationship to be considered a 'cohabitant', although the court will take into account its length, its nature, and the financial arrangements that were in place (s 25 of the Act). Moreover, the couple must have been living together 'as if they were married' – so, an analogy is again made with marriage. That said, interestingly, in *K v Secretary of State for Work and Pensions* [2017] SC 176, a lack of sexual relations between a woman and her gay flatmate was found not to preclude a finding of 'cohabitation'.

Under s 28 of the Act, a cohabitant must show that they have suffered an economic disadvantage and/or that their ex-partner has experienced economic advantage. Unlike with married couples or civil partners (where there are strictly controlled provisions in the event of divorce or dissolution), the court has wide discretion in deciding claims. Indeed, the purpose of any such award is not specified in the Act, meaning that there is no indication as to what judges should be aiming for in their decisions. The deficiencies of the Scottish regime were highlighted in *Gow v Grant* [2012] UKSC 29. In the Supreme Court, whilst Lord Hope felt that the issue was fundamentally one of 'fairness', Lady Hale asked the more important question of how that 'fairness' was to be determined. This, she found, was ascertained by looking both at the parties' situation at the beginning of the relationship, and at the end. The result has been that separating cohabitants in Scotland will receive less than divorcing couples, but not substantially so. Strikingly, Lady Hale ended her judgment by acknowledging that the 2006 Act had brought significant advantages to Scottish cohabitants, and that 'English and Welsh cohabitants and their children deserve no less'. The law has recently been reviewed by the Scottish Law Commission, which has recommended the introduction of principles to guide discretion, removing the marriage comparator in the definition of 'cohabitant' in s 25, and increasing in the range of remedies available. We are currently awaiting the response of the Scottish Government.

Kathryn O'Sullivan of the University of Limerick explored the Irish position contained in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. This operates as a 'safety net', applying automatically for qualifying cohabitants unless contracted out of. To seek relief under this Act, a number of hurdles need to be overcome. Initially, one must satisfy the definition of 'cohabitant' (under s 172(1) of the Act), which requires that the couple must 'live together as a couple in an intimate and committed relationship'. A statutory list of factors will be considered that include relationship duration, basis for living together, presence of children, and financial arrangements, and it is further implied that the relationship must have been sexual at one time. Next, there is a need to fulfil the definition of a 'qualified cohabitant' (under s 172(5)). A couple must have lived together for two or more years where there are children, or five or more years where there are not. Finally, there must be financial dependence that has arisen from the relationship (or the ending of it).

Once all of these steps have been met, a court may make an order where it is satisfied that it would be just and equitable to do so. O'Sullivan explained that there had been minimal litigation under the scheme, with very few reported judgments to date. This lack of precedent, in itself, hinders parties' ability to settle their matters and bargain in the shadow of the law. Moreover, O'Sullivan remarked that, given the deficiencies of the bespoke scheme for cohabitants, there was a renewed reliance on trusts principles. Further insights were provided on how the Irish scheme is particularly weak in protecting the children of cohabitants, with the 2010 Act not allowing express financial provision for them.

The event was rounded up by closing words from Professor Jens Scherpe of Aalborg University and Graeme Fraser, Chair of Resolution's Cohabitation Committee. Drawing upon their wealth of expertise in comparative family law, Scherpe remarked that cohabitation reform was essential and something that we owe as a society to future generations. He identified three reform strategies. The first was reform centred on specific property like the family home, as evidenced by the law in Sweden. This approach was not appropriate, as it did not reflect the lived reality of couples in England and Wales, especially in the absence of a developed welfare state. The second approach was 'compensatory', like Scotland, which provides inferior protections to cohabitants and prevents the courts from sharing the fruits of the relationship. The third and final approach was 'participatory', where couples are treated as spouses, but remedies are discretionary, with courts being able to take into account the fact that couples did not make the commitment of marriage. Ultimately, the choice of reform model is a policy decision but, crucially, Scherpe noted that the experience of Ireland reveals that, for any regime to be successful, it must be understandable and accessible.

Closing the event, Fraser set out Resolution's position and outlined his longstanding involvement in their campaign to change the law. He noted that, while some members of Resolution's Cohabitation Committee have begun to be persuaded that cohabiting couples should have the same rights as those that are married, only a minority were in favour. Even so, he highlighted how arguments favouring assimilation are gaining traction, and how, at Resolution's National Conference in May 2024, delegates at a workshop on cohabitation reform voted 51:49 in favour of treating qualifying couples as spouses over treating them differently. Irrespective of the model chosen, Fraser reiterated how Resolution will continue to push for a change in the law that promotes fairness, equality and protection for those left most vulnerable upon relationship breakdown.

As the dust begins to settle after the general election, our new Labour Government is confronted with an exciting opportunity to finally reform this highly problematic area of family law. However, this event allowed us to focus on important questions surrounding the efficacy of future reforms and how they might operate in practice. Considerable care must be taken to ensure that the reform model chosen is right for England and Wales. It must be framed effectively, easy to understand for the public, and a regime that offers

meaningful legal protection to qualifying couples currently left vulnerable by the law.

- Blog
- Cohabitation

Cohabitation and Separation: When *Does* the Clock Start and Stop?

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Since the two seminal decisions of the House of Lords, first in *White v White* [2000] 2 FLR 981 and then in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, introduced practitioners to the potentially crucial distinction (in sharing cases, at least) between matrimonial and non-matrimonial property, and the decision of Nicholas Mostyn QC (as he then was) in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108 introduced into orthodoxy the practice of treating seamless pre-marital cohabitation as, or at least as if it were, part of a marriage, the question of when parties commenced cohabitation has assumed an important significance (although, unlike the ES1, Form E still does not require them to set out when they say that was), alongside the question of when they separated.

Consequently, nowadays, when a court finds itself considering questions of cohabitation, it is far more likely to be considering when the parties began cohabiting with one another, prior to their marriage, than whether they are or are not now cohabiting, post-separation, with a third party (which was more often the point in issue between the parties in the past, notwithstanding that, except in rare cases, that question was very often of far greater interest to one or other of them than it was to the court).

There is much jurisprudence on what amounts to cohabitation. Where cohabitation with a third party is concerned, the case most often referred to

(although almost certainly not the leading authority, properly-so-called, given that it was decided at Circuit Judge level) is probably still *Kimber v Kimber* [2000] 1 FLR 383, which highlighted (i) living together in the same household; (ii) a sharing of daily life; (iii) stability and permanence; (iv) a mingling of finances; (v) a sexual relationship; (vi) a relationship with each other's children; (vii) a couple's intentions and motivations; and (viii) the opinion of the reasonable person with normal perceptions, as being amongst the potentially relevant considerations.

In this context, honourable mentions must also go to the decisions of Coleridge J in *K v K (Periodical Payments: Cohabitation)* [2006] 2 FLR 468, the Court of Appeal in *Grey v Grey* [2010] 1 FLR 1764, and His Honour Judge Willans in *KG v NB* [2023] EWFC 160 (B), in which case it was observed, at [23], that 'an issue such as cohabitation is dynamic rather than static in character' and '[r]elationships can of course wax and wane and commitment is often a developing emotion'.

Authorities dealing with the question of pre-marital cohabitation include *GW v RW; McCartney v Mills McCartney* [2008] 1 FLR 1508, per Bennett J; *IX v IY (Financial Remedies: Unmatched Contributions)* [2019] 2 FLR 449, per Williams J; *E v L (Financial Remedies)* [2022] 1 FLR 952, per Mostyn J; and *VV v VV* [2023] 1 FLR 170, per Peel J.

In *IX v IY*, Williams J had to consider when it might be said that a cohabiting relationship had commenced. At [68], he said as follows:

> 'What the court must be looking to identify is a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage. Of course, in very many cases, possibly most cases, this will be very obviously marked by the parties' cohabiting, possibly in conjunction with the purchase of a property. However, in other cases, and this may be one of them, it is not so easy to identify. The mere fact that parties begin to spend time in each other's houses does not of itself, it seems to me, equate to marriage. In situations such as this the court must look at an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship which may then either be added to the marriage to establish a longer marriage or becomes a weightier factor as one of the circumstances of the case.'

There is far less authority on what amounts to separation. In *FT v JT* [2023] EWFC 250 (B), Recorder Nicholas Allen KC stated, at [39], that 'in many senses it is the obverse of cohabitation'. In *MB v EB (Preliminary Issues in Financial Remedy Proceedings)* [2019] 2 FLR 899, Cohen J cited paragraph [68] of *IX v IY,* before stating, at [51], that '[t]hat analysis can be applied to an attempt to define the date of the end of the marriage as much to its commencement'. Thereafter he observed, at [52] and [54]:

> 'It is a truism that marriages come in all different shapes and sizes. What may be important to one couple may be trivial to another … In

> some rare cases the definition of when parties separated can be extremely difficult. This is one such case. In most cases it is clear when one, if not both parties, to a marriage emotionally and physically disconnect from it.'

In *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502, Mostyn J had to determine the date of the parties' separation. He observed that it was 'invidious to try to anatomise a marriage by reference to the contentedness of the parties in order to attribute an arbitrary date to its ending', and concluded that the parties 'were certainly not separated in the *Santos v Santos* [1972] Fam 247 sense' at the date alleged by the husband to have been the effective date of separation.

That was a reference to the decision of Sachs LJ in *Santos v Santos*, where, at p.263, the court was considering the meaning of the words 'living apart' in the Divorce Reform Act 1969, re-enacted in the Matrimonial Causes Act 1973 s 1(6) – in other words what was required to establish that the parties had been living apart for the purposes of the five year separation period. It was held that the relevant state of affairs did not exist:

> 'while both parties recognise the marriage as subsisting. That involves considering attitudes of mind; and naturally the difficulty of judicially determining that attitude in a particular case may on occasions be great.'

In other words, one or the other, or both, of the parties had to cease to recognise the marriage as subsisting for the state of affairs to exist.

In *VV v VV*, after referring to the other authorities in relation to cohabitation and after stating, at [44], that he agreed with the view expressed by Mostyn J in *E v L (Financial Remedies)*, at [28], that 'it is dangerous for the court to evaluate the quality of a marriage', at [45] and [46], Peel J stated:

> 'To the above jurisprudence I would add that the court should also look at the parties' respective intentions when inquiring into cohabitation. Where one or both parties do not think they are in a quasi-marital arrangement, or are equivocal about it, that may weaken the cohabitation case. Where, by contrast, they both consider themselves to be in a quasi-marital arrangement, that is likely to strengthen the cohabitation case … In the end, it is a fact-specific inquiry. Human relationships are varied and complex; they do not easily lend themselves to pigeon holing. The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage.'

In *MR v EF* [2024] EWFC 144 (B), Recorder Taylor observed, at [60], that by these comments Peel J 'appears to advocate a subjective element to the analysis'. At [61], he stated that the subjective element was touched upon again in *DE v FE* [2022] EWFC 71, by Sir Jonathan Cohen, at [20]:

> 'I am not impressed by H's argument that W's answer to the question in her divorce petition of when they separated as being November 2017 is conclusive of the point. Whilst that date marks the physical separation it was not the date of their emotional separation nor the date when, as I find, either had concluded that the marriage was at an end. I suspect that as 2018 went on H became less optimistic for the future of the marriage whilst W remained more hopeful.'

At [62] and [63], Recorder Taylor continued as follows:

> 'The subjective element of gazing through the window, into the heart of a marriage, was deprecated by King LJ in *Cazalet v Abu-Zalaf* [2023] EWCA Civ 1065, [2024] 1 FLR 565 where one of the questions concerned whether the parties had reconciled during the course of proceedings, such that the decree nisi should be rescinded … At [73(i)] King LJ commented that the judge's evaluation was undermined by:
>
> "The introduction of his own assessment of the quality of the relationship of the parties and his personal view as to the essential components of a marriage. The judge fell into this error notwithstanding that he had specifically reminded himself, by reference to his own decision in *NB v MI (Capacity to Contract Marriage)* [2021] EWHC 2249 (Fam), [2021] 2 FLR 786, that 'marriages come in all shapes and sizes' and that a marriage 'does not require the parties to love one another'. In the present case, the judge instead went on at para [46] to say that 'It does require, however, that the parties recognise that they enjoy a particular status and that they are in a formal union of mutual and reciprocal expectations of which the foremost is the sharing of each other's society, comfort and assistance'. ""

Those comments echo those of Sir James Munby P, in *Re X (A Child – Foreign Surrogacy)* [2018] 2 FLR 660, at [7], that a 'marriage is a marriage'. That observation was cited in *E v L (Financial Remedies)*, at [29], where Mostyn J said that for the court to start asking why there are no children and whether this denotes a lesser extent of commitment to the relationship 'is to make windows into people's souls, and should be avoided at all costs'.

Recorder Taylor then observed, at [64], that:

> 'there are conflicting cases about the applicability of the subjective element to determining whether parties consider themselves to be in a marital or quasi-marital relationship. This apparent conflict is made more difficult when the same question is being asked in slightly differing contexts.'

Having then considered that it did not fall to him to resolve these apparent conflicts he stated, at [65]:

> 'For my purposes, I am going to apply the non-subjective approach of King LJ. I am looking at objective and external markers. *Cazalet v Abu-Zalaf* is the more recent and more authoritative statement. Even if I am wrong to do so, I am fortified in this case that there is a solid mass of objective evidence which allows me to make my determinations without having to subjectively try to peer into the parties' souls.'

Perhaps unsurprisingly, and certainly unhelpfully, there are live issues as to whether the authorities on cohabitation and separation are consistent, within their respective groups and across them both, as to whether the test to be applied is subjective or objective. Interestingly, of course, the non-exhaustive list of potentially relevant considerations proffered by His Honour Judge Tyrer in *Kimber v Kimber*, derived from earlier authorities and the Social Security Contributions and Benefits Act 1992, involved both: the couple's subjective intentions and motivations and the objective assessment of the reasonable person with normal perceptions (nowadays not necessarily either a man or aboard the Clapham Omnibus).

- Blog
- Cohabitation

Help to Shape How Pensions on Divorce Reports Are Prepared

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Dr Ian Sharpe

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The Institute and Faculty of Actuaries (the IFoA) is looking for family lawyers to join a new working party looking at Pensions on Divorce.

It is critical that courts receive appropriate expert advice in relation to the often complex pension arrangements of divorcing parties. A small number of actuaries and other experts provide a valuable service preparing expert reports for the courts on how couples can treat their pensions on divorce. Actuaries, as members of the IFoA, benefit from extensive technical training and are subject to professional regulation, and are particularly well placed for this type of work.

All practitioners in the field will know that pensions on divorce have seen considerable development over the past few years through the work that the influential Pensions Advisory Group has done to identify and disseminate good practice.

Thematic review

Complementing this, at the IFoA we have recently carried out a thematic review looking at the quality of the expert reports prepared by actuaries and the way they carry out their work. The report focused on the position in England and Wales as reports are rarely needed in Scotland, where the approach is simpler. This forms part of a series of thematic reviews on areas of actuarial work ranging from climate-related risk to general insurance pricing.

We were delighted to find that the overall standard of the divorce reports we reviewed was good with sound levels of compliance with standards. Actuarial reports often need to quote figures on a range of scenarios in line with the instructions received from family lawyers. This typically leads to lengthy and complex reports. We saw good practices being followed by many actuaries using plain English and providing clear explanations: these could be adopted by others to help make reports more user friendly across the board.

Methods

There's been much debate on how to allocate pensions on divorce. Should the capital values be used, or should it be based on the relative pensions income in retirement? And should the whole pension be shared, or should it only be the pension accrued over the period of the marriage? These are rightly matters for the courts. The situation has been assisted by the publication of the Pensions Advisory Group's reports although there remains significant debate.

However, what seems less discussed in reports is the methodology to be used by the actuary in preparing the report. This can vary between actuaries and can have a material impact on how much pension each spouse receives after the divorce. What we found was that actuaries use a range of different methodologies. But what we also found was they used inconsistent terminology in describing these terms. On a simple level, the transfer value quoted by a pension scheme of the value of the pension rights can be described in a number of ways including: cash equivalent, fund value, or transfer value. Most readers of reports who are family lawyers will know that each of these is referring to the same figure. The actuary will also often calculate their own preferred valuation and refer to their approach in a number of ways. These methods will vary among actuaries preparing divorce reports. It is much harder for even the informed reader to tell these different methods apart. The Working Party will be looking at the methodologies followed and see if there can be more alignment in both the approach used and the way that actuaries describe them.

Data

As part of the exercise, we also heard from both actuaries and lawyers that the collection of data from pension schemes and providers is a major issue. There are often delays in obtaining pension information which can hold up the expert report and sometimes delay court hearings. The Working Party will also be looking at whether there are ways to simplify and speed up the process for both experts and pension schemes and providers.

Working Party

You can find out more about Working Party and how to volunteer here to volunteer for the Working Party. The full report can be read here.

- Blog
- Pensions on Divorce

Absence of Authority?

Published: 01/09/2024 22:38

Sir Nicholas Mostyn

Sir Nicholas Mostyn was a judge of the High Court, Family Division, and of the Court of Protection 2010–2023. He was a founder editor of *At A Glance* and of *Financial Remedies Practice* and continues as editor-in-chief of both publications. He is a member of the Duxbury Working Party.

In *G v S (Family Law Act 1996: Publicity)* [2024] EWFC 231 (B) (6 June 2024) HHJ Reardon asked:

> 'What is the default position in terms of publication in a case where s 12 [of the Administration of Justice Act 1969] does not apply?'

And answered:

> '42. … I would suggest, albeit tentatively and in the absence of authority,[1] that the starting point should be one of confidentiality in any application under FLA 1996 which involves allegations of domestic abuse or other harm, and that the burden of making the application should lie with the person seeking permission to publicise the information. That is certainly the basis on which these applications are currently dealt with in the Family Court, and the parties are almost invariably anonymised in published judgments.'

> '44. My decision that the starting point is one of confidentiality means simply that the applicant must seek the permission of the court to publish information about the proceedings. It does not establish a presumption that the respondent's Article 8 rights will prevail: in the balancing exercise conducted by the court, neither article has precedence over the other.'

Thus, the decision ostensibly addresses only a narrow procedural question: on which party falls the burden of bringing the issue of reportability before the court? It disavows that it creates a presumption in favour of secrecy.

But that is, with respect, precisely what the decision achieves. In so doing it is not merely at odds with 'the general rule' promulgated in two decisions of the House of Lords, which in turn rely on the foundational decision of the House of Lords in *Scott v Scott* [1913] AC 417; remarkably (if unintentionally) it purports to reverse that rule.

The general rule

In *Pickering v Liverpool Daily Post and Echo Newspapers Plc and others* [1991] 2 AC 370 Lord Bridge stated at 416:

> 'I believe that the enactment which is of central importance to the issues which your Lordships have to decide is section 12 of the Act of 1960 which provides:
>
> > "(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say — (a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant; (b) where the proceedings are brought under Part VIII of the Mental Health Act 1959 , or under any provision of that Act authorising an application or reference to be made to a mental health review tribunal or to a county court; (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published; (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings; (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
> >
> > (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
> >
> > (3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.
> >
> > (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section.'"

There are undoubted difficulties in construing this section, but certain effects of the section are clear. The general rule which the section declares is that it is

not a contempt to publish information relating to proceedings in court merely because the proceedings are heard in private. But the exceptions to that rule expressed in paragraphs (a) to (d) of subsection (1) must indicate that it is, at least prima facie, a contempt to publish information relating to the proceedings in the cases indicated. To some extent at least both the general rule and the exceptions reflect the common law principles as stated by Viscount Haldane LC in *Scott v Scott* [1913] AC 417, 437–438, where he said:

> 'While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield."
>
> Thus the exceptions in paragraph (a) are all proceedings requiring for their just disposal the safeguard of privacy which proceedings in wardship always attracted.'

HHJ Reardon apparently did not have this decision drawn to her attention. Had it been, it would presumably have been referenced in her judgment. It had not fallen into obscurity. Munby J referred to it in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142 at para 82(v) and extra-judicially as recently as 6 July 2022 in Some Sunlight Seeps In.

Similarly, HHJ Reardon overlooked para 18 of Lord Steyn's speech in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 entitled 'The general rule':

> 'In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine

> with care each application for a departure from the rule by reason of rights under article 8.'

While Lord Steyn here specifically referred to the 'ordinary' rule in criminal proceedings, it must follow that the general rule applies equally to proceedings of any nature in a civil court which do not fall within an exception in s 12, or within s 97 of the Children Act 1989. Any other interpretation would conflict with *Pickering*.

The omission of any reference to para 18 ('the general rule') of *Re S* is particularly surprising given that at para 28 of *G v S* HHJ Reardon quoted the preceding para 17 of Lord Steyn's judgment in *Re S* where he stated:

> 'First, neither article [8 or 10] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.'

However, Lord Steyn's conclusion at para 17 in *Re S* that neither article 8 nor 10 has priority over the other must be read in conjunction with the following para 18. Taken together paras 17 and 18 of *Re S* mean that the burden of seeking a departure from the general rule falls squarely on the party seeking secrecy. That party must make the application for the necessary reporting restriction order. But on the hearing of that application neither article has priority.

Finally, one must record that the legal analysis in *G v S* (paras [14]–[28]) makes no mention of *Scott v Scott.*

Conclusion

The ordinary or general rule referred to in *Re S* at para 18 is not confined to criminal proceedings. Were it to do so, it would conflict with *Pickering* which laid down a general rule for all those cases heard in private which are not subject to one of the exceptions listed in s 12(1) of the 1960 Act.

Nor does the general rule only operate in favour of the press. The rules themselves have been formally extended to allow legal bloggers to attend (FPR 27.11(2)(ff)). But the right to report does not stop with journalists and legal bloggers. Unless the case is covered by s 97 of the Children Act 1989, or by one of the exceptions listed in s 12(1) of the 1960 Act, only a formal reporting restriction order can prevent 'publication' by a party (i.e. revelation) of anything that took place in court, whether to a journalist, a relative, a friend or anybody else.

The general rule is full reportability of 'everything that took place' in court. Exceptions to that rule will only be allowed in unusual and exceptional circumstances and the burden of seeking a departure from the rule falls squarely on the party seeking secrecy.

HHJ Reardon's statement at [44] of *G v S* that the matter is devoid of authority is difficult to understand. On the contrary, the highest court in the land has on two occasions (*Pickering* and *Re S*) pronounced on the subject.

In my respectful opinion courts exercising family jurisdiction have to understand, accept and apply the general rule laid down in those decisions.

In all the debate about 'transparency' of family proceedings, sight is almost invariably lost of the signal feature of a court case. A court case is among the more significant interactions in our polity between a citizen and an organ of the state.

For reasons that hardly need to be stated, all interactions between citizens and organs of government should generally be fully open to public view and public scrutiny. Exceptions should be strictly limited. National security would be an obvious exception. Personal embarrassment would not.

Secret dealings between state courts and private citizens are, as Lord Shaw said in *Scott v Scott,* an attack upon the very foundations of public and private security. Secrecy in such dealings impairs the rights, safety and freedom of the citizen and the open administration of the law.

I venture that readers should enjoy the spirited discussion about the applicability of the open justice principle in matrimonial finance cases in our podcast Law and Disorder between me, Lord (Charlie) Falconer and Baroness (Helena) Kennedy KC.

– Blog

– Transparency – Publicity and Confidentiality

The Art of the Award: Delivering an Arbitral Award in a Financial Remedies Case

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Like advocacy, award writing is a solitary and idiosyncratic art. No doubt others use different brush strokes. These are my tips for award writing.

A stitch in time saves nine. The tribunal does not want to be left at the end of a hearing without a clear roadmap of what is required of them. I favour case management which provides for a 'proper' advocates' statement of issues. No argument, just a thoughtfully organised and numbered list of the factual, legal and discretionary decisions I am being invited to determine. This becomes a useful cross-check both in closing submissions and in writing the award, to ensure all the issues I need to consider have been dealt with.

In a particularly knotty and document-heavy case, I may invite the advocates to list and cross-reference the relevant page number for each document which is said to be pertinent to each issue. The PD 27A requirement for 350 pages is an attempt to get the parties to think more carefully about what documents the tribunal will need to consider. A cross-referenced list of all relevant documents is a further step in encouraging the advocates to focus on the key issues. It then acts both as an invaluable index for the write up and an *aide memoire* of the documents which may need to be referenced in the award.

In advance of a hearing, a tribunal will have carefully considered the papers, schedules and skeleton arguments. But the pre-read is different to the advocates' preparation. It has a lighter touch. It is interested. It is curious. It will canvass the figures. But it will be open-minded. The tribunal is ready to listen and to learn. The heavy lifting for the tribunal starts once the hearing is over.

Professional life has many demands. We all know that just an afternoon away from your desk will be rewarded with an inbox which has come under sustained mortar fire. Requests, demands and enquiries big and small will await from all directions.

My practice at the end of a hearing is not immediately to re-engage with the world around me. Instead, in the solitude and calm of the post-hearing room, I like to jot down my initial thoughts. I am not attempting to write up the case or determine the outcome. But whilst everything is fresh and clear, I like to jot down key impressions, first thoughts I may have, and a list of things to do which I expect will have to be wrestled with before an award can be delivered. At that moment, the case is teeming with bits of information which I want capture and store for later on. I do not want to let them swim away.

Parties to an arbitration have paid for a premium service which includes timely delivery of the award. Aside from fulfilling the expectations of the anxious parties, there is another reason to crack on with the write up. However good the note taking has been, the tribunal's grasp and feel for the case has a limited half-life. The longer time passes by, the more impressions fade and the more the mastery of the essence and detail of the case erodes and degrades. It is a truism that the more time that elapses the longer the award writing will take.

Within 24 hours of the end of an arbitration I will have perfected a skeleton plan of where I am going. I may not have determined the issues, but I will have sketched out what I know I need to do. This will be a combination of the statement of issues and a reflection upon my post-hearing first thoughts. I will know my direction of travel, although rarely anything like precise figures.

It is said that advocates glide like swans but kick furiously underneath. It is not dissimilar for the tribunal. The 10,000- or 15,000-word award does not just drop out of the tribunal's mind on to the page. There is a heavy lift to be done which is most unlikely to be done in one sitting.

It is much easier for an award writer to nibble away at their task in bite size chunks. I tend to write the award broadly in narrative order. Others may write up the factual background first but then jump to deal with a particular legal point which they want to get clear on the page before they deal with the evidence and findings. They will then knit it all together at a later stage.

The document needs to be set with a heading, introduction and background. Once these preliminary steps have been committed to the page there is a document which is ready to be worked on. It is gratifying to see how quickly an award can come together if this ground is broken first.

I will work through my award plan, ticking off various tasks as I go. Once the background has been summarised, next is my impression of the parties. Bearing in mind that a court will have to approve my award, I want any future (and potentially critical) reader to get a clear impression of my thoughts on the feel and sense of the case beyond just the cold hard numbers.

There is a story to be told in an award. Good advocacy with well-chosen words and phrases should be repaid in kind. The thing must be readable.

Unless a day has been set aside for judgment writing, which is not always possible, the award will be crafted in 'magic time'. Even if a day is set aside, it is almost always insufficient. Fresh professional demands will grind on around the tribunal, but once the draft is underway it is so much easier to slope off into the study and be lost in the quiet of the evening for a couple of hours. Ditto rising early and getting a couple of hours in before the bustle of the day. The writing of the award is an ever-present priority. It weighs heavily on the mind until the tribunal has got the better of it.

The task of the arbitral award writer is different to the private FDR tribunal. The FDR tribunal must articulate an outcome quickly. Whether delivered orally or in writing, everyone accepts that it will of necessity have an element of instinct and shorthand about its character. It is non-binding and so it will never need to go through the process of court approval or appeal. The FDR tribunal indication has an element of 'thinking fast' whereas the arbitral award is more closely related to 'thinking slow'. It is anxiously considered. It must winnow and organise. It must be clear, analytical, and its conclusions (hopefully) unimpeachable, however disappointing that may be to one or both parties. It aims to be appeal proof. It is much more of a slog than the FDR indication.

It may be that a considered decision on the outcome is impossible until the key factual issues have been wrestled into submission. I can think of cases where it really was not obvious even after closing submissions whose position was going to prevail.

Making factual findings is perhaps the most alien task to a tribunal whose primary occupation is otherwise as an advocate. As an advocate (with a very few exceptions) one simply assumes instructions are true and seeks to persuade the tribunal to believe them. The arbitral tribunal must take disparate and often conflicting pieces of evidence and craft to fit a coherent whole. I have heard it described as putting together a jigsaw puzzle without having the picture on the lid. Sometimes the picture isn't clear until the last piece is put in place.

I also like to settle my factual conclusions into a short summary of the assets in light of my factual findings. One can then look down across the plain and craft the solution. The cake is ready to be cut.

The discretionary distribution is sometimes the easier part of the tribunal's task. But it was only possible with the heavy slog to the summit of the factual findings and then taking in the view. That said, the more modest the assets, the more difficult the discretionary exercise may be. A fine sable may be needed and not a broad(er) brush.

A good tribunal should not be in a rush. Preliminary conclusions and drafts are best slept on. I recall one of the trainers on the IFLA course saying that he always went for a walk before pressing send. Wise words.

If the essential text of the award may come together within a week or so, my suggestion is that the tribunal still leaves it alone for enough time that it can be returned to more dispassionately. It is very hard to proof-read your own text when you are in the thick of it. You need some cool detachment. If something continues to nag away as not being right, it probably isn't and needs to be revisited.

Opinions differ on the circulation of an award in draft. I am firmly in the camp that this is helpful to all. With even the most anxious and careful consideration there may be some typographical errors or fact polishing that the advocates are able to identify. The Court of Appeal has repeatedly been clear as to the limits of requests for 'clarifications'.

I am aware that some say that the draft award is an anathema. I respectfully disagree and find a tight timetable for any comments to be a useful collaboration with the advocates. The draft can also often usefully express an initial view on costs. A brief 'Addendum' dealing with issues raised in response is often a useful coda for any future reader.

The canny tribunal will want to ensure that the award is capable of swift conversion into a court order. Wherever possible, solutions should not be overly complicated in their structure. There is beauty in simplicity.

The orders to be made consequent upon the award should be plainly heralded in the award itself. A short time for agreeing a reflective order should be given. In strict legal terms the arbitral tribunal is *functus officio* upon delivery of the award. If the parties wish me to, and they usually do, I will remain briefly involved as the arbiter of the reflective draft court order.

I am aware of stories of disappointed parties dragging their feet with agreeing an order which is reflective of the award. In some circumstances this may be a continuing example of domestic abuse. The last lash of the tail. If one party refuses to engage, then the propounding party should promptly issue a notice to show cause with their suggested draft order.

It is often said that a decision-maker should write any decision for two audiences. First the loser needs to know why they have lost. Second, an appeal court will want to know why and how a decision has been reached, so that this process can be reviewed if needed. The arbitral tribunal will want any court to understand why they have arrived at the award that they did. The single most useful piece of advice I have been given as a tribunal is to 'find your facts carefully'. Both the burden and standard of proof can have real significance.

The arbitral tribunal is also on show themselves, unlike a judge sitting with the benefit of security of tenure. An arbitral tribunal will need to find a way to package hard decisions. The temptation not to bite one of the two hands that feeds is to be resisted. Awards are to be delivered (to borrow a phrase) without fear or favour, affection or ill-will.

- Blog

- arbitration - NCDR

They Think It's All Over… It Is Not! Express Declarations, Subsequent Agreements and the Decision in *Re Cynberg*

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In *Stack v Dowden* [2007] UKHL 17, at [49], Baroness Hale said that '[n]o-one now doubts that … an express declaration [of trust] is conclusive unless varied by subsequent agreement or affected by proprietary estoppel'. It might reasonably be observed that the authority cited for that proposition, the decision of the Court of Appeal in *Goodman v Gallant* [1986] Fam 106, did not actually say that, but rather, at 110H–111A, that if there is an express declaration of trust which comprehensively declares the beneficial interests there is 'no room for the application of the doctrine of resulting, implied or constructive trusts unless and until the conveyance is set aside or rectified' and, as per the decision of the House of Lords in *Pettitt v Pettitt* [1970] AC 777, the severance of a beneficial joint tenancy results in a tenancy in common in equal shares.

Be that as it may, since 2007 it has generally been regarded as trite law that an express declaration is conclusive unless rectified, rescinded, varied by subsequent agreement or affected by proprietary estoppel.

In *Pink v Lawrence* (1978) 36 P&CR 98, the Court of Appeal had earlier emphasised that:

> 'where there is an express declaration of trust, the doctrine of constructive trusts cannot be referred to to contradict the expressly declared trust. The doctrine of constructive trusts is one which applies in circumstances where there is no declared trust.'

The decision in *Stack v Dowden* necessarily therefore posed important questions as to what kinds of 'subsequent agreement' will suffice to displace a prior express declaration of trust and whether a subsequent agreement capable of giving rise to a common intention constructive trust will do so.

Many appear to have taken the view, reflected in the judgment of ICC Judge Barton in *Re Iqbal* [2024] EWHC 49 (Ch), that one express declaration could only be superseded by another express declaration, complying with the statutory requirement in the Law of Property (Miscellaneous Provisions) Act 1989, s 2 (i.e. the requirement for signed writing). The rationale underpinning such a view is not difficult to follow, given the powerful public policy arguments in favour of clarity, certainty and finality, for the benefit of both the owners of the property and third parties such as potential creditors. After all, as Ward LJ memorably and forcefully observed when admonishing conveyancing solicitors in *Carlton v Goodman* [2002] EWCA Civ 545, at [44], an express declaration is intended to 'be conclusive and save all argument'. Given that the decision in *Hudson v Hathway* [2022] EWCA Civ 1648 provides that a simple email can satisfy the requirements of the 1989 Act and there is no requirement for a formal legal document endorsed with a 'wet ink' signature, it might be said, it is not a lot to ask of those who have expressly declared their intentions once to do so again if their intentions change.

Nevertheless, in the recent case of *Re Cynberg* [2024] EWHC 2164 (Ch), the contrary view was firmly and clearly taken by James Pickering KC, sitting as a deputy High Court judge, who dismissed the appeal of two trustees in bankruptcy, Ann Nilsson and Edward Thomas, against the earlier decision of District Judge Wilkinson that Collette Cynberg had acquired the beneficial interest of her former husband, Stuart Cynberg (who had later been made bankrupt), pursuant to an agreement which did not satisfy the statutory requirements but did, in the view of both judges, give rise to a common intention constructive trust.

Mr and Mrs Cynberg purchased the subject property, in their joint names, in 2001 and declared in the Form TR1, at box 11, that they were to hold the property on trust for themselves as joint tenants. They married in 2003 and had two children, born in 2006 and 2008, before finally separating in 2009. Following their separation, they agreed orally that Mr Cynberg disavow all his interest in the property, provided Mrs Cynberg agreed to leave it to the children in the event of her death. Thereafter, she bore sole responsibility for all outgoings relating to the property, including the mortgage repayments and, having received a bequest from her late mother in around 2014, funded minor works of improvement to the property. They eventually divorced in March 2018. In June 2018, HM Revenue and Customs petitioned for Mr Cynberg's bankruptcy and he

was declared bankrupt in October 2018. The appellant trustees in bankruptcy were appointed in March 2019. They asserted that Mr Cynberg had retained a 50% interest in the property, which had vested in them. Mrs Cynberg disagreed and issued proceedings, which were resolved in her favour when District Judge Wilkinson gave judgment in November 2023, finding that she held the whole beneficial interest under either a common intention constructive trust or as a result of proprietary estoppel.

The appellant trustees appealed on four separate grounds. Ground 1 raised an issue of principle, namely whether an express trust could be displaced by a common intention constructive trust. Grounds 2 to 4 inclusive attacked the district judge's findings in relation to various matters in issue. Permission to appeal was granted on the latter grounds but refused on ground 1, when Trower J considered the matter on paper. The appellants renewed their application for permission to appeal on ground 1 and that application was listed to be heard at a 'rolled up' hearing. After hearing argument, like Trower J before him, James Pickering KC refused the appellants permission to appeal on ground 1. He dismissed the appeal on grounds 2 to 4 inclusive.

In his judgment, the deputy High Court judge gave detailed consideration to four cases decided after *Stack v Dowden* but before the instant case: *Clarke v Meadus* [2010] EWHC 3117 (Ch); *Pankhania v Chandegra* [2012] EWCA Civ 1438; *Bahia v Sidhu* [2022] EWHC 875 (Ch); and *Re Iqbal*.

In *Clarke v Meadus*, Warren J had allowed an appeal against the decision of a Master to strike out a claim to a beneficial interest in a property pursuant to a constructive trust in respect of which there was an express declaration of trust, on the basis that they 'did not address the question [of] whether a constructive trust might have arisen after that date to displace the express trusts declared', adding: 'Nothing in *Stack v Dowden* or *Goodman v Gallant* can be read as suggesting that this is not possible: it all depends on the facts.'

In *Pankhania v Chandegra*, it was asserted that a constructive trust arose at the time of the purchase, notwithstanding an express declaration in different terms. At [13], Patten LJ held that, in the circumstances, there was 'no need for the imposition of a constructive or common intention trust … nor any possibility of inferring one'. He also stated, at [22], that it was 'always open to [the parties] to have executed a deed varying their beneficial interests'.

In *Bahia v Sidhu*, Joanna Smith J expressed much the same view as would ultimately be expressed by James Pickering KC in *Re Cynberg*. However, since the central issue in *Bahia v Sidhu* was as to whether an express trust could be overridden by a prior equity, and not a subsequent one, her comments were *obiter dicta*.

It follows that *Re Cynberg* is the first substantive decision in which a determination has been made, as part of the *ratio decidendi*, on the question of what kind(s) of subsequent agreement will suffice to displace a prior express declaration of trust. The answer is said to be that an oral agreement which

inevitably does not satisfy the statutory requirement for signed writing but does give rise to a properly constituted constructive trust will suffice.

There is no possibility of the higher appellate courts opining further on the question, in this case, because pursuant to the Access to Justice Act 1999, s 54(4), a refusal of permission to appeal after an oral hearing is final and not susceptible to challenge on any further appeal.

The remaining grounds, 2 to 4, were dismissed on the basis that the district judge's findings of fact were upheld, and indeed firmly endorsed, by the deputy High Court judge.

Whether this case is a welcome development or not will probably depend on the extent to which one sees recent developments in the law of constructive trusts as positive.

On one hand, if express declarations of trust can be displaced other than by signed writing, then there is clearly far greater scope for disputes as to the beneficial ownership of property than if they cannot. If these arguments lead to litigation, the resulting cases may be costly, due to the inherent uncertainties in resolving what people agreed orally or what agreements can be inferred from or imputed by reference to their conduct. Equally, it could undermine the position of third parties, as here, where the trustees in bankruptcy will have less to distribute to Mr Cynberg's creditors than had the court simply looked to the TR1.

On the other hand, if a purpose of equity is to protect against unconscionable consequences of a strict application of the law, continued expansion of it to protect someone like Mrs Cynberg is necessary. This position can be reinforced by the judge's observation, at [60]:

> 'Following the separation, Mrs Cynberg began paying the entirety of the mortgage repayments; but on the Trustees' case she only received 50% of the benefit of those payments in terms of increased equity, with the benefit of the other 50% going to Mr Cynberg. In my judgment, this was a significant detriment suffered by her; moreover, the idea that some 15 years after stopping paying anything towards the mortgage Mr Cynberg could turn around and claim half of the equity in the Property (not that he ever did) would seem to be wholly unconscionable and (to use the expression used in *Guest v Guest* [2022] UKSC 27) gut-wrenching.'

Finally, as a footnote, it is worth noting that an unusual feature of this case was that Mr and Mrs Cynberg were married but separated a number of years before Mr Cynberg's bankruptcy, during which time they failed to initiate proceedings for ancillary relief (as it was then known). This is a reminder, if any is needed, of the importance of resolving financial remedy proceedings promptly after separation. In this case, the judge noted, at [59], that had Mrs Cynberg done so it was highly likely she would have obtained the whole beneficial interest in the property.

However, for parties who are unwilling to take this step, another procedural route is available under the Married Women's Property Act 1882, s 17, which allows either spouse, whilst still married, to apply to the court for summary determination of their ownership of property. Clearly this would have been more expensive than simply agreeing with Mr Cynberg to enter into a written agreement evidencing their new ownership but may be an option if the spouse is unwilling or unable to engage. A similar power exists in respect of civil partners under the Civil Partnership Act 2004, s 66, and may also be exercised within three years of divorce (pursuant to the Matrimonial Proceedings and Property Act 1970, s 39) and by engaged-but-unmarried couples within the three years following the end of their engagement (pursuant to the Law Reform (Miscellaneous Provisions) Act 1970, s 2(2)).

– Blog

–Stack –Declarations of Trust –Estoppel –Trusts

A v M (No. 2) – Construing a Court Order After the Unforeseen Occurs

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Ben qualified in 2001 and since that time has been practising exclusively from 29 Bedford Row Chambers. His practice encompasses all of the financial aspects of relationship breakdown including divorce, dissolution of civil partnerships, the separation of unmarried couples and financial provision for children, together with jurisdiction disputes.

How should provisions of a court order that are in dispute be construed?

This question most often arises in the context of consent orders. As stated in *Besharova v Berezovsky* [2016] EWCA Civ 161 per Sir Stephen Richards at [11]:

> 'the principles applicable to the construction of a consent order are the same as those applying to a commercial contract: see *Sirius International Insurance Company v FAI General Insurance Limited* [2004] UKHL 54 at [18]. As Lord Steyn said in that paragraph, the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language; the answer to that question is to be gathered from the text under consideration and its relevant contextual scene.'

This applies to family proceedings as well as civil proceedings notwithstanding that (as observed in *Sharland v Sharland* [2015] 2 FLR 1367 per Lady Hale of

Richmond at [27]) in the former a consent order derives its authority from the court and not from the preceding agreement of the parties (*de Lasala v de Lasala* [1980] AC 546) whereas in the latter a consent order derives its authority from the contract made between the parties (e.g. *Purcell v FC Trigell Ltd* [1971] 1 QB 358).

Besharova v Berezovsky was cited with approval most recently in *Dehalli v Derhalli* [2021] 2 FLR 1097 per Eleanor King LJ when determining that the wife was entitled to live in the FMH rent free until it was sold and was not liable to pay an occupation rent to the husband pending sale.

In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 Lord Hoffman at pp.114–115 summarised the principles by which contractual documents are to be construed. The principles have also been set out in cases including *Arnold v Britton & Others* [2015] AC 1619 per Lord Neuberger of Abbotsbury at [15] and *Wood v Capital Insurance Services Ltd* [2017] AC 1173 per Lord Hodge at [10]–[15].

The need for a court order made after contested proceedings to be subsequently construed is rarer for the self-evident reason that it reflects the judgment that preceded it (and hence why an appeal is from the decision and why time for permission to appeal runs from the date the decision is given). However, it may occur.

In *A v M* [2021] EWFC 89, a private equity case, Mostyn J had ordered at [80](i) that W was to:

> 'receive 48.53% of the husband's share of carry in Fund 1 and 78.91% of the husband's co-investment in that fund, in each instance when realised. The payments to the wife will be made by way of contingent lump sums from the husband.'

The court order reflecting the same stated that H 'shall pay to [W] lump sums equal to 78.19% of all capital and income proceeds of or any other payments or receipts due or received by [H] from time to time arising out of the Fund I Co-Invest share net of tax' and similarly arising out of the Fund 1 Carry share.

Mostyn J's judgment was given in November 2021 and his final order was made in January 2022. In August 2024, in *A v M (No. 2)* [2024] EWFC 214, Sir Jonathan Cohen was tasked following Mostyn J's retirement with interpreting the order to determine whether or not W was entitled to share in H's investments which were in fact not realised but transferred into a continuation fund ('CF'). W's complaint was that she was not given the opportunity of sharing in H's co-investment and carry that was carried forward in the CF and instead was cashed out against what she said would have been her will if she had known that H was to remain invested.

At [22] the judge described his 'sole task' was to construe the final order and in doing determine whether the order gave W an option to elect to carry over to the

CF or whether it required H to pay W the lump sums calculated in accordance with the percentages that Mostyn J had determined.

It was agreed that the applicable law was as summarised in *Barnard v Brandon & Ors* [2023] EWHC 3043 (Ch) per Richards J:

> '[34] No doubt by coincidence, the sole authority to which I was referred on the proper approach to the construction of court orders, was my own judgment in *Banca Generali SPA v CFE (Suisse) SA and another* [2023] EWHC 323 (Ch). All parties were agreed that I should follow the approach set out in paragraphs [18] to [22] of that judgment. Ignoring those principles that are applicable to the construction of injunctions which are not applicable in the present case (there being no dispute as to the meaning of paragraphs [10] and [11] of the Trial Order) the parties' common approach can be summarised as follows:
>
> i) The sole question for the court is what the Trial Order means. Issues as to whether the Trial Order should have been made and, if so in what terms, are not relevant to construction. The court should not succumb to any temptation to stretch legal analysis to capture what are seen as the merits or lack of merits of the case that led to the making of the Trial Order.
>
> ii) The words of the Trial Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context, and with regard to the object of the Trial Order.
>
> iii) The reasons the Judge gave for making the Trial Order in his judgment or judgments are an overt and authoritative statement of the circumstances which the Judge regarded as relevant. Those reasons are admissible for the purposes of construing the Trial Order.
>
> iv) However, caution should be exercised before engaging in an excavation and analysis of the parties' submissions to the Judge to discover their motives for seeking particular orders with a view to construing the Trial Order. That runs the risk of being a difficult and dubious exercise with parallels to admitting evidence of negotiations in construing a contract.'

Applying these principles led Sir Jonathan Cohen to conclude (at [32]) that '[t]he order is clear: H's obligation is to pay the appropriate percentage of the proceeds due to or received by him from respectively the co-invest or carry funds net of tax and transactional costs' and (at [33]):

> '[t]his is exactly what he did. W received full value for her interest. Having paid W, the fact that he invested, as a matter of obligation,

some of the proceeds into the CF does not lead to any requirement for him to give W the same opportunity.'

Although what happened was not foreseen this did not mean (at [37]) 'it follows that if Mostyn J had been asked to consider this possibility he would have given W the opportunity to roll over her interest into the CF. Nor, should I enter into such surmise' as (at [38](i)) '[t]he words of the order are clear. That the event was not foreseen is not a ground for going behind the words'.

Both situations therefore require consideration of what was meant – with a consent order the question is what a reasonable person would have understood the parties to have meant and with an order made after contested proceedings the question is what the judge's order meant.

One lesson from *A v M (No. 2)* is the fact that something was not foreseen does *not* permit speculation as to what would have been the judge's intention if it had been foreseen and the judge asked to consider what ought to happen if – as was the case – the meaning of the order was clear.

- Blog
- Consent Orders

Are You Guilty of Money-Laundering? A Tale of Chinese Cotton, Lawyer's Fees and Unintended Consequences

Published: 17/09/2024 11:43

Andrzej Bojarski KC

Andrzej Bojarski KC, Barrister, Arbitrator, pFDR neutral evaluator, and mediator. Andrzej is head of the 36 Family financial remedies team at the 36 Group and a door tenant at Broadway House Chambers. He is a leading financial remedies practitioner. He is also Consultant Editor of the Matrimonial and Civil Partnership volumes of Halsbury's Laws of England and his other publications include *Unlocking Matrimonial Assets on Divorce* and *The Proceeds of Crime Act 2002: Practical Guide*.

It is not often that a family law blog warns ordinary hard-working honest family lawyers that they might be unwitting criminals. This is that blog. You should read it.

Remember POCA, NCIS and all that?

One of the common results of the necessity for parties to financial remedies to give candid, full and frank disclosure of their finances is that the disclosure includes evidence of illegality which has produced property which is the proceeds of crime within the meaning of the Proceeds of Crime Act 2002 (POCA).

Those readers who were in practice in the period between POCA 2002 coming into force and the Court of Appeal's decision in *Bowman v Fels* [2005] EWCA Civ 226 on 8 March 2005 will have painful memories of financial remedies proceedings being placed on ice and hearings being adjourned at the last minute to await notification of the suspected criminal property to the National Criminal Intelligence Service (the precursor to the National Crime Agency (NCA)) to await their consent being given (as it almost always was) to continuation of the proceedings pursuant to s 335 of POCA. It was usually triggered by a suspicion that a party had failed to declare all their income for tax purposes. The sums in question were often relatively trivial but nonetheless a suspicion of tax evasion with the result that there were potential proceeds of crime in the matrimonial asset 'pot'.

Bowman v Fels helpfully held that pursuit of the ordinary course of litigation did not fall within the concept of 'becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property'. It thus allowed litigation which concerned assets which might be criminal property to continue in the normal way without requiring the consent of the relevant authorities and without the risk of the lawyers committing a criminal offence.

Bowman v Fels only dealt with the conduct of litigation over potential criminal property. It did not deal with status of fees which were paid to a lawyer for bona fide work done for a client whose assets included criminal property. The received wisdom, endorsed by guidance issued by the professional bodies and endorsed by the Government, was that s 329(2)(c) of POCA provided a defence to any money laundering offence which would otherwise result from the receipt of and dealing with criminal property because the lawyer 'acquired or used or had possession of the property for adequate consideration', the consideration being the provision of legal services to the client.

That no longer seems to be correct, and every practising lawyer needs to be aware of that.

What does Chinese cotton have to do with the fees paid to family lawyers?

China is one of the world's largest producers of cotton. Some 85% of Chinese cotton is grown in the Xinjiang Uyghur Autonomous Region of China. There are widespread reports and allegations of human rights abuses in Xinjiang, which include allegations that forced labour is used to produce cotton there.

In *R (World Uyghur Congress) v National Crime Agency* [2024] EWCA Civ 715 the applicants challenged the NCA's decision not to investigate the importation of Chinese cotton into the United Kingdom on the basis that, amongst other things, it was criminal property within the meaning of POCA. One of the NCA's reasons for not investigating the importation was their reliance on s 329(2)(c) of POCA so that cotton bought by a bona fide purchaser for value was not tainted as criminal property. The NCA's understanding of the law was that the Chinese cotton in the hands of the bona fide purchaser would not be criminal property, whereas the money paid by the purchaser to the producer in China would be criminal property in the hands of the producer.

In other words, the NCA had interpreted the provisions of POCA in the same way that lawyers have been doing for over two decades when their fees for bona fide services are paid from a client's criminal property. The assumption was that the provision of adequate consideration 'cleansed' the criminal property and broke the chain of transmission of criminal property.

The Court of Appeal held that this was a misreading of POCA. POCA creates three distinct money-laundering offences:

(1) concealing, disguising, converting, transferring criminal property, or removing such property from England and Wales, or from Scotland or from Northern Ireland (s 327);

(2) entering into or becoming concerned in an arrangement which the person knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person (s 328); and

(3) acquiring, using or possession criminal property (s 329).

Importantly, the definition of 'criminal property' in POCA is very broad and contains a subjective element. Section 340(3) provides that property is criminal property if:

> '(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.'

Note the 'or suspects'.

All three offences contain a defence if the person concerned makes 'an authorised disclosure' to the NCA and obtains appropriate consent to the activity before it is carried out (i.e. as was the norm in proceedings where the existence of criminal property was suspected until the decision in *Bowman v Fels* – see above).

However, the defence that the person 'acquired or used or had possession of the property for adequate consideration' specifically only applies to the s 329 offence of acquiring, using or possession criminal property. It does not apply to the offences pursuant to s 327 or s 328. The Court of Appeal explained the position as follows (at [36]):

> 'Section 329(2)(c) would afford protection to the purchaser while he had the property in his possession even if he knew it was criminal property, but it would not protect him if, for example, in that knowledge, he transferred it to someone else, or took it out of the country and thereby became potentially liable under section 327(1)(d) or (e).'

Therefore, a lawyer who carries out work for a client and who is then invoiced for that work and pays for it from money which is criminal property has a defence to the s 329 offence of acquiring or possessing the criminal property. However, the criminal property is not thereby 'cleansed'. It remains criminal property in the lawyer's hands and, if the lawyer knows or suspects that it is criminal property, possibly the receipt itself and certainly any further dealing with that property may constitute an offence under ss 327 or 328.

There are reasons to question the correctness of the decision in the *World Uyghur Congress* but, for now, it defines the law. Whether the Court of Appeal was fully conscious of the full practical implications of its decision is unclear. Likewise, it is not clear whether POCA was actually intended to have the effect the Court of Appeal has found it to have. The Court of Appeal decision has caused great consternation in the commercial world for the effect it has on supply chains involving property which is or which may be criminal property. It clearly is a matter of real concern for lawyers. That is especially so for family lawyers who get an unusually detailed view into their client's affairs due to the disclosure obligations in financial remedy proceedings, with the result that the grounds of suspicion of the existence of criminal property arise more often than in other types of work.

Many family practitioners will have had experience of cases where some part of the assets under consideration in divorce may fall within the definition of criminal property. Although *Bowman v Fels* says that it is permissible to continue with the normal course of financial remedy proceedings notwithstanding that suspicion, the decision in the *World Uyghur Congress* case creates real reason for concern about the receipt of fees from such a client for work properly done in good faith.

Even if your client has never done anything remotely criminal, the property from which your fees are paid might still be criminal property. Most obviously that will be if the fees are paid from a lump sum paid by the other party who has obtained the property as a result of criminal activity, but there may be circumstances where neither spouse has been involved in criminality but they have property which is derived from criminal property. Chinese cotton on the bed, for example.

So what should family lawyers do if they suspect their fees are paid in whole or in part from criminal property?

This blog article cannot be taken to be advice or guidance. Every lawyer confronted with the spectre of fees being paid from what is suspected to be criminal property will need to consider the legal position and their duties.

Th Bar Council have published a Practice Note which states that:

> 'Even in cases where adequate consideration has been provided, where the funds in possession of the recipient are criminal property, they will remain criminal property where the recipient either knows or suspects that they are the proceeds of crime. Only persons who receive such funds without notice of their criminal nature receive them as clean funds.'

The Practice Note also provides the following advice:

> 'Accordingly, a barrister who receives payment for fees knowing or suspecting that the funds received are criminal property may be in possession of criminal property even if they give adequate consideration for those monies. Receiving such fees, without the required consent, could expose the barrister to potential criminal liability for the offences of being a party to a "transfer" within the meaning of s 327 or an "arrangement" within s 328 of the Act. A subsequent conversion or transfer of those monies could also expose the barrister to criminal liability under s 327 of the Act. A barrister who finds themselves in such a position should therefore give careful consideration as to whether they should make a Defence Against Money Laundering disclosure to the National Crime Agency.'

There has also been an addendum amendment to the Anti-Money Laundering Guidance for the Legal Sector 2021. This includes the warning that:

> 'Practitioners should also note that the Court in *Bowman v Fels* was not asked to and did not express a view as to whether the 'ordinary conduct of litigation' exemption applies to the receipt of legal fees. Caution should therefore be had as to the source of funds received for the payment of fees.'

It goes on to note that:

> 'Provided that the fee that you have agreed represents "adequate consideration" (within the meaning of s 329(2)&(3)) of POCA you will not have committed the s 329(1) offence of acquiring, using or possessing criminal property'

But:

> 'if you receive payment for fees knowing or suspecting that the funds received are criminal property you may be in possession of criminal property even if you give adequate consideration for those monies. Receiving such fees, without the required consent, could expose you to potential criminal liability for money laundering offences, such as being a party to a "transfer" within the meaning of s 327 or an "arrangement" within s 328 of the Act. A subsequent conversion or transfer of those monies could also expose you to criminal liability under s 327 of the Act. You should therefore give careful consideration as to whether you should make a POCA s 338 "authorised disclosure" (aka a "Defence Against Money Laundering" disclosure, or "DAML") to the National Crime Agency.'

Oh dear. Here we go again.

– Blog – Money Laundering

Enhancing Public Understanding of Financial Remedies on Divorce

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Introduction

Why is it that lawyers think that the principles underpinning financial remedies are clear, and yet the public are often perplexed? The issue is one of communication, or rather translating the law into plain English.

Our clients frequently feel disconnected when lawyers discuss the law, and particularly when writing about the law, especially in court documents and during court hearings.

It appears that the problem arises from the way we frame our laws. And that is something we, as lawyers, must all encounter daily. When our clients come to see us, they pay for strategy, but that is only worth paying for when they understand what we are talking about.

Over the centuries, perhaps the idea was to shroud the law in secrecy so that only the judges and the lawyers could understand the law. For our clients it must feel like we are talking in a code or a different language.

In my first week as a law student, my property law lecturer was very keen to talk about a *bona fide purchaser for value with notice*, or a '*b.f.p.v.w.n'.* Some 36 years later, I still can't retain in my mind what that means. I recall waking up in the early morning of an exam sitting to memorise these concepts so that I could regurgitate them to pass the exam. Why should we expect the paying public to understand these concepts and acronyms if we can't retain them?

Nevertheless, I have spent my career trying to provide clients with meaningful explanations of the law in the hope that they understand me. Otherwise, what is the point of advising? Surely, it's our job to continually aim to improve how we communicate the law to our clients.

The importance of clear, understandable communication

In his article The Public Speaks: An Empirical Study of Legal Communication (2011/2012), Christopher R. Trudeau emphasises the importance of clear, understandable communication. In his survey, seven out of ten people had struggled to understand their lawyers at some point. Using complicated terms put unnecessary barriers in the way of that understanding. Results from that survey showed that most clients prefer plain language. Interestingly, as both educational levels of clients and complexity of subject matter increase, so does the preference for plain language.

Trudeau makes some key recommendations that we should all heed.

- Do not underestimate the importance of oral communication, to enhance understanding of advice given in writing.
- Always define even commonly used legal terms.
- Be sure to avoid complicated terms and Latin words.
- Avoid confusion and misunderstandings by using plain language.

Communicating the law in more user-centred ways is more efficient and effective for all concerned – not just for clients but for businesses and lawyers too. If you want clients or unrepresented parties to really digest what you write, the simpler and clearer it is written, the more likely it will be read rather than ignored. This in turn is not only a better use of everyone's time but also potentially reduces risk – for example reducing or eliminating the potential for complaints down the line.

A more user-centred approach to communicating with clients will make our work as lawyers more inclusive for everyone, and specifically for people who speak English as an additional language, for those who are neurodivergent, and those with learning difficulties or low literacy levels. Bear in mind that 9% of the UK

population do not speak English, or Welsh in Wales, as their main language; over 16% of adults in England (7.1 million people) have very poor literacy skills; and the average reading age of people in the UK is allegedly just nine years old.

Quite apart from the importance of inclusivity, so many clients who are going through relationship breakdown don't listen because they are too upset or angry. Stress caused by separation and related disputes can reduce people's capacity to take in even clear straightforward information and advice.

Communicating the law better to improve access to justice

When it comes to the law, access to justice is improved when litigants have a better sense of how the law applies to them and what they can do to deal with their legal problem, increasing their legal capability and hopefully reducing stress.

Many people who use our courts never see a lawyer and therefore have very little help in terms of how to run their case or navigate the legal process.

Data published by the Ministry of Justice on Family Court statistics have identified that the number of cases where both parties are unrepresented have nearly trebled from 14% in 2013 to 38% by 2023.

Lawyers, judges and lawmakers have welcomed the last government's announcement, earlier this year, of the early legal advice pilot for parents, which assists separating couples to resolve issues on separation without using the family courts.

Resolution's Vision for Family Justice advocates scaling up services that enable separating families to access publicly funded legal information and early advice. This includes the Affordable Advice service, run by Law for Life working with Resolution, to support litigants in person and thereby reduce the demand on the family courts.

Tips on writing good legal information

The legal information and support charity, Law for Life, gives evidence-based guidance on writing good legal information. Crucially:

1. Know your audience.
2. Be clear what you are trying to achieve.
3. Build your legal information around the needs of your audience.
4. Make it easy to use.
5. Include only what your audience needs to know.
6. Build their legal capability.
7. Address the realities of their situation.
8. Test out your information to be sure it is helpful to your audience.

9. Choose the right language and tone for your audience.
10. Signpost accurately to further help.

Understanding is improved using simpler words where possible for example: 'work with' rather than 'collaborate'. Avoiding metaphors or colloquial phrases is especially helpful for those who speak English as an additional language. Use 'you' and 'we' as much as possible and write in the active rather than passive voice, for example, 'you fill in the form' (active) rather than the 'the form is filled in by you' (passive). Avoid abbreviations and acronyms – where they are unavoidable, explain them fully when the reader first encounters them. Keep sentences short, preferably less than 20 words long.

Such an approach to writing in general and the law specifically may lead some, or even many, to complain of a general 'dumbing down'. On the contrary, communicating in a more user-centred way, to clients and others in a legal context, aids understanding, saves everyone time and shows respect. User-centred legal information and advice has the capacity to open the law and in so doing make it far more accessible.

Clearer explanations of our laws

Why do the public feel so mystified by financial remedies law? Have our rules simply become too obtuse? Section 25 of the Matrimonial Causes Act has been in place for over 50 years and yet if you looked at the statute, you would have absolutely no idea of the principles underpinning the statutory criteria, and in particular the concepts derived from the key cases of *White v White*; *Miller; McFarlane* and *Radmacher v Granatino*. The law is expressed in tiers which makes the public feel that the law is too complex. The case law guidance makes the law more complex too.

Rather than uprooting this law entirely, why can't we just reframe it so that it is better expressed and understood?

Legislation in its current format can be hard to follow for lawyers, and impossible for litigants in person. User-centred guides that underpin legal advice are helpful for all litigants, regardless of whether they are legally represented, and help the public understand the law better, making it more transparent.

The principles identified by Law for Life's research into what makes for better legal information could guide the approach taken on providing more accessible explanations of legislation and case law.

It should be possible to envisage a future where the law in its various forms is written in more user-centred language. If s 25 were amended, for example, the statutory checklist could include longer passages to explain concepts such as contributions and conduct.

Conclusion

In summary, it is within every one of us to strive to communicate better on a basic level. Improving communications by expressing the law better and ensuring that it is better understood shows compassion for our clients and would go a considerable way to relieving the huge frustration and stress experienced by court users, be they represented or not. It might well help us to settle our cases more efficiently, cost effectively and with much greater levels of satisfaction all round – and without the need for a radical reform of laws that most of us think are fair and work well for our clients.

- Blog

- Public Understanding Client Communication

- Financial Remedies

Ma v Roux: Can You Strike Out a Set Aside Application?

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https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/1917

It was settled in *Wyatt v Vince* [2015] UKSC 14, [2015] 1 FLR 972 that the court cannot strike-out/give summary judgment on a legally recognisable application for a financial remedy order as an applicant is entitled to have such an application heard on its merits and it cannot therefore be dealt with summarily on the basis that it has no real prospect of success. The reasons for this are set out in the judgment of Lord Wilson of Culworth at [27]:

> 'It is clear to me that, with respect, Jackson LJ was wrong to insinuate into the concept of abuse of process in Rule 4.4(1)(b) of the family rules an application for a financial order which has no real prospect of success. The learned Lord Justice did not (and could not) suggest that the omission from the family rules of any rule analogous to Rule 24.2 of the civil rules was accidental. It was deliberate; and so it was bold for him to say that nevertheless the effect of that rule was to be discerned elsewhere in the family rules. Although the power to strike out under Rule 4.4(1) extends beyond applications for financial

> remedies, for example to petitions for divorce, no doubt it is to such applications that the rule is most relevant. The objection to a grant of summary judgment upon an application by an ex-spouse for a financial order in favour of herself is not just that its determination is discretionary but that, by virtue of section 25(1) of the 1973 Act, it is the duty of the court in determining it to have regard to all the circumstances and, in particular, to the eight matters set out in subsection (2). The determination of an application by a court which has failed to have regard to them is unlawful: *Livesey (formerly Jenkins) v Livesey* [1985] AC 424 at 437, Lord Brandon of Oakbrook. The meticulous duty cast upon family courts by section 25(2) is inconsistent with any summary power to determine either that an ex-wife has no real prospect of successfully prosecuting her claim or that an ex-husband has no real prospect of successfully defending it. Indeed, were the latter conclusion to be appropriate, how should the court proceed to quantify the ex-wife's claim? For in applications for financial orders there is no such separation as exists in civil proceedings between issues of liability and those of quantum. Procedures for the court's determination of applications for financial orders, which both respect its duty under section 25(2) of the 1973 Act and yet cater for such applications as may be fit for an abbreviated hearing, are now well in place: see para 29 below. I suggest that Rule 4.4(1) of the family rules has to be construed without reference to real prospects of success. The three sets of facts set out in paragraph 2.1(c) of Practice Direction 4A exemplify the limited reach of Rule 4.4(1)(a), valuable though no doubt it sometimes is. The touchstone is, in the words of paragraph 2.1(c) of the Practice Direction, whether the application is legally recognisable. Applications made after the applicant had remarried or after an identical application had been dismissed or otherwise finally determined would be examples of applications not legally recognisable. Since the greater includes the lesser, it is no doubt possible to describe applications which fall foul of Rule 4.4(1) as having no real prospect of success. Nevertheless paragraph 2.4 of the Practice Direction remains in my view an unhelpful curiosity which cannot override the inevitable omission from the family rules of a power to give summary judgment.'

Subsequently, in *Roocroft v Ball* [2017] 2 FLR 810 the Court of Appeal held that the approach set out in *Wyatt v Vince* applied to applications to strike out an application to set aside a financial remedy order in the same way as it applied to a substantive application for a financial remedy order.

An attempt in that case to distinguish strike out applications in the context of applications to set aside an order from those made within full financial remedy claims failed. Although at [43] Eleanor King LJ accepted that the former were not 'subject to the same imperatives as are imposed by the application of section 25 of the Matrimonial Causes Act 1973 … (matters to which the court is to have

regard in deciding how to exercise its powers)', she referred at [44] to Lord Wilson's comment at [27] that 'Although the power to strike out under Rule 4.4(1) extends beyond applications for financial remedies, for example to petitions for divorce, no doubt it is to such applications that the rule is most relevant' and stated that '[i]t follows that the rule, and therefore Lord Wilson's observations, apply equally to an application to set aside a financial remedy consent order on grounds of material misrepresentation/non-disclosure as an application for financial remedy order'. This was then broadly repeated at [45](i) as being one of the 'matters [that] can … be drawn from *Wyatt v Vince*'.

But is that the end of the matter? In *Ma v Roux* [2024] EWHC 1917 (Fam) Francis J heard an appeal from Her Honour Judge Reardon in which (following *Wyatt v Vince* and *Roocroft v Ball*) she determined that she did not have the power on the wife's application to strike out or otherwise summarily determine the husband's application to set aside a consent order on grounds the wife had been guilty of non-disclosure. Francis J framed the question as follows:

> '[1] This case today is concerned with whether the court has the power to strike out an application to set aside a consent order in financial remedy proceedings. Put another way, is there a power of summary determination of such an application in financial remedy proceedings? Or is the power to strike out limited to the category simply of legally unrecognisable claims?'

On the wife's behalf it was argued at first instance and on appeal *inter alia* that King LJ wrongly interpreted the decision in *Wyatt v Vince* and hence Francis J (at [19]) 'should therefore follow the guidance of the Supreme Court in *Wyatt v Vince* rather than of the Court of Appeal in *Roocroft v Ball*'.

Francis J, however, considered the position to be (at [20]) 'something rather more nuanced' than a conflicting decision between the Court of Appeal and the Supreme Court as he was considering:

> 'King LJ's interpretation in the Court of Appeal of *Wyatt v Vince* and whatever my view of her interpretation of *Wyatt v Vince* it seems to me to be absolutely clear that I have to follow what the Court of Appeal have said in relation to that interpretation.'

In analysing Ground 1 of the Grounds of Appeal (at [31]) that 'the learned judge erred in law in following the Court of Appeal decision of *Roocroft v Ball* upon an application to set aside a financial remedy order', Francis J stated:

a. at [31] '*Wyatt v Vince* was dealing with the summary determination of applications for a financial remedy order';
b. at [32] 'the Supreme Court decided unanimously that it would be inappropriate to strike out the wife's claims without a hearing' (for the reasons given at paragraph [27] of the judgment set out above);
c. at [34] 'on the set aside application, the court is not deciding whether to exercise its powers under sections 23, 24, 24A, 24B or 24E of the

Matrimonial Causes Act 1973. It is deciding whether to set aside an already made order and if so on what grounds';

d. at [34] 'Lord Wilson's decision regarding the lack of any power of summary judgment was very clearly limited only to final financial remedy order applications'; and
e. at [35] and [36] that although at paragraph [27] of *Wyatt v Vince* Lord Wilson had said 'that the power to strike out under Rule 4.4 applied equally to other applications that were not an application for a financial remedy order', 'the key to the reasoning in paragraph 27 is the duty that is imposed on the court to consider all of the matters set out in section 25 and that is not something that can be summarily determined'.

As a consequence (at [36]) Francis J stated that he disagreed with King LJ's interpretation of this passage of *Wyatt v Vince* but '[h]aving considered this very carefully I have no doubt at all that I have to yield to the decision of the Court of Appeal on this' because:

> '[37] As a judge of the High Court I am of course bound by the doctrine of precedent and although Mr Fairbank asserts forcefully that where there is a conflict between the Court of Appeal and the Supreme Court, I have to follow the Supreme Court, what I actually have here is an interpretation by the Court of Appeal of a decision of the Supreme Court with which I disagree. However, I am bound by that interpretation of the Court of Appeal of that Supreme Court decision.'

Did Lord Wilson mean to state at [27] of *Vince v Wyatt* that the court cannot strike out/give summary judgment on an application to set aside a consent order (as King LJ suggests) or were his comments 'very clearly limited' solely to applications for final financial remedy orders (as Francis J suggests)? Given that Francis J considered himself bound to follow the former interpretation – despite disagreeing with the same – a definitive answer to this question will need to wait for adjudication on another day.

- Blog

- Striking Out Applications
  - Setting Aside Orders (Including Barder Applications)

Who's Courtney? And Is She Helpful?

Published: 27/09/2024 09:00

On 10 September 2024, the first ever audio-visual legal library – demonstrating the key hearings and processes in English financial family law – arrived. Twenty years after YouTube landed, it is now possible to view the practical activity within an FDR, for example. Unlike the well-known digital libraries supplied by the international publishing giants, this library is available to all, not just those within/studying the law.

It is not hard to understand why it has taken this long to develop a digital legal library, accessible to consumers, having regard to the March 2023 LawTech UK Report: *Building an Entrepreneurial Ecosystem to Improve Access to Justice*. The barriers are plentiful. The result: 97% of JusticeTech funding in the last decade has gone to businesses serving corporate clients. In other words, there is no money to be made in advancements that serve the end consumers of the law. Or, that seems to be the perception of investors.

The fact that innovative educative resources are needed is not beyond sensible doubt. The fact that the legal sector lags behind other sectors in the adoption of innovative education is also clear. A 2015 LawforLife report noted:

> 'justice policy lags far behind advances in financial, health and consumer education that have promoted positive teaching methodologies that are more dynamic and engaging, involving innovative on and offline environments with integrated, concrete, practical help to allow individuals to see the real-life value of education and information.'

This landscape is particularly problematic in an era of disinformation and non-expert social media loudspeakers. As the Nuffield Fair Shares Report said: 'there was a rather chaotic picture of where divorcing people obtained information, support and advice' which included a 'mass of undifferentiated sources of varying authority and clarity'.

The Attorney General, Rt Hon Richard Hermer KC, addressed the Bar's AGM on 7 September 2024 and spoke of his admiration for the Bar's guiding mission of 'the pursuit of excellence'. He referenced the paramount markers of our profession: truth, evidence and integrity. Our first-of-its-kind audio-visual library is a product of that professional pedigree. It can be a source of professional pride that the (family law) Bar has done it and done it first.

Welcome, Courtney

Courtney – the audio-visual library in question – is the product of the energies of a growing group of family law barristers prepared to back the purpose without getting waylaid by the prospect of profit.

Courtney's library currently stretches to around fifty individual financial family law topics with a variety of audio-explainers, animations (with particular focus on NCDR processes), toolkits including example documents (like the FDR notes and final order to accompany the FDR animation) and articles broken down into intuitive segments. The question underlying the editorial process is: what is most helpful?

The focus, in terms of how material is presented and explained, is always upon the end consumer (the real people going through the tough stuff). This includes the estimated c.70% of the divorcing (together with, we imagine, the unmarried separating) population who do not access legal services. That said, Courtney's materials are also helpful to practitioners, especially newcomers. If Courtney is to consumers the equivalent of having a lawyer best friend, it is to new practitioners the equivalent of an educative 'water cooler' experience. At a time when home-working presents a real conundrum for the training of new practitioners, Courtney is an answer to the lack of colleagues down the corridor when you might need them. Never done an LSPO? Have a watch. Keen to get a sense of cross examination about non-disclosure? Have a watch. How might a judge approach an allegation of conduct at a First Appointment? Have a watch. Keen to get an overview of section 25 as it applies on the ground in practice? Have a watch (yes, the team have animated a section of a statute).

The next topics will include Part IV of the Family Law Act 1996 and child arrangements.

How is it different?

What to expect if you venture over to https://courtney.legal to peruse? It is a little different to the existing digital libraries:

- Visuals and transparency. Show don't tell. Any seasoned story-teller will say that. There is various evidence that supports the efficacy of visual learning in terms of understanding and retention. But this is also about transparency – these processes take place behind closed doors. There is something inherently humane about allowing individuals, who are experiencing change and vulnerability, to see a representation of what is going to happen during what could be the most momentous and important hearing or meeting of their adult lives. In no other professional sector we can think of, is there this failure to offer a view in and share a sense of the experience. The very wealthy undertake specialist witness training for a reason.
- Unapologetically practical. What is truly important? What helps? No unnecessary added ingredients. Ever read an article about law or

procedure that left you feeling bloated of mind? Well, ultra-processed legal content is banned on Courtney.

- The narrative tone. An unsolicited comment from a partner in a well-known firm: 'you have absolutely nailed the tone – it is accessible and wry with a really distinctive voice'.
    - If a newly separated father or a trainee solicitor or a paralegal are up at midnight stressing about tomorrow's meeting or hearing, we want to talk about these processes as we would with a friend. With a side order of humour and humanity. Not for the fun of it but because wellbeing has too long been thought of something to add to a list of things to do, rather than a practical way to work or learn. There is an outside risk you might enjoy the experience of visiting Courtney.
    - Existing digital libraries and content can be stuffy and impersonal in feel – reflecting the perception of lawyers. Courtney aims to model how things should be and help overcome that perceived stuffy 'mould', and the barriers it brings.

- Collaboration. Innovation – particularly around NCDR – has seen growth in collaborations among lawyers and other professionals. There is no more collaborative endeavour than a library. Diversity of contributors makes the library. Courtney is not the work of one group and is adamant, as part of its mission, to feature the widest range of practitioners and expertise. So far, at this earliest stage, we have contributions from three different sets of Chambers (two more in the pipeline), a law firm and The Divorce Surgery and are partnered with, among others, The Mediation Space.

Whose role is it to inform?

Our professional community can be supportive and progressive. It can also be a little sniffy about new things.

It's a curiosity that the judiciary often lend their weight to innovations before the professions do. This might be because the judiciary are at the sharp end of the ailing status quo. The new financial remedies pre-application protocol seemed, in some ways, to contain a little fight-back from the struggling system. Lawyers are encouraged, by paragraphs 33 and 40, to inform clients about NCDR resources and the duty of full and honest disclosure *and* the consequences of breaching it. This is different to advising. Informing arguably requires treating all clients to the same (neutral) information, regardless of the focused advice they require.

There are plenty of people who might doubt whether it is the role of practitioners to signpost, let alone provide access to, information and education. Putting aside the arguments either way, the reality is that lawyers already inform, educate and hand-hold but not in a consistent or accessible way. The clients who ask more questions get more information than those who choose not to. If we do not want our clients to consume disinformation or find themselves swimming around in the chaotic mish-mash described in the

Nuffield Report, we need to let people know where to turn. If costs must be kept under control and lawyers should not be used as helplines, where should we suggest our clients go for high quality insight and education?

Helpful?

Justice has done worse than any other department in terms of its funding since 2010. The need for properly funded legal aid is past acute. The phrase 'performance doom loop' has come into use to describe the situation. Educative tools have their own distinct place in the landscape of help required for legal problems. The question professionals might ask themselves when considering Courtney in this context is the same as Courtney's editorial refrain.

Is it helpful?

Please get in touch for a trial login by emailing admin@courtney.legal if you want to answer that question for yourself.

Further reading

- https://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf
- https://share-eu1.hsforms.com/1uM-7uRqoRfqw3SI4CjMwiwg7g8s
- https://www.nuffieldfoundation.org/wp-content/uploads/2021/03/Fair-Shares-report-final.pdf

– Blog

– Tech Corner

Till Debt Do Us Part: Bankruptcy and Financial Remedies

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Jasmine Knapman

Jasmine Knapman recently joined 29 Bedford Row as a junior tenant, following successful completion of her pupillage. Jasmine welcomes instructions in all areas of family law.

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Rosie Vorri is a pupil barrister at 29 Bedford Row. Prior to starting pupillage, she was a paralegal at Payne Hicks Beach, gaining experience of financial remedy and private children work.

Financial remedies practitioners are well-accustomed to advising parties in straitened financial circumstances. Often the central question is how to stretch the available resources to ensure both parties have a roof over their heads. However, when one or both parties find themselves in *serious* financial difficulty, a less familiar issue may arise: the interplay between the Insolvency Act 1986 (IA 1986) and the Matrimonial Causes Act 1973 (MCA 1973).

In this article, the authors will comment on the recent case of *Gudmundsson v Lin* [2024] EWHC 1576 (Fam) to explain how bankruptcy proceedings can alter the computational landscape of a case and, at times, undermine the intentions of the Financial Remedies Court.

Overview

In essence, bankruptcy entails the bankrupt individual being divested of all of their property, following which it is distributed to creditors and the individual is released from their debts.

MCA 1973 s 25(2)(b) directs the court to have regard to the 'financial needs, obligations and responsibilities of the spouses' (emphasis added). These 'obligations' will naturally include a spouse's obligations to their creditors, whether in their personal capacity or, if they hold a company which is not limited, as the company owner.

The key piece of legislation to consider when bankruptcy proceedings are in play is the IA 1986. An obligation to pay a lump sum or costs in family proceedings is a 'provable debt' in a bankruptcy (ss 322–332), which remains payable (even if it is payable on a fixed future date that has not yet passed). However, there is an order of priority in which bankruptcy creditors are paid (after the trustee in bankruptcy's costs and expenses), and a financial remedy order constitutes an unsecured debt, which ranks the lowest for distribution amongst the forms of debt (secured creditors are paid first, then preferential creditors, and finally unsecured creditors).

The Court of Appeal held in *Mullard v Mullard* (1982) 3 FLR 330 that the financial remedies court does not have the power under the MCA 1973 to exercise a form of 'bankruptcy jurisdiction' by preferring the husband's debts, i.e. creditors' claims, above the wife's claim. The court therefore held that it did not need to provide for the discharge of the husband's debts out of his share of the former matrimonial home (FMH), and instead ordered that the husband transfer to the wife his interest in the FMH, so that she received the entirety of the value of the property. The Family Court is therefore perfectly entitled to make orders that provide for a party's needs to be met (for example, by awarding a non-earning primary carer with the entire value of the FMH) *prior to* a bankruptcy petition being filed.

But what about *after* a bankruptcy order has been made? This was the issue explored by Peel J in *Gudmundsson v Lin* when faced with the thorny question of what to do when it only came to light that the husband had been made bankrupt after the final financial remedies order had been made.

Background

The litigation background was somewhat complicated. The parties were in protracted proceedings and the husband had been criticised for his opaque presentation of his assets. A clear computational picture never emerged, but the total assets were c.£2m. The final hearing took place in February 2019. Delivery of judgment was delayed until September 2019, but shortly before judgment was due to be delivered the husband drew the judge's attention to several matters said to affect his financial position. Following two adjournments to allow for further evidence, on 4 March 2020, HHJ Meston QC made a final order which provided for the husband to transfer to the wife his half share in the FMH, leaving W with 79% of the total assets.

After judgment had been handed down, H told the court on 4 March 2020 that he had been made bankrupt. He provided no evidence at the time, but a copy of the bankruptcy order was obtained soon after, showing he had been made bankrupt on 26 February 2020 (six days before the financial remedies order). Following the bankruptcy order being sealed, the trustees in bankruptcy gathered together the husband's creditors' claims, which came to c.£2.574m.

The husband appealed against the financial remedies order on the basis that the capital division in the wife's favour was unfair. Notably, his appeal did not mention the fact he had been made bankrupt. However, on 14 August 2024 Gwynneth Knowles J granted the husband permission to appeal in light of the bankruptcy order.

Bankruptcy judgment

In the meantime, the wife and the trustees in bankruptcy were engaged in proceedings in the Insolvency and Companies Court. In an order dated 15 April 2024, Deputy Insolvency and Companies Court Judge Frith:

- Dismissed the wife's claim that she had a 100% beneficial interest in the FMH pursuant to principles set out by the CA in *Hudson v Hathaway* [2023] KB 345, i.e. that a party claiming a subsequent increase in her beneficial interest in the FMH as a result of a post-acquisition changed common intention must show detrimental reliance on that changed common intention.
- Recorded that the wife and the trustees in bankruptcy each owned 50% of the beneficial interest in the FMH.
- Found that on five occasions between the presentation of the bankruptcy petition and the making of the bankruptcy order, the husband had corresponded with HHJ Meston QC to ask him to postpone handing down the judgment but had not informed him about the bankruptcy petition. Had he done so, it is likely the judge would have endeavoured to hand down the judgment earlier, and make an order earlier, such that the wife would have received 100% of the FMH prior to the bankruptcy order.
- Concluded that there were 'exceptional circumstances' under the IA 1986 s 335A(3) whereby the interests of the creditors should not outweigh all other considerations, including the husband's conduct in not informing the court and the wife of the bankruptcy petition, thereby depriving her of the opportunity to receive 100% of the FMH.
- Found that in light of the 'exceptional circumstances', the FMH should not be sold until August 2032, when the youngest child turns 18, with the wife then to receive her half share as found by the court.

The husband's appeal against the financial remedies order

The appeal was heard by Peel J, who began his judgment by stating that although the husband no longer pursued his appeal, it remained necessary for the court to set aside the order of March 2020 and substitute a fresh decision to ensure that the final financial remedies order was on a 'sound legal footing'. He found that the husband had deliberately acted so as to leave the wife and the court with no opportunity to prevent the bankruptcy taking its course.

At [25], Peel J found that although the judge was able to make a financial remedy order notwithstanding the bankruptcy order, he had no power to order a disposition of any of the husband's assets, including his interest in the FMH:

- By IA 1986 s 283, all the husband's assets fell into the bankruptcy estate, including his interest in the FMH.
- By IA 1986 s 306, the bankruptcy estate vests in the trustee in bankruptcy.
- In such circumstances, the authorities are clear that it is not open to the court to make orders disposing of assets formerly belonging to the husband, and now vesting in the trustee in bankruptcy; see for example *Re Holliday (A Bankrupt)* [1981] Ch 405*, McGladdery v McGladdery* [1999] 2 FLR 1102*,* and *Ram v Ram (No 2)* [2005] 2 FLR 63*.*
- Specifically, a property adjustment order cannot be made against a bankrupt*: Ram v Ram* (*supra*)*.* However, if a property adjustment order has already been made but not implemented before the bankruptcy order, it is still binding on the trustee in bankruptcy as long as the decree absolute/final divorce order has been made to make the order enforceable.
- A lump sum order *can* be made as it does not constitute an order disposing of the property of the bankrupt. A lump sum order is provable in the bankruptcy, and in fact, survives the bankruptcy (although the court has a discretion to release a party from lump sum obligations post-bankruptcy under IA 1986 s 281(5) in certain circumstances).
- However, a lump sum order will ordinarily only be made when the court has a clear idea of the likely residue of the estate once the bankrupt is discharged: *Hellyer v Hellyer* [1996] 2 FLR 579*.*
- If the court is satisfied the bankrupt will have a surplus upon discharge, there is no reason in principle why a lump sum order cannot be made which bites against the surplus, but the court must be cautious when estimating the likely available resources in the future.

As such, at [26], Peel J found the part of the order providing for a transfer of the husband's interest in the FMH to the wife ought not to have been made and could not take effect, as the asset in fact vested in the trustees.

Conclusions

Having set out the findings Peel J concluded as follows at [35]:

- The husband's appeal must be allowed to rectify the erroneous property adjustment order; the husband had no interest in the FMH to transfer by the date of the order, as the interest vested in the trustee.
- The husband's 50% interest in the FMH would be largely swallowed up by the trustees' costs of c.£657,000, and any surplus would be paid *pari passu* to the creditors.
- In the improbable event that there was any surplus after payment of (i) the trustees' costs; and (ii) the creditors' debts, then such surplus should be paid to the wife. That would reflect the intentions of HHJ Meston QC, who provided for the wife to receive the entirety of the FMH.

- That would be the just outcome, given the husband's conduct in concealing the fact of his bankruptcy from the wife and depriving her of the opportunity to secure for herself the entirety of the FMH.

The husband's appeal was allowed and paragraph 1 of the order, providing for the husband's interest in the FMH to be transferred to the wife, was discharged.

Peel J also noted that the trustees had lodged an appeal against the delayed order for sale of the FMH seeking an order that the property be sold forthwith. He therefore provided that should the trustees' appeal succeed, and the FMH have to be sold forthwith, the outcome which he had provided for should be the same as if the FMH was sold in 2032.

In practice

The consequence of the husband's bankruptcy was that the court had no choice but to set aside the order of HHJ Meston QC. As a result, the wife was left with far less than was anticipated by the divorce court. Had the court been able to make its order prior to the presentation of the bankruptcy petition, the wife's position would have been more secure. This underscores the importance of being alive to the possibility of bankruptcy proceedings which can (and often do) significantly alter the scope what the Financial Remedies Court can order.

It is clear, therefore, that concerns about bankruptcy should be considered at the earliest opportunity in financial remedy proceedings. If your client is the party who is not the potential subject of bankruptcy proceedings, it is very likely that time will be of the essence, and the following should be considered:

1. Whether the proceedings can be expedited (for example, by using the First Appointment as an FDR Appointment, or by narrowing the issues by agreement early with a view to a shorter and therefore quicker listing or by use of NCDR);
2. Whether the potential bankruptcy (and the circumstances leading to it) needs to be pleaded as 'conduct' of the insolvent party, pursuant to MCA 1973 s 25(2)(g);
3. Whether assets held by the solvent party were transferred from the insolvent party, and are therefore vulnerable to a potential claim by the trustee in bankruptcy under IA 1986 s 423 if the transaction took place to defraud creditors (noting that such a claim is not subject to the same time limits as a claim under MCA 1973 s 37); and
4. Whether the potentially insolvent party will offer an undertaking not to voluntarily institute bankruptcy proceedings without the other party's agreement.

Gudmundsson v Lin also highlighted the value of obtaining advice from a bankruptcy practitioner on the remedies that can obtained within the bankruptcy civil proceedings; in that case, the wife was able to secure the right to live in the property for another eight years, until the youngest child turned 18

in August 2032 (an arrangement akin to one that can be made under Schedule 1 of the Children Act 1989). Although this remedy was obtained, at least in part, as a result of the husband's exceptional dishonesty, it provides an indication of the remedies that are available to a judge within bankruptcy proceedings. It is therefore important to obtain legal advice from a bankruptcy practitioner regarding the potential to challenge a bankruptcy order in the civil courts.

Concluding thoughts

Gudmundsson v Lin is a clear demonstration of the potential for bankruptcy proceedings to significantly shrink the 'matrimonial pot' and thereby deprive the financially weaker spouse of what may have been a very valuable resource. Had the wife and the judge been made aware of the husband's impending bankruptcy, the financial remedy order may have been made *before* the bankruptcy order such that the wife would have received 100% of the husband's interest in the FMH. Once the husband had been made bankrupt, however, there was far less available for the wife to receive. As such, the case highlights the importance both of the duty of candour and of acting quickly where bankruptcy proceedings are on the horizon.

- Blog
- Bankruptcy

Report of the Duxbury Working Party (provisional), September 2024

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Michael Allum is a Solicitor and Partner at The International Family Law Group LLP. He specialises in finance cases with a particular emphasis on matters with an international element. He is also regularly instructed on cases regarding financial provision after an overseas divorce (Part III). He is a member of the *Financial Remedies Journal* editorial board and of the Duxbury Working Party.

Simon Bruce

Simon is a solicitor and Partner at Dawson Cornwell LLP. He is also a pro bono lawyer at law clinics in London. Simon has practised for over 41 years. He is a member of the Duxbury Working Party and writes the 'Thought Leader' in *Family Law*. He comes from Lancashire.

Sarah Hoskinson

With over 20 years' experience in complex financial remedy cases, Sarah is a Partner and Head of Burges Salmon's Family & Divorce practice. She sits on a number of financial remedy and other technical groups, including the Family Justice Council Financial Remedy Working Party, FJC Working Party on Needs, the Pension Advisory Group (PAG and PAG2) and the IAFL Pensions Committee, which she chairs. She is also a member of the Duxbury Working Party.

Lewis Marks KC

Lewis Marks QC is a family law barrister at QEB, specialising in financial remedy cases. He has been an editor of *At A Glance* since 1999, and is also a founder editor of the

Financial Remedies Practice. He was an original member of the Duxbury Working Party in 1998 and has authored a number of papers on the subject of Duxbury calculations. He has acted as Chair and convenor of the reconstituted Duxbury Working Party.

Sir Nicholas Mostyn

Sir Nicholas Mostyn was a judge of the High Court, Family Division, and of the Court of Protection 2010–2023. He was a founder editor of *At A Glance* and of *Financial Remedies Practice* and continues as editor-in-chief of both publications. He is a member of the Duxbury Working Party.

Joe Rainer

Joe is a junior barrister at QEB. He has a specialist matrimonial practice, with a focus on financial remedies and cases brought under TLATA 1996. He has appeared in several well-known reported cases and writes and lectures frequently on a variety of topics. He is a member of the *Financial Remedies Journal* editorial board, an editor of *At A Glance*, and a co-author of the fourth edition of *Pensions On Divorce: A Practitioner's Handbook*. He is also a member of the Pension Advisory Group and the Duxbury Working Party.

Mary Waring

Mary is a chartered financial planner, chartered accountant and Resolution Accredited Specialist. She is the founder of Wealth for Women, an award-winning company specialising in financial advice to women going through divorce. She is a member of the Duxbury Working Party.

Provisional report: This report has been prepared without any prior public consultation. It is published provisionally to allow interested parties to respond. Responses should be emailed to j.rainer@qeb.co.uk by 1 November 2024 and will be considered by the Working Party ahead of publication of our final report which we intend will be on 15 November 2024.

Executive summary

1. Duxbury calculations, whether presented as a printed table or by specialist software, have for nearly four decades been the tool of choice in the family courts for the assessment of lump sums necessary fairly to provide for a clean break in a case where there would otherwise have been a periodical payments order.

2. The underlying assumptions have been the subject of criticism in articles in legal journals, generally on the basis that the sums arrived at are not sufficient to provide the level of spending power intended for the lifetime of the recipient.

3. Those underlying assumptions have not been the subject of any general review for many years. This report is by an ad hoc and self-selected group of interested professionals to undertake that review, including, in the light of the criticisms, the methodology. The Working Party has no status to make any decisions about how the courts should approach Duxbury calculations. It proffers the proposals in this report to banish outdated concepts and generally to modernise the approach. It will be a matter for the courts whether to adopt the recommendations.

4. Our main conclusions are, in summary:

4.1. The existing underlying assumptions as to income yield (3%), capital growth (3.75%) and inflation (3%), remain essentially sound.

4.2. The calculation should also include an allowance for the management charges (1% for funds up to £1m, 0.5% for funds above £1m) likely to be suffered on the investment of the fund.

4.3. The calculation should no longer default to the life expectancy of the recipient (although there will be cases in which that is appropriate), rather the court should consider the likely duration of the periodical payments order which is being capitalised, and apply that period to the quantum of the periodical payments that is being capitalised.

4.4. The computation should not default to the inclusion of the State Pension, although the fact of such entitlement may impact on the quantum of the periodical payments being capitalised.

4.5. It is neither necessary nor appropriate (where the appropriate duration for the calculation is a term of years and as State Pension age is now the same for men and women) to have separate tables for male and female recipients.

4.6. Where whole-of-life is determined to be the appropriate duration for the calculation extreme caution should be exercised in undertaking a Duxbury calculation for any payee whose life expectancy is less than about 15 years, although we think that these will be very rare cases.

4.7. Legal advisers to parties who are receiving Duxbury based awards, or awards with a Duxbury component, should ensure that their clients have a proper understanding of the basis of the calculation and disabuse them of the erroneous belief that it ensures a particular level of expenditure for a particular period.

5. While our recommendations in relation to management charges and State Pension will tend to increase awards, we anticipate that in practice this will be mitigated, and sometimes outweighed, by the adoption of our recommendation for a lesser duration than life expectancy in most cases.

Terminology

6. In this report we use the following terms:

6.1. '*Financial remedy*' to encompass all financial awards made by agreement or court adjudication following relationship breakdown (generally divorce, but including dissolution of a civil partnership), notwithstanding that much of the jurisprudence deploys now antiquated terminology such as ancillary relief.

6.2. '*Periodical payments*' for what is sometimes referred to as maintenance or alimony, being regular payments made to another person (usually a spouse, ex-spouse or co-parent) as a financial remedy.

6.3. '*Joint lives*' to mean an award of periodical payments with no term specified which endures until the death of either party unless varied or discharged by a subsequent order, or until the remarriage of the payee.

6.4. '*Payee*' to mean the recipient of a financial remedy award.

6.5. '*Payer*' to mean the party against whom a financial remedy award is made.

Background

7. The Duxbury calculation originates from the work of accountant Tim Lawrence then of Coopers & Lybrand, instructed as an expert witness on behalf of Mrs Duxbury during the course of her financial remedy proceedings consequent upon the breakdown of her marriage to Mr Duxbury in 1984.

8. Mr Lawrence had devised a spreadsheet which worked out by trial and error the lump sum which in his opinion might fairly enable Mrs Duxbury to meet her 'needs' pursuant to the then newly implemented obligation imposed on the court to achieve a clean break. The calculation was of the capital payment in the form of a lump sum (a 'Duxbury fund') which, if depleted at a steady rate in real (inflation adjusted) terms, allowing for assumed income yield and capital growth while invested, and allowing for the depredations of tax on income and on realised capital gains, would theoretically be exhausted on the date of Mrs Duxbury's actuarially anticipated death. Lord Nicholls of Birkenhead gave a

graphic description of the concept in *White v White* [2000] UKHL 54 at [39]: 'The Duxbury fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables.'

9. Mr Lawrence's modelling was accepted by the court (Reeve J at first instance, and a Court of Appeal comprising Ackner, Stephen Brown and Parker LJJ). Although the judgment of the Court of Appeal was given in November 1985, it was not reported until 1987 (*Duxbury v Duxbury* [1987] 1 FLR 7) and the report itself says nothing about this method of calculation. However, the existence of Mr Lawrence's calculation became known, and the thoughts of professionals turned to creating, in what was then the relatively new medium of the spreadsheet, [1] an iterative program which would work out the discounted lump sum payment to be made in lieu of what would otherwise be a series of periodical payments. Nicholas Mostyn believes he wrote the first such program in 1989. [2] Other such programs followed.

10. The program asked the user to input the claimant's annual spending requirement and age and then made a 'guess' as to the required capital sum, with the calculation being conducted repeatedly (iteratively), refining the 'guess', until the remaining figure at the terminal date was zero.

11. The arithmetic involved a number of 'assumptions' including that:

11.1. The claimant, Mrs Duxbury, would die on, and neither before nor after, her actuarially estimated date of death, but without regard to any individual characteristics that she might have which would tend to either shorten or lengthen her life as compared to her standardised or actuarial life expectancy based solely on her date of birth.

11.2. Inflation would remain at a constant level throughout the period of her life.

11.3. The income yield ('yield') would remain at a constant level throughout her life.

11.4. The gross capital appreciation ('growth') of her investments would remain at a constant level throughout her life.

11.5. Taxation of both income and gains would be met from the fund, with only the allowances and bands altering (in line with the assumed constant rate of inflation), and without Mrs Duxbury or her advisers taking any steps to invest in ways which would reduce that tax burden.

11.6. The claimant would be entitled to a full State Pension at the then applicable commencement date.

11.7. Income would be spent first, then capital drawn as required, including the relevant proportion of gains comprised in the capital (attracting tax where applicable) but also – and initially largely – the original capital (which would be

tax free). The proportion of gains would increase as the original capital was gradually depleted.

118. Additional realisations would take place annually, equal to a fixed percentage (3%) of the remaining funds, for reasons of proper management of the fund and/or because of market forces requiring such realisations (this was called 'churn'), which might also give rise to a liability to tax to be paid as it arose.

119. No consideration was given to the possibility that the claimant might remarry – indeed, Mr Duxbury's appeal against the order on the basis that this possibility should have been factored in to reduce the award was dismissed by the Court of Appeal.

12. The calculation was not wholly unlike a discounted cash flow model, or the kind of computations then used to calculate lump sum awards in personal injury or medical negligence cases, which generally operated on the basis of a 'discount' for the advance payment of a fixed sum to be depleted over a period of years.

13. For a few years an industry arose where accountants would be instructed in individual cases to put forward bespoke computations adopting some or all of the assumptions put forward by Mr Lawrence, supplemented with their own variations, particularly as to investment yield, capital growth and inflation (to which we shall refer as the 'key assumptions'), but sometimes also in relation to life expectancy. It soon became apparent that costs, common sense and appropriate allocation of court resources favoured a standardisation of the arithmetic and 'assumptions' rather than evidence being given, submissions being made, and judgments delivered in every case.

14. By 1991 the concept of a Duxbury calculation had received judicial endorsement. In *B v B* [1990] 1 FLR 20 Ward J said 'if this calculation is accepted as no more than a tool for the judge's use, then it is a very valuable help to him [sic] in many cases'. in *Gojkovic v Gojkovic* [1990] 3 WLR 261 Butler-Sloss LJ stated that 'a Duxbury calculation … produces a figure to which the judge is entitled to have regard in deciding what is the right answer'.

15. In 1991 a group comprising Nicholas Mostyn, Peter Singer QC, James Holman QC and Valentine Le Grice worked on the production of the first edition of the Family Law Bar Association's flagship annual publication *At A Glance*, which came out in 1992. It was decided that it should contain a table giving guideline Duxbury figures based on just two variables: the *age* of the payee (specifically, until 2001/02 only for women [3]) and the target amount of the revenue 'need' in the first and all subsequent years. From inception to date those tables have proceeded on a 'whole life' basis – i.e. that the inflation adjusted spending requirement would continue for the remaining actuarial life expectancy of the recipient.

16. This table was updated annually to reflect changes in life expectancies (as predicted by the Government Actuary and the Office for National Statistics) and

changes in the applicable rates of tax, including future changes which had been announced even if not yet implemented. There also became available commercial software to undertake ever more bespoke computations, [4] most notably and popularly, *Capitalise* by Class Legal, first produced in 2000.

17. The aggregation of the key assumptions gives a real rate of return (RRR): income yield + capital growth – inflation = RRR. That was initially set at 5%. In 'Reflections on Duxbury' in the 1995 edition of *At A Glance* the editors stated:

> 'In the introductory material to *Actuarial Tables for use In Personal Injury and Fatal Accident Cases* (HMSO, 2nd edition 1984) the Ogden Committee point out that for a payee to be certain to receive an inflation-proof income for the period to which the loss relates it would be necessary to invest in Index-Linked Government Stock. The return upon these has historically ranged between 2.5% and 4.5% gross. The rate applicable on 30 January 1995 was 3.89% before tax (source: Financial Times). By contrast the gross real return on equities has over the 25 years to 1993 averaged 5.8% (source: The BZW Equity-Gilt Study Investment in the London Stock Market since 1918). …
>
> The lower the percentage real rate of return selected, the higher the capital fund required. So the choice made for these Duxbury tables of 4.25% should be regarded as fair to each spouse, and designed to cover such considerations as any professional expense in managing the award, once made.
>
> Whereas therefore the previous editions of *At A Glance* have suggested that it was a matter for evidence and argument in each case what assumptions should be adopted, it may now be that such a laissez-faire approach is outmoded. It would be better to accept that (for the illustrative purpose which is all that the calculation can provide) an industry-standard of 4.25% should be adopted as the real rate of return in current and foreseeable financial circumstances.'

18. This was followed by *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833 where Holman J stated:

> 'Although I am a member of the editorial committee of *At A Glance* (FLBA) I was not the author of "Reflections on Duxbury" to be found at the beginning of the 1995 edition. But I agree with its reasoning and its conclusions. In my view it is important that there should indeed be "an industry standard" for the purpose of the Duxbury approach and in my experience that standard has already settled at around 4.25%'

19. In 1998 the original Duxbury Working Party came into existence. It was a self-selected group of (male) lawyers, accountants and actuaries who shared an interest in the topic and had sufficient understanding of both the underlying

object of the calculation and the workings of it, as well (at least for some members) the expertise to identify appropriate figures for the key assumptions. They had no status or standing other than their willingness to discuss and publish the outcome of their discussions in the commentary to the annually updated Duxbury table published in *At A Glance*. It produced its first report quickly '*Duxbury – The Future*': [1998] Fam Law 741 proposing a RRR of 4.25%. Unsurprisingly, that was adopted by the editors of *At A Glance*. From 1998 until 2006 there were occasional, but by no means annual, adjustments made to the key assumptions, in line with the collective or majority views of the then members of the original Duxbury Working Party, of which the authors of this report are a reconstitution. [5]

20. In practice the adjustments, if any, tended to be *de minimis*, since the view of all members of the Working Party was that even seemingly dramatic events in the financial landscape (for example Black Monday in 1992 when the FTSE 100 fell by over 11% in a single day, while the Dow Jones fell 20%) would usually be 'blips' in an otherwise historically clearly identifiable trend. Views about what had happened in the last 15 months were not determinative when considering an investment horizon measured in many decades.

21. In January 2002, the Duxbury Working Party reconvened and recommended that from April 2002 calculations should be done using a RRR of 3.75%. This led to two tables being published in the 2002–2003 edition of *At A Glance* one using a RRR of 4.25%, the other a RRR of 3.75%. That rate of 3.75% was approved by the court in *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 at [57] where N Mostyn QC stated:

> 'It might seem hubristic of me to approve in my capacity as a deputy High Court judge a rate recommended by me (among others) in my capacity as a member of the working party. But it is blindingly obvious that as between 4.25% and 3.75%, the lower figure is right. Indeed, present market conditions might suggest that 3.75% is distinctly optimistic. If by making this statement I can help to avoid some needless controversy about rates of return in some future case then I consider it will have been justified.'

22. In the 2009–2010 edition it was explained that the assumed income yields for years 1 and 2 had been reduced in the light of the global financial crisis and that the advice of the Duxbury Working Party was awaited. The Duxbury Working Party duly met again in 2009 and recommended a reduction in the assumed income yield in the first year to 1.5% which was adopted, and which remains in place.

23. These minor variants aside the key assumptions (income yield 3%, capital growth 3.75%, inflation 3%) have remained essentially undisturbed since the 2003–2004 edition (20 annual editions). In 2015, they received detailed judicial consideration and approbation in *JL v SL (No 3)* [2015] EWHC 555 (Fam) which also approved the underling algorithmic architecture. While it has always been

open to individual litigants to argue against the adoption of the standard assumptions, in practice it would require a good argument or an unusual factual scenario for such an argument to succeed. There is, so far as we can tell, no recent authority in which such arguments have been successful.

24. That the calculation – and the assumptions underpinning it – were only a 'guide' or 'tool' and not 'the rule' in any particular case was repeatedly emphasised in the authorities, although inevitably, deviations from the guide were the exception rather than the norm. Generally, where the court was persuaded to make an order on a basis different from the result thrown up by a Duxbury calculation, the order was more generous to the claimant. That has not been because of a departure from the assumptions, but because of the specific factual matrix against which the calculation was being utilised.

25. A table giving the key assumptions and the RRR in each annual edition of *At A Glance* is at Appendix 2.

Criticisms

26. The Duxbury calculation – but in particular the key assumptions deployed in it – have been the subject of criticism by practitioners, financial advisers and academics alike in articles appearing in both legal and academic journals. A list of the articles which we have considered appears in Appendix 3.

27. Most of those criticisms centre around the unlikelihood, in reality, of a recipient of a Duxbury fund as an element of their financial remedy award, actually being able to invest their fund so as to enable them confidently to spend at the rate assumed as the starting point of the computation of the capital sum, without risking running out of money during their life. The common theme of the criticisms was, directly or indirectly, that the calculation was unduly mean and that claimants were being short-changed.

28. Amongst the objections have been that:

28.1. there is no protection for the payee if they turn out to be long-lived and therefore potentially surviving beyond the exhaustion of their fund even if it had otherwise performed as anticipated in the calculation,

28.2. the investment returns assumed could only be achieved (if at all) with a relatively risky investment strategy, and

28.3. the payees are likely to be more cautious than adventurous investors, and would generally not be financially sophisticated.

29. This has been argued, in effect, to place unfair risk on the payees – predominantly women – for the benefit of the payers – predominantly men. The payees were left, according to the critics, faced with either reducing their expenditure immediately or later in life when the funds were likely to be dwindling, or hoping to remarry, rather than being able confidently to continue

with the lifestyle judged to be appropriate at the time of the establishing of the quantum of their Duxbury fund.

30. Defenders of the status quo focussed not so much on the likelihood that in practice the fund could be prudently invested so as to enable spending to continue at the initially assumed rate, but rather on the balance of fairness between divorcing spouses and the true aim of the calculation being to establish the fair sum to be paid immediately to compensate the payee for forgoing what would otherwise be their right to receive maintenance by way of periodical payments.

31. This has been explained in the text accompanying the Duxbury Tables since the 2010–2011 edition. In that edition it was stated:

> '… the assumptions must be such as strive to achieve fairness between the parties. An ancillary relief award is a "nil gain sum" – so any benefit to one party is necessarily a detriment to the other. The capitalisation of a periodical payments award should therefore aim to achieve as fair a balance as possible between ensuring that the payer does not pay too much and that the payee receives enough but no less. Standardisation inevitably leads to anomalies and occasionally unfair results in individual cases. A payee who capitalises her periodical payments for a lump sum calculated on Duxbury assumptions is a net winner if she soon remarries (or cohabits in circumstances which would have led to a reduction in her periodical payments) or, more paradoxically, if she dies young. On the other hand, she will be a net loser if she lives singly for longer than her average contemporary. The likelihood of re-marriage by the payee, or a payer's inability to continue to make periodical payments long into old age, are factors which would tend to favour the recipient.'

32. In the 2024–2025 edition the explanation was put this way:

> 'The calculation is not, and never has been, to work out the sum which is the equivalent of a guaranteed index-linked annuity for the life of the recipient.
>
> Rather, it is an attempt to identify a fair net present value of a periodical payments award (where the applicant's right to claim under the Inheritance (Provision for Family and Dependants) Act 1975 remains open) i.e. a maintenance award that endures until the death of the claimant.
>
> The latter is likely to be materially less than the former for many reasons including the variability of a periodical payments order and its automatic cessation on remarriage.'

33. This reconstituted Duxbury Working Party has been established to consider and discuss the competing arguments and to make recommendations for the

retention or adjustment of any of the underlying assumptions, but particularly those identified as the 'key assumptions'.

34. In the course of discussion all of the members expressed disquiet about the implicit steer towards 'whole-of-life' provision in the Duxbury calculation by the publication of tables which provide a 'guide' as to the sum targeted at the actuarial life expectancy of the payee, which runs counter to the modern practice of achieving financial independence rather than lifelong dependence following marital breakdown, and counter to the statutory directive to consider financial provision by way of periodical payments 'only for such term as would … enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party'.[6] While that provision does not apply directly to lump sum payments if, as discussed below, the proper rationale for the Duxbury calculation is of the fair sum to pay in compensation for not receiving a periodical payments order, it appears to us to be illogical, if not irrational, to assume in that calculation that the periodical payments would endure for the whole of the payee's life.

35. The members now[7] comprise five men and two women, two barristers, three solicitors, a chartered financial planner and one retired High Court Judge.

The legal framework

36. Prior to 1984 the family courts were enjoined to exercise their powers under Part II Matrimonial Causes Act 1973 so as to put the parties, as near as was practicable, in the position in which they would have been had the marriage not broken down – the so-called 'minimal loss objective'.

37. The 'usual' order was provision for a home and for maintenance by way of periodical payments. Periodical payments were, and still are, always susceptible to variation (in either direction) including termination. Such payments are automatically terminated by remarriage of the payee. However, before 1984 such periodical payments orders were often, even usually, expressed as being 'during joint lives'.

38. Such an order would end automatically on the death of the payee and, unless secured, also on the death of the payer – although recourse might then be had in an appropriate case to an application under the Inheritance (Provision for Family and Dependants) Act 1975 to obtain relief against the deceased's estate, so long as the payer had died domiciled in England or Wales.

39. A periodical payments order might also be made for a limited period (a 'term' order). In the absence of a specific bar (under s 28(1A) Matrimonial Causes Act 1973 introduced in 1984) the payee could apply for such a term to be extended (under s 31).

40. But also newly introduced in October 1984 was what has become to be understood as the prioritisation of the clean break. Sections 25A and 31(7)

Matrimonial Causes Act 1973, both inserted in 1984, required the court when considering an application for the first time (s 25A) or for variation of an existing periodical payments order (s 31) to 'consider whether it would be appropriate' to exercise its powers [8] so as to bring about a clean break 'without undue hardship' to the claimant.

41. *Duxbury* (heard at first instance and on appeal in 1985) was one of the earliest cases in which the court considered how fairly to arrive at a figure for a lump sum in place of what would previously have been periodical payments, and usually on 'joint lives' terms, albeit supposedly in the shadow of the then new s 25A.

42. Mr Duxbury appealed to the Court of Appeal against the making of such an award having regard to the fact that Mrs Duxbury was, and had been at the time of the hearing at first instance, cohabiting with another man and was, he argued, likely to remarry. His appeal was dismissed, the Court of Appeal considering that her cohabitation was 'irrelevant'. [9]

43. This is the context in which the computation of the Duxbury lump sum figure has to be viewed. It is in substitution for a stream of periodical payments with all of the variability and uncertainty that come with such a stream. The lump sum payment serves to liberate both the payee and the payer from the continuing financial interconnection of a periodical payments order but should in other respects be financially neutral for them both. That this is the essential premise of the calculation has been made clear in 13 consecutive editions of *At A Glance* since 2010–2011. [10]

44. Between 1987 and 2000, the Duxbury calculation dominated the computation of awards in cases in which a clean break was plausibly achievable. Thus, in *Harris v Harris* [2001] 1 FCR 68 Thorpe LJ observed that the table had an 'obvious utility' offering the judge a starting point. But, in reality only a very small proportion of separating couples had anything like the resources necessary to enable a Duxbury calculation to be relevant to the computation of an award – this was essentially the province of the wealthy and the comfortable professional classes. It required the parties to have available to them sufficient capital to provide homes for them both and have sufficient surplus capital to render the capitalisation of any needs-based revenue claim feasible.

45. The legal landscape in that period meant that in moderately large and very large money finance cases, the applicant's award was usually computed as the sum of their housing requirement (usually the purchase price and ancillary expenses) and the sum necessary to compensate for the clean break imposed by reason of s 25A and the dismissal of what would otherwise have been their claim to periodical payments (as mentioned, at that time, frequently on a joint lives basis).

46. That all changed in October 2000 when the House of Lords in the case of *White v White* [2000] UKHL 54, ruled that the general rule should be that the

ancillary relief award should be measured against the 'yardstick of equality'. That in turn led in 2006 to the identification by the Supreme Court, in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 of the 'sharing principle'.

47. In larger cases, in which there were significant capital assets to be divided, 'needs' – usually characterised as 'reasonable requirements' – no longer provided a limit to the quantum of claims against the wealthier spouse's resources. Duxbury was to a large extent relegated to cases in which – for whatever reason – the sharing principle was not engaged. Examples of cases in which the sharing principle was less likely to curtail the relevance of needs/periodical payments and therefore Duxbury calculations were those in which:

47.1. the overall wealth was largely non-matrimonial having been inherited or brought into the marriage by one spouse (e.g. from a previous marriage or a pre-existing business);

47.2. the capital claims had already been dealt with and the current application was for the capitalisation of an existing periodical payments award; or

47.3. (after 2010 and the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42) there was a prenuptial or postnuptial agreement to which effect was to be given, under which the sharing principle had been disapplied by agreement, but which left the needs of the claimant spouse at large.

48. Duxbury calculations were also frequently carried out in sharing cases as a means of cross-checking whether an applicant's sharing award would meet their needs in moderately large to large money cases. The common practice, which remains in place today, is to identify the appropriate portion of an award necessary to meet an applicant's capital need (often housing), and then use Duxbury, or a bespoke calculation adopting the Duxbury assumptions, to check whether the remainder of the award is sufficient to meet the applicant's income need. This analysis sometimes precipitates argument about the fair assumptions to be adopted in the bespoke Duxbury calculation – most often when, and the extent to which, an applicant should be expected to amortise their 'free' capital fund to meet their annual income needs in circumstances where the other party is able to better preserve their capital share by meeting their needs from earned income.

49. The Court of Appeal has declined to endorse a default approach and considers that it is a fact specific evaluation to be carried out in each case (*Waggott v Waggott* [2018] EWCA Civ 727). In contrast, in *CB v KB* [2019] EWFC 78 at [53] Mostyn J was in no doubt that a recipient of a Duxbury fund should almost invariably be expected to amortise it. [11] Of course, a conventional Duxbury calculation presumes complete amortisation of the capital fund.

50. Another trend in the law, or at least in the application of the law, over the period from 1985 to the present day, has been the almost total disappearance of the previously ubiquitous 'joint lives' periodical payments order. While such orders are still made from time to time, they are of increasing rarity. [12] This has been a consequence of a combination of socio-economic and legal developments. The strengthened status of women in the workplace, the increased proportion of women, but in particular mothers, who continue in employment after marriage and the increasing expectation that even those who do not stay in employment remain potentially employable following a divorce, no doubt all played into the decline in joint lives order. On the legal side it was the combination of the greater embracing by the court of the desirability of the clean break, the introduction of pension sharing as well as the sharing principle, which have all contributed to the near extinction of the 'joint lives' periodical payments order. This is exemplified by the decision in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [13] following which joint lives maintenance orders have become an endangered species, and secured joint lives periodical payments for a claimant in middle-age virtually extinct.

51. One potentially significant reason for the decline in the making of joint lives periodical payments orders is, of course, the availability of the power to make a lump sum order, typically quantified on the basis of a Duxbury calculation. However, even allowing for this the advent of the pension sharing order (with effect from 1 December 2000) would surely have greatly reduced the number of cases in which periodical payments would ever be ordered to continue beyond the normal retirement age of the payer.

52. Nonetheless, the published Duxbury methodology has continued to provide figures – at least in the print versions – exclusively on the basis of a whole-of-life entitlement of the payee, by fixing the duration of the dependency to be capitalised to the actuarial life expectancy of the payee. This might be thought to be of marginal relevance in the general run of cases and to cater only for a minority clique.

53. That is the background against which the Working Party has focussed its discussions leading to the recommendations in this provisional report.

The issues

54. Central to the discussions amongst the members of the Working Party have been the following questions:

541. What is – and what should be – the proper rationale and basis of a Duxbury calculation?

542. Is the overall algorithmic model apt or inapt for such calculations?

543. If inapt, what recommendations might we make for its replacement?

5.44. What is a realistic long-term average rate to assume for inflation, or otherwise factor into the calculation?

5.45. What are realistic income yield and capital returns to assume on an investment portfolio representing a Duxbury award to achieve the appropriate objectives?

5.46. How, in answering that question and if at all, should fund management costs be taken into consideration and at what stage?

5.47. Should the courts be encouraged or discouraged from abandoning reliance on published tables and seeking bespoke evidence in individual cases?

5.48. Should the individual characteristics and proclivities of the payee be taken into account in such an exercise (for example real or claimed reluctance to take investment risk, or considerations of familial longevity or the opposite)?

5.49. Does the practice of publishing tables of Duxbury figures based only on 'whole-of-life' provision lead to a disproportionate number of awards or settlements being based on the false premise that the alternative would have been a 'joint lives' order?

5.410. With what 'health warnings' should Duxbury calculations be endorsed better to educate both lawyers and, more importantly, lay parties about the differences between such a fund and a guaranteed income for life as if from an annuity?

The rationale for a Duxbury calculation

55. Jurisprudentially it is beyond doubt that the Duxbury calculation has been deployed, or should have been deployed, in substitution for what – in the absence of sufficient capital to make a lump sum order – would otherwise have been a periodical payments order.

56. This was undoubtedly its function in the case of Duxbury itself, although precious little consideration appears to have been given to the implausibility or unlikelihood of a joint lives periodical payments order actually subsisting during joint lives in that case, bearing in mind that Mrs Duxbury was already cohabiting with a new partner. As already mentioned above, the Court of Appeal considered that fact to be 'irrelevant'.

57. *Pearce v Pearce* [2003] EWCA Civ 1054 was a case which concerned the capitalisation under s 31(7B) Matrimonial Causes Act of what was undoubtedly a joint lives order, in which there were also undertakings by the husband as to the continuation of payments to the wife in the event of his death before hers effectively rendering the periodical payments order 'secured'. Thorpe LJ was quite clear, at [20], that in such an exercise: [14]

> 'What the judge is endeavouring to do is to express as a capital sum what is a fair capital sum in the circumstances in substitution for the periodical payments which would otherwise have been appropriate.'

58. This was not an original thought. Thorpe LJ was there quoting with approval what Pill LJ had previously said in *Harris v Harris* [2001] 1 FCR 68 at [44].

59. No one has contradicted or improved upon that concise summary of the objective of the Duxbury calculation in the intervening 23 years.

60. This simply stated objective belies the numerous considerations which might impact on the 'fair capital sum in the circumstances'.

61. The bare Duxbury model itself, as epitomised by the table appearing annually in *At A Glance*, considers only two case specific circumstances viz the age and (latterly) sex of the payee. All other factors are, necessarily in that particular exposition, overlooked in the arithmetic.

62. More sophisticated modelling tools, such as *Capitalise*, can factor in a variety of other circumstances, most obviously whether or not the recipient will be entitled to the full State Pension assumed in the printed tables, but also any other anticipated capital or income receipts and whether the annual spending power might fairly be adjusted (usually by way of reduction) at some stage in the future. It can also be used to calculate capitalisation figures based on anticipated dependency shorter or, theoretically, longer than actuarial life expectancy.

63. Whilst those considerations must plainly exclude entirely subjective criteria such as re-marriageability, we do consider that the model should properly err on the side of under- rather than over-generosity in the computational phase, to reflect the much greater likelihood that 'circumstances' would in practice lead to a termination or reduction of the hypothetical underlying periodical payments order rather than to an increase or extension. The law now – much more than it did in 1985 – encourages financial independence rather than life-long financial support. It will not be in every case, even when the payer has abundant resources, that the 'start on the road to independent living' [15] would require that the traveller is armed with a fund liberating them from all financial responsibility and risk for the rest of their life.

64. We have already commented that genuinely joint lives periodical payments orders, and *a fortiori* joint lives *secured* periodical payments, have reduced in popularity and prevalence, perhaps almost to the point of becoming an endangered species. Why then, we have wondered, has the default computation of a Duxbury award remained stubbornly based on the actuarial life expectancy of the payee and even that based solely upon their date of birth?

65. We venture to posit that were the Duxbury case to be reheard now, regardless of the revolutions to financial remedy proceedings wrought by the decisions in *White* and *Miller*, but in the light also of the changed approach to

independent living, it might well have resulted in a different outcome. Mrs Duxbury was only 45, the parties' youngest child already 20 following a 22-year marriage. As already mentioned, she was living with a new (and much younger) partner. It is hard to imagine in 2024 the starting point for Mrs Duxbury's provision being a secured periodical payments order for the rest of her life. Of course, the difference, in the modern era, is that Mrs Duxbury would very likely have received a substantial sharing award which might have obviated the need for the additional consideration of her needs.

66. In our proposals for change we canvass a new presentation of the capitalising algorithm which is no longer based on the assumptions of (i) a full State Pension nor, more importantly, (ii) whole-of-life provision.

67. Rather, we propose that the judge should consider what is an appropriate duration to assume for continuing financial support from the payer, which may not be 'whole-of-life', and select the guideline figure from a new table based on that duration rather than the specific age of the payee.

The algorithm - what it isn't

68. Before discussing what the Duxbury algorithm is, and how it works, we want to emphasise what it is not.

69. The Duxbury methodology is sometimes mistaken for an estimate of the cost of something with the qualities of an annuity to produce a guaranteed net income for life. Certainly, there are at least anecdotes of recipients of such funds visiting financial advisers and demanding an investment portfolio designed to achieve the same outcome as such an annuity. One can only assume that such recipients had not been advised by their lawyers that the fund would not be able to achieve the equivalent of an annuity return, at least not without considerable risk.

70. Even the most copper-bottomed of purchased annuities (e.g. using a SIPP fund) are only of a guaranteed *gross* annuity – sometimes, but not always, indexed or otherwise increasing to mitigate the effects of inflation – and so will always remain subject to the vagaries of the tax system even if the gross income is guaranteed.

71. An annuity is the purchase of a guaranteed, usually annual or monthly, receipt of money from an annuity provider, almost always an insurance company. The annuity purchaser pays a cash lump sum (these days almost always from a pension fund and known as a 'compulsory purchase annuity' even though the previous compulsion no longer exists) in return for lifelong, guaranteed, fixed, regular payments until their death.

72. There are variations on the annuity theme including:

72.1. joint annuities where the payments will continue (sometimes at the same rate, sometimes at a reduced rate) after the death of the first annuitant and

until the death of the second annuitant, typically a spouse or civil partner;

722. index-linking, or flat rate (typically 3.0% p.a.) increases in the regular payments intended to off-set the effect of inflation; and

723. guarantees, typically of five years, so that even if the annuitant dies during the guaranteed period, the payments will continue to their estate or nominated payee until the end of the guarantee period.

73. Each of those variations comes, of course, at a cost resulting in initially lower regular payments from the same capital purchase price for an annuity. Index linking might, for example, reduce the gross payments of an annuity purchased at age 55 by around 45%, at age 65 by around 36% and at age 75 by around 27%, so only those annuitants who live a substantial period after the purchase of the annuity would recover enough from the beneficial effect of the index linking (particularly in periods of low inflation) to make up for the much lower payments received initially. Other factors, such as tax, might nonetheless make deferral or index-linking financially astute even in low inflationary times.

74. Although there was once a thriving market in open market purchased life annuities (i.e. cash purchased annuities where the purchase price does *not* emanate from a pension pot), at the current time and for many years past, the only widely available annuities in the UK are those purchased using pension funds.

75. When an annuity is bought with a pension fund the entirety of the regular payments are taxed as income in the hands of the recipient even though, in reality, the bulk of the payments in fact comprise a return of the capital used to purchase the annuity. This is because the payments into the pension to accumulate the fund were (almost invariably) of untaxed income as a result of the income tax relief available on pension contributions whether made personally or by an employer.

76. Purchased Life Annuities (for which there are presently only two active providers in the UK market), are subject to a different tax regime which is much more onerous on the annuity provider (which may partly account for their scarcity) but much more beneficial for the annuity purchaser. The annuity provider has to provide the annuitant with a figure each year for the part of the regular payment which is return of capital (on which there is no tax) and the part which is income (or yield) on which the annuitant is to pay income tax. The part that is original capital will – for a long-lived annuitant [16] – eventually be exhausted, so that the annuitant would end up suffering tax on effectively the whole of the annuity payments in their later years (as with a pension annuity), having suffered almost no tax in the early years. The administrative costs for the providers are correspondingly higher and customer satisfaction presumably correspondingly lower.

77. The Annuities Table in *At A Glance* (page 66 of the 2024–2025 edition) shows that typical Purchase Life Annuities are seemingly less good value than Pension

Annuities, paying out around 17% less if purchased at age 55, 11% less at age 65 and 3% less at age 75 than the corresponding Pension Annuities which could be purchased at those ages, possibly in many instances negating the tax advantage of receiving the tax free return of capital.

78. The annuity market depends on the fact that a significant proportion of annuitants will die before they have received even the return of their original purchase capital. Others (another sizeable minority and together with the earliest casualties, a majority) will die before receiving the whole of the income and capital growth that the annuity provider earns from their original purchase capital. The early mortality 'profits' (from the annuity provider's perspective) have to be sufficient to meet their obligations to the long-lived annuitants amongst their customers, as well as to fund their corporate operations and provide a commercially viable profit for their shareholders.

79. Thus, annuities depend on a collective market, where the profits from the short-lived fund the continuing payments for the long-lived.

80. This is not the case in relation to financial remedy orders, where there is no such collectivity. Rather, in each case, the fairness has to be as between the payer spouse and the payee spouse – two individuals engaged in a nil-sum game. In fairness, there must be anticipated to be as many winner payees (who receive too much) as there are loser payees (who receive too little), so that the same balance is struck for the payers.

81. The crucial fact in relation to annuities is that once they have been purchased the capital purchase price is gone. Subject to any guarantee period, on the death of the annuitant the payments cease, and the purchase price cannot be recovered from the insurers. Naturally, some annuitants will die very soon after buying their annuity leaving their estates much smaller than had they died without purchasing the annuity. It is perhaps for this reason, as well as others discussed shortly below, that annuities have never been the mechanism of choice in the family court for providing for the income needs of a claimant for financial remedies.

82. Other reasons for eschewing annuities as the mechanism for providing for the needs of a claimant in financial remedy proceeding include at least the following:

821. income provision on divorce has always been, by its nature, subject to variation in the event of changes in circumstances. Such changes might include changes to the situation and economy of the payee or those of the payer;

822. the most obvious of such changes include the death or remarriage of the payee, either of which would, under the Statute, end a periodical payments order, even a secured periodical payments order. Neither of those things can be regarded as unusual or unexpected, indeed the first is inevitable save only as to timing and the latter a common occurrence; and

823. while there will be those cases in which the position and financial standing of the payer might be so secure that it is inconceivable that they would ever be able to secure a variation based on a diminution of their capacity to pay, in the overwhelming majority of cases the payer will be subject to the vicissitudes of life including as to their health, earning capacity, investment outcomes and the macro-economic environment.

83. Having regard to those matters the family court has been understandably reluctant to impose on payers the obligation to fund the purchase of a copper-bottomed revenue stream by way of an annuity or of a sum calculated to achieve the same net effect as such an annuity. Rather, and as already mentioned, the Duxbury mechanism amounts to a discount for advance payment of what would otherwise be a continuing obligation serviced over time.

84. It is perhaps fair, however, to regard the cost of a net annuity equivalent to the initial spending requirement as an absolute ceiling on the assessed capital equivalent of a periodical payments order. A formula or approach which gave rise to a higher figure would be self-evidently too generous, since the payee could purchase the annuity and pocket the change, assured in their position for the rest of their life be it long or short.

85. Establishing figures for that ceiling is problematic because we have not been able to track down *any* providers of index-linked or otherwise inflation proofed Purchased Life Annuities and, even if such were available, the progressive increase in the (variable) portion that is subject to tax would render the arithmetic beyond the competence of our working party.

86. Thus, we now turn to consider and explain the workings of the Duxbury model as now properly understood and adopted by the courts.

The algorithm - what it is

87. As already mentioned, we consider that the Duxbury calculation is properly viewed as a rationalisation for the discounting of a lump sum payment to reflect the benefit(s) to the payee of having the money paid upfront rather than over a period of years.

88. The essential algorithm underlying the Duxbury calculation has been a constant since inception. It has experienced some very modest refinements but has proved durable and easily adaptable. It is also, perhaps something of a mystery to many users.

89. It is neither reasonable nor fair to assume that even all family law practitioners, let alone parties to litigation, could glean even a basic understanding of the methodology from the widely available material.

90. The text in *At A Glance* has for some years contained this explanation:

> 'Duxbury relies on an iterative computation, seeking the amount which if invested to achieve capital growth and income yield (both at assumed rates and after tax on the yield and realised gains) could theoretically be drawn down in equal inflation-proofed instalments over a period (usually the recipient's actuarial life expectancy) but would be completely exhausted at the end of the period.'[17]

91. The underlying 'assumptions' are summarised in *At A Glance* as follows:

91.1. a uniform income yield of 3% p.a. (1.5% in the first year),

91.2. a uniform rate of capital growth of 3.75% p.a.,

91.3. a uniform rate of inflation at 3% p.a.,

91.4. a consistent regime of taxation – with bands/allowances increasing in line with inflation save that allowances are assumed to be frozen until 2025–26,

91.5. a constant level of drawdown in real terms,

91.6. a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure),

and that the recipient will:

91.7. survive for precisely the expected average of their contemporaries, and

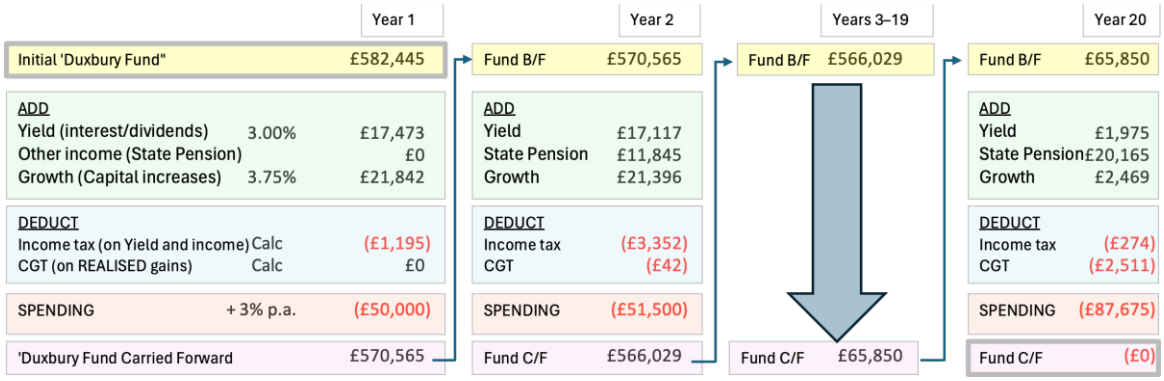
91.8. be or become entitled to a 'full' State Pension, and

91.9. that pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock'), and

91.10. the age from which the State Pension is payable will not alter in the meantime.

92. A moment's reflection about those assumptions would quickly lead to the conclusion that few, if any, of them will hold true over even a short period, let alone the typical 15–50 years of a Duxbury calculation. They are, at best, approximations or guesses at what might *on average* happen over such a period and stand as a proxy for the unknowable future figures. Some of the assumptions have been the subject of challenge by authors of articles published in various legal journals and blogs over the years.

93. While so far as it goes, that is an accurate – if very simplified – summary, even a well-educated and reasonably numerate new-comer might have difficulty envisaging precisely how it works. This infographic is an attempt to de-mystify the algorithm:



94. This *very inexact* example shows the first, second and final years of a calculation based on a spending requirement of £50,000 p.a. assuming that a State Pension becomes available in the second year. The tax calculations in this example are illustrative only. The amount carried forward at the end of each year is brought forward to the start of the next. At the end of the chosen period (by default the life expectancy of the payee) the fund is exhausted.

95. The tax calculations are necessarily estimates, based on the current and already announced future rates and allowances, save that beyond any already announced period of freezing such allowances, they are assumed to begin increasing in line with inflation (at 3% p.a.), as is the State Pension. The calculation of Capital Gains Tax (CGT) on realised gains is also necessarily approximated, but under the model all gains made are eventually subject to tax, subject only to the (now much reduced) personal CGT annual allowance.

96. The calculation is always undertaken by starting with a 'guess' for the figure at the top left (£582,445 in this example), and the guess is repeatedly refined ('iterated') until the figure in the bottom right is, as in this example, £0.

The algorithm – is it fit for purpose?

97. In a wide range of accounting and statistical applications derivative iterative calculations haven proven their worth as an aid to understanding values. For example, in Discounted Cash Flow valuations with which many family law practitioners will be familiar in the context of private companies, and projecting or calculating returns on investments more generally, including calculating Internal Rates of Return on investments and projecting potential 'carried interest' or other performance related returns.

98. Such calculations, albeit using different underlying assumptions reflecting the difference between an injured person's empirical need for continuing care and a divorced spouse's subjectively assessed reasonable requirements to maintain a given lifestyle, also underlie the Ogden Tables used in personal injury cases.

99. The members of the Working Party are unanimous in our view that the essential algorithm underlying the Duxbury calculation is arithmetically sound,

subject to (a) the appropriateness of the underlying assumptions and (b) a proper understanding of what the Duxbury calculation aims to achieve.

Are the assumptions appropriate?

Real returns and inflation

100. It is convenient to take the first three 'key assumptions' together. By way of recap they are:

100.1. a uniform income yield of 3% p.a. (1.5% in the first year);

100.2. a uniform rate of capital growth of 3.75% p.a.;

100.3. a uniform rate of inflation at 3% p.a.

101. Together those produce a 'real' or 'inflation adjusted' assumption of investment return of around 3.75% p.a. over the period of the calculation. The concessionary yield rate of 1.5% in the first year is intended to reflect the inevitable delay in compiling an overall balanced portfolio. This is a crude and somewhat simplistic approach which could be open to criticism as being either too 'generous' or too 'mean' but it has the virtue of simplicity and only a modest impact on overall outcomes.

102. We have obtained data and analysis from Dimensional Fund Advisors [18] for the period 1 January 1990 to 30 November 2023, examining all periods of 15, 20, 25 and 30 years during that 34-year period (i.e. covering returns affected by supposedly 'black swan' events of the recent past including the Global Financial Crisis of 2008, the Brexit Referendum in 2016, Covid-19 in 2020/21 and the 'mini-budget' of the Truss-Kwarteng administration). The analysis is summarised in this table, which shows 'real' rates of return based on an assumed investment portfolio of either 50:50 equities and bonds, or 60:40 equities and bonds:

	15 years	20 years	25 years	30 years
50% Portfolio	3.492%	2.94%	2.57%	3.49%
60% Portfolio	4.41%	3.56%	2.90%	3.81%

103. Those figures show that over the relatively recent past, some investors would have achieved more than the 3.75% assumed real return, while others would have achieved somewhat less. Timing is everything with investment, and a claimant who received a Duxbury based award in (say) 1999 – immediately prior to the bursting of the so-called dot.com bubble – would have achieved relatively disappointing returns compared to someone who received their award in say 2010 – immediately after the worst impacts of the Global Financial Crisis had been absorbed. This is a natural and well-understood phenomenon in the investment world. Equally obviously these figures are of average returns and

individual investors will have achieved better or worse outcomes depending on the investment choices that they made, and the timing of those choices.

104. In contrast, a comparison with average returns for the same periods from 1915 to 2022 (which includes two World Wars, the Three-Day-Week of 1973/74, the miners' strike of 1984/85 and numerous other market distorting events) show that the more recent returns referred to above have been modern-historically anomalous: [19]

	15 years	20 years	25 years	30 years
50% Portfolio	5.32%	5.27%	5.26%	5.26%
60% Portfolio	5.69%	5.66%	5.67%	5.69%

105. This in turn begs a question, which we cannot answer, which is whether the most recent investment experience represents a 'new norm' or a deviation from the longer-term realities of the markets which will in due course be corrected. [20]

106. We acknowledge and agree that most Duxbury recipients will have little or no prior investment experience, and their instincts will usually be for security rather than return maximisation, so their *actual* risk profile will be cautious to very cautious. However, security and caution come at a cost, and the issue is whether that cost should be borne by the payee or the payer in the Duxbury assumptions. To some extent this 'issue' is one of education and explanation by financial advisers, who need to be able to justify their investment advice (and the cost of it) in a way which makes it acceptable to the Duxbury fund recipient.

107. We have considered whether it is fair and reasonable to assume that the recipient of a Duxbury based award would or should invest that fund in a mixed portfolio of equities and bonds, and in what proportions, and concluded that the above figures represent a fair band, even if the reality is that such funds are perhaps more likely to be invested more cautiously, and therefore with potentially lower returns. The individual risk profile of the payee – i.e. seeking more rather than less security, in return for the likelihood of lesser rather than greater investment returns – should, we think, not be relevant to the computation of the fair sum to compensate for the forgoing of a periodical payments order. It is not unreasonable to assume that in many potential 'Duxbury' cases the ability of the payer to satisfy such an award has depended on their willingness to take entrepreneurial risks and have their own exposure to the vagaries of the markets. We do not consider it appropriate to regard a cautious (or very cautious) investment strategy in an individual case as a reason to adopt lower than reasonably achievable investment returns.

108. That does leave a question about the weighting appropriate as between the more recent figures and those achievable historically. Plainly the more recent figures deserve greater weight as a guide to what might happen in the immediate future, but not in our view to the exclusion of any weight being

attributed to the longer-term history. Thus, notwithstanding the shortfall that will have been experienced, on average, by Duxbury fund payees who received their awards more than 15 but less than 25 years ago, we consider that the overall weight of the data supports the continued reasonableness of assumed average real returns of at least the 3.75% p.a. currently assumed, and arguably somewhat higher returns.

109. While those figures broadly support the status quo in terms of overall real investment return assumed there are two important caveats:

109.1. the above figures do not take account of investment management costs, whereas the original assumptions made by Mr Lawrence in 1985 were for returns net of the (then lower) cost of managing the funds; and

109.2. because inflation also affects the other parts of the calculation, including taxation reliefs and allowances and, most importantly, spending, it is necessary also to consider inflation separately as well as part of the real rate of return.

Inflation

110. It would be unusual for a Duxbury fund recipient also to be responsible for funding a mortgage, [21] which means that the more appropriate measure of inflation for the purposes of these calculations is the Consumer Prices Index (CPI) rather than the mortgage inclusive Retail Prices Index (RPI).

111. The CPI in July 2024 stood at 171.3:

111.1. 15 years earlier in July 2009 it stood at 110.9 – an overall difference over 15 years of 54.46%, or 2.94% p.a. almost exactly the 3% figure assumed in Duxbury.

111.2. Over 20 years, 25 years and 30 years the CPI measure of inflation has been 2.84%, 2.52% and 2.42% respectively – all of which are lower than the figure assumed in the Duxbury calculation.

112. That inflation (as measured by the CPI) has consistently undershot the assumption made in Duxbury of 3% is a factor which has been favourable to payees, since the assumption has included that their spending requirement would increase annually at a rate greater than inflation. Conversely, but much less significantly, it has also assumed that tax bands and allowances would increase more than they have in fact done.

113. Broadly, therefore, it can be seen that subject to management charges (discussed below) average real returns of a balanced portfolio have approached (and in some cases exceeded) the assumptions, and – at least as measured by the CPI – inflation in relation to expenditure has lagged behind the assumed rate. Overall, although the assumptions may have been marginally more favourable to payees rather than payers, they continue in our view to represent a fair estimate, insofar as such can be made based on historic figures, for deployment in future calculations.

Taxation

114. The next assumption is that of a consistent regime of taxation – with bands/allowances increasing in line with inflation (save that allowances are assumed to be frozen until April 2026 as announced in 2021 by then Chancellor Rishi Sunak and not altered by any of the several successive Chancellors).

115. This assumption is both necessarily simplistic and knowingly wrong. Rates of taxation, and the overall tax 'take' vary considerably over time and in both directions. In the most recent past the trend has been unmistakeably upwards overall, although – subject to the imminently forthcoming budget – the headline rates for income tax (including on dividends) and CGT have been relatively stable in the recent past.

116. Changes to National Insurance, Corporation Tax and VAT have little, and usually no, impact on the Duxbury calculation, and most other indirect taxes are captured in the computation of the CPI measure of inflation.

117. However, the freezing of bands and allowances leading to so-called 'fiscal drag' has resulted in a higher overall tax burden on recipients of Duxbury based awards than assumed at the time they were computed.

118. Although the freezing of the bands and allowances for income tax will have had some impact on the real-life working out of the tax for Duxbury fund recipients, it is the reduction in the tax-free allowance for Capital Gains and the reduction in the tax-free allowance for Dividend income, [22] which will have had most impact in practice. Those changes are, of course, accounted for in the Duxbury model looking forward, but the assumptions made in earlier calculations have been falsified to the detriment of the cohort of payees.

119. There is, at the time of writing, considerable media speculation that the new Labour Government is likely to increase the headline rate of taxation on Capital Gains – perhaps to as much as the corresponding rates of income tax as previous Labour Governments have done. If implemented, such a change would be taken into account for future Duxbury calculations, but those whose awards were computed at a time of a more benign regime will have lost out, just as those who had awards calculated at higher rates prevailing under previous Governments benefited when rates of taxation were later reduced.

120. The uncertainty as to the impact of tax is to some extent, and in some cases no doubt completely, off-set by the absence in the Duxbury calculation of any assumptions that recipient investors will take steps to mitigate tax on their investment returns. If nothing else, even the most inadequate of financial advisers would recommend that the maximum subscription be made each year to ISAs, removing all yield and capital gain from the ambit of tax. The assumptions include that a significant proportion of the fund will be invested in equities, the income from which is taxed at preferential dividend rates, significantly lower than earned income or interest income, but the tax calculation in Duxbury has never descended to the level of precision by seeking

to allow for this beneficial rate of tax. Other strategies, for example in relation to Capital Gains on Government Bonds, could serve to shelter other returns. In short, subject to the caveats above about the constantly shifting burden of tax, Duxbury has historically taken a pessimistic view of tax, and in that regard has significantly favoured payees.

121. Taking that rough with the smooth, while at the same time seeking not to over-complicate what is already a multi-faceted computation, we consider that the present approach of adopting the current bands and allowances, and inflating them by the same inflation factor as is used for expenditure *save* where there has been a pre-announced freeze or other change (in which case the announcement is assumed to end up being implemented) is a fair and reasonable assumption to continue to make, albeit one acknowledged to favour payees.

A constant level of drawdown in real terms

122. It is the essence of the Duxbury calculation when presented in tabular form (i.e. as per the Table in *At A Glance*) that the assumed rate of required funding remains constant, in real terms, for the whole of the recipient's remaining life expectancy.

123. Leaving aside the question to which we turn below about the appropriateness of the whole-of-life expectancy assumption, it is more or less obvious that no one will ever, in practice, have a constant and unaltered spending requirement for the rest of their lives or, indeed, over any appreciable period. Life does not work like that. What may appear to be desirable or even necessary items of expenditure for a person in their 50s or 60s, may be quite undesirable and certainly unnecessary when they are in their 70s let alone their 80s. Of course, as items fall away they may well, indeed almost certainly will, be replaced by other items of expenditure the cost of which need bear no relation at all to the items of expenditure which they replace.

124. Certainly since 1995 and the decision of Thorpe J in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 there has been awareness, at least in 'big money' cases, that levels of expenditure are likely, in real terms, to reduce rather than increase in what he described as 'the years of dower' beyond the period of the 'flood' of an expensive lifestyle.

125. It is a societal norm – and not only in the UK – that older people, and certainly those beyond retirement age, will tend to have less available to spend than younger people at the height of their earning power (in the case of bread winners) and usually the height of their domestic obligations (in the case of home makers). Accordingly, retirement income and expenditure are normally expected to be lower than pre-retirement income and expenditure. To some extent this is facilitated by the reliefs and 'concessions' available to older people, and – of course – the receipt of State Benefits in the form of pensions on an entitlement rather than means-tested basis.

126. More sophisticated Duxbury calculators (such as *Capitalise* by Class Legal) allow for the tailoring of expenditure requirements, in both directions, but in a two-dimensional tabular form as in *At A Glance*, the assumption of a constant real rate of drawing is in our view favourable to recipients/payees in the majority of cases.

Churn

127. The calculation assumes a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure) equal to 3% p.a. This is a sophistication to the calculation to reflect the 'real world' fact that sometimes gains will be realised other than to fund expenditure, which will serve to increase by bringing it forward, the taxation of such gains.

128. We have not considered it necessary to examine whether this assumption, which has never been the subject of criticism or even discussion in any of the many articles written about Duxbury over the years, should be revisited.

Life expectancy

129. Duxbury, certainly as published hitherto in *At A Glance*, has always assumed that the recipient will survive for precisely the expected average of their contemporaries.

130. Life expectancy is the age by which 50% of the population of a particular age can be expected to have died.

131. On one level this is a necessary and knowing simplification. It would plainly be impracticable for even *bespoke* Duxbury calculations fairly to be undertaken on a case-by-case individualised assessment of life expectancy. Even taking account of family history, personal medical history and more or less hazardous lifestyle choices, the art of predicting how long an *individual* is likely to live, other than by reference to their statistical and actuarial life expectancy is a fool's errand – rightly eschewed even in the small number of cases where it could be confidently asserted that a life expectancy was greater or, more usually, lesser than the actuarial table would dictate.

132. Moreover, there is no such thing as a single 'life expectancy'. Rather there are various different projections from various bodies, most notably (in the UK) by the Government Actuaries Department based on data from the Office for National Statistics (ONS). At any one time there will be several different tables available of estimated life expectancies of different cohorts based on social class, membership of pension schemes and a variety of other factors. The variance between such datasets may be great or small for a person of a specific age.

133. Were it not for our main conclusion (as discussed below) relating to the inappropriateness of the assumption of whole-of-life computations, we might have sought outside assistance from the Government Actuary as to whether the

current selection of the ONS20 whole UK national projections, as used in the computations in *At A Glance*, is appropriate, although we have no reason to consider that it is not. A choice has to be made which is of general application to the population as a whole, and ONS20 seems to us to be as rational a choice as any other.

134. However, we are unanimous in our view that while whole-of-life is a permissible, and in some cases appropriate, basis for a Duxbury calculation, it should not, in the light of societal changes and in particular the near extinction of the whole-of-life periodical payments order, be as hitherto the default.

135. Rather, we are of the view that the process should become one of two stages – as it presently is in a continuing periodical payments case:

135.1. What is the appropriate level of financial support to be made for the benefit of the payee by the payer?; and

135.2. What is the appropriate duration for such support to be provided?

136. Considering those two stages separately will throw up a figure based on the number of years in the second stage, which may be quite different from the actuarial life expectancy. The figure may be affordable by the payer (in which case there can be a clean break on payment of the appropriate figure) or it may not be affordable in which case either a hybrid award (periodical payments for a period followed by a smaller lump sum) or a continuing periodical payments award would follow.

137. In considering the quantum and/or duration of the required support the court would be able to take into account whether the recipient was entitled to a State Pension (rather than the current default that such entitlement exists), and the impact of any pension sharing award or pre-existing pension held by the recipient. Pension sharing was not available in 1985 when Duxbury was decided.

138. There will, of course, continue to be cases in which whole-of-life provision is appropriate, but we cannot see why it should be the default assumption. That assumption was perhaps fairly made under the old, pre-*White*, regime of paternalistic protection by the court of otherwise financially disadvantaged claimants. But in the modern era, and regardless of proposed reform to the law of financial remedies limiting periodical payments to a relatively short timeframe, it appears to us to be an anachronistic legacy inconsistent with the development of the law more generally.

139. To put it another way, if in a case where capital has been shared, but where (per *Waggott* [2018] EWCA Civ 727) income is not to be shared but is to be allocated by way of needs-based provision as periodical payments subject to the enjoinder for the court to consider 'whether it would be appropriate to require those payment to be made … only for such term as would … be sufficient to enable the party in whose favour the order is made to adjust without undue

hardship …' then why should a payment in substitution for such a periodical payments order be calculated on a whole-of-life basis by default?

140. We therefore propose a new presentation of the now familiar Duxbury calculation table, based on a number of years for a fixed annual spend. The table would be age and gender neutral, and not include the hitherto built-in discount for an assumed full State Pension. The existence or not of such an entitlement would be factored into the duration of the provision (or perhaps the quantum) rather than hard-baked into the calculation. The differences in life expectancies between men and women could be, but does not have to be in every case, reflected in the selection of the duration element of the award. This feeds directly into the next assumption to be discussed.

The full State Pension

141. The Duxbury calculation has always assumed that the recipient is or will become entitled to a 'full' State Pension at their current pension age.

142. As the Women Against State Pension Inequality (WASPI) campaign has made widely known, that assumption – even in the case of those women who *had* built up the necessary entitlement to receive such a pension – has not necessarily held good as the pension age has progressively moved backwards from 60 to a presently fixed, but likely to be further extended, age of 68.

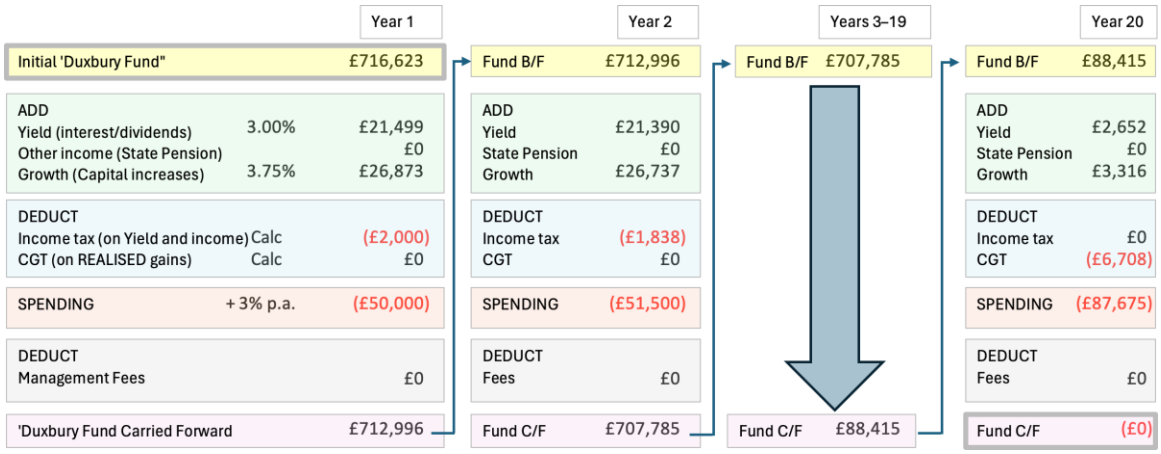
143. Moreover, while in 1985 almost all divorcing wives would have been entitled to a State Pension based on their husband's National Insurance contributions, such entitlement now accrues only based on their own contributions.

144. Although it is also true that a large proportion of the adult population, including married women and mothers, are now in employment outside the home and likely to be making the necessary National Insurance contributions for at least the majority of the necessary contribution period, there will still be a sizeable number of claimants in financial remedy proceedings who do not have any State Pension entitlement, or less than the full amount.

145. We consider that it is relatively easy when considering the duration of a proposed periodical payments or capitalised (Duxbury) award to take account of the existence or not of such entitlement, and particularly so when coupled with a pension sharing award or pre-existing pension entitlement, to arrive at a fair outcome. On the other hand, we consider that it was and is more difficult for a court or legal adviser to consider what increase should be made to a conventionally ascertained Duxbury award, based on a two-dimensional table of the kind appearing in *At A Glance*, to reflect any shortfall in the individual's State Pension entitlement. It is one thing to know that it should increase the award, but quite another to work out by how much.

146. Removing the State Pension element from the illustration at paragraph 93 above results in an increase (for a calculation undertaken over 20 years) in the fund required from £582,445 to £716,623, an increase of about £134,000 or

about 23%. This divergence is towards the top of the range previously identified in *At A Glance* for the adjustment necessary when a State Pension is not, in fact, going to be received:



Pension inflation

147. The Duxbury assumption has been that the State Pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock').

148. Given our conclusion as to the appropriate mechanism as discussed in the previous section, this assumption is rather less significant under our proposed model than under the existing model.

149. It is an assumption which has been extremely favourable to payees (except a small class of the WASPI age-group), to the cost of payers. State Pension inflation has outstripped inflation over the last 15, 20, 25 or 30 years – even allowing for the later date of commencement for some recipients. Particularly for those entitled to the 'new' State Pension (i.e. men born after 5 April 1951 and women born after 5 April 1953) pension inflation has been substantial.

150. The effect of the 'triple lock' is that in reality pension inflation will continue to outstrip general inflation.

Pension age

151. As already mentioned, the assumption made in Duxbury has traditionally been that the age from which the State Pension is payable will not alter in the meantime. Like all of the assumptions, this is a knowingly false assumption, made because some assumption has to be made.

152. Pre-announced changes are already built into the calculation.

153. Insofar as, contrary to our proposal, pension entitlement continues to be part of the algorithm, we consider that it is fair to assume that the existing and pre-announced changes to pension ages will apply to the individual under consideration. Naturally, the younger the individual the more likely it is that this

assumption, and any or all of the others, will be falsified by events unfolding over the ensuing decades.

154. To the extent that old Duxbury awards were based on an assumed State Pension age which has been falsified by the progressive increases in that age, that will have been to the detriment of payees and the benefit of payers. In practice, such changes were announced and taken into account by the Duxbury calculation many years (and in some cases decades) earlier, so whatever may have been the state of ignorance of the WASPI complainants, any Duxbury payees in that rank will probably not have been disadvantaged.

Conclusion on the assumptions

155. Subject only to the questions of (i) fund management charges (ii) the continued reliance on a default of whole-of-life support and (iii) the default inclusion of a full State Pension, we therefore conclude that the 'assumptions' continue to represent a reasonable basis for the undertaking of capitalisation calculations.

156. While there will be those cases – we anticipate very much a minority – in which the facts, including for example the security of the paying party's financial position (the super-rich) or the age of the claimant (already at or close to retirement age) might justify the court adopting a whole life approach to capitalisation, we are collectively somewhat mystified that this has been the tacit default in almost all reported 'Duxbury' cases over the last three decades.

Management charges

157. Our enquiries have revealed that charges, including both fees for advice and management and the costs associated with dealings, might typically be in the order of 1.5% p.a. on a medium sized portfolio, but somewhat less on a larger portfolio.

158. There appears to be very considerable variance in relation to fees including at least the following factors:

158.1. some fees are calculated on the basis of the funds under management or in respect of which advice is given, while others or other providers, charge fixed or pre-agreed fees;

158.2. some providers have published stepped rates, with a lower percentage charge for larger portfolios, while others publish only flat rates;

158.3. some providers are amenable to individual negotiation on fees, perhaps particularly for larger portfolios and will 'compete on price';

158.4. some investors (payees) will be willing to engage in negotiation and/or be prepared to change providers in search of a better deal, while others, through

inertia, or loyalty, or lack of knowledge, will remain with the same advisers and the same platforms regardless of price; and

1585. in periods of high returns, as have been enjoyed in the immediate past, investors are willing to tolerate levels of fees which might be less palatable during periods of lower returns.

159. Those charges are not in general allowable against tax on yield or capital gains.

160. Historically, as stated in 'Reflections on Duxbury' in the 1995 edition of *At A Glance* (see paragraph 17 above), and as recently accepted by Moor J in his judgment in *MN v AN* [2023] EWHC 613 (Fam), the 'assumptions' in Duxbury have been inclusive of management charges. We are concerned that the data does not necessarily support the *average* achievability of such returns *after* charges.

161. The impact of such charges (say 1.5%) on the real rates of return illustrated at paragraphs 102 and 104 above is obvious and potentially significant.

162. The average real rate of return of the 50:50 (equities to bonds) portfolio would be reduced to about 1.62%, and for the 60:40 portfolio to about 2.17% if relying on the historic data only since 1990.

163. Taking the longer view relying on data over the period since 1915 would reveal long-term real returns net of charges of 1.5% p.a. to be 3.77% (50:50 portfolio) or 4.18% (60:40 portfolio).

164. The former – and arguably the more relevant data being the most recent – shows a sharp divergence from the assumptions presently adopted in the Duxbury calculation, whereas the latter tends to show that the present assumptions may be conservative.

165. We have not found it easy to reach any firm conclusions on how, if at all, the Duxbury calculation should be adjusted to reflect the impact of management charges and fees.

166. A purist approach – seeking to attribute arithmetical justification for every variable and to further complicate the computation – holds a certain appeal, and we have considered whether an additional allowance should be introduced into the algorithm to deduct such charges after computation of the annual tax charge.

167. Some of us have concluded that the overall algorithm is already quite materially slanted in favour of the majority of claimants/recipients for the reasons which we have explained above relating to the exclusion of the factors would which be likely to have led to a reduction or termination of the periodical payments order had such an order been made rather than capitalised. This is true whether the current default of whole-of-life is retained or replaced, as we recommend, with the two-stage approach in which the amount and duration are

assessed separately as part of the capitalisation calculation, although perhaps less so if the reforms we propose were to be adopted.

168. We acknowledge that this would result – as Duxbury always has – in winners and losers amongst the recipients. Those who are long lived and remain single will, as now, be at risk of being underpaid by reference to the fund necessary to enable them to live at the given rate for the rest of their lives. They are the losers. Those who are either short-lived (dying before their fund is exhausted despite being drawn as anticipated) or who remarry or otherwise adjust their living arrangements so as to end their entitlement to dependence on the payer are the 'winners'. To the winners must also be added the payees in those cases in which the fortunes (including health) of the payer take a downward turn so that the periodical payments order, had one been made and not capitalised, would have been reduced or terminated as a result of the change in their circumstances.

169. Some of us consider that the potential investment return shortfall, if indeed there is such a shortfall, whether as a result of macro-economic factors, investment decisions or fund management charges, is a fair risk for the cohort of recipients to be required to assume to balance the advantage that the same cohort has by reason of the non-variability of the capitalised award.

170. However, others of us consider that the impact of management charges is a separate 'assumption' which should be baked into the computation. If the computation is to be based on investment returns which can realistically only be achieved with the assistance of professional fund managers, allowance must be made for the deductions from the fund to meet their costs.

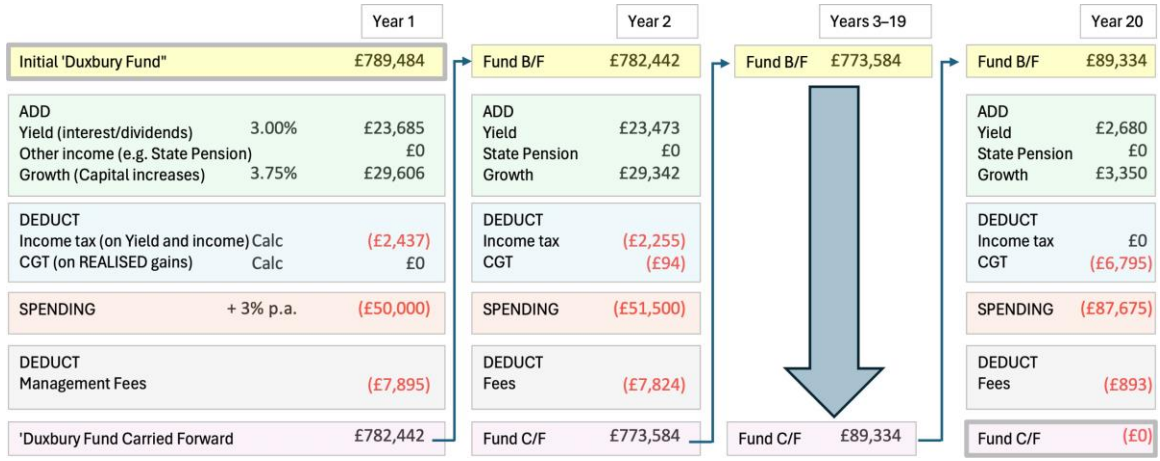
171. Establishing what those costs are likely to be is problematic for the reasons just given. Different platforms and different advisers have different charging rates. We have obtained anecdotal and informal soundings from various potential managers and advisers, and the range is wide and the pattern inconsistent.

172. Aware that this is something of a compromise our conclusion has coalesced around making *some* allowance in the basic computation, by allowing for a deduction while leaving the other underlying assumptions unchanged. We have opted for a graduated charge, with funds under £1m suffering 1% p.a., and funds over £1m suffering 1% on £1m and 0.5% on the value of the funds in excess of £1m. Thus, a fund of £3m would suffer annual charges of £1m x 1% + £2m x 0.5% = £20,000 or 0.67% overall. We propose that as with tax allowances, the £1m band is 'inflated' each year in accordance with the general rate of inflation adopted. By the end of any fund the rate will be 1% as the amount in the fund dwindles below the inflated first ceiling of £1m in real terms. We consider that this compromise effectively allocates *some* of the likely actual charges to the payee and *some* to the payer. In any individual case that is likely to strike a fair balance. Requiring the payee to shoulder some of the charges is an additional counterbalance to a powerful but unquantifiable imponderable operating in their favour namely that they do not have to repay any part of the Duxbury fund if they

remarry or re-partner before the expiration of the assumed term or if the payer dies in that period.

173. There may be individual cases in which a party might be able successfully to argue for a bespoke calculation based on different assumptions, including in relation to management charges, but for the purposes of the vast majority of cases in which a two-dimensional Duxbury table is utilised as the guideline for the appropriate figure, we commend the compromise in the previous paragraph.

174. Reworking the calculation illustrated at paragraph 146 above by allowing an additional deduction for management charges increases the initial fund required to £789,484 (an increase of c. £207,000 (or +35.5%) on the original requirement calculated in accordance with the current assumptions illustrated at paragraph 93 above):



175. However, we would not envisage that the 'new' Duxbury Calculation for a payee would be undertaken without regard to whether the payee did in fact have an entitlement to a State Pension.

176. The example we have been using is based on a female payee aged 66 or 67 at the commencement of the period. For reasons we have explained above, we anticipate that a court approaching such a case would assess the spending need first, and in doing so would be able to consider to what extent that might be met by a pension if the payee had any such pension (whether State Pension or as the result of a pension sharing order or from an occupational or otherwise self-funded pension) before fixing the amount of spending to be met from the capitalised part of the award. The court would then consider over what period that financial support should be provided – which might be based on life expectancy but, more usually we suggest, some lesser period.

177. In our example, if the court was aware that the payee would soon become entitled to a full State Pension of (say) £11,500 p.a. it might assess the spending requirement at perhaps £50,000 less 80% of £11,500 (to allow for the tax on the pension) = £40,800. It might also assess that the appropriate duration of the award was – in view of the payee's age and despite our overall recommendation to move away from whole of life awards, to be taken as their life expectancy of 20 years. It would thereby arrive at a figure of about £638,000 – or around £56,000

(10%) more than under the current assumptions. This is the effect of allowing separately for the management charges.

178. But for a much younger payee, say in their late 40s or early 50s, the court might entirely disregard any entitlement to a State Pension, allow for a full 'budget', and management charges but at the second stage limit the term of the financial provision to, perhaps the number of years of the payer's remaining working life prior to their State Pension age. That would, for younger payees, potentially significantly reduce the overall term over which the sum was calculated, eliminating or mitigating the so-called Duxbury paradox (the younger the claimant the higher the award and vice versa). We discuss this further in the section 'The whole-of-life assumption' below.

Bespoke calculations

179. Consistency and predictability militate strongly against encouraging or even permitting bespoke calculations in relation to 'assumptions' in individual cases in the absence of some special factor taking the case out of the usual run. Obviously bespoke calculations dealing with earnings, changes in spending requirement, capital injections and things of that sort, which do not depend on adjusting the 'assumptions' are often required and helpful.

180. It would be time and costs wasteful to have, or encourage, bespoke calculations in standard cases, and the easy availability of published tables from which guideline figures can be ascertained should, in our view, be sufficient in nearly all cases.

181. While the previously published tables – including, and most notably, those in *At A Glance* – have stood the test of time, as we have mentioned above we consider that the time has come for a revised presentation to be made available for use in our proposed two-stage computation abandoning the whole-of-life default.

182. Even if bespoke calculations were to be permitted in an individual case, we consider that a judge accepting evidence based on the subjective characteristics of the proposed payee (for example the longevity of their parents) would be entering dangerous and uncharted waters. For one thing the admission of such evidence would be difficult to distinguish from the admission of evidence tending to show that the payee had a shorter than statistically average life expectancy, by reason of a pre-existing condition or habit (such as alcoholism or smoking) or family history. For another, such evidence would have to be scientifically robust [23] and would amount to expert evidence requiring the court's permission to adduce and meeting the necessity threshold test. It is also difficult to see how a judge would be able to avoid case specific evidence about prospects for remarriage or cohabitation. We perceive this to be a slippery slope towards unpredictability and inconsistency which should be discouraged.

The whole-of-life assumption

183. At the risk of unwelcome repetition, we return to our main conclusion which is that while the algorithm as a whole, and the underlying assumptions taken as a whole, remain viable and reasonable, we are troubled by the default of whole-of-life provision.

184. Duxbury has for many years come with a warning against its deployment in cases where, by reason of the advanced age of the payee, the life expectancy is less than about 15 years. This is for the very obvious reason that once life expectancy is that short it becomes possible to outlive it by a very substantial margin in proportionate terms. A woman of 78 years with a life expectancy of 11.5 years, might well live to 101 – more than double her expectancy. A woman of 58 with a life expectancy of 29 years has almost no chance of living to 116.

185. We consider, in the surely very rare case where an assessment of the needs of a claimant over (about) 75 is undertaken, the consequences of the unfolding facts differing from the initial assumptions could be so severe, that a Duxbury capitalisation would not be appropriate. In such a case the purchase of an annuity, or the fixing of the award by reference to the cost of doing so, may well be apt. An alternative may be to adopt a Duxbury calculation utilising a longer-than-life-expectancy basis, perhaps with the 'balance' held on trust to revert to the payer on the payee's death provided the payer was the survivor, or to their estate if they were not. Such outlier cases should not lead to the tail wagging the dog of the great majority of cases.

186. The problem of the whole-of-life default is particularly acute in relation to younger payees – i.e. those with an actuarial life expectancy of more than about 30 years – i.e. men under about 54 and women under about 58 years of age, and spectacularly so for those with a life expectancy greater than 40 years (men under 45 and women under 47), since the practical likelihood a periodical payments order remaining in payment for such periods is self-evidently slim to non-existent.

187. It is not for us to devise new defaults, and any proposal for which would need to be fully argued and the subject of consultation if not judicial determination. It may be that future legislative reform in relation to periodical payments will render this discussion moot, but for the moment we recommend that parties and courts might consider arguably more generous *quantum*, perhaps (in an appropriate case where pension assets are insufficient to meet relationship-generated retirement need and resources are sufficient to render a stockpiling element fair) to include an element of 'stock piling'[24] coupled with less than whole-of-life *durations*, taking into account factors such as the anticipated working life of the payer, the presence or absence and duration of the remaining domestic contributions of the payee and the length of the relationship relative to ages of the parties, as factors which might lengthen or curtail the duration. This would enable the known or anticipated pension position of the payee to be

taken into account in assessing both quantum and duration of the dependency to be capitalised.

188. To this end we have created and placed in Appendix 5 a 'new' Duxbury table which, with interpolation, enables the easy computation of a capitalisation award for a wide variety of plausible amounts and durations, but would force the separate consideration of the latter without the default of whole-of-life.

Education and 'health' warnings

189. As we have adverted to above, we perceive that a good deal of the disquiet in relation to past Duxbury awards has arisen from a misunderstanding of what the computation aims to do, and the necessary balance to be struck between payees and payers.

190. In this report we have first addressed the inconsistency that while a joint lives maintenance order is a now an exceedingly rare bird, the whole-of-life Duxbury award has been the court's almost invariable approach. We have sought to resolve that inconsistency by devising a revised Duxbury table which gives capitalisation figures for various terms (which, of course, could correspond, as before, to the subject's life expectancy). The figures in the revised table have been calculated using, for the first time, management charges as an additional discrete key assumption.

191. The following points should be included in advice to clients:

191.1. A Duxbury calculation is not designed to identify (and will not achieve) a sum necessary to guarantee a particular level of expenditure and precision of calculation is never achievable. It must be clearly distinguished from a pension which will pay out indefinitely.

191.2. The calculation is based on a range of assumptions as to life expectancy (if that is the term being used); inflation, management charges; rates of income yield and inflation; and tax rates. It may also allow for receipt by the subject of a full State Pension. None of these may be fully accurate for that individual. This should be clearly pointed out to clients.

191.3. Financial planners/advisers often make the point that a cautious investor payee will not have the appetite for risk that will achieve the illustrated income. In contrast, the payer, perhaps a more adventurous investor, may argue that a higher return could be achieved. This is the key point with Duxbury. It is a tried and tested, judicially accepted and endorsed, *illustration* giving a capital figure for the sum required to meet the recipient's income needs over a specified term. But, like Heather Mills, [25] the recipient might remarry within that term. Had the payee been in receipt of periodical payments they would have terminated automatically. So, in that scenario the payee has 'beaten' Duxbury. Similarly, the payer could lose their job and successfully apply for a downwards variation or discharge of a joint-lives maintenance order. In that case the payee of a Duxbury

fund has beaten it again. Conversely, the payee may invest more cautiously, or use more expensive advisors, or live for longer than the actuarial age. In those scenarios the Duxbury sum will not be enough, and it will be exhausted before the expiration of the utilised term, or more likely the payee will have had to rein in their expenditure to prevent that from happening. The mathematical initial number will not turn out to be the right number in the events that unfold – that is the only guarantee. As Ward J stated in *B v B* [1990] 1 FLR 20 'The only certainty is that it will not happen as we have predicted'. And Baroness Hale in *Simon v Helmot* [2012] UKPC 5 at [72]: 'However, *Duxbury* calculations do suffer from the uncertainties of prediction. Nothing will in fact turn out exactly as it is predicted to turn out, whether in family law or in personal injuries law.'

1914. Financial advice could be sought before making proposals or reaching an agreement, so that the payee might have a financial adviser's perspective (but which is still only an estimate) on what income the payee might expect to receive from a given capital sum using different assumptions. But the payee should be made aware that it is unlikely that arguments proposing the use of different assumptions (let alone a different method of calculation) will be accepted. Clients should be told that while the calculation is a 'tool not a rule', experience shows that it is tends to be closer to the latter than the former.

The Duxbury Working Party

Michael Allum
Simon Bruce
Sarah Hoskinson
Lewis Marks KC (Chair),
Sir Nicholas Mostyn
Joseph Rainer
Mary Waring

Appendix 1: Short biographies of the members of the reconstituted Duxbury Working Party

Michael Allum

Michael is a solicitor at The International Family Law Group LLP. He specialises in financial issues which arise on relationship breakdown, with a particular focus on cross border and international cases. He is also a member of the *Financial Remedies Journal* editorial board.

Simon Bruce

Simon Bruce is a solicitor and Partner at Dawson Cornwell LLP. He is also a pro bono lawyer at law clinics in London. Simon has practised for over 41 years.

He's on this Duxbury Committee as he had the cheek to write a critique on Duxbury more than a decade ago. Simon writes the 'Thought Leader' in *Family Law*. He comes from Lancashire.

Sarah Hoskinson

With over 20 years' experience in complex financial remedy cases, Sarah is a Partner and Head of Burges Salmon's Family & Divorce practice. She sits on a number of financial remedy and other technical groups, including the Family Justice Council Financial Remedy Working Party, FJC Working Party on Needs, the Pension Advisory Group (PAG and PAG2) and the IAFL Pensions Committee, which she chairs.

However, it is through her membership of Resolution's Financial Remedies, Tax and Pensions Committee that she became involved in the Duxbury Working Party in 2023. Her approach to all of the work she has done in these groups, the Duxbury Working Party included, is to focus on relevant and practical education for family lawyers on the technical issues, and how they apply in practice.

Lewis Marks KC (Chair)

Lewis has been a barrister for over 40 years, a QC (now KC) since 2002 and has specialised in financial remedy cases for most of that time. He has appeared in many of the leading cases (including as junior counsel in *White* in the House of Lords, as leading counsel in the Court of Appeal in *Miller* and dozens of influential cases at first instance in the High Court and on appeal to the Court of Appeal).

He has been an editor of *At A Glance* since 1999, and is also a founder editor of the *Financial Remedies Practice*.

He was an original member of the Duxbury Working Party in 1998 and has authored a number of papers on the subject of Duxbury calculations. He has acted a Chair and convenor of the reconstituted Duxbury Working party. He has no judicial aspirations.

Sir Nicholas Mostyn

Nicholas was a barrister for 30 years specialising in matrimonial finance cases, appearing as a QC in the foundational decisions of the House of Lords in *White v White* (2000) and *Miller v Miller* (2006) and of the Supreme Court in *Granatino v Radmacher* (2010).

He became a High Court judge in 2010 and sat in the Family Division, where he gave many judgments of importance in the financial remedy field.

He was a founder editor of *At A Glance* in 1992 (now in its 33rd edition) and of *Financial Remedies Practice* in 2011 (now in its 13th edition) and continues as editor-in-chief of both publications.

He was also a judge of the Court of Protection and of the Administrative Court of the King's Bench Division of the High Court where he heard many judicial reviews of government decisions. Renowned for his independent, outspoken style, he frequently challenged the received wisdom of the law in favour of justice.

He retired from the Bench in July 2023, three years after being diagnosed with Parkinson's Disease, since when he has become an acclaimed podcaster. In July 2024 he was awarded a Doctorate of Laws honoris causa by his alma mater Bristol University.

Joe Rainer

Joe is a barrister who specialises in financial remedy cases. He is a (relatively new) editor of *At A Glance*, a co-author of the fourth edition of *Pensions On Divorce: A Practitioner's Handbook*, and a member of the *Financial Remedies Journal* editorial board and the Pension Advisory Group.

Mary Waring

Mary is a chartered financial planner, chartered accountant and Resolution Accredited Specialist.

She is the founder of Wealth for Women, an award-winning company, specialising in financial advice to women going through divorce, especially those who haven't been responsible for the finances during their marriage. She supports clients through this particularly challenging time who need trustworthy expertise and guidance. She works with her clients, so they understand the options available to them based on their financial situation and know how to improve their future.

Mary was interested in joining the Duxbury Working Party since her clients are typically non-earning spouses and have been for maybe 25+ years. They are therefore unlikely to become major income earners post-divorce.

Appendix 2: Key assumptions adopted in *At A Glance* 1992-2025

Edition	Income yield %	Capital growth %	Inflation %	Real rate of return %	
1992	6.00	6.00	7.00	5.00	
1993	5.00	4.00	4.00	5.00	
1994	4.50	2.00	2.00	4.50	
1995	4.25	2.00	2.00	4.25	

1996	4.25	3.00	3.00	4.25	
1997	4.25	3.00	3.00	4.25	
1998–1999	4.25	3.00	3.00	4.25	
1999–2000	3.25	4.00	3.00	4.25	
2000–2001	3.25	4.00	3.00	4.25	
2001–2002	3.25	4.00	3.00	4.25	
2002–2003	3.25	4.00	3.00	4.25	Note 1
2002–2003	3.00	3.75	3/00	3.75	Note 1
2003–2004	3.00	3.75	3.00	3.75	
2004–2005	3.00	3.75	3.00	3.75	
2006–2007	3.00	3.75	3.00	3.75	
2007–2008	3.00	3.75	3.00	3.75	
2008–2009	3.00	3.75	3.00	3.75	
2009–2010	3.00	3.75	3.00	3.75	Note 2
2010–2011	3/00	3.75	3.00	3.75	Note 3
2011–2012	3.00	3.75	3.00	3.75	Note 3
2012–2013	3.00	3.75	3.00	3.75	Note 3
2013–2014	3.00	3.75	3.00	3.75	Note 3
2014–2015	3.00	3.75	3.00	3.75	Note 3
2015–2016	3.00	3.75	3.00	3.75	Note 3
2016–2017	3.00	3.75	3.00	3.75	Note 3
2017–2018	3.00	3.75	3.00	3.75	Note 3
2019–2020	3.00	3.75	3.00	3.75	Note 3
2020–2021	3.00	3.75	3.00	3.75	Note 3
2021–2022	3.00	3.75	3.00	3.75	Note 3
2022–2023	3.00	3.75	3.00	3.75	Note 3
2024–2025	3.00	3.75	3.00	3.75	Note 3

Note 1 – two tables were published: one with a 4.25% RRR, the other with a 3.75% RRR.

Note 2 – income yield for year 1 set at 0% and for year 2 at 1.5%.

Note 3 – income yield in year 1 set at 1.5%.

Appendix 3: A list of the articles which we have considered

- Singer and others, 'Duxbury – The Future' [1998] Fam Law 741. (Paper of the Duxbury Working Party: Singer J, Nicholas Mostyn QC, Lewis Marks, Peter Lobbenberg, Timothy Lawrence, Adrian Gallop, Dominic Wreford and Nicola van Lennep)
- Woelke, 'Is Duxbury the Answer?' [1999] Fam Law 766
- Mostyn, 'Is Duxbury the Answer? Yes is the Answer' [2000] Fam Law 52
- Merron, Baxter and Bates, 'Is Duxbury Misleading? Yes It Is' [2001] Fam Law 747
- Marks, 'Duxbury – The Future? Episode II' [2002] Fam Law 408
- Gold, 'Civil way' 159 NLJ 1030, 17 July 2009
- Phillpotts and Bruce, 'An Alternative View of Duxbury' [2010] Fam Law 161
- Marks, 'An alternative view of Duxbury: A Reply' [2010] Fam Law 614
- Hitchings, 'Reconsidering the Duxbury default' [2021] 33 CFLQ 275
- Allum, Jenkins and Gilbert, 'Looking back at Duxbury 30 Years On' [2023] FRJ 11
- The *commentary on Duxbury* in each edition of *At A Glance* as listed in Appendix 2

Appendix 4

The indices used to generate the figures in paragraphs 102 and 104 were as follows.

Dimensional used the Bloomberg Aggregate Bond Index for the bond element in each example. The bond element was reduced by 2% held as cash as most platforms require a cash balance to cover upcoming fees. The MSCI All Country World Index was used for the equity element.

For their analysis, Timeline used the Morningstar Global All Cap Target Market Exposure Index for the equity element and the Global Aggregate Bonds Unhedged – Morningstar Global Core Bond index for the bond element.

Appendix 5: Capitalisation in whole thousands of pounds to three significant figures

Quantum £ p.a.

Duration (years)	£ 10,000	£ 15,000	£ 20,000	£ 25,000	£ 30,000	£ 40,000	£ 50,000	£ 60,000	£ 75,000	£ 100,000	£ 125,000	£ 150,000	£ 175,000	£ 200,000	£ 250,000	£ 300,000	Duration (years)
3	28	42	56	70	84	112	140	169	211	281	352	422	493	563	704	845	3
4	37	55	74	92	111	148	185	222	278	371	464	557	650	742	929	1,120	4
5	46	68	91	114	137	183	229	275	343	458	573	688	803	918	1,150	1,380	5
6	54	81	108	135	162	217	271	326	407	544	680	816	954	1,090	1,370	1,640	6
7	62	93	125	156	187	250	313	376	470	627	784	943	1,100	1,260	1,580	1,900	7
8	70	105	141	176	211	282	353	424	531	708	887	1,070	1,250	1,430	1,790	2,160	8
9	78	117	156	196	235	314	393	472	590	788	988	1,190	1,390	1,590	2,000	2,410	9
10	85	128	172	215	258	345	432	518	648	867	1,090	1,310	1,530	1,750	2,200	2,650	10
11	93	140	187	234	281	375	469	563	705	944	1,180	1,420	1,670	1,910	2,400	2,900	11
12	100	151	201	252	303	404	506	608	761	1,020	1,280	1,540	1,800	2,070	2,600	3,130	12
13	107	161	215	270	324	433	542	651	816	1,090	1,370	1,650	1,940	2,220	2,800	3,370	13
14	114	172	229	287	345	461	577	693	870	1,170	1,460	1,760	2,070	2,370	2,990	3,600	14
15	121	182	243	304	365	488	611	735	923	1,240	1,550	1,870	2,200	2,520	3,180	3,830	15
16	127	191	256	321	385	515	644	776	975	1,300	1,640	1,980	2,330	2,670	3,360	4,060	16
17	133	201	269	337	405	541	677	816	1,030	1,370	1,730	2,090	2,450	2,810	3,540	4,290	17
18	140	210	282	353	424	566	709	855	1,080	1,440	1,810	2,190	2,570	2,960	3,730	4,510	18
19	146	220	294	368	442	591	741	894	1,120	1,510	1,900	2,300	2,700	3,100	3,910	4,730	19
20	152	229	306	383	460	615	772	932	1,170	1,570	1,980	2,400	2,810	3,230	4,090	4,950	20
21	157	237	317	398	478	638	803	969	1,220	1,630	2,060	2,500	2,930	3,370	4,260	5,160	21
22	163	246	329	412	495	662	833	1,010	1,260	1,690	2,140	2,590	3,050	3,500	4,440	5,370	22
23	168	254	340	426	512	684	862	1,040	1,300	1,760	2,220	2,690	3,160	3,640	4,610	5,580	23
24	174	262	351	439	528	707	891	1,070	1,340	1,820	2,300	2,780	3,270	3,770	4,780	5,780	24
25	179	270	361	452	544	729	919	1,110	1,390	1,880	2,370	2,880	3,380	3,900	4,940	5,980	25
26	184	278	371	465	559	750	947	1,140	1,430	1,930	2,450	2,970	3,490	4,030	5,100	6,180	26
27	189	285	381	478	574	771	974	1,170	1,470	1,990	2,520	3,060	3,600	4,150	5,260	6,370	27
28	194	292	391	490	589	792	1,000	1,200	1,510	2,050	2,590	3,140	3,710	4,280	5,420	6,560	28
29	198	299	401	502	603	812	1,030	1,230	1,550	2,100	2,660	3,230	3,810	4,400	5,580	6,750	29
30	203	306	410	514	617	832	1,050	1,260	1,590	2,150	2,730	3,310	3,920	4,520	5,730	6,930	30

% discount factors

Quantum £k p.a.

Duration (years)	£ 10	£ 15	£ 20	£ 25	£ 30	£ 40	£ 50	£ 60	£ 75	£ 100	£ 125	£ 150	£ 175	£ 200	£ 250	£ 300	Duration (years)
3	93.3	93.6	93.5	93.5	93.4	93.3	93.3	93.9	93.8	93.7	93.9	93.8	93.9	93.8	93.9	93.9	3
4	92.3	92.2	92.3	92.3	92.5	92.5	92.5	92.5	92.7	92.8	92.8	92.8	92.9	92.8	92.9	93.3	4
5	91.0	91.1	91.1	91.2	91.3	91.5	91.6	91.7	91.5	91.6	91.7	91.7	91.8	91.8	92.0	92.0	5
6	89.8	89.9	90.0	90.0	90.0	90.4	90.3	90.6	90.4	90.7	90.7	90.7	90.9	90.8	91.3	91.1	6
7	88.7	88.8	89.3	89.1	89.0	89.3	89.4	89.5	89.5	89.6	89.6	89.8	89.8	90.0	90.3	90.5	7
8	87.6	87.5	88.1	88.0	87.9	88.1	88.3	88.3	88.5	88.5	88.7	89.2	89.3	89.4	89.5	90.0	8
9	86.6	86.7	86.7	87.1	87.0	87.2	87.3	87.4	87.4	87.6	87.8	88.1	88.3	88.3	88.9	89.3	9
10	85.4	85.3	86.0	86.0	86.0	86.3	86.4	86.3	86.4	86.7	87.2	87.3	87.4	87.5	88.0	88.3	10
11	84.4	84.8	85.0	85.1	85.2	85.2	85.3	85.3	85.5	85.8	85.8	86.1	86.8	86.8	87.3	87.9	11
12	83.3	83.9	83.8	84.0	84.2	84.2	84.3	84.4	84.6	85.0	85.3	85.6	85.7	86.3	86.7	86.9	12
13	82.3	82.6	82.7	83.1	83.1	83.3	83.4	83.5	83.7	83.8	84.3	84.6	85.3	85.4	86.2	86.4	13
14	81.4	81.9	81.8	82.0	82.1	82.3	82.4	82.5	82.9	83.6	83.4	83.8	84.5	84.6	85.4	85.7	14
15	80.7	80.9	81.0	81.1	81.1	81.3	81.5	81.7	82.0	82.7	82.7	83.1	83.8	84.0	84.8	85.1	15
16	79.4	79.6	80.0	80.3	80.2	80.5	80.5	80.8	81.3	81.3	82.0	82.5	83.2	83.4	84.0	84.6	16
17	78.2	78.8	79.1	79.3	79.4	79.6	79.6	80.0	80.8	80.6	81.4	82.0	82.4	82.6	83.3	84.1	17
18	77.8	77.8	78.3	78.4	78.5	78.6	78.8	79.2	80.0	80.0	80.4	81.1	81.6	82.2	82.9	83.5	18
19	76.8	77.2	77.4	77.5	77.5	77.8	78.0	78.4	78.6	79.5	80.0	80.7	81.2	81.6	82.3	83.0	19
20	76.0	76.3	76.5	76.6	76.7	76.9	77.2	77.7	78.0	78.5	79.2	80.0	80.3	80.8	81.8	82.5	20
21	74.8	75.2	75.5	75.8	75.9	76.0	76.5	76.9	77.5	77.6	78.5	79.4	79.7	80.2	81.1	81.9	21
22	74.1	74.5	74.8	74.9	75.0	75.2	75.7	76.5	76.4	76.8	77.8	78.5	79.2	79.5	80.7	81.4	22
23	73.0	73.6	73.9	74.1	74.2	74.3	75.0	75.4	75.4	76.5	77.2	78.0	78.5	79.1	80.2	80.9	23
24	72.5	72.8	73.1	73.2	73.3	73.6	74.3	74.3	74.4	75.8	76.7	77.2	77.9	78.5	79.7	80.3	24
25	71.6	72.0	72.2	72.3	72.5	72.9	73.5	74.0	74.1	75.2	75.8	76.8	77.3	78.0	79.0	79.7	25
26	70.8	71.3	71.3	71.5	71.7	72.1	72.8	73.1	73.3	74.2	75.4	76.2	76.7	77.5	78.5	79.2	26
27	70.0	70.4	70.6	70.8	70.9	71.4	72.1	72.2	72.6	73.7	74.7	75.6	76.2	76.9	77.9	78.6	27
28	69.3	69.5	69.8	70.0	70.1	70.7	71.4	71.4	71.9	73.2	74.0	74.8	75.7	76.4	77.4	78.1	28
29	68.3	68.7	69.1	69.2	69.3	70.0	71.0	70.7	71.3	72.4	73.4	74.3	75.1	75.9	77.0	77.6	29
30	67.7	68.0	68.3	68.5	68.6	69.3	70.0	70.0	70.7	71.7	72.8	73.6	74.7	75.3	76.4	77.0	30

- This version allows for easy interpolation of any number of years or quantum. The figures shown are the overall discount on simply multiplying the quantum by the duration in years.

- For example, £40k x 15 years (bare multiplication gives £600,000).
- The discount factor (shown boxed) is 81.3%.
- 81.3% x £600,000 = £487,800.
- Compare with £488,000 on the detailed table.
- Thus one could interpolate for £45,000 for 15 years by taking an average of 81.3% and 81.5% = 81.4% x £45,000 x 15 = £549,450, say £549,000.

Blog

Duxbury Capitalisation

Delaying a Divorce Because of Financial Prejudice: The New No-fault Law and Practice

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Executive summary

There can be real loss and prejudice in some divorce cases if the final divorce order, previously the decree absolute, is granted before the final financial settlement and its implementation in circumstances when the paying party then dies. Automatic entitlement to pensions, the primary circumstance, but also insurance policies, beneficial interest in trusts and similar are then not available as the applicant is now divorced, financial remedy claims are no longer available after death and there might have to be a difficult and separate civil claim. The usual answer from the law, and perhaps just as crucially by the practice of lawyers, is to delay the final divorce order until the financial settlement has been implemented. But the new no-fault divorce has ended some opportunities to

defend a divorce pending the financial settlement or to go deliberately slowly. The new provisions in the legislation arguably do not go far enough to give adequate protections, if based on previous case-law. In any event, what is the procedure being adopted at the digital divorce centres? This article looks at the background to the relevant legislation, and how it might be applied and is operating. [1]

Introduction and the risk and prejudice

The starting point is the circumstances in which this sort of case arises. There are automatic entitlements for a spouse during marriage in respect of the other's pensions. This is lost on the final divorce order being made; the marriage coming to an end. A pension sharing order may be made in respect of marital pensions so that the applicant spouse receives her share, or what she needs. Once this pension sharing order is in place, [2] the final divorce order can be safely made and the applicant spouse has her own pension and doesn't have any risk or prejudice by the pension holder dying. But if the pension holder dies between the final divorce order and the final financial settlement including pension sharing order, the applicant spouse will have no further remedy through the family courts. She will lose out significantly on what would otherwise be a pension sharing arrangement.

A similar situation may apply in relation to entitlements under insurance policies. An automatic entitlement as spouse ends on the divorce order and could not be recoverable if the policyholder dies before the Family Court makes an order. Less frequently but certainly relevant may be entitlements as a beneficial owner under trusts and other similar holdings.

So in this context, and over several decades, where there would be this financial prejudice the family law profession has by and large operated a system of putting over the final divorce order until the final financial settlement has been made. Very often once the possibility of any financial prejudice becomes clear, the request would come from the lawyer of one spouse to the lawyer of the other spouse to agree, in terms, that no one would apply for the final divorce order until the financial settlement was completed. Very often that agreement would be forthcoming. Where there is any prospect of a financial prejudice, it's thoroughly reasonable. Advice was given that making this commitment would save the costs of any application and avoid animosity and contentiousness. This agreement was often recorded on the court file either as an agreement or a formal undertaking not to apply. Moreover and as set out below, the profession often didn't trouble itself too much with the technicalities (restrictions) of and in the law, not least because the law didn't help in all circumstances. Lawyers got on with it for the best progress of cases and reasonable outcomes.

But family law also engages in highly adversarial situations and sometimes one party may not play ball, may refuse and insist on going ahead with the final divorce order. In those circumstances, an application had to be made to the

court to delay the final divorce. These applications were rare but certainly occurred. And it was at this point that scrutiny of the technical law found the position was sometimes wanting.

The previous fault-based divorce system had ways to overcome the unreasonable difficulties presented by one party wanting to pursue the granting of the divorce before the financial order where there could be financial prejudice to the other party. If it was the applicant who was at potential risk and if it was known that the other party would not be agreeable to holding off on the final divorce, the simple answer once the acknowledgement of service arrived was not to progress to the conditional order. Either the respondent had to start their own divorce or try to find other ways of encouraging the divorce to go through. They might not have had their own grounds to petition for divorce themselves or it was in any basis a nuisance to have to start a new petition if either the basis of 2 years' or 5 years' separation. These were additional factors encouraging sensible resolution. By and large it often worked.

However once no-fault divorce arrived, the opportunity to prevent the final order being granted was more limited. What opportunity would there be in the new legislation to hold off the final divorce order? Was it fit for the new purpose?

Original position in the 1973 legislation and before no-fault divorce

The provisions are in ss 9 and 10 Matrimonial Causes Act 1973 (MCA). Although fairly cumbersomely worded, for these purposes they are similar in intent and outcome, i.e. a request to delay the divorce. They are however completely different in the party to whom they apply. Section 9 is for the divorce applicant when the respondent to the divorce wants the divorce to be pronounced but the applicant, the financially vulnerable party, seeks to delay it pending the financial settlement. Section 10 is for the respondent where the applicant for the divorce wants the divorce to be pronounced and the respondent is the financially vulnerable party who seeks to delay the final divorce. It is crucial for practitioners to make the distinction.

The original 1973 wording of ss 9 and 10 bears alarming similarity to the present law in circumstances where so much in law and society has changed. Section 9(2)[3] of the pre-no-fault divorce legislation recorded that if there had been no application for the final divorce order, and 3 months had elapsed since the earliest time the applicant could have applied for the divorce order, the respondent could apply for the final divorce order. On that application, the court would make an enquiry and could make the final divorce order, rescind the conditional order[4] or make any other order.[5] The applicant for the divorce would oppose the respondent obtaining the final divorce order by reason of financial prejudice.

Section 10(2) [6] of the pre-no-fault divorce legislation is for the respondent to prevent the divorce being finalised by the applicant pending a financial settlement. However, this statutory protection only applied in circumstances of 2 years or 5 years of separation, and it was only the respondent who could in effect delay the conditional order. In other words, it was not available to the applicant (then known as petitioner), nor available in the other three, fault-based, grounds. Section 10(3) was explicit that in considering whether to make the s 10(2) order in effect delaying the pronouncement of the final divorce order, the court had to take into account all of the circumstances including financial position of the respondent as it was likely to be after the death of the applicant if they should die first. In other words, exactly the circumstances contemplated above. The court *shall* not make the final divorce order unless satisfied the applicant should not require to make any financial provision for the respondent or that the financial provision made [7] by the applicant for the respondent was reasonable and fair or the best that could be made in the circumstances. [8] There were two exceptions in s 10(4) in which the court would make a final divorce order notwithstanding the circumstances in s 10(3) if either there were circumstances which made it desirable the divorce order should be made without delay [9] or the court had obtained a satisfactory undertaking [10] from the applicant that he would make such financial provision [11] for the respondent as the court may approve. [12]

This s 10(2) remedy was only available in circumstances of divorce applications based on 2 or 5 years of separation. Parliament anticipated in the 1973 legislation that most people would use the so-called civilised grounds of a period of separation. That might have been the case in the first couple of decades but certainly wasn't so in the past couple of decades when parties were less willing to wait, hence the greater use of fault-based grounds. Technically, this disallowed any access to s 10(2). In reality applications were entertained. These issues needed to be addressed in the reforms of no-fault divorce which introduced a completely new process of who could apply. It is important to understand this in the context of the position in law now.

Who can now apply at each stage of the divorce?[13]

For a careful understanding of the circumstances of who can now apply to delay the divorce and when, it's important to understand who can and cannot apply at each stage for the divorce, the conditional order and the final divorce order:

(1) A can apply for a divorce.

(2) B can apply for a divorce.

(3) A and B can apply for a divorce jointly.

(4) If A applied for the divorce, A can apply for a CO (conditional order) but B cannot apply if A doesn't and A cannot agree to it being joint, i.e. A and B cannot then apply together.

(5) If B applied for the divorce, then as above for A.

(6) If A and B applied for divorce jointly, they can apply jointly for a CO or, on notice, one of them, e.g. A can apply alone.

(7) If A alone applied for CO, A alone can apply for the final divorce (DA) 6 weeks after a CO. A cannot agree to it being joint so A and B cannot apply together.

(8) In (7) above, if A doesn't apply for the DA, B has to wait 3 months to apply for the DA after the earliest date A could apply.

(9) If A and B applied jointly for the CO, both can apply jointly for the DA or either, e.g. A, on notice, can apply alone 6 weeks after the CO.

(10) In (7) and in (9) above (if it were a sole application for DA and not now joint), B applies under s 10(2) to prevent A applying for the DA after 6 weeks and in effect to delay the DA.

(11) In (8) above, B has to apply for the DA and in doing so A opposes under s 9(2), in effect to delay the DA.

It will be seen that the new divorce law creates a different situation for the respondent to a sole divorce compared to a joint divorce application. Lawyers quickly realised that there remained often a significant advantage in a sole divorce application and consequently a sole application for a conditional order. It is certainly not a process of anyone can apply at any time interchangeably. [14]

As to the extra 3 months before a respondent can apply for the final divorce order, the old law has been retained, perhaps rather cumbersomely. It is difficult to see why. The extra 3 months will rarely mean the difference in finalising a settlement. It might have been far better to have had simultaneous time periods but better protection against financial prejudice.

The position in law now

As the new divorce legislation was going through Parliament, organisations such as the Law Society lobbied for more explicit and clearer protection for the financially vulnerable spouse in the context where the divorce would be concluded within 6 months, perhaps even with one spouse having had much less than 6 months' awareness. It was proposed that it was made far easier to oppose the granting of the final financial order if any or any material financial prejudice or risk was shown. This lobbying was unsuccessful. The position as far as the criteria for delaying the divorce doesn't seem to have changed much.

Section 9(2) has been amended in the new law. Where a conditional order has been made on the application of one party, [15] then any time after 3 months from the earliest time the applicant could have applied for the divorce order, the so-called respondent can apply to the court for the making of the final divorce order. The other party can then oppose, in effect seek to delay, whereupon the court can refuse or allow the granting of the final divorce order or make other orders. [16]

Therefore if a party is anxious that there might be financial prejudice by a divorce order before the financial order is made, ideally they should be the original sole applicant for the divorce. This will give them an additional 3 months to try to finalise the settlement otherwise then applying under s 9(2). These tactics are crucial for lawyers, although perhaps unfortunate in the spirit in which the new legislation was intended.

Section 10(2) [17] of the new law is mostly new as necessary given s 10(2)'s previous reference to separation petitions. Unlike s 9(2) where the application is 3 months after the earliest date the final divorce order could have been sought, an application under s 10(2) must be made quickly after the conditional order and before the 6 weeks have elapsed before the divorce order could be applied for. Section 10(2) applies when a conditional order has been made and is either in favour of one party to the marriage or in favour of both but one party has since withdrawn from the application and then applied to the court under s 10(2) for consideration of their financial circumstances after the divorce, i.e. in effect the prejudice of a final divorce before the financial order. This is in effect the respondent seeking to delay the divorce. If the applicant wants to delay the divorce, they will simply not apply for the final order and let a further 3 months elapse and then apply under s 9(2).

New s 10(3) is a shortened version of s 10(3) of the pre-no-fault divorce legislation and says that the court *must* [18] not make a final divorce order unless satisfied that the applicant should not be required to make any financial provision for the respondent or the financial provision made by the applicant for the respondent is reasonable and fair or the best that can be made in the circumstances. [19] In other words if the court doesn't think there's going to be any more financial provision for the applicant for the delay in the petition, the application won't be successful.

Parts of s 10(3) of the pre-no-fault divorce legislation are now s 10(3A). They reiterate that the court must take into account all the circumstances of the case including what the financial position of the respondent is likely to be after the death of the applicant should that person die first, i.e. the impact of the death of the applicant if they die first. Section 10(4) remains substantially the same.

It will be seen that there has been no change in the criteria to be taken into account by the court. It can certainly be argued that it is pretty clear: the court must not make a final divorce order unless satisfied there shouldn't be, in

practice won't be, any other financial provision. This may not necessarily be reflected in case-law.

The rules [20] state that the court will make a conditional order final if satisfied the provisions of s 10(2)–(4) do not apply or have been complied with.

The position in case-law

So what are the case-law principles and guidance on when a court should and should not delay the divorce, whether s 9(2) or s 10(2)? There had been a concern under the pre-no-fault divorce law that it was narrow and geared towards big-money cases. The risk of prejudice applies just as much in modest cases and everything is relative. There should be no dispensations or special allowances in bigger-money cases

The leading case was *Thakkar*, [21] in which the husband wanted, under s 9(2), the final divorce which the wife sought to prevent in circumstances either of non-disclosure or of uncertain risk through trust interest or both or more uncertainty regarding his finances. The court found the existence of offshore structures might cause *very considerable prejudice* to the wife and therefore the divorce was delayed. The husband was quite probably a billionaire, with offshore interests. There were apparent concerns about whether he had given full and frank disclosure. However, the court made it clear that granting this provision to delay the divorce was exceptional, referring to special circumstances. Nevertheless, it declined to explain the special circumstances in which the court would or should (or now must) delay the divorce. This was unfortunate. The High Court could have said for example any case in which there would be any or any material financial prejudice to one party by one party dying after the final divorce order but before the financial settlement. Simple, clear and across the financial spectrum. But specifically it did not.

Years earlier in *Dart*, [22] another big-money case, the Court of Appeal said that there was a presumption in favour of the granting of the final divorce order, weighing heavily against the finding of any special circumstances to delay a divorce. Hence it was felt at High Court level that such delaying orders would be very much the exception or at least were under the pre-no-fault divorce law. This was very unfortunate. Will this position still be upheld? *Dart* had also held under s 9(2), but presumably also under s 10(2), that the court had an absolute discretion as to whether to grant the application.

Mere outstanding financial provision proceedings are not in themselves a reason to delay the divorce; there might be no financial prejudice. This is another reason for the quick issuing of Form A, i.e. so that at the time of the application to delay the divorce there should at least have been financial disclosure and therefore better knowledge of whether there are any assets which might be lost on a death after divorce and before the financial settlement and what other financial provision can be put in place instead. If for example there are no

questions, for example about a pension sharing order and the only asset is the family home where the joint tenancy could be severed, there should be no reason to delay the divorce.

There is limited case-law. In the excellent article referred to in note 1 by David Salter, he refers to the case-law as positively *antique*, citing from past decades. Accordingly, *Thakkar* being the most recent has tended to dominate expectations of when, and specifically when not, a delay order may be made. This may be unfortunate and indeed unintended. Nevertheless, in the pre-no-fault divorce days, the general perception in the profession was that the availability of ss 9(2) and 10(2) had become limited, e.g. non-disclosure of significant assets, risk of losing out of entitlement in substantial trusts or other offshore vehicles. Not the wife of a plumber anxious after a long marriage to make sure she can have a pension sharing order! This was why there had been lobbying at the time of the legislation to extend or at least clarify the protective provision.

The position in the digital divorce centres

It will be seen that an application is needed under s 9(2) or s 10(2) to delay the divorce. But is this happening in practice? It seems that where opposition to the granting of the final divorce by either applicant or respondent is given to the online divorce centre, they will set the matter down for a review in the locality of the parties. Too often, even if the parties are represented in the financial matters, for costs reasons the parties may attend in person, unrepresented, and then have to try to argue the complexities of ss 9 and 10! With the encouragement to people to act in person on the divorce even if represented in financial matters, an opposition to the granting of the final divorce order can be given to the divorce centre without any merits, i.e. without any likelihood of any financial loss or prejudice. It might be that the only asset is the family home which can be protected by severance of the joint tenancy. This does not need a formal s 9 or s 10 process. It might be that they are simply waiting for a final financial order and one of them doesn't want to have the divorce finished until it has come through, but again without any financial prejudice. Moreover, it may well be that the opposition communicated to the divorce centre gives no indication of relevant financial matters or specifically of financial prejudice. Nevertheless, a review hearing locally is likely to be fixed.

It must be remembered that these matters will be referred by the divorce court to a local judge under the divorce portal number alone, so the judge may not even know the number of the financial remedy proceedings to find out what is the financial background and review the merits.

The divorce centre is obviously taking a pragmatic view, particularly with the informality of litigants in person, and an email in clear terms seeking to delay a divorce is sufficient to prompt a court hearing review. Naturally when the court is hearing the review, the judge is likely then to insist on a strict adherence to a formal application and statement, including showing the financial prejudice of

the pronouncement of an immediate divorce order. In practice, in many such cases, the issues may be sorted out at the review hearing, and directions sent back to the digital divorce centre to progress the divorce.

Good practice must of course be formally to apply with a statement in support which should set out, strongly particularised, what are the pertinent financial circumstances and what financial prejudice there will be. Only then can the court properly undertake its duties under ss 9(2) and 10(2).

Conclusion

So the important point for lawyers is what criteria are being used in the consideration of delaying a divorce? Does the inclusion of the word *must* in the new s 10(3) legislation strengthen the expectation that there would be a delay in the divorce? Is it the case that around the country, district judges being given these review hearings are turning up *Thakkar* to look at the distinctive circumstances of offshore holdings? Or is it more likely to be the case that if there would be any or especially any material financial prejudice, e.g. in the context of a likely pension sharing order or similar, a delay order is made? If this latter is right, as I suspect, then is there any difference of practice between High Court and District Judge level? District Judges faced with an applicant, quite probably at significant risk of prejudice if the divorce order was made before the financial settlement with the risk of a death, may well adjourn or delay the divorce to make sure that there is no such loss. It is difficult to see why this should not be the normal case where the court is presented with good evidence that such financial prejudice would arise by the immediate granting of the divorce order.

Of course, in big-money cases, insurance can be taken against the death of one party and this does occur. But this is impossible in the wide range of modest asset cases.

The divorce law landscape changed with no-fault divorce. It was well overdue. The entire thinking and psychology, coupled with an encouragement of a collaborative approach, should be informing the new process. Yet it is still fraught with looking back to the pre-no-fault process. The fact a respondent, as equally not at fault as the applicant and often only a matter of timing of who issues first, is at a disadvantage in the timing of the final CO and divorce [23] seems odd and out of kilter. [24] But crucially with a divorce based only on a 6-month notice given to the divorce court office, with no opportunity to defend, with financial claims invariably taking much longer than 6 months, the potential exists for parties to be in a prejudicial position as described in this article. The simple solution should be that if there is any material risk of financial prejudice, there should be a delay on the divorce. [25] Rarely will there be too much prejudice on a divorce delayed a matter of months or a year or so. The financial prejudice may be colossal. It must be hoped that if and when ss 9(2) and 10(2) go back to the High Court, the opportunity will be taken to make sure that financially

vulnerable parties on no-fault divorce are suitably protected. In the meantime, solicitors should not be beguiled by the no-fault divorce concepts and they have positive professional [26] duties to take steps to protect their clients at key stages of the divorce.

–Blog –Journal

– divorce

Resolution's Report on Domestic Abuse in Financial Remedy Proceedings: An Overview of the Key Findings and Recommendations

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Introduction

This blog piece has been timed to coincide with the publication, on 8 October 2024, of the report by Resolution on 'Domestic Abuse in Financial Remedy Proceedings'. This groundbreaking report delves into the interplay between domestic abuse and the treatment of finances on separation and divorce/dissolution (hereinafter 'divorce'), and how domestic abuse is addressed in other financial proceedings.

The report is the culmination of an 18-month project which originated in mid-2023 with the formation of a Resolution multi-disciplinary working party on this issue. The working party was convened following the Domestic Abuse Act 2021 (DAA 2021) coming into force and the significant advances in the Family Court's understanding of domestic abuse in recent years, particularly in light of the landmark cases of *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] 2 FLR 1116 and *Re K* [2022] 2 FLR 1064 in relation to children proceedings.

Chaired by Olivia Piercy (Hunters Law) and Anita Mehta (4PB), the working party comprised specialist family law solicitors and barristers, representatives from the Family Law Bar Association (FLBA), family law academics, independent financial advisers and domestic abuse charities. The working party commissioned a six-week survey in January 2024 to understand the reported incidence of domestic abuse, and to consider what impact any abuse has on outcomes. The survey was open to all family law professionals. It was distributed by Resolution and the FLBA to all their members, and was widely shared on social media. The survey also asked questions about proceedings involving cohabitants and separated parents.

In March 2024, a follow-up questionnaire was sent to the professionals who had volunteered in the survey to share further insights. This follow-up questionnaire was also open for six weeks, and coincided with the lead up to the changes to the Family Procedure Rules 2010 (the FPR) relating to non-court dispute resolution (NCDR) which came into effect on 29 April 2024. [1]

The results of the survey and follow-up questionnaire are in the report. The results are staggering and make for sobering reading. The deeply personal testimonials given by victim-survivors of domestic abuse, and from the lawyers who represent them, underline the pressing need for Resolution's proposals for legal and procedural change to better meet the needs of victim-survivors seeking the resolution of their finances on divorce.

This research was followed up with a workshop at the National Resolution Conference in May 2024 involving more than 120 family law professionals who were invited to consider what changes would improve outcomes for their clients who are victim-survivors. An Economic Abuse Summit was later convened in June 2024 to consider proposals for change and to assist Resolution in determining its recommendations. The Law Commission was in attendance as an observer.

Results of the survey and questionnaire

In the report, the term 'domestic abuse' is used to refer to all forms of domestic abuse, as defined by s 1 of the DAA 2021. Pursuant to s 1(3) of the DAA 2021:

> 'Behaviour is "abusive" if it consists of any of the following—

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse (see subsection (4));

(e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.'

Economic abuse is defined at s 1(4) of the DAA 2021 as 'any behaviour that has a substantial adverse effect on the [victim]'s ability to (a) acquire, use or maintain money or other property, or (b) obtain goods or services'. A failure by a party to comply with their obligation to give full and frank disclosure, refusal to provide sufficient (if at all) interim financial provision, and withholding family funds in order to prevent the other party from being able to access legal advice/representation, all potentially amount to economic abuse.

The result of the working party's survey, which attracted 526 full responses – in our view a high response rate for a legal policy survey – revealed that c.80% of professionals believe that domestic abuse, and specifically economic abuse, is not sufficiently taken into account in financial remedy proceedings. The percentages increased when it came to unmarried families, with 85% stating that it is not sufficiently taken into account in Schedule 1 proceedings, and 87% stating it is not sufficiently taken into account in TLATA proceedings involving cohabitees.[2] The responses indicated that regional differences did not exist.

Professionals also voiced overwhelming concern about the lack of legal aid for victim-survivors and their ability to access funds (especially family money) to pay for legal fees with 90% responding that there was insufficient access to legal aid for victim-survivors. Failure to disclose assets, delaying tactics, and breaching court orders were also persistent issues of concern.

Strikingly, there was a significant disparity between how often respondent professionals identified domestic abuse (and specifically economic abuse) as an issue between separating couples when resolving their finances, and how often it was raised in court proceedings. This was perhaps not surprising, given the statutory test in s 25(2)(g) of the Matrimonial Causes Act 1973 (MCA 1973) that conduct should only be taken into account if 'it is such that it would in the opinion of the court be inequitable to disregard it' and in light of current caselaw.[3]

Recommendations

In its report, Resolution calls for a cultural shift from all family justice professionals to better meet the needs of victim-survivors of domestic abuse

seeking the resolution of their finances on divorce. Much more must be done to prevent domestic abuse from being perpetrated post-separation, through negotiations and NCDR, during court proceedings, and after the conclusion of proceedings but before full implementation of final orders.

Resolution's recommendations are as follows:

(a) The Family Procedure Rule Committee should consider changes to the Family Procedure Rules 2010 (FPR 2010) to ensure that parties are safeguarded from ongoing domestic abuse, to include consideration of an amendment to the overriding objective in Part 1 so that dealing with a case 'justly' in FPR 1.1(2) includes 'ensuring the parties are safeguarded from domestic abuse'; an amendment to Part 9 so that every case management decision in applications for a financial remedy is conducted in a way that will safeguard the parties from domestic abuse; and whether the court's case management powers can be better used where a party fails to provide disclosure in pre-proceedings correspondence or NCDR.

(b) It should be made clear as a matter of law that the duty of full and frank disclosure starts when parties start to engage in NCDR or negotiations (in other words, that this duty will usually start before any court proceedings).

(c) Where there is ongoing economic abuse by a party's failure to disclose their finances within a reasonable timeframe, [4] and/or a party does not have security that interim maintenance, bills associated with the family home or legal services payments are agreed (in cases where resources allow), and/or there are allegations of ongoing domestic abuse, the balance shifts *away* from any form of NCDR continuing (at least without directions from the court to ensure that full, frank and clear disclosure is provided timeously). Consideration of the option of NCDR should always involve robust and ongoing assessments of risk, suitability, and safeguards. Where an exemption from NCDR has been given by a mediator at a MIAM due to domestic abuse (a stringent test that mediators do not take lightly), Resolution seeks confirmation that the court will respect that decision and not re-traumatise victim-survivors by requiring them to explain again why they cannot participate in NCDR, or directing them to try NCDR again.

(d) The Institute of Family Law Arbitrators (IFLA) and the Lead Judges of the Financial Remedies Court should work with Resolution and others to develop an expedited procedure to convert financial arbitration awards, and agreements reached at private FDRs, into court orders so as to avoid delay.

(e) Lead Judges, in consultation with Resolution and others, should introduce amendments to the Financial Remedies Court Efficiency Statements to include specific reference to the need to ensure that financial remedy proceedings are not used by perpetrators to facilitate ongoing domestic abuse.

(f) Further consideration should be given to measures to help ensure that victim-survivors are financially supported between the time of separation, and the final outcome of a financial remedies application, including consideration of

the need for a review of the law and procedure relating to interim financial remedies. This could include longer listings for a combined First Appointment and the hearing of an application for maintenance pending suit (MPS) and/or a legal services payment order (LSPO). Where this is not possible, any application for MPS and/or LSPO should be listed within six weeks.

(g) A review of the legislation relating to LSPOs should take place as soon as possible, to recognise that post-separation economic abuse may be in play to obstruct a victim-survivor of domestic abuse from accessing resources to obtain legal advice and representation. Pending this review, there needs to be greater awareness among the profession and the judiciary that where there are sufficient resources for both parties to be represented, but one party is being denied access to it for their legal fees and is forced into borrowing at a high rate of interest, this may well be symptomatic of an abusive dynamic.

(h) Financial thresholds and requirements for legal aid should be reviewed, so that victim-survivors can more easily access legal aid in financial remedy, Schedule 1, and TLATA cases. The capital and income thresholds should be increased so that the gap between victim-survivors who are eligible for legal aid and those who can afford to pay for legal representation privately is substantially reduced.

(i) Legal aid rates in these areas should also be increased to make it commercially viable for legal aid providers to act for victim-survivors.

(j) Lead Judges and the legal profession should co-operate to ensure that the consequences of any non-compliance with a financial remedy order should be decided at the time of the making of the order, especially if enforcement proceedings seem likely.

(k) The Government should implement, at the earliest opportunity, the Law Commission's 2016 recommendations to extend existing methods of enforcement and introduce new types of enforcement orders.

(l) The Family Procedure Rule Committee should consider whether the rules in respect of costs orders could be amended to reduce abuse from the proceedings themselves. For example, the rules at FPR 28.3(7) could be amended to include a new subsection requiring the court to have regard to any use by a party of litigation, failure to provide financial disclosure or failure to engage in NCDR, as a form of domestic abuse, as defined in the DDA 2021, when considering the making of an order for costs.

(m) An explanatory Practice Direction should be issued, in consultation with Resolution and others, setting out the approach in financial remedy proceedings where there is ongoing, or where there are allegations of, domestic abuse. This should both clarify the current law around conduct, and improve practice and procedure to better protect victim-survivors.

Resolution is also supportive of the introduction of a procedure for a consolidated fact-finding hearing in cases before the Family Court if domestic abuse is likely to be a relevant factor in multiple proceedings (Children Act 1989, domestic abuse injunctive applications, and/or financial remedy applications (when sufficiently serious)). Such a procedure would ensure that victim-survivors are not re-traumatised by having to give their account on multiple occasions, and would also save costs and court resources.

Resolution is also clear that the current approach of the courts to 'conduct' under s 25(2)(g) of the MCA 1973 leads to unfair outcomes for some victim-survivors of domestic abuse. The report does not set out to achieve a final recommendation as to how to resolve that thorny issue, but affirms Resolution's commitment to continue to consider the issue by liaising with a wide range of stakeholders, and by considering the developing research in this area from the *Fair Shares?* project [5] and the work of the Law Commission into possible reform of s 25 of the MCA 1973, including the operation of 'conduct' as a factor to which the court must have regard when deciding financial remedies orders. [6]

Conclusion

Domestic abuse is indubitably vile and indefensible. There is increasing awareness of the incidence of domestic abuse, and its harmful and pernicious effects. [7]

The Resolution report voices a powerful call for change and poses pressing questions as to what we *can* do to ensure that victim-survivors are protected from ongoing domestic abuse, and that the outcomes they receive are fairer. Many will be watching keenly to see how this area develops, and the extent to which the recommendations in the report are carried forward. In the words of Resolution's Chair, whilst we continue to ignore the elephant in the room, we fail to protect some of the most vulnerable litigants in the family justice system. [8]

- Blog
- Domestic Abuse

AI and Family Law

Published: 14/10/2024 14:05

Professor David Hodson OBE KC(Hons) MCIArb

Prof David Hodson OBE KC(Hons) MCIArb is a dual qualified English and Australian (NSW) solicitor, a mediator, an arbitrator and a deputy (part-time) family court judge (DDJ) at the Central Family Court in London and recently also on the Western Circuit. He was a co-founder and for 16 years a partner at The International Family Law Group (iflg.uk.com), a specialist law firm representing international families. He is a member of the English Law Society Family Law Committee, a Fellow of the International Academy of Family Lawyers, a member of LawAsia, the Family Law Section of the Law Council of Australia and a similar contributor to many family law organisations around the world. He is a regular speaker at international family law conferences around the world. He was awarded the OBE for *services to international family law*. He was appointed a KC(Hons) in March 2022 by virtue of making a significant impact on the law of England and Wales. He is the editor and primary author of the LexisNexis textbook *The International Family Law Practice* (6th ed.). He is Visiting Professor at the University of Law and Honorary Professor of Law at Leicester University. He is an Anglican lay preacher.

Breakfast meeting, Support through Courts, 8 October 2024

AI has the real likelihood of transforming the practice of family law solicitors more than the major conceptual changes from the Children Act, the seismic shift from *White* or the speed of response needed from *lis pendens* of EU law – a transformation which will happen fast even in the slow-moving, conservative legal profession.

So, after that understated introduction, thank you for inviting me.

I speak from the perspective of a London family law solicitor specialising in complex finance and international cases, but also as a Deputy District Judge in the family court in London over many years and more recently also in Devon and Cornwall. I am not an AI expert but over decades I have pursued, often frustratingly, a vision for the application of digital opportunities for the improvement of the practice of law and justice. I am mostly optimistic about AI

and that we can produce a better justice system for clients as a consequence. In this huge topic I touch here on five elements.

Having started with optimism, why is it that revolutions never seem to be good for jobs? The agricultural revolution on farmworkers. The Industrial Revolution on skilled craft workers. The digital revolution on clerical workers. The AI revolution will be no different except this time the revolution is coming for us lawyers. In March 2023 Goldman Sachs reported AI could replace the equivalent of 300 million jobs. But that's not us of course. In the same month, three leading US academics wrote that of all the professions most at risk from AI, the legal profession was amongst the greatest. Now getting closer. So, let's look at our parish. In 2021, in a paper which had little publicity at the time, the Law Society predicted *savage reduction* in legal jobs as a consequence of AI. Now getting a bit scary. But don't worry, obviously this will be amongst commercial contract lawyers. So, what about us? Can we necessarily presume we will be safe, cocooned by our discretionary finance system and working for the best interests of the individual child? I am certain the unwelcome answer is no, we're not safe. We should be planning for this and should have already been planning for this. We aren't.

Secondly, presuming AI will be undertaking some of the work presently undertaken by us family law solicitors, it must cause us to ask ourselves the basic, quite ethical, question: what value do we, I, add to the resolution process? It clearly won't be explaining the basic law, an increasing AI function. Many letters will be AI drafted. Analysis of disclosure or statements will be summarised by AI. I am sure that within 18 months, preparation of Form E will be via an AI chat bot. Of course, all of this will require experienced lawyer review and oversight. That apart, where and how do we bring value? I suggest strongly we need to have this conversation. It couldn't be more fundamental to why we are doing this area of work and what work will be needed. In addition, at which levels of the profession will that value added be brought and what will be expected of each level of the profession? Which is most at risk? Are we brave and bold enough to start this conversation?

Thirdly, I worry the present discussion in the legal profession about AI is coming only from the mega law firms. A survey ten days ago by Lexis Nexis said 41% of legal professionals now use AI and a similar number have imminent plans to do so. Really? Have they spoken to the multitude of small practices around the country doing family law? Three weeks ago, the *Law Society Gazette* carried a discussion of a roundtable meeting about use of AI. Everyone there was from a mega firm or an IT company. Family law was notably absent. We are at real risk of creating a two tier profession. The large firms are able to create their own bespoke AI programs, building upon existing public programs. The much smaller firms are simply unable to do so. Remember family law here and around the world is very often conducted in those relatively smaller firms. This is nothing new. I remember similar concerns about 30 years ago when personal computers came through and yet we family lawyers have thrived and have been ahead of the game, e.g. during the recent lockdown. I'm not pessimistic but I am anxious. We

have an interest in family law in making sure the law firms doing this work are up to pace, aware and embracing opportunities. We can but it won't be easy.

Fourthly, one short-term consequence of real concern is confidentiality. The breach of client confidentiality by using publicly available AI programs, as distinct from individual bespoke programs available to the mega firms. Some firms absolutely prohibit the use of AI by their lawyers for this reason. As judges, we have received helpful guidance such as not attempting to use a public AI program for assistance in writing our judgments! Breach of confidentiality. The SRA will be tough. But what can we do? If we won't have our own AI programme for our own firms for some time, do we abandon AI? Of course not, but this is a major professional issue which needs early resolution. Inputting anonymously, as some have said and I know some are doing, is not the answer. This is no time for the regulatory luddites but it is definitely time for proper understanding of confidentiality in the AI program context and to find solutions.

Fifth and finally, for now, in my career perhaps one of the biggest changes were the dramatic reforms of the Children Act 1989. Still one of England's best family law innovations, much copied around the world. But it came into force in October 1991. We specifically allowed two years for education, training, adaption and preparation. This brought about changes in law, of course, and also in the very new ways we approached cases and clients. AI will be as big or bigger in its dramatic changes in practice. Yet we have no training and are doing almost nothing. In fact, what we do have has come significantly from our senior judges in the guidance they have given, and I feel far better prepared on ethics and conduct as a DDJ than as a solicitor. This is why I welcome the Law Society AI department setting up last month a family law working party with a view to our producing guidance for the profession. It cannot come soon enough. Watch this space and get in touch with me to learn more.

Brief conclusion: all of us here this morning know that family and parental breakdown is an appalling experience, having adverse consequences for so many. Our value-added role as family lawyers is to help people through this process as painlessly, constructively, fairly and collaboratively as possible; one reason why we fully support the marvellous work of Support Through Court. I am certain that AI will dramatically help us in this work, in partnership with our clients, many of whom will undoubtedly be using AI already themselves. And ultimately this is why AI will be the game changer.

The legal profession is ultraconservative and inherently cautious. If it worked in the 19th century, why change it? Yes, why? Because our public has changed. I suggest they are no longer willing to accept some of our ways of practising and work. They will be embracing AI long before most of us. The practice of family law has to change significantly, not least to meet the public in their digital lives using AI daily. I remain optimistic that in doing so we can thereby deliver a better, fair and good family justice system.

At A Glance Conference 2024: Live Updates

Published: 16/10/2024 10:48

Samantha Hillas KC

Sam Hillas is a senior member of SJB's matrimonial finance team, dealing exclusively with financial remedy work. Commended by Chambers and Partners and Legal 500 as a "charismatic and client-friendly advocate" who "works like a Trojan", Sam specialises in high net worth and/or complex cases, especially those involving marital agreements, trusts and corporate structures, cases involving non-disclosure and Schedule 1 Children Act.

8:57 AM

Good morning FRJ followers! You have an exciting day ahead of you as we will be providing live updates from the At A Glance conference today – watch this space #AAG2024

9:33 AM

About to start!

9:35 AM

Mr Justice Peel calling the conference to order

9:37 AM

Thanking Class Legal for the considerable effort that goes into these, the "flagship of conferences"

9:39 AM

Thanks also to the headline sponsors, 3PB and to the indefatigable Sir Nicholas Mostyn for putting together such a superb conference programme

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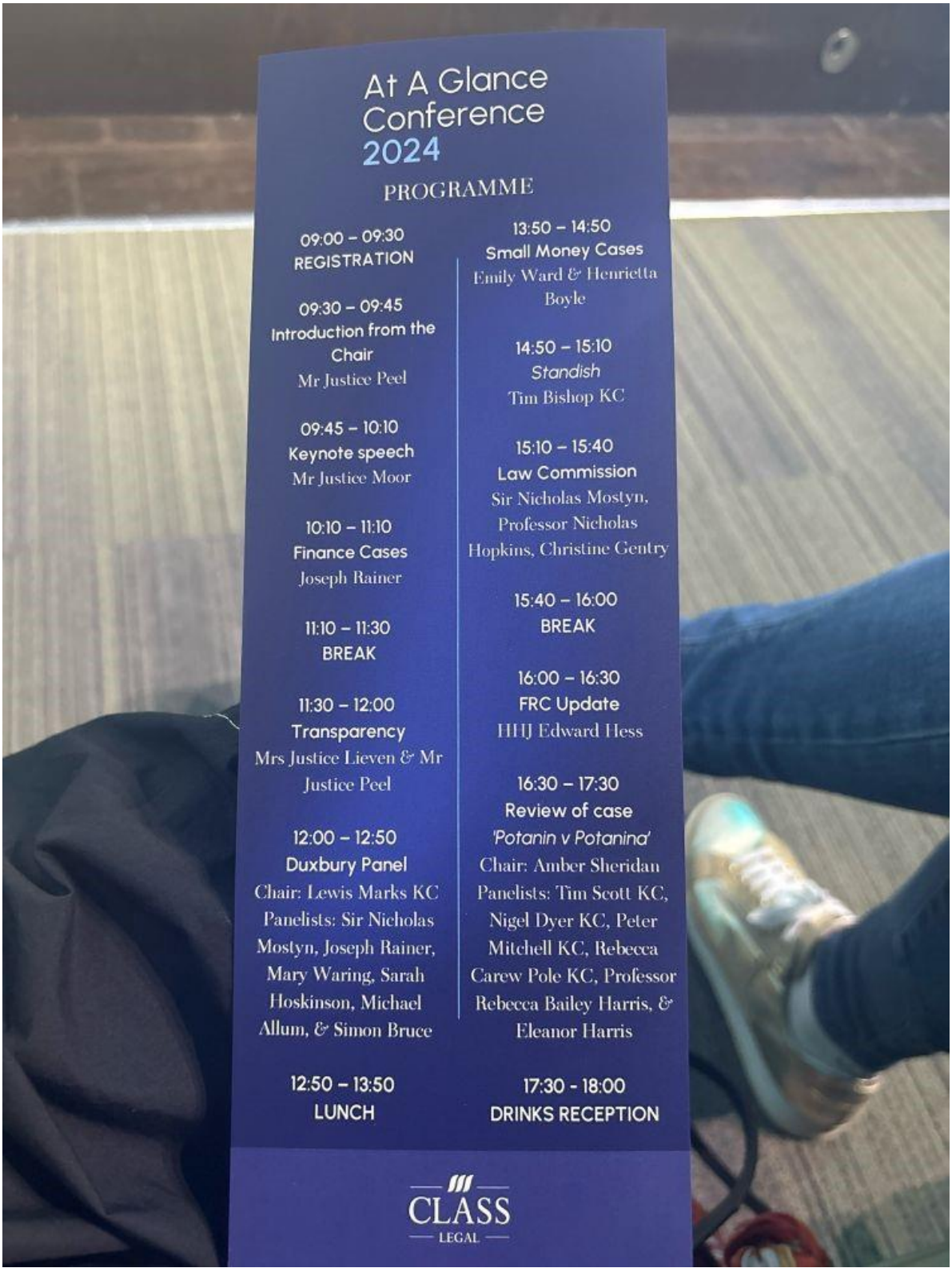
9:43 AM

The programme (and Nikki Saxton's gold trainers)



9:45 AM

Keynote speech, headlined "Revolution" by Sir Philip Moor

9:47 AM

Recollecting his first case at Edmonton County Court – no skeletons, no schedules, no devices. Ahhhh those were the days

9:52 AM

Discussing historical top rate of tax (98%) and how important it was that PP attracted full tax relief – "a different world"

9:57 AM

Moor J: White v White – a fitting case to start the new century – and the effective introduction to the concept of matrimonial property

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10:00 AM

Moor J: fundamental changes in FR have been judge-led. See eg marital agreements and the sea change following Radmacher

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10:02 AM

Moor J: the future? Earlier visionaries ahead of the curve – Peter Singer QC, Lord Wilson and Sir Nicholas Mostyn. Where will be in 2065?

10:05 AM

Moor J: the future almost certainly includes the use of AI. Will it include codification of FR outcomes?

10:07 AM

Moor J: sincerely hopes conduct does not make a return to the battlefield not least due to a lack of resources to meet the costs of such cases. As many as 60% of cases involve domestic abuse. All applicants would quality (merits ground) for legal aid and all respondents would be entitled to a QLR

10:08 AM

Moor J: can be assured that the family court and the FR court are in the safest of hands. Fabulous keynote address

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10:09 AM

Next up Joe Rainer – QEB's "rising star"

10:09 AM

10:10 AM

Look at him – so stylish! V, v decent handout too

10:12 AM

JR: how to condense the last year's cases into a 1 hour talk? The FR Annual Case Law Awards!!

10:13 AM

JR: and the award for the Appellate backfire of the year category? Standish

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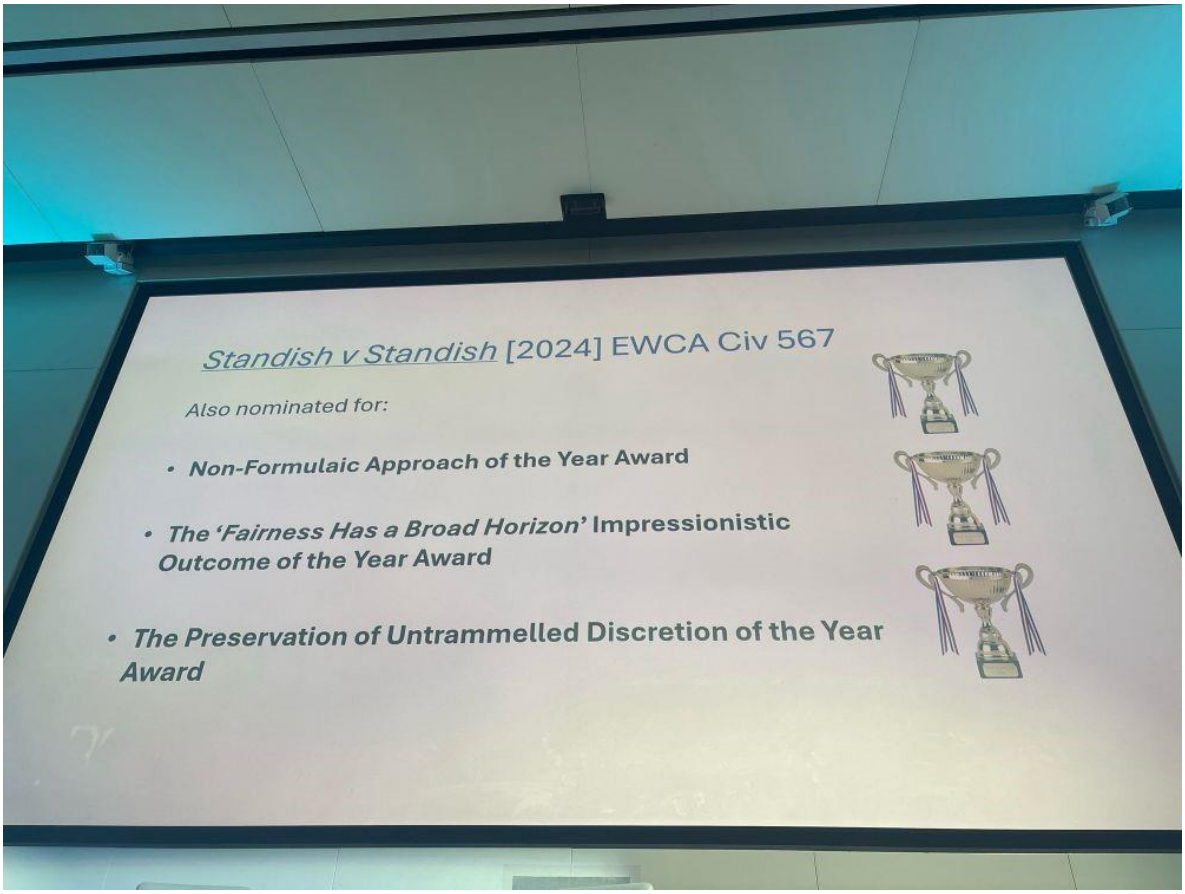
10:17 AM

JR: Standish has won 3 awards. Audience response suggests no real assistance when advising on mingling and matrimonialisation



10:20 AM

JR: the Radmacher Award for Respecting Authority – BI v EN [2024] EWFC 200. Unvitiated PNA, Cusworth J decided on basis of needs, not sharing

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10:21 AM

"Needs" in a £100m case more properly categorised as a "lifestyle award" which enabled her to live at marital standard of living indefinitely

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10:22 AM

JR: Spooky Jurisdiction that may or may not exist Award – Thwaite

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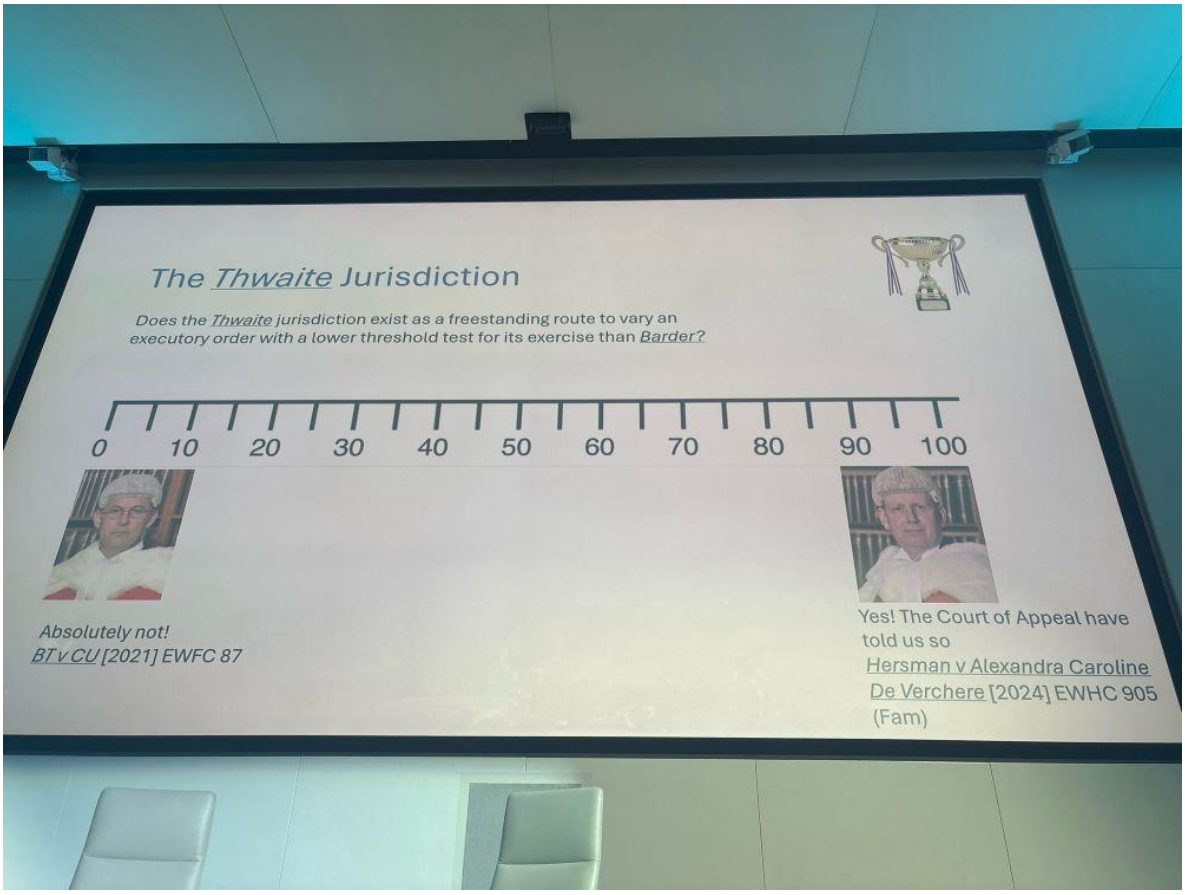
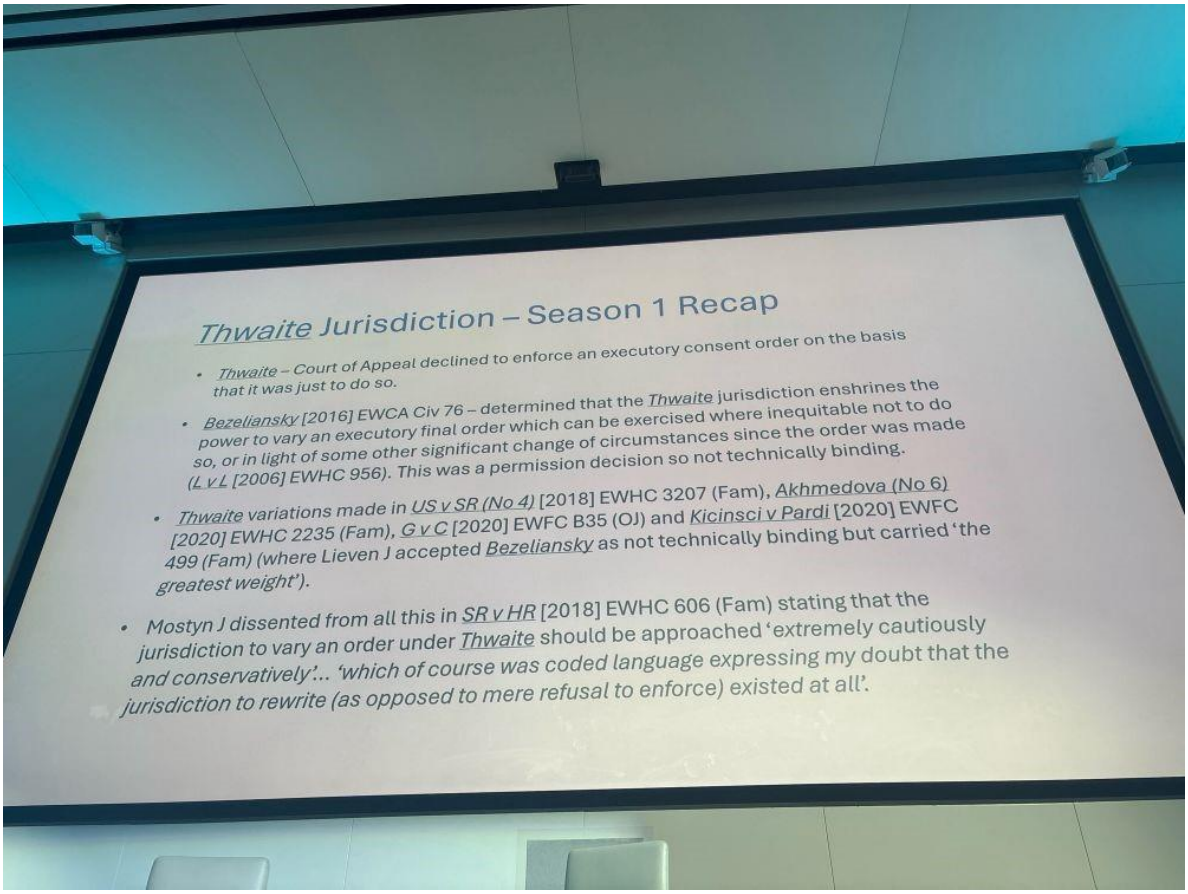
10:23 AM

The Thwaite-ometer



10:24 AM



10:27 AM

FR: Thwaite case this year – Rotenberg [2024] EWFC 185. Jurisdiction to be used sparingly. Unusual case with exceptional facts.

10:28 AM

JR querying whether the facts of Rotenberg were in fact exceptional

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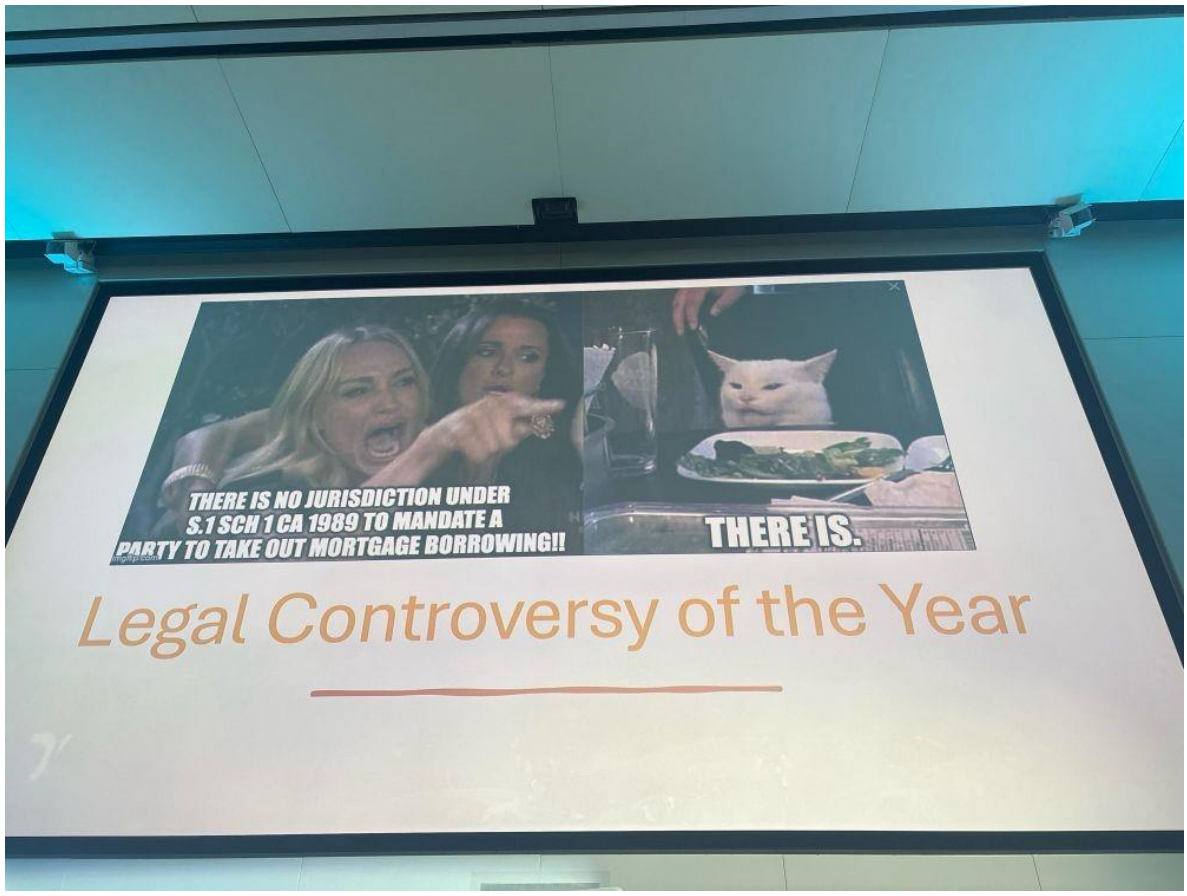
10:30 AM

JR: Hersman v de Verchere [2024] EWHC 995 (Fam). A 'Thwaite' case in reality?

10:30 AM



10:33 AM

JR: Re A v B – second appeal in effect. Issue of mortgage borrowing in Schedule 1. F conceded court's power to order it at first instance then doubled back. hHJ Evan's-Gordon agreed with him and declined to convert arb award to order. Appeal allowed by Cobb J

10:36 AM

JR: Michael Horton KC's article on this issue on the FRJ suggests Cobb J is wrong – JR recommends as essential reading

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10:37 AM

JR: Polite Judicial Telling Off of the Year Ward – Mrs Justice Knowles in Re X

10:41 AM

JR: Legal Innovation of the Year Award – AT v BT [2023] EWHC 3531 (Fam). Issue whether H's assets were non-mat. H argued needs only. W argued her compensation claim trumped H's non-mat arguments – 50/50 outcome by Francis J. Compensation engaged as shield to the other arguments against sharing

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10:46 AM

JR: FR case of the Year Award: Runner Up = HO v TL [2023] EWFC 215. Needs based outcome. W ordered to pay £100k costs order due to failure to negotiate reasonably on an open basis

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10:51 AM

JR: FR case of the Year. Double header- GA v EL, both judgments. First = Peel J's case management decision at [2023] EWFC 187: Daniels v Walker and historical business valuation

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10:53 AM

JR: Substantive decision in GA v EL at [2023] EWFC 206, Trowel J (almost) on post-separation accrual

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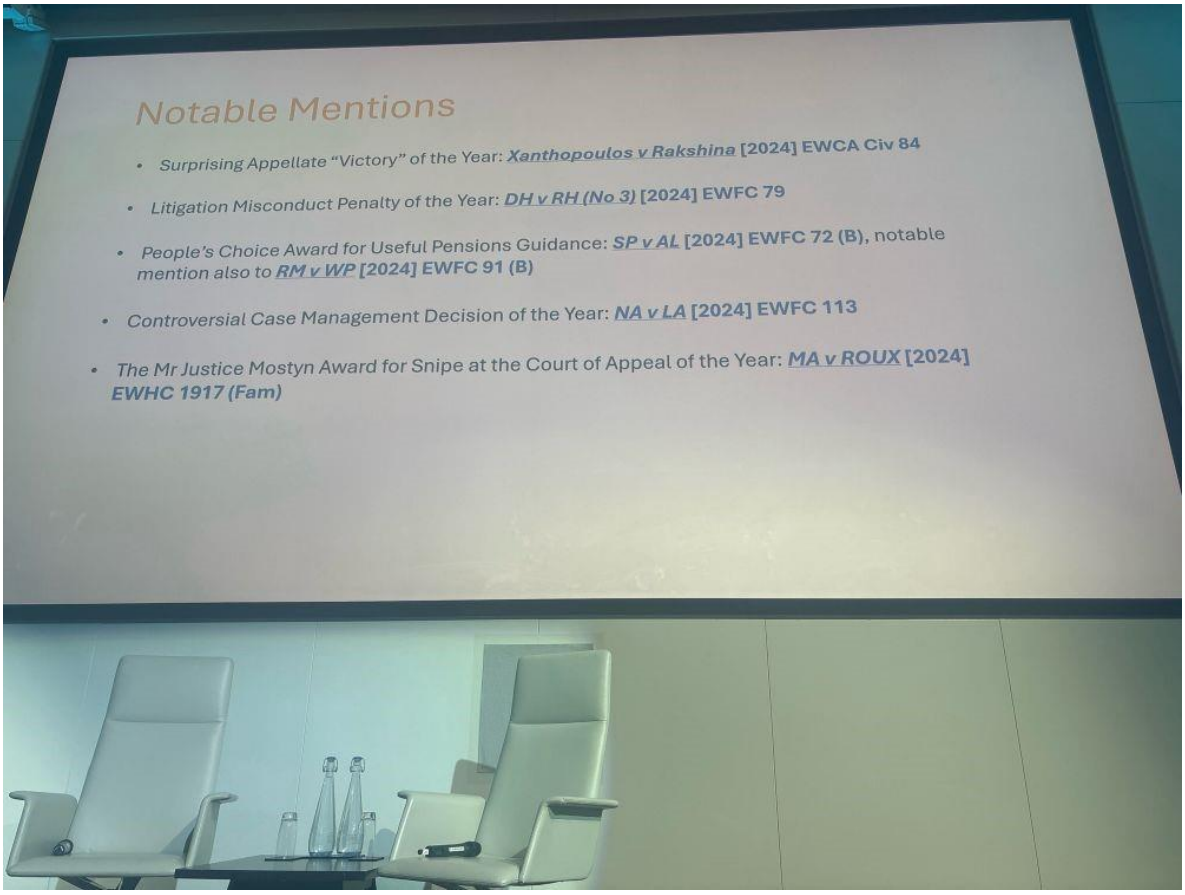
10:54 AM

JR: Notable mentions



10:58 AM

Xanthopoulos; DH v RH (No 3) – litigation misconduct: SP v AL and RM v WP on pensions; NA v LA – controversial case management and MA v Roux – the Mr Justice Mostyn Award for Snipe at the Court of Appeal

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11:02 AM

Joe Rainer – a superstar. Entertaining, informative and allowing us an extra 5 mins for coffee break. Wonderful

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11:04 AM

Peel J – commenting on costs. Going around country now about this – costs will be high on the agenda if failure to negotiate reasonably on open basis – even in smaller money cases

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11:32 AM

Our gorgeous sponsors! All out of HCJ stress balls!!

11:33 AM

After a lovely break of bananas and pains au raisin, back to it with Peel and Lieven JJ on Transparency

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11:34 AM

11:36 AM

Lieven J: privacy in family proceedings has allowed a myth to grow that they are "secret" courts. Driving force behind transparency is to increase public knowledge and confidence in the family justice system

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11:37 AM

Lieven J: rules are clear – reporters can attend and report what they see and hear subject to anonymity

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11:38 AM

Lieven J: pilot in 3 courts rolled out to another 16. Gone surprisingly well. Peel J adopting same principles for FRC.

11:41 AM

Lieven J: promoted a good deal of well informed commentary. No breach of anonymity orders. In the FRC, there is an issue about commercial confidentiality and also need to be confident that anonymity will stand. Further, issue of transparency being used as litigation tactic is concerning

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11:45 AM

Lieven J: wants to drive home that anonymity rules are not there to protect the professionals. Freedom of expression is fundamental to a democratic system. Equally, judges are not the arbiter of the quality of the journalism – have to step back and take it on the chin

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11:46 AM

Lieven J: next steps – working on FRP to embed the pilot principles from 2025. Push to publish more judgments is a work in progress. Resource issue. Anonymising judgments takes time. Even if done by AI, judges have to ensure no identifying features. Encouraging more judges to publish

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11:48 AM

Peel J: bringing everyone up to date with transparency in FRC. Moving more gradually towards a more open system. Press are now there – generally constructive, helpful and not there to make trouble so nothing to fear

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11:50 AM

Peel J: no other Judge has followed Mostyn J's approach. The issue has not been properly argued in front of him by parties or press, so reserves comment until then.

11:56 AM

Peel J: now more judgments from lower courts than in previous years – an important part of transparency. Gives a sense of how judges are dealing with FR issues

12:00 PM

Peel J: published Tsvetkov without anonymisation due to poor litigation conduct, parties had never paid tax/completed tax returns and that H had received threats – all of these were matters of public importance. Press not interested in any of that. They were only interested in W's £1m handbags…

12:01 PM

Now the Duxbury Panel. A stellar line up!!

12:02 PM

12:04 PM

Lewis Marks KC chairing – explaining how the group was put together

12:05 PM

Lewis Marks KC: report is provisional to allow others chance to comment. Invites musings – direct them to Joe Rainer

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12:07 PM

Lewis Marks KC: Rhys Taylor has commented on the lack of economic diversity in terms of composition of the group. Push back from Sarah Hoskinson – we are diverse group and all interests represented

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12:11 PM

Ooh the panel appear to be v defensive about this. Shout out to Rhys Taylor – the first to comment on the report!

12:11 PM

Lewis Marks KC: don't really get Duxbury in low money cases.

12:14 PM

Lewis Marks KC: first recommendation is that not just joint lives orders. Second is that fundamental underlying assumptions are sound. Third is incorporating management charges. Further proposal – no longer safe assumption that full state pension will be received so should not be a factor

12:16 PM

Mostyn J: AAG published now for 33 years

12:17 PM

A prize will be given for the first photograph posted which shows all 33 AAG editions. And to tempt you all, the prize won't be another copy of AAG

12:19 PM

Mostyn J: the tables will include various terms – now neutral whereas Duxbury default is whole life

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12:21 PM

Lewis Marks KC: picking on gorgeous Rhys Taylor again – needs to be careful that people are not put off commenting, bearing in mind the provisional nature of the report at this stage is to enable others to comment / make suggestions.

12:25 PM

Mary Waring: real rate of return of 3.75% is not unreasonable but management fees need to be factored in. Costs of professional adviser plus platform charge plus management charge, usually a % of the fund

12:30 PM

Joe Rainer: decision to remove state pension was not that difficult.

12:34 PM

Lewis Marks KC: how to decide the issue of term? Simon Bruce: we could a have a presumption of term – until kids are 16

12:42 PM

Questions… one (which I don't quite understand) about algorithms and open source data. Sounds clever!

12:46 PM

Q from Sarah Lucy Cooper – what consultation by group on using different tables eg in personal injury? Response is that the rate of return has been debated at length. PI tables provide for different needs

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12:47

The AAG "ball" (which is square) is being thrown around

12:49 PM

Q from Helen Brander – will Capitalise be updated? Lewis Marks – it will have to be at some point

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12:50 PM

Q from Peel J – have you looked at Fair Shares report for term? Yes we have

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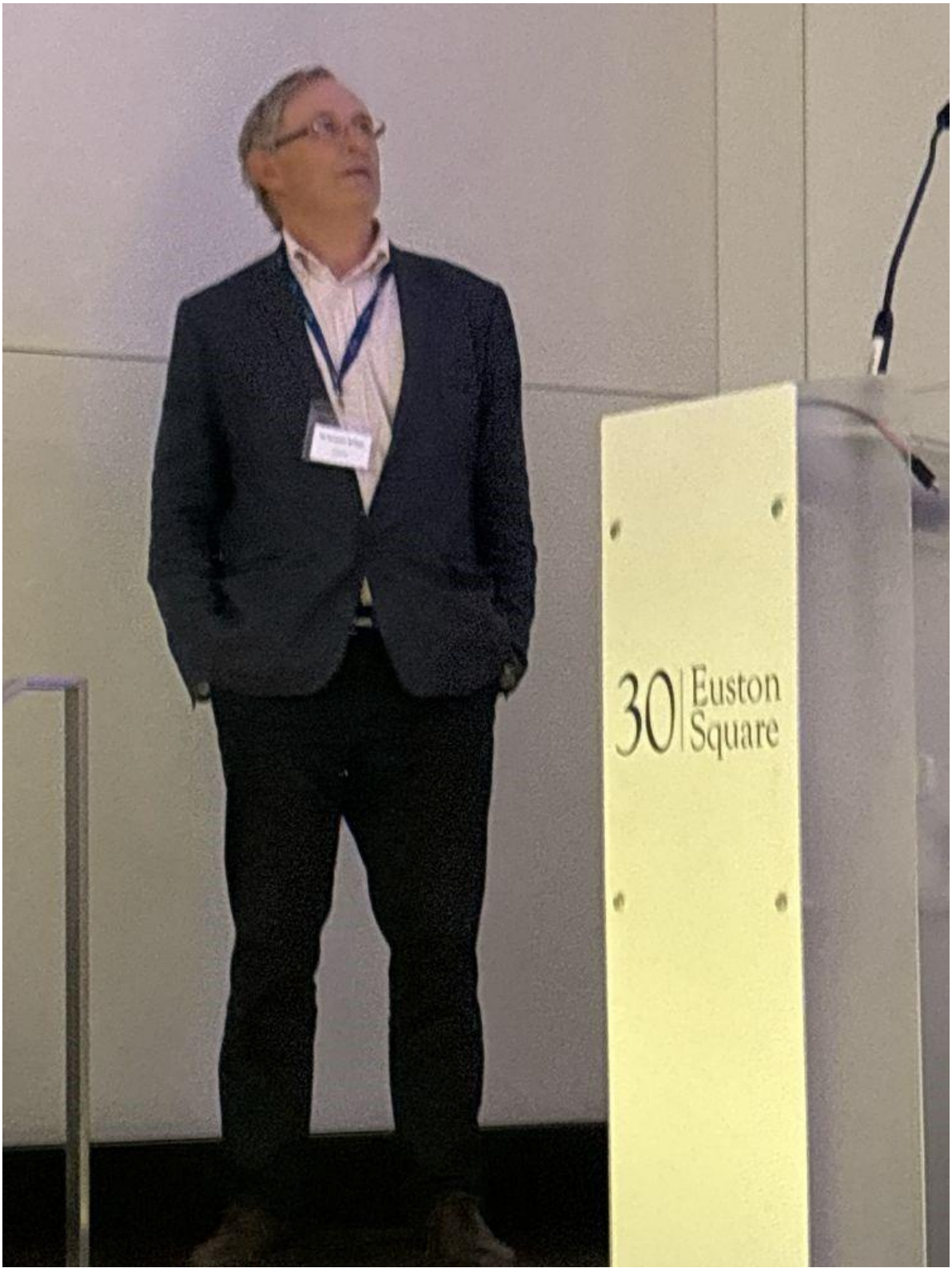
12:50 PM

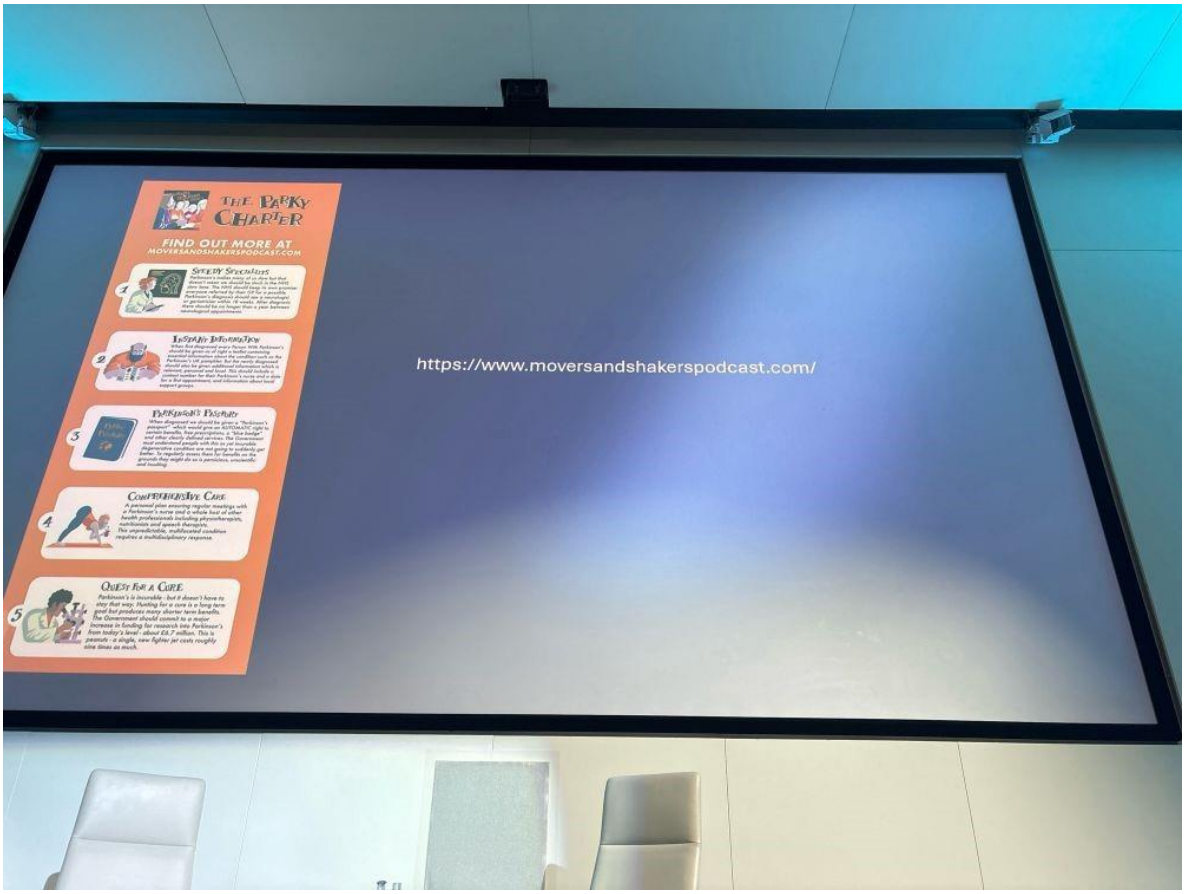
Now LUNCH – hurrah!!

1:54 PM

And we're back. First up, an impromptu presentation on behalf of the Movers & Shakers campaign. Fabulous accompanying video



1:55 PM



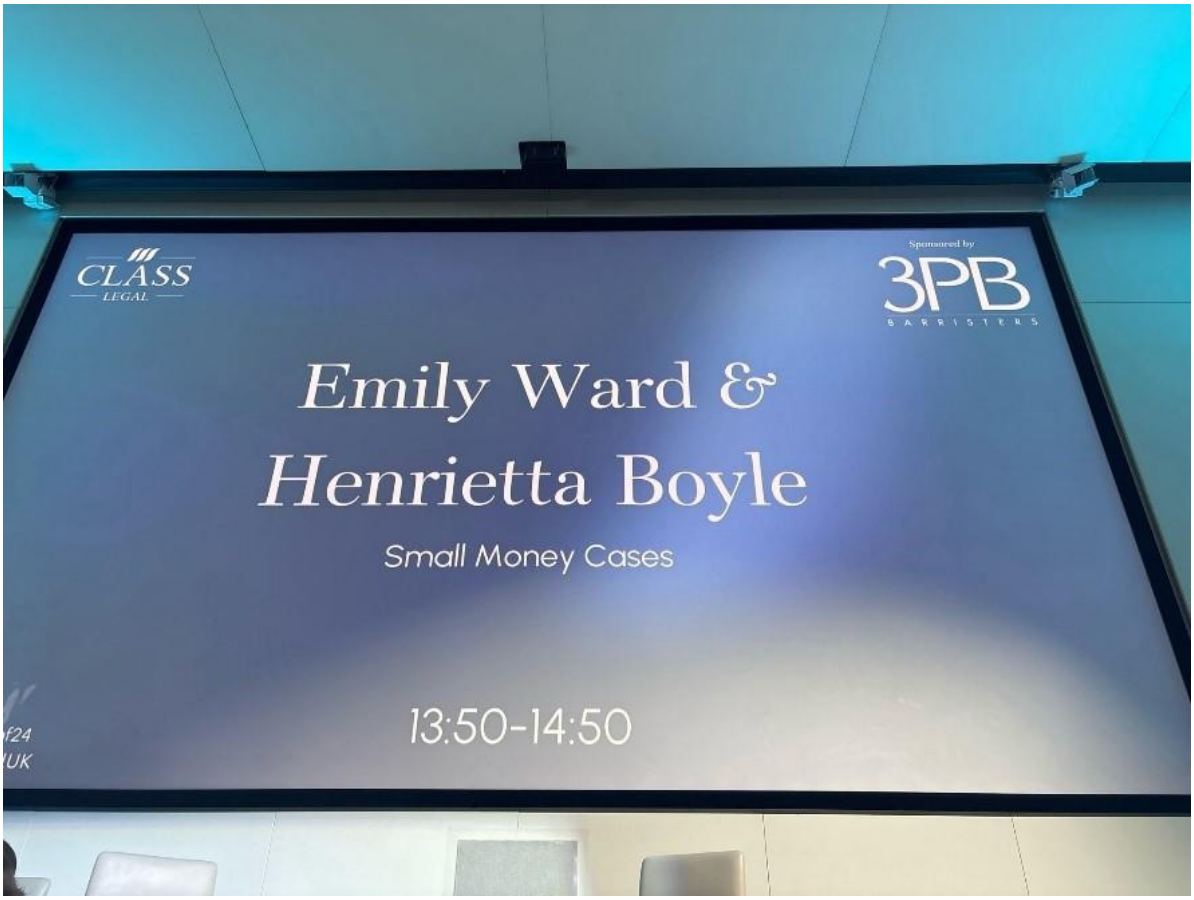
1:56 PM

SIGN THE PARKY CHARTER!!! At [www.moversandshakerspodcast.com](LINK)

1:59 PM

Now Emily Ward and Henrietta Boyle on Small Money Cases

1:59 PM



2:01 PM

What is small money? Views vary. Emily refers to small money fast track proposal arising from the first Farquhar report – judges asked to record asset values. Over

50% or cases involved assets of less than £500k

2:03 PM

HB: proportionality is key – don't get side tracked by satellite litigation; consider NCDR

2:08 PM

EW: don't write off arbitration. Consider a stay – whip out NAKC's judgment in NA v LA. Use accelerated procedure. Engage with necessity test when it comes to experts – marketing appraisals rather than SJE and have cost caps / properly considered LOI if going for SJE

2:10 PM

EW: be brutal with Qaires. Do we really need to know someone gave Auntie Margaret £50 3 years ago

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2:11 PM

EW: give thought to (not) running conduct in light of recent case law and whether cheaper to rely on needs in low value case

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2:13 PM

HB: LIPs more common in small money cases. Bar Council, FLBA and Resolution have all produced guides to assist LIPs

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2:16 PM

HB: watch out for potential difficulties with citing small money cases judgments by DJs and CJs. Cannot rely on them as a result of the 2001 PD. Creates a problem but don't lose sleep over it

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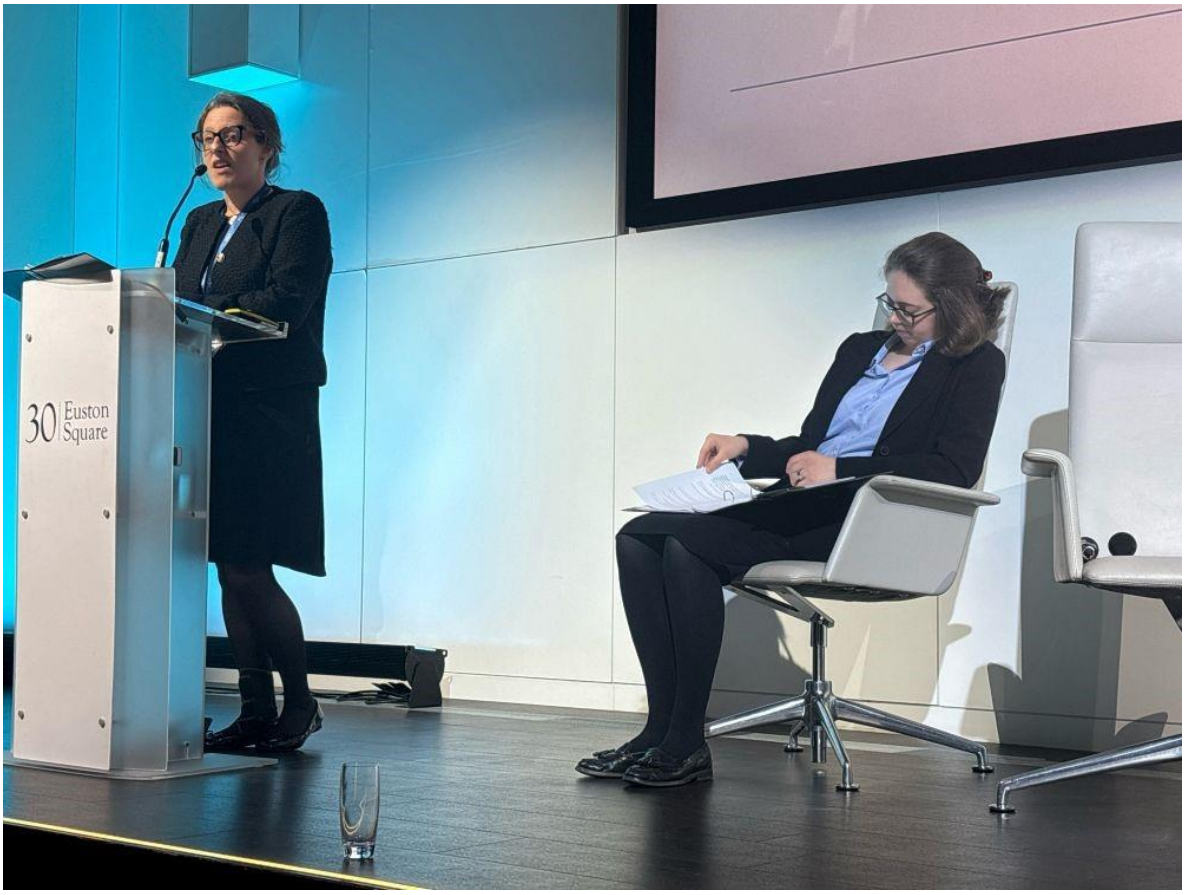
2:19 PM

EW: sounds obvious, but both parties' needs have to be taken into account – North v North (Thorpe LJ) and A v L (Moor J): "fairness has two faces"



2:20 PM

2:23 PM

EW: developing practice to instruct SJE to do mortgage capacity reports. Avoids cynical reliance on flawed capacity reports

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2:29 PM

HB:authorities permit Judges to have regard to housing prices even if specific particulars not provided in the right bracket.

2:31 PM

HB: rented property? Nothing to say everyone has to live in owner-occupied property. If FMH is rented, court can transfer tenancy

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2:32 PM

EW: Mesher orders? A lot to be said for grappling with issues now rather than kicking the can down the road

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2:38 PM

HB: has reached the "sexy" part of her talk: pensions

2:55 PM

Next up, Tim Bishop KC on Standish

3:02 PM

TBKC: what does Standish say about matrimonialisation? 1. Should be applied narrowly. 2. If there has been some matrimonialisation, make "fair allowance" for the fact some is mat and some is non-mat. 3. Slight reformulation of para 19 in K v L (too nuanced for character count)

3:05 PM

TB: Moylan LJ seems to have moved away from being 'High Pries' of discretion. Standish is another big step from discretion to principle

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3:08 PM

TB: CoA = 3 pointers towards principles rather than discretion: 1. Look at source; 2. Dismissal of ancillary arguments such as title, autonomous arrangements eg agreement and 3. (Indirectly) make factual findings as to whether may or non-mat

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3:11 PM

This is an insightful talk by Tim about the nuances of Standish and where it fits with the other authorities. Fascinating. And he does it all whilst looking like a retired member of a 1980s soft rock band. Fabulous ????

3:13 PM

TB: we now have very clear principles about how to deal with matrimonialised assets. Better to keep with that than reform s25 which would be 10 years of work for the lawyers but 10 years of misery for our clients

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3:15 PM

Talk on Law Commission up next, chaired by Sir Nicholas Mostyn

3:15 PM

Do we need to reform s25? (Neat segue there from TBKC's closing comments)

3:18 PM

NH: preparing scoping report about whether FR provides certain outcomes. Can't say what is going to be in the report as we don't know yet. Will be out before year end. It will be a step on path of reform, not reform itself

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3:24 PM

NH: looking at other potential models from codification to default models which would require significant departure from existing laws

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3:25 PM

NH: looking at other, specific issues – marital agreements, conduct, spousal PP and pensions

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3:27 PM

NH: not for Law Com to make recommendations as to approach. It's a step back from that

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3:30 PM

Questions: what was main gripe when consulted public? People want to protect own assets and rely on agreements and concerns that court does not do enough to punish bad behaviour

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3:31 PM

Question from Nigel Dyer KC – issues raised by judiciary? Nuptial agreements, term on PP with safeguards

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3:33 PM

Q from Henrietta Boyle – will it address costs? We're not making recommendations but didn't hear much from public about costs. Judiciary are concerned about costs – that they're just far too high

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3:36 PM

Q from Maria Henry: how will codification impact the more vulnerable. NH turned it would. If vulnerable and looked at s25 it would not tell you how your case is going to be settled

3:37 PM

Sir NM: will you be asked to do full report after this scoping paper? NH: we have new government. 3 choices – go ahead with reform itself, do nothing or ask us to make recommendations for reform

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3:41 PM

Sir NM. – you've told us as much as you could without actually telling us what's in the report ????

4:06 PM

Next up…HHJ Hess. Deputy National Lead FR Judge and Lead Judge for London with an FRC update


HHJ EDWARD HESS
OCTOBER 2024
THE FINANCIAL REMEDIES COURT UPDATE

4:09 PM

HHHEH: DON'T FORGET THE EFFICIENCY STATEMENTS (his capitalisation, not mine. Think he means BUSINESS)

4:11 PM

HHHEH: read N v J on conduct – judges taking it very seriously. Aware of Resolution report and judges will be digesting it – see how that develops. Would lead to radical changes

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HHHEH: the portal. Most consent orders dealt with within a few weeks. Contested portal is more recent. 12,500 contested cases annually nationally – 1/6 in London. Staff over worked and under resourced. Competing with other parts of family justice system with equally acute problems

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4:17 PM

HHHEH: 2,000 unread emails in CFC inbox. There has been a dramatic reduction in HMCTS staff. If want a response, don't email court, issue a general application on the portal. Will get quicker response

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4:19 PM

HHHEH: upload ALL documents and in the right place – HMCTS guidance. If don't have it, email him and he will send you a copy.

4:20 PM

HHHEH: most judges don't mind direct emails with case summaries etc but don't send to generic email address and remember to upload it on the portal too

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4:22 PM

HHHEH: new HCJ level allocation procedure since 21.05.24. By application on portal. HHHEH will deal and liaise with Peel J. It's on FRJ website

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4:25 PM

HHHEH: promotion of NCDR. All must read new pre-action protocol annexed to PD9A. Reinforces existing policy to attempt NCDR *before* issuing. Extends range of forms of NCDR. Court can suspend proceedings to enable it on own motion

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4:27 PM

HHHEH: if NCDR not attempted, respondent can apply for court to direct an adjournment for the parties to attempt NCDR. He has made such orders

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4:29 PM

HHHEH: PAG2 should be first port of call in a pensions case. Think before FDA about the Qs you want the PODE to answer. Perhaps only 1 Q – what PSO required to equalise income at state retirement age?

4:31 PM

HHHEH: part III leave apps will now be inter partes, not ex parte

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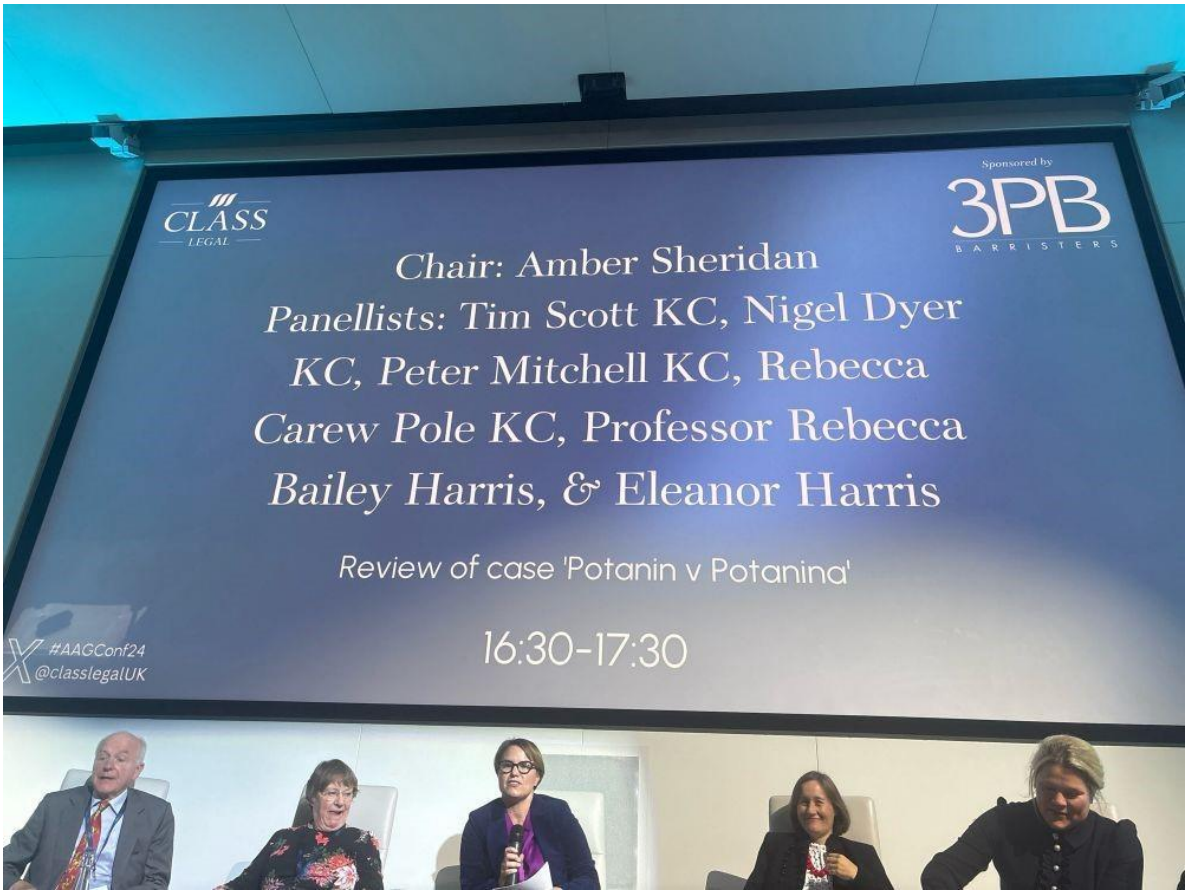
4:33 PM

Now the Potanin panel!!



4:36 PM

Amber Sheridan chairing in a wonderfully co-ordinated outfit (Aspiga?) even down to her shoes. Currently introducing the fabulous panel but Saxton and I are

distracted by Amber's beautiful velvet suit

4:37 PM

AS: Part III cases are rare

4:39 PM

Prof Becky Bailey Harris – history lesson on development of Part III apps, to protect women when divorcing overseas

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4:41 PM

BBH: law commission wanted to balance desire for law reform with the inherent risks – forum shopping, different legal systems er.

4:42 PM

BBH: the leave filter was brought in to protect the respondent from unmeritorious apps

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4:44 PM

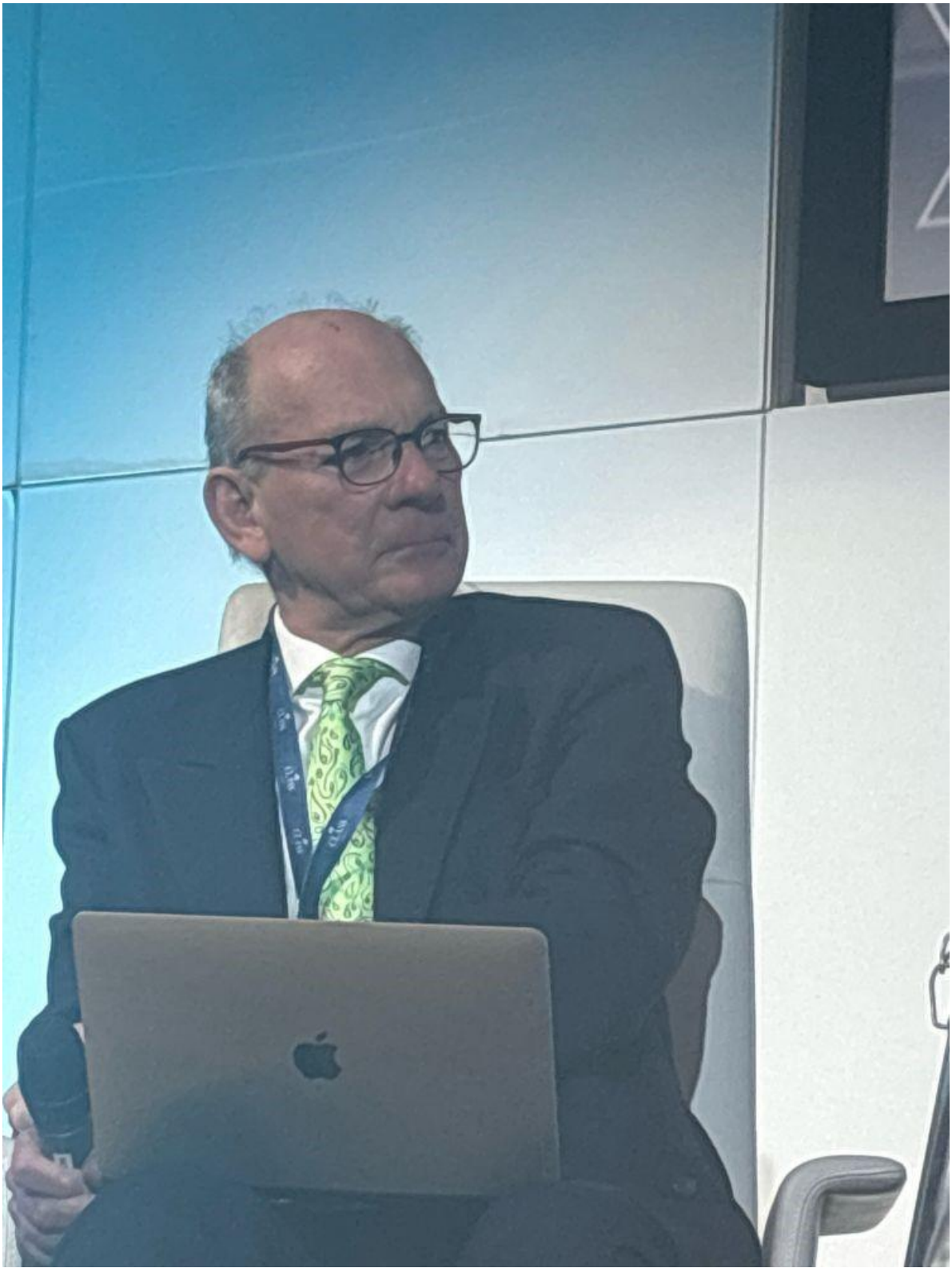
Eleanor Harris: going through the case from first application stage

4:49 PM

Peter Mitchell KC looking wonderful: you never know when open a brief that going to end up in Supreme Court

4:50 PM

Nigel Dyer KC: tallied up 19 judges involved in Agbaje



4:54 PM

PMKC: of assets of £705k, W received £106k and H received £599k

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4:56 PM

Coleridge J increased W's award in Agbaje to 39% of the assets

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4:58 PM

NDKC & Tim Scott KC – Supreme Court got it right.Agbaje was in the liberal court of that age – a reforming court and 5 of the justices were on panel for Radmacher

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5:00 PM

NDKC: legislative purpose of part III is to alleviate financial hardship

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5:04 PM

Tim Scott KC: absolutely nothing exceptional about Agbaje

5:05 PM

BBH: facts of Potanin – "striking". No connection between W and England during marriage

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5:07 PM

BBH: 43 hearings in Potanin.

5:10 PM

Rebecca Carew Pole KC – aka "Becky the Younger". Her thunder stolen by HHJ Hess about inter parties leave apps

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5:12 PM

RCPKC: no longer for respondent to produce knock out blow

5:16 PM

These panels are brilliant. We get to hear about the 'behind the scenes' processes which really bring the case alive

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5:19 PM

Healthy debate between NDKC and RCPKC about Lord Briggs' minority judgment. May spill over soon. Fingers being pointed and everything

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5:21 PM

NDKC responding. Taking his life in his hands if you ask me. I know who my money is on

5:23 PM

PMKC believes Part III *is* for W's like Potanina – it's about narrowing the huge disparity created by the outcome in the overseas country. RCPKC does not agree. Peter is a brave man

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5:26 PM

BBH: 2 practical tips: (1) read s12. This process not available in non-proceedings divorces (ie pure Talaqs) and (2) lengthy dissenting judgments are a waste of

resources. Don’t bother reading them

5:28 PM

TSKC top tip – in a jurisdiction dispute, factor in costs of a Part III in your costs l/benefit analysis

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5:29 PM

Peel J closing a FABULOUS conference. Put 16.10.25 in your diaries for next year’s AAG conf. See you next year loves.

- Blog
- At A Glance

At A Glance Conference 2024: Conference Report

Published: 16/10/2024 12:00

Amy Beddis

Amy is a specialist family barrister at 3PB Chambers. Amy has a particular focus on financial remedy work and TLATA matters. Amy regularly presents at webinars, conferences and often edits the 3PB family law newsletter. She looks forward to blogging on all things matrimonial finance as well as providing practical tips and hints along the way.

The flagship financial remedy conference of the year took place on Wednesday 9 October 2024, expertly chaired by Peel J. The Class Legal team excelled yet again with the At a Glance annual conference, sponsored by the brilliant 3PB Barristers – who brought along some squeezy stress-ball judges for delegates to take away (needless to say they vanished pretty quickly!)

This year's conference did not disappoint. The speakers are some of the greatest minds of the financial remedies world, who we didn't just learn from but were also entertained by their anecdotes and insights from such eminent practices.

The overarching themes from the conference this year were as you might expect. The importance of NCDR was emphasised on several occasions, including in small money cases. The reminder again from Peel J that costs orders will be made – the emphasis is on early and regular open offers to settle. And, the need to narrow issues, and appropriately case manage in a system which is overloaded.

We were treated to a whistle-stop tour of the last 40 years in matrimonial finance from the superb Sir Philip Moor following his retirement from the High Court Bench, who spoke of the ways not only that technology has changed but also how the courts have shaped the law in this area. It was telling that the statutes we use in practice have not really changed since 1973 and 1984 but our practices have, the important case law which has developed and evolved to modernise the way in which we deal with finances on divorce really has been the progress.

This talk linked in very neatly with the panel session chaired by Sir Nicholas Mostyn with Law Commissioners Professor Nicholas Hopkins and Christine Gentry covering the key areas of work for the new report. The feedback they had

received from the public about reform was that people wanted to protect their assets, highlighted nuptial agreements, delays in the court service, and costs. This resonated with the feedback from professionals. They will be advising Government on a number of approaches which could be taken, albeit the Government does not have to take them up on their suggestions! The work they are doing is vital, particularly given the progression in case law but not in statute.

Delegates were surprised to find themselves at an unofficial awards ceremony hosted by the brilliant Joe Rainer. Joe didn't just provide us with a library of the top cases from the past year but delivered it in a way which many of us are unlikely to forget! Demonstrating the sheer effort that goes into the talks provided by members of the profession.

Emily Ward and Henrietta Boyle provided a super helpful and pragmatic update on small money cases which will help everyone in their daily practices. It is so important to not just focus on the big money cases and the tips and tricks we learnt along the way will be used time and again.

We were also kept abreast of the changes to our profession with Lieven J and Peel J providing an insightful update on the transparency project and the importance of not being a 'secret court'. The key messages are that it is working, it is nothing to be afraid of and overall has been very positive. HHJ Hess echoed this in his helpful update on the FRC which demonstrates the focus and innovation in our area of family law which was very much needed. HHJ Hess also made it clear that our courts are still under extreme pressure but there are things that *we* can do to make it better. For example, for general applications using the portal is more likely to get a response than simply emailing the court; comply with the efficiency statement, and avoid submitting consent orders absent the decree nisi/conditional order.

It really does demonstrate the gravitas of this conference when you have Tim Bishop KC giving a talk on *Standish*. A case which will impact people whatever the level of money involved. Echoed by the discussion with the Duxbury Panel (Chair: Lewis Marks KC, Panelists: Sir Nicholas Mostyn, Joe Rainer, Mary Waring, Sarah Hoskinson, Michael Allum, and Simon Bruce). Again, to hear first-hand the initial thoughts of the panel (following the publication of the report) and to be able to ask questions about it demonstrates the valuable insight gained when attending the AAG Conference.

Every year there is a panel convened of an important case which includes members of the team involved. This year we had a review of the case *Potanin v Potanina* with chair Amber Sheridan, and panellists Tim Scott KC, Nigel Dyer KC, Peter Mitchell KC, Rebecca Carew Pole KC, Professor Rebecca Bailey Harris and Eleanor Harris. To hear first-hand from those who have dealt with such high-level Part III cases including this one and to listen to the arguments played out gives you an element of learning that I don't think you can achieve with a standard conference or talk. At the end we were given top tips from our expert panel which will be invaluable to those with an international practice.

Sir Nicholas Mostyn was, as always, the stalwart of the day having assisted with such an excellent programme. He also played to us a video made by the Movers and Shakers, an inspirational group of people with Parkinson's Disease and I would ask you to please check it out at https://www.moversandshakerspodcast.com/ and share it.

This conference really does deliver CPD with pure Class and I cannot recommend it enough for those of you with a money practice – and if you can pick up a free squeezy judge what's not to miss?! Here's to next year!

Please do sign up to the FRJ for more updates on all FR issues.

- Blog

- At A Glance

A 40-Year Revolution in Financial Remedies

Published: 16/10/2024 12:11

Sir Philip Moor

Sir Philip Moor specialised in financial remedies at 1 Hare Court for nearly thirty years, of which he was a QC for ten years. In 2011, he was appointed a Judge of the High Court, Family Division, where he undertook many of the high profile financial remedy cases. He retired from the judiciary in October 2024 and has returned to Chambers to conduct private FDRs.

My subject today is revolution. Don't worry. I am not advocating a take-over of the country by Tommy Robinson or Piers Corbyn. I am talking about the fundamental transformation of financial remedy work since I undertook my first ever case on 19 July 1983 in the Edmonton County Court, just over 41 years ago.

It was an application for periodical payments, which could, of course, still be heard today. Everything else about it was entirely different to the position now. It was conducted in a County Court, not the Family Court, although, in fairness, it would have been the same judge, in the same room, in the same building. It was called an application for ancillary relief, not financial remedies, it being ancillary to the main matter of the divorce decree. There would have been no position statements; skeleton arguments; chronologies; schedules of issues; or indeed any documents to speak of other than a couple of affidavits that were almost certainly entirely irrelevant to the issue that had to be determined. The judgment, as with all judgments then, would have been delivered orally. The Registrar (not District Judge) would have drafted the order. There would have been no MIAM; no First Appointment; and no FDR.

Chambers and solicitors' offices were also entirely different. In Chambers, there was a paper diary. There were four phone lines. There was not a computer in sight. There was a telex machine, but I believe it was only ever used by our then Head of Chambers, Joseph Jackson QC to receive instructions from Hong Kong. Fax machines had not been invented. There was a pretty basic photocopier, but all letters and documents were typed on typewriters, using carbon paper to produce more than one copy. In consequence, briefs to counsel were mercifully small; usually folded and tied together with pink tape. The brief fee was written by the clerk onto the brief and the brief had to be endorsed at the end of the case with the outcome or you would not get paid. The internet was the stuff of

science fiction. An email was unheard of. If you wanted a reply to an urgent letter, it would almost certainly take a week at least to arrive.

It was only in 1986 that one Nicholas Mostyn told me we had to get personal computers. They came from IBM. Mine arrived in a huge box and remained unopened in my room for a couple of months, before I plucked up the courage to start to set it up. It used a DOS operating system but there was still no internet and, at least so far as my use of it was concerned, it was basically a glorified word processor. The internet only came several years later, using a dial-up modem that made a screeching noise whenever you turned it on.

I do not believe anyone then would have envisaged a world of video hearings; electronic bundles; instant communications worldwide; or correspondence by email, written by artificial intelligence.

But most importantly, what of the law itself? In one sense, the 1973 Matrimonial Causes Act was very similar to the one in force today. The powers of the court were essentially the same, other than in relation to pension sharing and legal services orders. Prior to the Matrimonial and Family Proceedings Act 1984, s 25 required the court to have regard to all the circumstances of the case, whilst, as now, paying regard to specific matters, such as 'income, earning capacity, property and other financial resources'; 'financial needs, obligations and responsibilities'; 'standard of living enjoyed before the breakdown of the marriage'; 'age of the parties; the duration of the marriage'; 'any physical or mental disability of the spouses'; contributions; and 'benefits lost on dissolution of the marriage'. That all sounds very familiar; but there was a tailpiece:

> 'and so to exercise those powers as to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to each other.'

Of course, it could, with justification, be said that, in the vast majority of cases, this aspiration was pie in the sky. If assets are being divided, how can you be placed in the same position as if the marriage had not broken down and the assets not divided? Note as well that there was no obligation to achieve a clean break and the welfare of the children was not mentioned in that section at all.

How was it all interpreted? The 1973 Court of Appeal case of *Wachtel v Wachtel* was the most significant decision. Lord Denning was of the view that an appropriate starting point for an award would be to give the wife one-third of the capital and one-third of the income. The justification in relation to income was one-third to each party and one-third for the children. Remember, that tax relief was available on periodical payments orders. This was of vital importance. In the late 1970s, the top rate of tax was a staggering 83% and there was a 15% unearned income surcharge on top of that. In one year, a desperate Chancellor, Denis Healey, even increased the highest burden to 103%. This undoubtedly affected the approach of everyone. High earning barristers, such as Joe Jackson

and Jeremy Tatham, ran their Rolls Royce cars as business expenses to reduce their taxable income.

Thereafter, 'needs' became the watchword and, as late as 1996, the Court of Appeal was clear that there was a ceiling on ancillary relief awards. In the case of *Dart v Dart,* the Wife received £10m out of the Husband's assets of around £400m, admittedly all inherited/received before the marriage. Even then, however, I remember some commentators saying that, by providing for the spouse's reasonable requirements, generously assessed, the law of England and Wales was a generous one to divorcees, particularly as it was impossible to oust the jurisdiction of the court by a pre-nuptial agreement.

So how did the law change so dramatically? Parliament did make a few amendments to s 25 in the 1984 Family and Matrimonial Proceedings Act, but there was nothing too fundamental. It is right that the tailpiece in s 25, about putting spouses back in the position they would have been, if the marriage had not broken down, was removed. Whilst the court still had to have regard to all the circumstances of the case, the first consideration became the welfare whilst a minor of any child of the family who has not attained the age of 18. I have to say that I do not think this changed the way the judiciary applied s 25 at all, as the needs of children had always taken centre stage.

As opposed to being mentioned in the tailpiece, 'conduct' became a specific factor in s 25(2), but only if it was such that it would be inequitable to disregard it. Whilst I will return to that briefly in due course, we all know that the Supreme Court in *Miller/McFarlane* confined this, in reality, to cases where the conduct was gross and obvious, to the huge relief of the judiciary, which took the view that it could not cope otherwise. Parliament did require the court to consider the extent to which it would be reasonable to expect a party to take steps to increase their earning capacity, which was broadly welcomed.

The main change, however, in the 1984 Act, was to give prominence, for the first time, to achieving a clean break. A new s 25A imposed a duty on the court to consider, in every case, whether it would be appropriate to terminate financial obligations as soon as is just and reasonable. Moreover, s 25A(2) required a court, making a periodical payments order, to consider whether it would be appropriate to require payments to be made only for such term as would enable the spouse to adjust to the termination of those payments without causing undue hardship. Note that the Act specifically refers to 'undue' hardship so there could be hardship, just not undue hardship. I consider that these changes have made a significant difference but have done so over a considerable period of time, rather than immediately on the Act being passed. The clean break has become the overwhelming norm and spousal periodical payments, unlimited in time, an increasing rarity.

The most significant change in the law, however, was undoubtedly judge-led. I am, of course, referring to the sea change in approach commenced by the House of Lords in *White v White* on 26 October 2000, a fitting way to begin the 21st Century. and since developed further in cases such as *Miller/McFarlane*. Gone

forever was the jurisprudence to be found in *Wachtel* and *Dart* requiring a needs-based solution.

It was replaced, for the first time, by the concept of matrimonial property and, as the years passed, a virtual rule that, in the absence of need, there would be an equal division of such matrimonial property, namely property created during the marriage. Indeed, we must not forget the way in which *White* outlawed discrimination in financial remedy proceedings and redefined 'contributions' such that financial contributions no longer had pre-eminence but were the equal of other contributions such as bringing up the family and maintaining the matrimonial home.

Miller/McFarlane reminded us, however, that sharing of the matrimonial property is only one strand of three that the court must consider. Needs remains alive and well, if the claimant's needs award exceeds the sharing claim, but again the court must never forget that the respondent's needs must be considered too. The final strand of the three, namely compensation, has of course been confined to a very narrow category of case which can perhaps better be considered under the heading of 'relationship generated disadvantage'.

Few would argue that these developments were not welcome. Whether it is really appropriate for the judiciary to change the law so fundamentally is an interesting philosophical question that cannot be answered in the limited time available and perhaps can never be answered, but fundamental change to the law has undoubtedly been judge-led. The justification given is, of course, the failure of Parliament to grasp the nettle of changing the law, now over 40 years since passing the 1984 Act.

The other fundamental change in the law over the past 40 years relates to the issue of Nuptial Agreements. Back in the 1980s, it was overwhelmingly the view of the judiciary and practitioners that such agreements were in breach of public policy as you could not oust the jurisdiction of the court. It was not helped by the fact that the vast majority of such agreements at the time simply provided that the economically weaker party, almost always the wife, would get nothing on divorce. Time after time, I remember drafting such an agreement with an accompanying written Opinion telling the husband that it was a complete waste of time and would never be upheld.

And then, in 2010, we had the second sea-change in approach, this time from the Supreme Court, in the case of *Radmacher v Granatino*, the subject of last year's case review, so I do not intend to say anything more on that topic now.

So, what of the future? Forty years ago, nobody could possibly have predicted *all* the numerous changes outlined above. There were, however, some visionaries. Mr Justice Singer, then Peter Singer QC, did advocate for the changes brought about by *White v White* in a lecture to the Family Law Bar Association at Cumberland Lodge, years before the House of Lords agreed. Lord Wilson of Culworth, in a case called *S v S* in 1997, in which I was junior counsel for the husband, suggested that there might come a time when pre-nuptial agreements

were upheld. Mr Justice Mostyn was always well ahead of the curve in relation to just about everything but certainly in relation to technology. He was, almost single-handedly, responsible for the introduction of virtual hearings at the very beginning of the pandemic when he insisted, despite serious reservations from the Senior Judiciary, that he undertake a five-day Court of Protection case entirely remotely in the first weeks of lockdown. It was a great success and paved the way for the Family Court showing every other area of practice, and the vast majority of foreign jurisdictions, the way to proceed. Thank goodness he did or the backlog in cases would have been unmanageable, and many litigants would have been denied justice by the passage of so much time.

It is, of course, quite impossible to say where we will be in the year 2065. I am not convinced that Artificial Intelligence will be quite the game changer that some predict or fear. Professor Sir Nigel Shadbolt, Principal of Jesus College, Oxford, and Professorial Research Fellow in Computer Science at the University of Oxford, points out that what AI basically involves is the analysis, incredibly quickly, by computers of billions, if not trillions, of separate pieces of information to come to an answer to a problem. It is not the computers thinking for themselves. It follows that they make errors. Initially, it may be a relatively small percentage of error. Professor Shadbolt considers it is about 3%, which, whilst small, is not irrelevant. Moreover, he makes the point that, if the computers continue to analysis the same information over and over again, which will, by then, include their own errors, they become more and more error prone as time goes on.

I accept entirely that AI will be a force for significant change. It will be able to conduct legal correspondence, analyse replies to questionnaires, and even produce an answer to a financial remedy conundrum, but Professor Shadbolt is reassuring in pointing out that human ingenuity is such that humanity will always create new types of employment, notwithstanding technological change, as is shown throughout our history from the days of the industrial revolution right through to the present day. Legal secretaries may have largely disappeared but instead we have HR; Compliance; IT; Marketing; Front of House, etc.

In terms of the law itself, this is not the time to predict the work of the Law Commission. There may be some sort of codification of financial remedy outcomes. Pre-Nuptial Agreements are likely, eventually, to be given the force of law, provided safeguards are in place; and there may well be a law to give more financial rights to cohabitees. I would tentatively support all three.

I sincerely hope that 'conduct' will not make a return to the battlefield. I fear it would increase costs dramatically, as it is as rare as a snow leopard to find a spouse who admits to coercive and controlling behaviour. Apart from anything else, we simply do not have the court rooms, the judges and the staff to cope, let alone the legal aid fund available to fund the litigation, as, by definition, everyone raising conduct will be entitled to legal aid, and everyone defending it will be entitled to a QLR (Qualified Legal Representative) to cross-examine the complainant. It is said that as many as 60% of cases include allegations of

domestic abuse or coercive and controlling behaviour. We have always tried to avoid rummaging in the attic of a marriage. I fear that permitting a return of conduct will lead to rummaging, not just in the attic, but in the basement, the ground floor and the first floor as well. Moreover, let us assume that coercive and controlling behaviour is established, how does a judge quantify the effect on the financial remedy award? It is already settled law that, if, as a result of such behaviour, a spouse's earning capacity is reduced, either as a result of physical or mental impairment, the court will compensate for that loss. Other than that, how much else should be awarded? Is it a fine and, if so, how do you quantify it? Moreover, surely a fine is the job of the criminal courts not the hard-pressed Family Court judge.

Having said all that, I tentatively suggest that it is difficult to see how there can be quite the same fundamental change in the next 40 years, as there has been in the last 40 years, although I suspect I would have said that if I had given this lecture in 1983. Some will take comfort from that. Others may find it slightly disappointing. I am, however, amazed at how well we have adapted to all the changes that society has thrown at us. I am confident that, whatever the future holds, family law in general and financial relief in particular, is in safe hands.

- Blog
- At A Glance

GH v GH – FDRs Are Not to Be Dispensed With

Published: 21/10/2024 23:38

Emma Kelly

Emma Kelly is a member of the Family Finance team at St Ives Chambers in Birmingham. Her practice encompasses all aspects of family finance, with an increasing focus on TLATA matters. Alongside her family finance work, Emma maintains a successful Civil and Commercial practice, with extensive experience in civil claims related to business, property, and social housing. Emma also practises in Crime with a growing focus on financial crime.

If ever there were any doubts as to the importance of the FDR appointment and the parties' attendance at one, then Mr Justice Peel has unequivocally put those doubts to rest in his judgment in *GH v GH* [2024] EWHC 2547 (Fam), published on 3 October 2024. The court's ongoing focus on assisting parties to resolve financial remedy proceedings in a timely and proportionate manner means that FDRs (including private FDRs) are, perhaps unsurprisingly, still receiving significant praise and judicial support.

The facts

In the Family Court, the judge had dispensed with the FDR appointment and directed that the case proceed straight to a final hearing. The judge had done so for two reasons: (i) there was an ongoing factual dispute about the wife's earning capacity; and (ii) the wife's position had not crystallised so as to enable the FDR process to be successful.

The judgment does not set out the facts of the case as it supplements the appeal judgment which was given *ex tempore,* but Peel J decided to commit to paper his reasons for overturning the judge's decision on what he described as a 'narrow but important point'. Having allowed the appeal Peel J directed that parties attend a court FDR and ordered the parties to file without prejudice offers in advance in the usual way.

FDRs

Peel J could not have been more emphatic in expressing his support for the FDR process describing it as an 'integral part of the court process' and that

'anecdotally it facilitates settlement in a significant number of cases'. As he stated, '[i]ts value has been proved time and time again'.

He referred to the Family Procedure Rules 2010 as a reminder to all practitioners of the centrality of the FDR to the process:

By FPR 9.15(4)(b)

> '(4) The court must direct that the case be referred to a FDR appointment unless—
>
> (a) the first appointment or part of it has been treated as a FDR appointment and the FDR appointment has been effective; or
>
> (b) there are exceptional reasons which make a referral to a FDR appointment inappropriate.' (Highlighting by Peel J)

Peel J was clear that 'under (b) the words "exceptional reasons" need no gloss or interpretation'.

He also highlighted para 6.1 of PD 9A:

> 'A key element in the procedure is the Financial Dispute Resolution (FDR) appointment.'

The judgment also noted that the parties had not attempted any form of 'Non-Court Dispute Resolution'. [1] Whilst it is unlikely that the judge's view would have been any different if that had been the case (unless the parties had perhaps undertaken a private FDR), it is significant that the judgment makes clear an FDR is *more* pressing in such circumstances.

Application

So, what does this mean for cases in which factual disputes and uncrystallised positions are central?

Peel J was clear that factual disputes are no bar to an FDR. This is of particular importance as parties (or perhaps their advisers) are often concerned about the likely efficacy of an FDR when there is a factual dispute which the tribunal will not of course be able to resolve. He stated that:

> '[t]he FDR judge is well able to deal with factual issues (such as, in this case, W's earning capacity), not by determining them but by expressing a view as to how they appear on the available evidence and how relevant they are.'

In relation to this particular case, in spite of the factual issues, '[t]he essential facts and resources are clear and there is no impediment to the parties' making offers, or to the court giving a firm steer'.

In some cases, particularly those – as Nicholas Mostyn QC (as he then was) observed in *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 – where there is a dispute about the ownership of property between a spouse and a third party, the dispute should be directed to be heard separately as a preliminary issue before the FDR so the parties know at an early stage whether or not the property in question falls within the dispositive powers of the court and a meaningful FDR can take place. However, it all depends on the issue in dispute and this is by no means a universal rule.

Likewise in relation to uncrystallised positions:

> '[t]he FDR judge is also well able to give a clear overview even if (as the judge assumed to be the case here) one or other party's position is not fully crystallised.'

The judgment also sends a clear message, to practitioners and clients alike, that the benefits of the FDR process are wider than the indication itself. As Peel J said, it enables the parties to hear, probably for the first time, an independent evaluation of the case; where parties' positions differ, the judge can consider which arguments are sound and which are devoid of merit; and parties have the opportunity to consider the risks (in terms of costs, uncertainty, delay and emotional toll) of protracted litigation.

Peel J was emphatic in stating that it was 'very hard' to envisage a situation where the FDR should be dispensed with. He said that one example might be if one party had not engaged at all, including not attending court hearings, and had stated that they will not attend the FDR. Although there might be other situations which might justify proceeding from First Appointment to final hearing without an FDR 'these will be very few and far between'.

GH v GH complements earlier cases which emphasised the importance and centrality of the FDR including *S v S (Ancillary Relief: Importance of FDR)* [2008] 1 FLR 944 per Baron J and *Mann v Mann* [2014] 2 FLR 928 per Mostyn J.

In *S v S*, the parties did not have an 'effective' FDR. The District Judge's involvement on that occasion was said to have been 'so slight that both of the parties accepted that he could, despite the rules, undertake the final hearing'. Baron J observed as follows:

> 'The FDR procedure must be undertaken in an effective way in every case, for it gives every party the opportunity to settle the litigation, to air the issues and to have neutral judicial evaluation at a time before the costs have denuded the parties' assets in the manner in which they have in this case. As a general principle, therefore, I make it clear that where an FDR is not effective, it is incumbent upon the court to fix another appointment as soon as practicable in order to ensure that there be such mediation. It must come before an experienced tribunal and it must be given sufficient time to enable that tribunal to read the papers fully and to engage with the parties/their

> professional teams in order that the matter can, if possible, be sorted out.'

GH v GH therefore states that it will be exceptional to dispense with the listing of an FDR and *S v S* states that if one is listed but is ineffective the court should fix another one as soon as practicable.

In *Mann v Mann*, Mostyn J referred to the introduction of FDRs in 1996 on a pilot basis and in 2000 nationwide as 'a significant innovation' and 'a great success, contributing to the settlement of the majority of cases'. He referred to the good practice guide promulgated by the Family Justice Council: *Financial Dispute Resolution Appointments: Best Practice Guidance December 2012* [2013] 1 FLR 1109. He stated that an FDR 'is almost invariably ordered' and that when ordered 'attendance by the parties is compulsory', referring to FPR 9.17(10). He said:

> 'I have never heard of a party refusing to attend and so cannot say from experience what would happen if someone did. It would be a serious contempt of court were a party recalcitrantly to refuse to do so.'

Peel J's support for the FDR process is therefore consistent with these previous cases where their importance has been underlined. It is obvious why this is so: early neutral evaluation by a specialist judge minimises the risk in terms of costs, uncertainty, delay and emotional toll of protracted litigation. Given what is exceptional needs 'no gloss or interpretation' parties can therefore expect a court dispensing with such a hearing to be a very rare occurrence.

- Blog
- FDRs

No Special Favours: Litigants in Person and the Financial Remedies Court

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https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/2614

Although not impacted in the same way as private law children proceedings by the restrictions on access to justice brought about the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 1 April 2013, there are many parties who represent themselves in financial remedy proceedings, sometimes due to cost and sometimes by choice.

Self-evidently most such litigants in person (LIPs) are not familiar with either the law underpinning their case, or the rules by which the Financial Remedies Court operates. The consequences of this were considered at length by the *Judicial Working Group on Litigants in Person: Report (July 2013)*.[1] The Family Procedure Rules 2010 (FPR) are complicated and can appear intimidating. Perhaps as a consequence, practitioners often believe (or certainly feel) that courts are

kinder to LIPs than to those who are represented and treat those who represent themselves more leniently.

The recent judgment of Henke J in *Philip John Mainwaring v Susan Claire Bailey (Costs)* [2024] EWHC 2614 (Fam) – published on 16 October 2024 – is, however, a reminder that this is not the case. During the course of her judgment she stated (at [18]) that the Court of Appeal has held that LIPs are required to comply with the procedural rules on appeals as much as a represented party. She referred to *Re D (Appeal: Procedure: Evidence)* [2016] 1 FLR 249 per McFarlane LJ (as he then was) at [40]:

> 'The fact that an applicant for permission to appeal is a litigant in person may cause a judge to spend more time explaining the process and the requirements, but that fact is not, and should not be, a reason for relaxing or ignoring the ordinary procedural structure of an appeal or the requirements of the rules. Indeed, as I have suggested, adherence to the rules should be seen as a benefit to all parties, including litigants in person, rather than an impediment.'

However, this guidance extends far wider than just the procedural rules that surround appeals. In *Barton v Wright Hassall LLP* [2018] UKSC 12, the Supreme Court was concerned with whether the court should retrospectively validate service in a case where the claimant purported to serve a claim form on the defendant's solicitors by email, without obtaining any prior indication that they were prepared to accept service by that means, and where it was common ground both that this was not good service and that the claim form expired unserved on the following day. By a three to two majority the appeal was dismissed. Lord Sumption JSC (with whom Lord Wilson and Lord Carnworth JJSC agreed) stated:

> '[18] … In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings, But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules … The rules do not in any relevant respect distinguish between represented and unrepresented parties … Unless the rules and practice directions are particularly inaccessible or obscure it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.'

Even the dissenting judgment of Lord Briggs JSC (with whom Baroness Hale of Richmond JSC agreed) struck a note of caution:

> '[42] … there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them. If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences.'

Lord Sumption's judgment suggests there may be some leniency towards LIPs in respect of 'case management decisions and in conducting hearings'. Examples of this would be to give unrepresented parties longer time limits for compliance with case management directions or assisting unrepresented parties to present their evidence during a final hearing. However, the clear message is that when it comes to *compliance* with procedural rules and practice directions, LIPs should be treated the same as represented parties. This message is, however, arguably tempered slightly by the reference in paragraph [18] to 'inaccessible or obscure' CPR rules and practice directions. It is not clear what parts of the CPR are to be so considered and the same is the case with the FPR.

This language perhaps echoes that used in *Re D (Appeal: Procedure: Evidence)* [2016] 1 FLR 249 where McFarlane LJ (as he then was) referred (at [25]) to the fact that 'some procedural latitude may be justified' to accommodate LIPs but the appeal procedure established by FPR Part 30 'is neither complicated nor onerous'.

In *Mainline Pipelines Limited v Thomas Derrick Phillips & Anor* [2023] EWHC 2146 (Ch), HHJ Paul Matthews (sitting as a judge of the High Court) said as follows:

> '[6] … there is no special set of rules in this country for litigants in person. As a general proposition, we do not have two sets of rules, one for those with lawyers and one for those without. We have only one set, which (with a few exceptions) applies to everyone. Litigants in person need to know this. A relatively recent decision of the Supreme Court, in a case called *Barton v Wright Hassall* [2018] 1 WLR 1119, makes clear that lack of legal representation will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court …
>
> [7] Moreover, litigants in person, in choosing to self-represent, cannot excuse themselves from compliance by saying that they do not know the rules. It is their responsibility, in choosing to take part *personally* in formal legal proceedings, rather than by way of professional legal representation, to make themselves aware of the relevant procedural rules, and to follow them. Apart from the many textbooks and handbooks on civil procedure which are published and usually available for consultation in libraries, the relevant rules themselves are available, without charge, via the internet from the Ministry of Justice website. There are many other websites, too,

> some providing the full texts of legislation and of caselaw precedents, and others proffering free legal advice. In addition, there are Citizens Advice Bureaux and law centres which offer free legal advice.
>
> [10] … Litigants in person need to understand that, other than in trivial respects, the court is not going simply to ignore their failure to follow the appropriate procedures, or (worse) to treat them as though they had in fact complied. That is not fair on those who do comply …'

The same judge made similar comments in *Greenwood & Anor v Pringle* [2024] EWHC 84 (Ch). At [28] he referred to *Barton v Wright Hassall LLP* stating that it 'makes clear that lack of legal representation will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court'.

Although many of the relevant authorities are civil cases it was made clear in by Munby J (as he then was) in *A v A* [2007] 2 FLR 467 that this is a distinction without a difference:

> '[21] … But what it is important to appreciate (and too often, I fear, is not appreciated at least in this division) is that the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions …'

And he said to like effect in *Whig v Whig* [2008] 1 FLR 453 (original emphasis):

> '[60] The Family Division applies *precisely* the same principles, and in *precisely* the same way, as the Chancery Division, or for that matter the Queen's Bench Division …'

The impact of a LIP on the quasi-inquisitorial nature of financial remedy proceedings is a separate issue and one considered in *Clarke v Clarke* [2023] 2 FLR 1 per Mostyn J where the quantum of the spousal periodical payments order was considered on appeal even though the wife herself has not pressed it. This raised the question (at [27]) 'of how much encouragement the court should give to a litigant-in-person to take the right points and to eschew the wrong ones'. The judge stated:

> '[29] … It has been stated time and again, for example in *Barton v Wright Hassall LLP* [2018] UKSC 12, that no special concessions or assistance should be given to litigants-in-person …
>
> [30] On the other hand, in a financial remedy case the court exercises a quasi-inquisitorial function. It would be a dereliction of its inquisitorial duty if it allowed a case to be decided under procedural rules and customs which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for

> whatever reason, chosen not to advance the relevant arguments applicable to those facts.'

Perhaps the pithiest conclusion in relation to the court's approach to LIPs is that in *Reynard v Fox* [2018] EWHC 443 (Ch) per HHJ Paul Matthews (sitting as a judge of the High Court) at [46]:

> 'You cannot successfully claim that an apple is an orange, on the grounds that you do not know the difference because you are a litigant in person.'

- Blog
- Litigants in Person

The Autumn 2024 Budget: A Summary of the Key Reforms for Financial Remedy Practitioners

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'Like mothers, taxes are often misunderstood, but seldom forgotten.' - Lord Bramwell, 19th century English jurist

Introduction

The Autumn Budget 2024 ('the Budget') saw history being made as Rachel Reeves, who became our first female Chancellor of the Exchequer, set out arguably the biggest tax changes for a generation, set to raise taxes by £41bn by 2029/30 and said to be part of the Government's plan to revitalise Britain.

In this article, we will summarise the key reforms of the Budget, highlighting those which may be of particular relevance to financial remedy practitioners and their clients.

Key reforms

For those advising separating couples, the two main areas of concern that are likely to require immediate recalculations in any ongoing financial remedy proceedings are:

- increases in Capital Gains Tax (CGT) on business and other assets (but not residential property); and
- changes in the way that Carried Interests are taxed, which affects only those in the world of Private Equity who are remunerated in this way.

It is fair to say that employers and companies will bear a large burden from this Budget. Personal tax has not escaped scrutiny, and the pre-announced VAT on private school fees, CGT and Inheritance Tax (IHT) will also see changes.

Readers should be aware that whilst many of the reforms will take effect from 6 April 2025 (and beyond), some changes, will be implemented sooner, such as the increase in CGT which takes effect from 30 October 2024, and the increase in additional Stamp Duty Land Tax (SDLT) takes effect from 31 October 2024. The imposition of VAT at 20% will also be applied to private school fees from 1 January 2025.

Highlights from the budget

- The national minimum wage will increase by 6.7% to £12.21 an hour in April 2025, with more than 3 million low-paid workers in line for a pay rise.
- The main rate of class 1 employer national insurance contributions (NICs) will be increased by 1.2% from 13.8% to 15.0% with effect from 6 April 2025, and the secondary threshold at which NICs are payable will be reduced from £9,100 to £5,000.
- The main rates of capital gains tax will increase with immediate effect from 10% to 18% for non and basic rate taxpayers, and from 20% to 24% for higher and additional rate taxpayers. The rate for business asset disposal relief (also known as entrepreneur's relief) will rise to 14% for 2025/26 and 18% from 2026/27. The CGT annual exempt amount for individuals will remain at £3,000 for 2025/26. The annual exempt amount for most trusts will stay at £1,500 (minimum £300).
- Inheritance tax (IHT) business and agricultural 100% reliefs will be capped at a combined total of £1m from April 2026. Above that, the rate of tax relief will be 50%. However, the cap will not apply to Alternative Investment Market (AIM) shares which will just qualify for 50% relief.
- The remittance basis of taxation for non-UK domiciled individuals will be replaced from 6 April 2025 with a residence-based regime. Individuals who opt into the new regime will not pay UK tax on any foreign income and gains arising in their first four years of tax residence. The previous government's proposal of a 50% reduction in foreign income subject to tax in the first year of the new regime will not go ahead.

- VAT at 20% will be applied to private school fees from 1 January 2025. From 1 April 2025, charitable relief for business rates will be withdrawn.
- Unused pension funds and death benefits will form part of a person's estate for IHT purposes from 6 April 2027 (but not if they are passed on to spouses or civil partners).
- The additional SDLT rate for second homes and buy-to-let properties increases from 3% to 5% from 31 October 2024. The temporary increases in the 0% SDLT band for first time and other property buyers will end on 31 March 2025.
- There will be a change to the taxation of carried interest, moving from a capital gains tax regime to income tax (relevant to those in the private equity industry).
- In respect of income tax, the personal allowance for 2025/26 will remain at £12,570 and the higher rate threshold will stay at £50,270. The freeze on both will end from April 2028, when the threshold will increase in line with inflation.
- As for dividend tax, the dividend allowance will remain at £500 for 2025/26 and the rates of tax on dividends will be unchanged. In respect of savings, the 0% band for the starting rate for savings income for 2025/26 will remain at its current level of £5,000.

National minimum wage

The national minimum wage will increase to £12.21 an hour in April 2025 (adding £1,400 a year to the income of an eligible full-time worker aged 21 and above). The minimum wage for workers aged 18 to 20 will also increase from £8.60 to £10 an hour (adding £2,500 next year to the income of workers in this bracket). There will be a single adult rate phased in over time to eventually equalise pay for under-21s.

National insurance contributions (NIC)

Whilst there are no increases in rates and no lowering of thresholds for employees, the main rate of employer's Class 1 NIC will increase from 13.8% to 15% with effect from 6 April 2025. Class 1A and Class 1B employer rates will mirror this increase. With effect from 6 April 2025, the employer's Class 1 NIC secondary threshold will also be reduced from £9,100 to £5,000 per annum, resulting in an increase in employer NIC contributions as the deductions will start to apply at a considerably lower level of earnings.

The Employment Allowance will be enhanced from £5,000 to £10,500 and eligibility will be eased. This will also take effect from 6 April 2025 and will enable eligible small employers to reduce their NIC liabilities by up to £10,500 per year.

These are big fiscal measures from the budget and are said to raise £25bn by the end of the forecast period (by the end of parliament).

Capital Gains Tax (CGT)

The main rates of CGT have been increased immediately with the lower rate rising from 10% to 18% for non and basic rate taxpayers, and from 20% to 24% for higher rate taxpayers. These will affect disposals made on or after 30 October 2024. However, there will be no changes to the 18% and 24% rates of CGT that apply to residential property gains.

The new, higher rates of 18% and 24%, which brings all asset classes into the same band, does particularly target those who are non or basic rate taxpayers, and could impact planning between spouses where the lower rate income taxpayer held most of the assets that were heavy with gains. When drafting a financial order, careful consideration should be given to whether any of this tax liability can be mitigated, who will be responsible for its payment, and whether indemnities for payment will be required. Legal and tax advice is likely to be essential.

As for the main reliefs from CGT, Business Asset Disposal Relief (BADR) and the less common Investors' Relief are remaining at their current 10% rate of gains over £1m for the rest of the current 2024/25 tax year, but will increase to 14% for disposals made on or after 6 April 2025, and from 14% to 18% for disposals made on or after 6 April 2026.? The Investors' Relief lifetime allowance is being reduced from its current generous £10m to just £1m, in line with the existing BADR lifetime allowance.

The changes to BADR will almost double the current rate of Capital Gains Tax for individuals disposing of business assets. Accordingly, any valuations of businesses by a Single Joint Expert or otherwise will need to be updated to reflect the increase in tax and thought will need to be given as to whether it is appropriate to impute the 14% or 18% rates.

Inheritance tax (IHT)

The freeze on the threshold for inheritance tax will be extended for a further two years until 2030, allowing £325,000 to be inherited tax free, rising to £500,000 if the estate includes a residence passed to direct descendants. Married couples will continue to be able to pass on a maximum inheritance of £1m, tax-free.

However, reforms have been announced to Business Property Relief (BPR) and Agricultural Property Relief (APR). From 6 April 2026, the current 100% rate of relief will continue for the first £1m of combined BPR and APR for individuals and trusts, except for shares designated as 'not listed' on the markets of recognised stock exchanges such as the Alternative Investment Market (AIM). The rate of relief will then be 50% (reduced from 100%) for such assets above the combined £1m threshold and for all 'not listed' shares.

For certain trusts that were established before 30 October 2024, the £1m allowance will apply to each trust. The £1m allowance will be divided between

trusts where a settlor sets up multiple trusts on or after 30 October 2024.

The changes to BPR and APR have attracted much comment. Parties who are business owners and landowners will need to review carefully their succession plans to ensure their businesses can endure the increased IHT liability from April 2026. For some, this may mean tightening budgets or taking out life insurance to offset IHT. Under the current rules, life insurance proceeds fall outside an individual's estate for IHT purposes. For farms, the £1m cap is likely to be insufficiently generous for even very small farms, with those with development value or higher local land prices particularly affected. It is therefore envisaged that landowners will look to fragment ownership ahead of a potential IHT charge on their death. However, such planning will not be an option for those farmers who are financially dependent on their agricultural assets.

A new allowance will apply to the combined value of property in an estate qualifying for 100% business property relief and 100% agricultural property relief. For example, the allowance will cover £1m of property qualifying for business property relief, or a combined £400,000 of agricultural property relief and £600,000 business property relief qualifying for 100% relief. If the total value of the qualifying property to which 100% relief applies is more than £1m, the allowance will be applied proportionately across the qualifying property. For example, if an estate contained agricultural property of £3m and business property of £2m, the allowance for the agricultural property and the business property will be £600,000 and £400,000 respectively.

Assets automatically receiving 50% relief will not use up the allowance and any unused allowance will not be transferable between spouses and civil partners.

Furthermore, from 6 April 2027, unused pension funds and death benefits payable from a pension will be included in a person's estate for IHT purposes, unless it is being passed on to one's UK-domiciled spouse/ civil partner, in which case it will be inherited tax-free. This is a significant change, removing a distortion which has led to pensions being used as a tax planning vehicle to transfer wealth rather than to fund retirement. Individuals are now more likely to access their pensions earlier and/or to draw upon them more heavily in retirement (rather than leaving them exposed to IHT upon their deaths). Also, whilst the IHT spousal exemption will benefit married couples and civil partners, unmarried partners are not within scope.

Private school fees

As expected, the Budget has confirmed that from 1 January 2025, fees for education, boarding, and vocational training provided by private schools in the UK will be subject to VAT at the standard rate of 20%. Under the anti-forestalling measures, pre-payment of fees on or after 29 July 2024 relating to a term starting in or after January 2025 will be subject to VAT.

There are some important nuances, which include modifications to the definition of 'nursery classes' to ensure most remain VAT-exempt. Higher Education courses at private schools have also been exempted, as have Further Education Colleges (not private sixth forms).

According to the Office for Budget Responsibility (OBR), the VAT changes could result in 35,000 fewer private school students. Whilst the changes are unlikely to make a material difference to HNW/UHNW clients with children in fee-paying schools, the added financial cost will undoubtedly raise affordability issues for families who are not in that wealth bracket. Parties may need to re-visit the issue of school fees by applying to vary a school fees order, or consider applying for a specific issue order to change a child's school, if agreement cannot be reached.

At the time of writing, it appears that the Independent Schools Council (ISC), the body which includes most independent schools in the UK, has voted to pursue legal action over this VAT reform. Watch this space.

Non-UK domiciled individuals

As previously announced, the taxation of non-UK domiciled individuals will be substantially reformed. This is a highly complex area and the specific details are beyond the scope of this article. In summary, the remittance basis of taxation for non-UK domiciled individuals will be replaced from 6 April 2025 with a new residence-based regime. Individuals who opt into the new regime will not have to pay UK tax on any foreign income and gains arising in their first four years of tax residence, provided they have not been UK tax resident in the ten tax years immediately prior to their arrival (the FIG regime). The relief will apply whether or not such income and gains are brought into the UK.

The 'protected settlement' rules for trusts will be abolished for both new and pre-existing trusts. This will as a general rule result in settlors being taxed on all income and gains arising within a trust after their first four years of residence.

IHT for non-UK domiciled individuals will also move to a residence-based system from 6 April 2025, which is aimed at ending the use of offshore trusts to shelter assets. Those who have been UK resident for ten of the preceding 20 years will become subject to IHT on their worldwide assets (tightening the current rules which applies worldwide IHT exposure after 15 years of UK residence).

Taxpayers will have five months to seek specialist advice and to plan. There are transitional rules for CGT purposes, and a 'temporary repatriation facility' (TRF) which will allow individuals to elect for foreign income and gains which have arisen under the current remittance regime, and not yet brought to the UK, to be taxed at special rate.

Stamp Duty Land Tax (SDLT)

The additional dwellings SDLT surcharge will be increased from 3% to 5%. This will take effect on 31 October 2024. Where contracts are exchanged prior to that date but complete (or are substantially performed) after that date, transitional rules may apply. Coupled with the abolition of multiple dwellings relief earlier this year, the increase in the SDLT surcharge for additional dwellings will have an impact on smaller scale investors in residential property.

The single rate of SDLT charged on corporates purchasing residential dwellings costing more than £500,000 (where they are not intended to be let out on a commercial basis) will also be increased from 15% to 17%. It is also worth noting that the Annual Tax on Enveloped Dwellings (ATED) for the 2025 to 2026 chargeable period will rise by 1.7% from 1 April 2025. This affects residential properties held by companies.

The threshold of the 0% SDLT band for residential property will be cut from £250,000 to £125,000 from 1 April 2025. Between £125,001 and £250,000 a rate of 2% will apply. The 0% band for first time buyers will be reduced to £300,000 from 1 April 2025 for properties valued up to £500,000. These changes will likely impact small money cases where available assets will have to be stretched even further to meet housing needs.

Carried interest

From April 2026, all carried interest, mainly held by individuals engaged in private equity and hedge fund businesses, will be taxed within the income tax framework and subject to class 4 NICs. The rate of income tax for qualifying carried interest will be adjusted by applying a 72.5% multiplier, which when applied to the current top rate of income tax of 45%, yields a top rate of carried interest income tax of 32.6%. As an interim step, the current two CGT rates for carried interest will increase to 32% from 6 April 2025. There will be a consultation on introducing further conditions for access to the regime.

Corporate Tax

The Chancellor has decided to maintain the 25% headline corporation tax rate. The small profits rate will stay at 19% for the financial year starting 1 April 2025. The government has committed to maintaining full expensing, the annual investment allowance cap at £1m, and research and development (R&D) relief rates.

Conclusion

In summary, the Budget has wide-ranging consequences for divorcing couples. The vast majority of financial remedy proceedings that have not yet been finalised will need to be reviewed before they are concluded to ensure that any underlying tax calculations remain appropriate.

Cases that involve only residential properties are the least likely to be affected, but any tax calculations involving businesses or business assets will need to be updated to reflect the new rates. Farming families are likely to be those most significantly affected and although the changes in the Budget relate to IHT and will certainly affect succession planning, it would be surprising if they did not also have an impact on current financial remedy proceedings.

Finally, any international cases involving non-UK domiciled individuals will need to be revisited in the light of the new residence-based regime.

Jennifer Lee

Roger Isaacs

Note: This article is only intended as a general statement of the law and no action should be taken in reliance on it without specific legal advice.

– Blog

Open Offers: Achieving More or Seeking Less

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Alyssa Callaway

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The obligation on parties to negotiate openly and reasonably within financial remedy proceedings – and the consequences of not doing so – are well known.

They were perhaps set out most clearly in *OG v AG* [2021] 1 FLR 1105 per Mostyn J:

> '[31] It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.'

This reflects the amendments to FPR PD 28A para 4.4 which came into effect on 27 May 2019 when *inter alia* the following was added:

The court will take a broad view of conduct for the purposes of this rule [i.e. r 28.3(6) and (7)] and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.

In *LM v DM (Costs Ruling)* [2022] 1 FLR 393 Mostyn J observed at [1] that the obligation to negotiate openly and reasonably 'is especially important in interim applications'. This was the case notwithstanding that PD 28A para 4.4 technically applies solely to r 28.3 cases. He was therefore clear at [4] that 'Litigants must learn that they will suffer a costs penalty if they do not negotiate openly and reasonably'.

The Family Procedure (Amendment) Rules 2020 (SI 2020/135) introduced a new r 9.27A as a consequence of which there is a duty to file and serve open proposals for settlement within 21 days after a Financial Dispute Resolution Appointment which does not result in a consent order or direction for a further FDR Appointment. The period can be extended or shortened by the court. There is every reason to consider that this rule should also be read as applying to Private FDR Appointments. If no FDR Appointment takes place, the open proposals must be made not less than 42 days prior to the final hearing. Again, the period can be extended or shortened by the court. The duty to make open proposals before a final hearing (no later than 14 days before the hearing by the applicant and no later than seven days thereafter by the respondent) remains.

The move to give open offers 'teeth' in relation to costs is one reason (and perhaps the principal one) why neither the government nor the FPRC have (at least to date) been persuaded of the merits of reintroducing *Calderbank* offers as being admissible at final financial remedy hearings (they of course are admissible at interim hearings, appeals and any other proceedings not governed by FPR 28.3).

Notwithstanding the above rules – and in particular r 9.27A – it is often thought that open offers will define the boundaries of the court's decision-making process and that the court will inevitably 'middle' the open offers. This may be why r 9.27A is arguably honoured more often in the breach than the observance.

However, courts have been clear that the open offers will not necessarily influence the award.

In *MAP v MFP (Financial Remedies: Add-Back)* [2016] 1 FLR 70 Moor J stated:

> '[87] Now that we no longer have Calderbank offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified.'

More recently and to similar effect in *LMZ v AMZ* [2024] 2 FLR 735 Moor J stated:

> '[41] Both parties have made two open offers each. It is pertinent to note that their respective positions have moved further apart rather than closer together from the first to the second of such offers. I do not criticise this. I accept that it is entirely legitimate to say, in a first offer, that the offer is more generous than the court will award so it should be accepted, followed by a second offer in which the litigant says that, as it was not accepted, this is now the litigant's position. Indeed, this is the only way to deal with the inability of parties to make Calderbank offers, which I have to say I find so regrettable in these big money cases.'

Perhaps less well known is the view expressed in *JS v RS* [2016] 2 FLR 839 – *Sharp* at first instance – where at [60] Singer J considered 'another circumstance' to which he was entitled to have regard under MCA 1973 s 25 but 'not [one] which so far as I am aware or can recall has assumed prominence in reported decisions'. It was this proposition: if one party puts forward a coherent case for an outcome less advantageous to herself or himself, is the court in any sense under an obligation to make a higher order in line with what the court regards as that individual's entitlement upon principled application of the relevant provisions and considerations? Singer J answered this question as follows:

> '[61] The answer must surely be "no". The concept of individual autonomy must encompass not only the right of an adult party to settle for less than the court would award him or her, but also the right to invite the court to resolve a dispute by ordering less than it otherwise might. A party may often have his or her own notion of what is the fair outcome and that may be based upon or influenced by factors wholly unknown to the judge, and beyond the judge's perception or indeed even his or her understanding. But there can surely exist no embargo on the court's ability to award an adult and competent party less than the court regards as that party's entitlement.'

It is arguable that in *Clarke v Clarke* [2023] 2 FLR 1 Mostyn J took a different view. His comments were made in the context of an appellant litigant in person having at [27] 'shown little interest' in seeking to pursue an argument that the judge erred for not allowing a higher figure than £26,000 net income per annum for life and hence raised the question of how much encouragement the court should give to a litigant in person to take the right points and eschew the wrong ones. However, his conclusion – which allowed him to conclude that the judge had fallen into error when he determined such a figure – may be said to have been expressed (at least in part) more generally:

> '[30] … in a financial remedy case the court exercises a quasi-inquisitorial function. It would be a dereliction of its inquisitorial duty if it allowed a case to be decided under procedural rules and customs

> which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts.'

Subject to the decision of *Clarke v Clarke*, however, the current position may perhaps be expressed as this: a court may if justified award a party more than their open offer seeks but may also award a party less than the court regards as their entitlement if that is what their open offer seeks.

– Blog

– Open Offers – Negotiations

Wells Sharing: Commonplace or a Matter of Last Resort?

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The importance of the 'clean break' has been reemphasised in recent years with greater emphasis being placed on MCA 1973 s 25A (and s 28(1A)), particularly in the judgments of Mostyn J. For example, in *Quan v Bray & Ors* [2019] 1 FLR 1114, having referred at [48] to s 25A and s 28(1A) as having been 'strangely neglected since they were enacted', he stated that:

> 'recent decisions have emphasised their key importance. A limited term should be imposed unless the court is satisfied that the claimant would not be able to adjust to a cut-off without undue hardship. Normally that decision is easily reached because the claimant will have a capital base to fall back on in her later years. Generally speaking, there would have to be shown good reasons why a term maintenance order should not be made. And, generally speaking, where a term maintenance order is to be made there would have to be shown good reasons why it should not be non-extendable. Ultimately the court's goal should be wherever possible, to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties.'

In *Clarke v Clarke* [2023] 2 FLR 1 the same judge reiterated this view (at [36]): [1]

> 'xvii) Where an application for spousal periodical payments is actively pursued the court must diligently apply s 25A and consider whether the application can be dismissed and an immediate clean break effected. If the court concludes that a substantive order is needed to meet the applicant's needs the court should only make the award in such amount and for such a period as to avoid the applicant suffering

> undue hardship. The applicant must show good reasons why a non-extendable term maintenance order should not be made. The court's goal should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties. The same principles apply, mutatis mutandis, where the court considers an application by a payer of spousal periodical payments for the variation or discharge of the order. The burden will be on the payee to justify a continuance of the order, and if so, for how long: *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124, *Quan v Bray & Ors* [2019] 1 FLR 1114.'

In *Cummings v Fawn* [2024] 1 FLR 117 likewise:

> '[29] As for the judge's decision to impose a clean break, it seems obvious to me that the judge must, at least subconsciously, have applied principle (xvii) with which I augmented Peel J's compendium of principles in *WC v HC (Financial Remedies Agreements)* [2022] EWFC 22 at [21] by my decision in *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [36]. That principle states …
>
> [30] I would suggest that this case amply demonstrates that the FRC judiciary is now asking itself the right question whenever it is suggested by an applicant that a clean break should *not* be imposed. That question is "Has the applicant demonstrated by clear and cogent evidence good reasons why there should not be a clean break?" and not "Has the respondent demonstrated why there should be a clean break?" I emphasise that, in order to comply with the terms of s 25A Matrimonial Causes Act 1973, a decision not to impose a clean break must be seen very much as the exception to the rule. The onus is on the applicant distinctly to prove by clear and cogent evidence that there should not be a clean break.
>
> [31] The judge was right to answer the correct question negatively. The wife adduced no evidence, let alone clear and cogent evidence, which distinctly proved why, having regard to the finding concerning her earning capacity, a clean break should not be imposed.'

But to what extent does *Wells* sharing – often used where assets are presently illiquid and/or there are other reasons why they cannot currently be shared – offend against the clean break?

The Court of Appeal (arguably) suggested in *Versteegh v Versteegh* [2018] 2 FLR 1417 that the form of *Wells* sharing by which funds are paid by one party to the other when received by the former (usually by way of deferred contingent lump sums) is an anathema to the clean break and should therefore be avoided if at all possible. As Sir Jonathan Cohen noted in *ES v SS* [2023] EWFC 177:

> '[43] It is helpful at this juncture to set out the principles underlying the making of such a [*Wells* sharing] order. I adopt with respect the

statement of King LJ at paragraph 151 of *Versteegh*, where she says:

> "I fully accept that the making of a Wells Order is something that should be approached with caution by the court and against the backdrop of a full consideration by the court of its duty to consider whether it would be appropriate (per Section 25a of the MCA 1973) to make an order which would achieve a clean break between the parties."

[44] In the same case Lewison LJ quoted Mostyn J in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313 where at paragraph 24 he said:

> "Generally speaking a Wells sharing arrangement … should be a matter of last resort, as it is antithetical to the clean break. It is strongly counter intuitive, in circumstances where one is dissolving the marital bond and severing as many financial ties as possible, one should be thinking about inserting the wife as a shareholder into the husband's company …"

[45] But, I must not overlook paragraph 135 where reference is made to circumstances where any other course might lead to "considerable unfairness".'

It may be 'antithetical' to the clean break but does this mean that it should be a 'matter of last resort' as Mostyn J described it in *WM v HM*? After all, in *BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 the same judge said as follows:

> '[85] Mr Southgate argues that the arrangements in para [82](ii) [(ii) The assets and liabilities referable to the business are to be shared equally on a *Wells* basis] and (iv)(d) [A charge will be imposed on Green Farm in favour of the trustees of the new settlement] are not compliant with the clean break principle and cause messy long term inter-connections to be endured between H and W. Sometimes in order to achieve fairness the court has to reach for *Wells* sharing, or contingent lump sums (as in *Charman*), or deferred interests by way of a charge. These are commonplace. The court has to strive to make the break as clean as is reasonably possible, but I emphasise the qualification. Fairness is not to be sacrificed on the altar of finality.'

So should a *Wells*-sharing order be considered to be 'commonplace' or a 'matter of last resort'? As so often the case in financial remedies it is arguable (and with apologies to Newton's Third Law of Motion) that for every case there is an equal and opposite one. But this is perhaps all but inevitable in a jurisdiction where so much turns on how the court considers it can best achieve objective fairness (or prevent unfairness) between the parties.

- Blog

- Wells Sharing - Clean Breaks and Term Maintenance

The End of the Non-Dom Tax Status: Time Now to End Family Law Domicile Jurisdiction

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Overview

Domicile has been a fundamental basis of jurisdiction in English law including English family law. But it is intrinsically backward-looking, archaic in its concepts, thoroughly unknown or at best misunderstood by the population, differently defined abroad and at odds with many other countries including the EU. With the non-domicile tax status being abolished as announced in the budget in late October 2024, is it not time now to end domicile as a family law basis of jurisdiction? Nationality is a far more straightforward, certain and modern basis.

Domicile

Domicile is a distinctly common law concept, primarily denoting a form of connectedness, a legal and factual relationship, between a person and a country, known by lawyers as a jurisdiction.[1] It is used significantly in matters of tax, inheritance and connectedness to form the basis of proceedings in courts. As part of its complexity, the general position as perceived by family lawyers and others is as follows:

- everyone always has one domicile;
- everyone always has a domicile of origin at birth;
- domicile is of origin or choice or very occasionally of dependence;
- no one can have two domiciles;
- no one can have no domicile;
- a domicile of choice cannot be lost without another domicile replacing it, alternatively the domicile of origin reverting.

This shows some of the complexities. It is very historic and complex.[2] When family lawyers seek assistance on the complexities of domicile, they quite often look at tax and inheritance cases for guidance. Yet these cases are looking at quite different situations to connectedness for the purposes of family court proceedings.

It is a very backward-looking concept. In *Cyganik v Agulian* [2006] EWCA 129, Mummery J commented that Soren Kierkegaard's aphorism that *life must be lived forwards but can only be understood backwards* resonates in the very nature of domicile disputes. To understand domicile of origin it is sometimes necessary to go back two or even three generations. The case law is replete with delving into family histories to understand connection at the point of birth. Amongst others, in *Sekhri v Ray* [2014] 2 FLR 1168,[3] it was necessary to review the movements of the husband's father and other generations between their then home country and England. In *Holliday v Musa* [2010] 2 FLR 702, a 1975 Inheritance Act application, the court had to look at the movements of the deceased who left Cyprus in 1958, making regular visits then from 1974 including attempting to stand as President, but unsuccessfully showing a Cypriot domicile. There are many other cases.[4]

Naturally it doesn't help that definitions of domicile abroad can be different. In the civil realm, if domicile is used, it more often equates to habitual residence. It's far easier to acquire or lose domicile. So, a British citizen may have domicile in England and in a country abroad at the same time. To overcome this problem, legislation allowed a double domicile test,[5] which, although solving the problem, also added to the complexity.

Before the UK joined the EU, specifically the Brussels Regulation in March 2001, divorce jurisdiction was domicile of either party or 12 months' habitual residence. BII changed that for all national cases, substituting several jurisdictional bases, mostly based on residence and ordinary residence. Moreover, where another basis was used, BII specified nationality, e.g. joint nationality of both parties. The UK, along with the Republic of Ireland, negotiated an alternative to refer to

domicile instead. This carried through to other EU family laws. So, the UK was distinctly different. Moreover, with a broad interpretation often given to domicile, it meant that the UK would find available jurisdiction for proceedings in circumstances where nationality (in another EU country) may not necessarily have given connectedness. This was part of the several difficulties between the UK and the EU on family law jurisdiction, perhaps found most in the very different expectation of habitual residence. The post-EU departure position is below.

Domicile in the Lugano Convention, of which the UK is no longer a party after leaving the EU, is even more complicated, with the definition of domicile within the Convention looking far more like habitual residence than the UK expectation. This is perhaps not surprising given that it is essentially a civil law creation.

There is then deemed domicile, a distinctly tax but not a family law concept!

Domicile is, probably primarily, a tax concept, especially inheritance tax.

In this regard, practitioners have had to walk a very careful path when considering the use of domicile as a connecting feature. Asserting domicile in a divorce petition or other family law initiating process without checking with the client on the impact on any tax planning can be lethal for the client for tax and for the solicitor for negligence. It could destroy years, perhaps decades, of careful tax planning by the client and their financial advisers to assert a foreign domicile. It might pit the family law advisor, choosing England for the advantages of a family law settlement, against the tax adviser anxious about fiscal consequences of a domicile in England.

The end of the non-domiciliary status for tax purposes

Over the years, particularly perhaps the last couple of decades, there has been a perception that very many people including families living wholly or primarily in England but with foreign connections were asserting a foreign domicile for tax purposes. Being offered a peerage would come at a cost of having to review a domicile basis. But not, famously, being the wife of a prime minister. For the public, it seemed curious at best that anyone fully involved in English life could nevertheless avoid inheritance tax by asserting a continuing connection with another country. For the Treasury, it became an easy target. So it was that the previous Conservative administration announced plans in March 2024 to simplify the rules regarding tax breaks for non-domiciliaries. Predictably and as signposted by the incoming Labour administration, the Chancellor in her budget has stated that from April 2025, the non-domicile status will be abolished and replaced by a new residence-based system. It is expected to raise £12.7 billion over the next five years.

In some ways this makes it easier for family lawyers as there will be less risk in admitting domicile. But as a concept, it will very probably become far less pertinent. It will not be a matter of domicile tax planning any more, at least as far

as the UK is concerned. Whereas family lawyers might ask a client whether they were engaging in any domicile tax planning, sometimes to be met with a very blank expression, it may now be more often.

This naturally raises the question of why should family law continue to adhere to this backward-looking, historic and previously tax-absorbed complex concept? Is it not now time for family law to embrace more modern concepts of connectedness?

Domicile on leaving the EU

After the EU referendum, it was obvious that in family law the primary area where EU law had changed national law was divorce jurisdiction. The pre-March 2001 basis had been entirely replaced by Art 3 of Brussels II. So, what should we have instead? A small group of us quickly formed ourselves to consider this question. Although some continuity with the jurisdictional basis from the EU was advantageous, there was a distinct feeling that we should not retain domicile any longer. Submissions were made to the Ministry of Justice. In the end, they created a new divorce jurisdiction law,[6] which they said was Art 3 but had a distinct difference,[7] although it isn't relevant here. Indeed, by incorporating what was known as the residual basis, sole domicile, as an equivalent basis of connectedness, they created a complete dichotomy because another basis of connectedness is joint domicile. Who would ever rely on joint domicile if sole domicile was (uncontentiously) available?

For jurisdiction under Part III of the Matrimonial and Family Proceedings Act 1984, financial provision after a foreign divorce, the connectedness has reverted to the pre-EU position which includes domicile of either party at the time of the application, alternatively at the time of the foreign divorce. Scotland hasn't followed England and Wales in replicating the EU position but has also for divorce gone back to the position before joining the EU, again including domicile at the point of the divorce.

What could have been an ideal opportunity on leaving the EU to review and debate what should be the connectedness for family court proceedings was met by the single focus of getting alternative legislation in place as quickly and uncontentiously as possible. Opportunity of broader circumspection was limited. It was a great pity. But it means that yet again our connectedness for the family courts holds onto domicile.

With the huge upheaval in the non-domicile tax status, now is the opportunity to review and debate an alternative basis. The profession should do so and then encourage government to reform this law.

An alternative basis: nationality

Instead of domicile, many countries use nationality. This is of course true across the EU, apart from Ireland. But other countries also prefer nationality. It has many advantages:

- There is clear evidence, such as a certificate of citizenship, passport, national ID.
- Where nationality has been acquired other than birth, there is a record of the specific date.
- Although a number of countries won't allow joint nationality, many do but again there is clear evidence.
- Both spouses will invariably know the nationality of the other, which may not necessarily be the case with domicile as evidenced by the many case reports into complex family backgrounds.
- It brings England and Wales into closer proximity with the EU and other countries.
- It's a far more modern, clear, certain and discernible concept.
- It removes the prospect, opportunity, of expensive, uncertain, backward-looking, nebulous litigation over domicile, particularly at a time when its tax status is now either irrelevant or less material.

With the abolition of the non-dom tax status, the time has come for the family law of England and Wales to do the same, to abolish domicile as the basis of connectedness, jurisdiction, and replace with a far more up-to-date, modern, evidentially discernible, popularly understood and clear concept, that of nationality.

– Blog – Jurisdiction – Domicile

Related

English EU-Equivalent Divorce Jurisdiction Clearly Out of Step With EU Law

When the UK left the EU, and new domestic legislation was needed to replace EU law, the UK government said in relation to divorce jurisdiction of England and Wales that it would follow, be the same as, the EU law. This was for very justifiable reasons of continuity and comity. They incorporated the relevant EU law into domestic legislation. But not word for word.

Divorce Jurisdiction Post-Brexit

Professor David Hodson OBE KC(Hons) MCIArb Michael Allum

12/02/2024

What Financial Remedy Lawyers Need to Know About Emojis ?🤦🤔🧐😶

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Graeme Fraser

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Emojis play a significant part in digital communications, including casual messaging, social media posts, and increasingly, professional communications. When we are reviewing historical messages, understanding what the emojis were intended to mean could become an essential part of identifying what was discussed and/or agreed at that time.

What is an emoji?

An emoji is a pictogram embedded in text used in electronic messages and web pages. An emoji extends language by filling in emotional cues otherwise missing from typed conversation as well as replacing words. They can set an emotional tone in messages, adding meaning, clarity and credibility to text.

They are ubiquitous in social media. Facebook estimate that over 900 million emojis are sent every day without text on Messenger with over 700 million emojis used in Facebook posts every day, while it is estimated also that half of all comments on Instagram include an emoji.

Emoji characters are standardised into Unicode by Apple and Google. They include facial expressions, activity, food and drinks, celebrations, flags, objects, symbols, places, types of weather, animals and nature. Apple iPhone users have access to over 3600 emojis but with the development of the 'genmoji' available following the iOS 18 update released in September 2024, users can create original genmojis to express themselves through custom characters.

Not only do we have the ubiquitous generic emojis in modern communications,

therefore, but their variety are also set to continue to grow and become increasingly personalised.

The meaning of emojis in different cultures

There is a temptation to regard the use of emojis as heralding a new form of communication, particularly as it is possible to capture emotions at life events such as a birth or wedding by writing social media posts purely using emojis. This has led to declarations by linguistic professors that emojis have become the world's universal form of communication or even language.

However, emojis do not by themselves constitute meaningful communications between two people, as they are used to complement meaning by enhancing text messages and social media posts in a form of additional punctuation through expressions of nuance, tone, and emotion.

A recent YouGov survey found that people across 17 international markets preferred communicating with friends and family via SMS or text message (40%) as opposed to mobile phone calls (29%), with the preference for texting particularly high among 18 to 24 year olds.

As the message might be one line only, using emojis to express feelings and emotions removes the risk of it being misinterpreted as negative, bossy or rude.

However, emojis don't mean the same thing to all people. While the thumbs up symbol 👍 means approval in Western culture, I understand it can be interpreted as vulgar and offensive in the Middle East. In China, I understand the slightly smiling emoji ☺ is not a sign of happiness but implies distrust or disbelief. Joining the palms 🙏, one of the most widely used emojis, may carry religious significance in the West. But in Japan, the birthplace of emojis, the symbol, to many, means please or thank you.

Therefore, while emojis are seen as having the power to bring people closer together, in a legal context, it is essential to be clear as to both the meaning of the emojis as well as the emotional intention of the message sender.

Judicial interpretation of emojis

In the Australian defamation case of *Burrows v Houda* in 2020, involving a claim for defamation for the publication of two posts on Twitter, the District Court of New South Wales found that expert evidence was not necessary to interpret the relevant emojis. The court instead consulted internet dictionaries to interpret emojis, commenting that:

> 'the nature of modern communications makes consultation of internet dictionaries, such as Emojipedia, a necessary step for the trier of fact who seeks to determine what the ordinary reasonable Twitter reader would make of the use of these symbols.'

In the Canadian case of *South West Terminal Ltd v Achter Land* [2023] SKKB 116, one of the parties habitually used the thumbs up emoji 👍 to represent an agreement. The disputed issue was whether the reply containing the thumbs up emoji 👍 in a significant email to a contractual offer amounted to acceptance. The court held that the thumbs up emoji 👍 signified acceptance of the contract. This was because texting a thumbs up emoji 👍 was like using words which had also been used during the transaction such as 'looks good', 'ok' or 'yup'. The judge held that the 'courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like'.

In *Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd* [2024] EWHC 255, a thumbs up emoji 👍 was confirmed by the High Court as acceptance of contractual terms.

However, the Scottish case of *Leander CB Consultants Ltd v Bogside Investments Ltd and Alan McLeish CA4/22* [2024] CSOH 9 made clear that the context needs to be managed, in considering different emojis such as a laughing/crying emoji 😂.

Therefore, while a thumbs up emoji 👍 is an established legal form of language to signify acceptance, the context of the situation remains important.

Emojis in context

In the USA, a District Court for the District of Columbia ruled in 2023 in *Re Bed Bath & Beyond Securities Litigation* that using a 'smiling moon' emoji 😏 in a tweet could potentially constitute securities fraud. This was because a 'meme stock investor' was using social media to tell his audience that the value of the stock was going up, i.e. 'to the moon' or 'take it to the moon', to encourage them to buy the stock, prior to him selling his own stock, causing the stock price to subsequently plummet by 40%. This message was associated with the smiling moon emoji 😏 in meme stock subculture.

In family law, emojis are more likely to be significant in explaining the emotions of parties at the time of their texts and emails. But the nuances are significant. For example, does a shrug emoji 🤷 indicate confusion or indifference to a financial remedy proposal? Does a stack of pound notes 💷 mean that a divorce is expensive, or that one spouse is wasting assets on purpose? Does a smiley face 😏 denote acceptance? Does a thumbs down emoji 👎 mean 'I do not agree'.

While no specific criteria have been developed yet to determine what emojis mean in context, the following observations might be helpful to consider:

- What previous use did the party make of a particular emoji, and why?
- Is the party using an emoji in a generic or specific way to send a certain message?
- What interpretation does the party place on the emoji, and how has that changed over time?
- Has the emoji been used to give an alternative impression in the same

negotiations?

- If a personalised emoji has been used, what was the intended meaning, and could other interpretations be drawn?

Judicial use of emojis

The judgment of Peter Jackson J in *Lancashire County Council v M* [2016] EWFC 9 is believed to have been the first by a Senior Court Judge in England and Wales to use emojis in the judgment. It was praised for being written in a way that the children caught up in the case could understand. The relevant passage was as follows:

> 'The mother left a message in the caravan for the father's sister, who I will call the aunt. It told her how to look after the family's pets. The message said that the family would be back on 3 August. It has a 😏 beside the date. After the family left, the police searched the caravan. They found the message and say that the 😏 is winking, meaning that the mother knew they wouldn't be coming back. I don't agree that the 😏 is winking. It is just a 😏. The police are wrong about that, and anyhow they didn't find anything else when they searched the caravan.'

Comment

Communications are crucial in our daily lives, and in family law, what a couple, their respective legal advisors and even judges intend by their language is often the key to deciding a fair outcome.

It is therefore perfectly conceivable that our case law will develop in TLATA and Financial Remedy cases to determine the context and intention in respect of emojis, depending on which ones are used, and what they are intended to mean.

There is scope for the use of emojis to be considered where there is statutory legislation, which allows for judicial discretion. For example, the emojis within texts and emails between a cohabiting couple sent casually around the time a home is purchased could end up being inferred as a common intention to establish a constructive trust in TLATA cases. Similarly, the emojis communicated electronically between an engaged, married or separated couple could be considered as an intention to form a nuptial or separation agreement and therefore relevant as part of 'all of the circumstances of the case' or as 'conduct' within the s 25 exercise under the Matrimonial Causes Act 1973, when redistributing resources between them on a divorce.

Therefore, while emojis might seem to us to be everyday innocent and amusing pictures to brighten our messaging visually, we need to be aware that they could lead to unintended consequences, including the risks and uncertainties of litigation. The conclusion must be that whatever you write, and however you write it, always make sure it is clear ✍ 🗒 🤦.

Dangers of Applying PSOs Determined Using pre-*McCloud* CEVs on '*McCloud* compliant' CEVs

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Those working in the Pensions on Divorce arena (whether PODEs, solicitors or scheme administrators) will by now be all too familiar with the *McCloud* ruling, and how much additional work this has caused for cases involving public sector pension schemes.

To quickly recap, the *McCloud* ruling requires (i) for the pension administrators to record all pensionable service from 1 April 2015–31 March 2022 (or earlier exit) to be treated as having been accrued in the relevant section of the 'old' legacy scheme (referred to as 'rollback') and (ii) to maintain a dual (shadow) record with pensionable service over the same window as having been in the replacement 'new' CARE scheme. Prior to any revision, usually the pension benefits accrued were in the 'old' legacy scheme up to 31 March 2015 and the 'new' CARE scheme from 1 April 2015.

The *McCloud* ruling appears to have caused a big headache for the scheme administrators, who now have to produce '*McCloud* compliant' CEVs for divorce purposes. In summary, the scheme administrators need to determine which of the two records (the 'old' legacy scheme or the 'new' CARE scheme) produces the greater CEV in respect of accrual over the 2015–22 window, i.e. which set of benefits is the most valuable based on the position at the date of calculation, and it is this 'compliant' CEV that will be used in the pension sharing calculations.

These '*McCloud* compliant' CEVs were originally meant to be produced from 1 October 2023. However, it soon transpired that the majority of the schemes were not in a position to produce such CEVs from that date. Over a year later, we

are finally seeing '*McCloud* compliant' CEVs being produced by all the public sector schemes for most members!

What this all means is that cases involving public sector pension schemes, for those members that fall under the scope of the *McCloud* ruling, have become much more complicated (whereas pre-*McCloud* they tended to be the simplest), especially when it is the affected public sector pension that is to be shared.

We have stated from the outset that we expected the biggest impact of *McCloud* would be for the uniform public sector schemes (Firefighters, Police and Armed Forces), given these legacy schemes all contain very generous early retirement provisions under the terms of the relevant legacy scheme and *McCloud* is likely to result in CARE scheme benefits being rolled back into these legacy schemes. This is best shown by a (very simple) worked example.

Let's consider a hypothetical scenario whereby we have a husband (H) and wife (W) who are the exact same age of 48. The H has been a member of the Police Pension Scheme (PPS) from 1994 onwards (having now attained 30 years' service in the scheme) and the W has a private sector defined benefit pension of £10,000 pa that is CPI-linked before and after retirement, and payable unreduced from age 60.

The table below summarises the H's PPS benefits before and after rollback has occurred, and the impact this has on his PPS CEVs.

Scheme	PPS 1987	PPS 2015
Normal Retirement Age (NRA)	Immediately	67
Pre *McCloud* (pre-rollback)		
Service	To 31 March 2015	From 1 April 2015
Pension	£18,443 pa	£8,736 pa
CEV	£537,069	£123,354
Post *McCloud* (post-rollback)		
Service	To 31 March 2022	From 1 April 2022
Pension	£24,666 pa	£1,831 pa
CEV	£718,262	£25,855

As you can see, post rollback he has gone from having a PPS 1987 pension of £18,443 pa payable immediately (without reduction) to a PPS 1987 pension of £24,666 pa payable unreduced immediately. It will come as no surprise that this significantly increases the PPS 1987 CEV (by around 34%). Conversely, post rollback his PPS 2015 pension reduces from £8,736 pa to £1,831 pa. Overall the total of the CEVs across both schemes has increased from c.£660k to c.£744k.

What does all this mean in terms of the PSOs? The W is awarded a pension credit calculated by multiplying the CEV by the percentage stated in the Pension Sharing Order (PSO). The table below shows a comparison of the PSOs we would have suggested to equalise incomes from age 60 based upon: a) pre-rollback non-compliant CEVs, that may have been issued in 2023 and b) post-rollback *McCloud* compliant CEVs, that may have been issued more recently.

	PPS 1987	PPS 2015
PSO(s) to produce equality of income (based upon pre-rollback CEVs)	17.6%	47.7%
PSO(s) to produce equality of income (based upon post-rollback CEVs)	24.8%	0.0%

As you can see from the table above, a year or so ago we may have suggested a pension sharing solution that involved two PSOs. However, now, with *McCloud* compliant CEVs, we suggest that there is a single PSO over the PPS 1987 pension of the H, that accounts for around 97% of his PPS pension benefits by value.

The table below shows the amount of pension credit that would be awarded to the W, if the 2023 PSOs are applied to (i) pre-rollback non-compliant CEVs and (ii) post-rollback *McCloud* compliant CEVs:

	PPS 1987	PPS 2015	Total
Non-compliant 2023 CEVs	£94,524	£58,840	£153,364
2024 compliant CEVs	£126,414	£12,333	£138,747

It can be seen that if the 2023 PSOs are now applied to *McCloud* compliant CEVs, the W will end up with a lower amount of pension credit in the PPS (and hence less valuable PPS pension benefits) versus what she would have received had the 2023 PSOs been applied to non-compliant CEVs that were used to derive those PSOs.

So whilst the H's pension benefits increased in value as a result of *McCloud* (£660k to £744k), it is possible that the W will receive less valuable PPS pension benefits than anticipated before any *McCloud* adjustments. Clearly, this cannot be right.

It therefore follows that, in most cases, if PSOs were determined based upon pre-rollback non-compliant CEVs, then these PSOs will not produce equality if implemented using post-rollback *McCloud* compliant CEVs.

In theory, if PSOs have been determined based upon pre-rollback CEVs, and updated CEVs have not been requested since, then the scheme administrators should use updated pre-rollback CEVs when implementing the PSO(s). However,

given that pension administrators are now focused on producing *McCloud*-compliant CEVs, this may not happen in practice.

The message here is that if you are working with a PODE report that is based on non-compliant CEVs (this is likely to include all reports issued in 2023 and early 2024), there is a real risk that if the PSOs given in that report are now served to the relevant administrator, the outcome may not be the intended outcome and equality may not be achieved. The safest thing to do is to 'start again' with compliant CEVs and a new PODE report.

- Blog

- Pensions on Divorce

Report of the Duxbury Working Party (final), November 2024

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Simon Bruce

Simon is a solicitor and Partner at Dawson Cornwell LLP. He is also a pro bono lawyer at law clinics in London. Simon has practised for over 41 years. He is a member of the Duxbury Working Party and writes the 'Thought Leader' in *Family Law*. He comes from Lancashire.

Sarah Hoskinson

With over 20 years' experience in complex financial remedy cases, Sarah is a Partner and Head of Burges Salmon's Family & Divorce practice. She sits on a number of financial remedy and other technical groups, including the Family Justice Council Financial Remedy Working Party, FJC Working Party on Needs, the Pension Advisory Group (PAG and PAG2) and the IAFL Pensions Committee, which she chairs. She is also a member of the Duxbury Working Party.

Lewis Marks KC

Lewis Marks QC is a family law barrister at QEB, specialising in financial remedy cases. He has been an editor of *At A Glance* since 1999, and is also a founder editor of the

Financial Remedies Practice. He was an original member of the Duxbury Working Party in 1998 and has authored a number of papers on the subject of Duxbury calculations. He has acted as Chair and convenor of the reconstituted Duxbury Working Party.

Sir Nicholas Mostyn

Sir Nicholas Mostyn was a judge of the High Court, Family Division, and of the Court of Protection 2010–2023. He was a founder editor of *At A Glance* and of *Financial Remedies Practice* and continues as editor-in-chief of both publications. He is a member of the Duxbury Working Party.

Joe Rainer

Joe is a junior barrister at QEB. He has a specialist matrimonial practice, with a focus on financial remedies and cases brought under TLATA 1996. He has appeared in several well-known reported cases and writes and lectures frequently on a variety of topics. He is a member of the *Financial Remedies Journal* editorial board, an editor of *At A Glance*, and a co-author of the fourth edition of *Pensions On Divorce: A Practitioner's Handbook*. He is also a member of the Pension Advisory Group and the Duxbury Working Party.

Mary Waring

Mary is a chartered financial planner, chartered accountant and Resolution Accredited Specialist. She is the founder of Wealth for Women, an award-winning company specialising in financial advice to women going through divorce. She is a member of the Duxbury Working Party.

A provisional version of this report was published on 2 October 2024 and invited representations for consideration by the Working Party ahead of publication of this final report. Such representations as were received are summarised in Appendix 6, and in a few instances in alterations to the text of the report. The main recommendations of the Working Party have not changed following consideration of those representations. The figures in the illustrative tables in Appendix 5 have been revised to reflect increases in the rate of Capital Gains Tax announced and implemented in the October 2024 budget.

Executive summary

1. Duxbury calculations, whether presented as a printed table or by specialist software, have for nearly four decades been the tool of choice in the family courts for the assessment of lump sums necessary fairly to provide for a clean break in a case where there would otherwise have been a periodical payments order.

2. The underlying assumptions have been the subject of criticism in articles in legal journals, generally on the basis that the sums arrived at are not sufficient to provide the level of spending power intended for the lifetime of the recipient.

3. Those underlying assumptions have not been the subject of any general review for many years. This report is by an ad hoc and self-selected group of interested professionals to undertake that review, including, in the light of the criticisms, the methodology. The Working Party has no status to make any decisions about how the courts should approach Duxbury calculations. It proffers the proposals in this report to banish outdated concepts and generally to modernise the approach. It will be a matter for the courts whether to adopt the recommendations.

4. Our main conclusions are, in summary:

4.1. The existing underlying assumptions as to income yield (3%), capital growth (3.75%) and inflation (3%), remain essentially sound.

4.2. The calculation should also include an allowance for the management charges (1% for funds up to £1m, 0.5% for funds above £1m) likely to be suffered on the investment of the fund.

4.3. The calculation should no longer default to the life expectancy of the recipient (although there will be cases in which that is appropriate), rather the court should consider the likely duration of the periodical payments order which is being capitalised, and apply that period to the quantum of the periodical payments that is being capitalised.

4.4. The computation should not default to the inclusion of the State Pension, although the fact of such entitlement may impact on the quantum of the periodical payments being capitalised.

4.5. It is neither necessary nor appropriate (where the appropriate duration for the calculation is a term of years and as State Pension age is now the same for men and women) to have separate tables for male and female recipients.

4.6. Where whole-of-life is determined to be the appropriate duration for the calculation extreme caution should be exercised in undertaking a Duxbury calculation for any payee whose life expectancy is less than about 15 years, although we think that these will be very rare cases.

4.7. Legal advisers to parties who are receiving Duxbury based awards, or awards with a Duxbury component, should ensure that their clients have a proper understanding of the basis of the calculation and disabuse them of the erroneous belief that it ensures a particular level of expenditure for a particular period.

5. While our recommendations in relation to management charges and State Pension will tend to increase awards, we anticipate that in practice this will be mitigated, and sometimes outweighed, by the adoption of our recommendation for a lesser duration than life expectancy in most cases.

Terminology

6. In this report we use the following terms:

6.1. 'Financial remedy' to encompass all financial awards made by agreement or court adjudication following relationship breakdown (generally divorce, but including dissolution of a civil partnership), notwithstanding that much of the jurisprudence deploys now antiquated terminology such as ancillary relief.

6.2. 'Periodical payments' for what is sometimes referred to as maintenance or alimony, being regular payments made to another person (usually a spouse, ex-spouse or co-parent) as a financial remedy.

6.3. 'Joint lives' to mean an award of periodical payments with no term specified which endures until the death of either party unless varied or discharged by a subsequent order, or until the remarriage of the payee.

6.4. 'Payee' to mean the recipient of a financial remedy award.

6.5. 'Payer' to mean the party against whom a financial remedy award is made.

Background

7. The Duxbury calculation originates from the work of accountant Tim Lawrence then of Coopers & Lybrand, instructed as an expert witness on behalf of Mrs Duxbury during the course of her financial remedy proceedings consequent upon the breakdown of her marriage to Mr Duxbury in 1984.

8. Mr Lawrence had devised a spreadsheet which worked out by trial and error the lump sum which in his opinion might fairly enable Mrs Duxbury to meet her 'needs' pursuant to the then newly implemented obligation imposed on the court to achieve a clean break. The calculation was of the capital payment in the form of a lump sum (a 'Duxbury fund') which, if depleted at a steady rate in real (inflation adjusted) terms, allowing for assumed income yield and capital growth while invested, and allowing for the depredations of tax on income and on realised capital gains, would theoretically be exhausted on the date of Mrs Duxbury's actuarially anticipated death. Lord Nicholls of Birkenhead gave a

graphic description of the concept in *White v White* [2000] UKHL 54 at [39]: 'The Duxbury fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables.'

9. Mr Lawrence's modelling was accepted by the court (Reeve J at first instance, and a Court of Appeal comprising Ackner, Stephen Brown and Parker LJJ). Although the judgment of the Court of Appeal was given in November 1985, it was not reported until 1987 (*Duxbury v Duxbury* [1987] 1 FLR 7) and the report itself says nothing about this method of calculation. However, the existence of Mr Lawrence's calculation became known, and the thoughts of professionals turned to creating, in what was then the relatively new medium of the spreadsheet, [1] an iterative program which would work out the discounted lump sum payment to be made in lieu of what would otherwise be a series of periodical payments. Nicholas Mostyn believes he wrote the first such program in 1989. [2] Other such programs followed.

10. The program asked the user to input the claimant's annual spending requirement and age and then made a 'guess' as to the required capital sum, with the calculation being conducted repeatedly (iteratively), refining the 'guess', until the remaining figure at the terminal date was zero.

11. The arithmetic involved a number of 'assumptions' including that:

11.1. The claimant, Mrs Duxbury, would die on, and neither before nor after, her actuarially estimated date of death, but without regard to any individual characteristics that she might have which would tend to either shorten or lengthen her life as compared to her standardised or actuarial life expectancy based solely on her date of birth.

11.2. Inflation would remain at a constant level throughout the period of her life.

11.3. The income yield ('yield') would remain at a constant level throughout her life.

11.4. The gross capital appreciation ('growth') of her investments would remain at a constant level throughout her life.

11.5. Taxation of both income and gains would be met from the fund, with only the allowances and bands altering (in line with the assumed constant rate of inflation), and without Mrs Duxbury or her advisers taking any steps to invest in ways which would reduce that tax burden.

11.6. The claimant would be entitled to a full State Pension at the then applicable commencement date.

11.7. Income would be spent first, then capital drawn as required, including the relevant proportion of gains comprised in the capital (attracting tax where applicable) but also – and initially largely – the original capital (which would be

tax free). The proportion of gains would increase as the original capital was gradually depleted.

118. Additional realisations would take place annually, equal to a fixed percentage (3%) of the remaining funds, for reasons of proper management of the fund and/or because of market forces requiring such realisations (this was called 'churn'), which might also give rise to a liability to tax to be paid as it arose.

119. No consideration was given to the possibility that the claimant might remarry – indeed, Mr Duxbury's appeal against the order on the basis that this possibility should have been factored in to reduce the award was dismissed by the Court of Appeal.

12. The calculation was not wholly unlike a discounted cash flow model, or the kind of computations then used to calculate lump sum awards in personal injury or medical negligence cases, which generally operated on the basis of a 'discount' for the advance payment of a fixed sum to be depleted over a period of years.

13. For a few years an industry arose where accountants would be instructed in individual cases to put forward bespoke computations adopting some or all of the assumptions put forward by Mr Lawrence, supplemented with their own variations, particularly as to investment yield, capital growth and inflation (to which we shall refer as the 'key assumptions'), but sometimes also in relation to life expectancy. It soon became apparent that costs, common sense and appropriate allocation of court resources favoured a standardisation of the arithmetic and 'assumptions' rather than evidence being given, submissions being made, and judgments delivered in every case.

14. By 1991 the concept of a Duxbury calculation had received judicial endorsement. In *B v B* [1990] 1 FLR 20 Ward J said 'if this calculation is accepted as no more than a tool for the judge's use, then it is a very valuable help to him [sic] in many cases'. in *Gojkovic v Gojkovic* [1990] 3 WLR 261 Butler-Sloss LJ stated that 'a Duxbury calculation … produces a figure to which the judge is entitled to have regard in deciding what is the right answer'.

15. In 1991 a group comprising Nicholas Mostyn, Peter Singer QC, James Holman QC and Valentine Le Grice worked on the production of the first edition of the Family Law Bar Association's flagship annual publication *At A Glance*, which came out in 1992. It was decided that it should contain a table giving guideline Duxbury figures based on just two variables: the age of the payee (specifically, until 2001/02 only for women [3]) and the target amount of the revenue 'need' in the first and all subsequent years. From inception to date those tables have proceeded on a 'whole life' basis – i.e. that the inflation adjusted spending requirement would continue for the remaining actuarial life expectancy of the recipient.

16. This table was updated annually to reflect changes in life expectancies (as predicted by the Government Actuary and the Office for National Statistics) and

changes in the applicable rates of tax, including future changes which had been announced even if not yet implemented. There also became available commercial software to undertake ever more bespoke computations, [4] most notably and popularly, Capitalise by Class Legal, first produced in 2000.

17. The aggregation of the key assumptions gives a real rate of return (RRR): income yield + capital growth – inflation = RRR. That was initially set at 5%. In 'Reflections on Duxbury' in the 1995 edition of *At A Glance* the editors stated:

> 'In the introductory material to *Actuarial Tables for use In Personal Injury and Fatal Accident Cases* (HMSO, 2nd edition 1984) the Ogden Committee point out that for a payee to be certain to receive an inflation-proof income for the period to which the loss relates it would be necessary to invest in Index-Linked Government Stock. The return upon these has historically ranged between 2.5% and 4.5% gross. The rate applicable on 30 January 1995 was 3.89% before tax (source: Financial Times). By contrast the gross real return on equities has over the 25 years to 1993 averaged 5.8% (source: The BZW Equity-Gilt Study Investment in the London Stock Market since 1918). …
>
> The lower the percentage real rate of return selected, the higher the capital fund required. So the choice made for these Duxbury tables of 4.25% should be regarded as fair to each spouse, and designed to cover such considerations as any professional expense in managing the award, once made.
>
> Whereas therefore the previous editions of *At A Glance* have suggested that it was a matter for evidence and argument in each case what assumptions should be adopted, it may now be that such a laissez-faire approach is outmoded. It would be better to accept that (for the illustrative purpose which is all that the calculation can provide) an industry-standard of 4.25% should be adopted as the real rate of return in current and foreseeable financial circumstances.'

18. This was followed by *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833 where Holman J stated:

> 'Although I am a member of the editorial committee of *At A Glance* (FLBA) I was not the author of "*Reflections on Duxbury*" to be found at the beginning of the 1995 edition. But I agree with its reasoning and its conclusions. In my view it is important that there should indeed be "an industry standard" for the purpose of the Duxbury approach and in my experience that standard has already settled at around 4.25%'

19. In 1998 the original Duxbury Working Party came into existence. It was a self-selected group of (male) lawyers, accountants and actuaries who shared an interest in the topic and had sufficient understanding of both the underlying

object of the calculation and the workings of it, as well (at least for some members) the expertise to identify appropriate figures for the key assumptions. They had no status or standing other than their willingness to discuss and publish the outcome of their discussions in the commentary to the annually updated Duxbury table published in *At A Glance* . It produced its first report quickly '*Duxbury – The Future*': [1998] Fam Law 741 proposing a RRR of 4.25%. Unsurprisingly, that was adopted by the editors of *At A Glance*. From 1998 until 2006 there were occasional, but by no means annual, adjustments made to the key assumptions, in line with the collective or majority views of the then members of the original Duxbury Working Party, of which the authors of this report are a reconstitution. [5]

20. In practice the adjustments, if any, tended to be *de minimis*, since the view of all members of the Working Party was that even seemingly dramatic events in the financial landscape (for example Black Monday in 1992 when the FTSE 100 fell by over 11% in a single day, while the Dow Jones fell 20%) would usually be 'blips' in an otherwise historically clearly identifiable trend. Views about what had happened in the last 15 months were not determinative when considering an investment horizon measured in many decades.

21. In January 2002, the Duxbury Working Party reconvened and recommended that from April 2002 calculations should be done using a RRR of 3.75%. This led to two tables being published in the 2002–2003 edition of *At A Glance* one using a RRR of 4.25%, the other a RRR of 3.75%. That rate of 3.75% was approved by the court in *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 at [57] where N Mostyn QC stated:

> 'It might seem hubristic of me to approve in my capacity as a deputy High Court judge a rate recommended by me (among others) in my capacity as a member of the working party. But it is blindingly obvious that as between 4.25% and 3.75%, the lower figure is right. Indeed, present market conditions might suggest that 3.75% is distinctly optimistic. If by making this statement I can help to avoid some needless controversy about rates of return in some future case then I consider it will have been justified.'

22. In the 2009–2010 edition it was explained that the assumed income yields for years 1 and 2 had been reduced in the light of the global financial crisis and that the advice of the Duxbury Working Party was awaited. The Duxbury Working Party duly met again in 2009 and recommended a reduction in the assumed income yield in the first year to 1.5% which was adopted, and which remains in place.

23. These minor variants aside the key assumptions (income yield 3%, capital growth 3.75%, inflation 3%) have remained essentially undisturbed since the 2003–2004 edition (20 annual editions). In 2015, they received detailed judicial consideration and approbation in *JL v SL (No 3)* [2015] EWHC 555 (Fam) which also approved the underling algorithmic architecture. While it has always been

open to individual litigants to argue against the adoption of the standard assumptions, in practice it would require a good argument or an unusual factual scenario for such an argument to succeed. There is, so far as we can tell, no recent authority in which such arguments have been successful.

24. That the calculation – and the assumptions underpinning it – were only a 'guide' or 'tool' and not 'the rule' in any particular case was repeatedly emphasised in the authorities, although inevitably, deviations from the guide were the exception rather than the norm. Generally, where the court was persuaded to make an order on a basis different from the result thrown up by a Duxbury calculation, the order was more generous to the claimant. That has not been because of a departure from the assumptions, but because of the specific factual matrix against which the calculation was being utilised.

25. A table giving the key assumptions and the RRR in each annual edition of *At A Glance* is at Appendix 2.

Criticisms

26. The Duxbury calculation – but in particular the key assumptions deployed in it – have been the subject of criticism by practitioners, financial advisers and academics alike in articles appearing in both legal and academic journals. A list of the articles which we have considered appears in Appendix 3.

27. Most of those criticisms centre around the unlikelihood, in reality, of a recipient of a Duxbury fund as an element of their financial remedy award, actually being able to invest their fund so as to enable them confidently to spend at the rate assumed as the starting point of the computation of the capital sum, without risking running out of money during their life. The common theme of the criticisms was, directly or indirectly, that the calculation was unduly mean and that claimants were being short-changed.

28. Amongst the objections have been that:

28.1. there is no protection for the payee if they turn out to be long-lived and therefore potentially surviving beyond the exhaustion of their fund even if it had otherwise performed as anticipated in the calculation,

28.2. the investment returns assumed could only be achieved (if at all) with a relatively risky investment strategy, and

28.3. the payees are likely to be more cautious than adventurous investors, and would generally not be financially sophisticated.

29. This has been argued, in effect, to place unfair risk on the payees – predominantly women – for the benefit of the payers – predominantly men. The payees were left, according to the critics, faced with either reducing their expenditure immediately or later in life when the funds were likely to be dwindling, or hoping to remarry, rather than being able confidently to continue

with the lifestyle judged to be appropriate at the time of the establishing of the quantum of their Duxbury fund.

30. Defenders of the status quo focussed not so much on the likelihood that in practice the fund could be prudently invested so as to enable spending to continue at the initially assumed rate, but rather on the balance of fairness between divorcing spouses and the true aim of the calculation being to establish the fair sum to be paid immediately to compensate the payee for forgoing what would otherwise be their right to receive maintenance by way of periodical payments.

31. This has been explained in the text accompanying the Duxbury Tables since the 2010–2011 edition. In that edition it was stated:

> 'the assumptions must be such as strive to achieve fairness between the parties. An ancillary relief award is a "nil gain sum" – so any benefit to one party is necessarily a detriment to the other. The capitalisation of a periodical payments award should therefore aim to achieve as fair a balance as possible between ensuring that the payer does not pay too much and that the payee receives enough but no less. Standardisation inevitably leads to anomalies and occasionally unfair results in individual cases. A payee who capitalises her periodical payments for a lump sum calculated on Duxbury assumptions is a net winner if she soon remarries (or cohabits in circumstances which would have led to a reduction in her periodical payments) or, more paradoxically, if she dies young. On the other hand, she will be a net loser if she lives singly for longer than her average contemporary. The likelihood of re-marriage by the payee, or a payer's inability to continue to make periodical payments long into old age, are factors which would tend to favour the recipient.'

32. In the 2024–2025 edition the explanation was put this way:

> 'The calculation is not, and never has been, to work out the sum which is the equivalent of a guaranteed index-linked annuity for the life of the recipient.
>
> Rather, it is an attempt to identify a fair net present value of a periodical payments award (where the applicant's right to claim under the Inheritance (Provision for Family and Dependants) Act 1975 remains open) i.e. a maintenance award that endures until the death of the claimant.
>
> The latter is likely to be materially less than the former for many reasons including the variability of a periodical payments order and its automatic cessation on remarriage.'

33. This reconstituted Duxbury Working Party has been established to consider and discuss the competing arguments and to make recommendations for the

retention or adjustment of any of the underlying assumptions, but particularly those identified as the 'key assumptions'.

34. In the course of discussion all of the members expressed disquiet about the implicit steer towards 'whole-of-life' provision in the Duxbury calculation by the publication of tables which provide a 'guide' as to the sum targeted at the actuarial life expectancy of the payee, which runs counter to the modern practice of achieving financial independence rather than lifelong dependence following marital breakdown, and counter to the statutory directive to consider financial provision by way of periodical payments 'only for such term as would … enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party'.[6] While that provision does not apply directly to lump sum payments if, as discussed below, the proper rationale for the Duxbury calculation is of the fair sum to pay in compensation for not receiving a periodical payments order, it appears to us to be illogical, if not irrational, to assume in that calculation that the periodical payments would endure for the whole of the payee's life.

35. The members now[7] comprise five men and two women, two barristers, three solicitors, a chartered financial planner and one retired High Court Judge.

The legal framework

36. Prior to 1984 the family courts were enjoined to exercise their powers under Part II Matrimonial Causes Act 1973 so as to put the parties, as near as was practicable, in the position in which they would have been had the marriage not broken down – the so-called 'minimal loss objective'.

37. The 'usual' order was provision for a home and for maintenance by way of periodical payments. Periodical payments were, and still are, always susceptible to variation (in either direction) including termination. Such payments are automatically terminated by remarriage of the payee. However, before 1984 such periodical payments orders were often, even usually, expressed as being 'during joint lives'.

38. Such an order would end automatically on the death of the payee and, unless secured, also on the death of the payer – although recourse might then be had in an appropriate case to an application under the Inheritance (Provision for Family and Dependants) Act 1975 to obtain relief against the deceased's estate, so long as the payer had died domiciled in England or Wales.

39. A periodical payments order might also be made for a limited period (a 'term' order). In the absence of a specific bar (under s 28(1A) Matrimonial Causes Act 1973 introduced in 1984) the payee could apply for such a term to be extended (under s 31).

40. But also newly introduced in October 1984 was what has become to be understood as the prioritisation of the clean break. Sections 25A and 31(7)

Matrimonial Causes Act 1973, both inserted in 1984, required the court when considering an application for the first time (s 25A) or for variation of an existing periodical payments order (s 31) to 'consider whether it would be appropriate' to exercise its powers [8] so as to bring about a clean break 'without undue hardship' to the claimant.

41. Duxbury (heard at first instance and on appeal in 1985) was one of the earliest cases in which the court considered how fairly to arrive at a figure for a lump sum in place of what would previously have been periodical payments, and usually on 'joint lives' terms, albeit supposedly in the shadow of the then new s 25A.

42. Mr Duxbury appealed to the Court of Appeal against the making of such an award having regard to the fact that Mrs Duxbury was, and had been at the time of the hearing at first instance, cohabiting with another man and was, he argued, likely to remarry. His appeal was dismissed, the Court of Appeal considering that her cohabitation was 'irrelevant'. [9]

43. This is the context in which the computation of the Duxbury lump sum figure has to be viewed. It is in substitution for a stream of periodical payments with all of the variability and uncertainty that come with such a stream. The lump sum payment serves to liberate both the payee and the payer from the continuing financial interconnection of a periodical payments order but should in other respects be financially neutral for them both. That this is the essential premise of the calculation has been made clear in 13 consecutive editions of *At A Glance* since 2010–2011. [10]

44. Between 1987 and 2000, the Duxbury calculation dominated the computation of awards in cases in which a clean break was plausibly achievable. Thus, in *Harris v Harris* [2001] 1 FCR 68 Thorpe LJ observed that the table had an 'obvious utility' offering the judge a starting point. But, in reality only a very small proportion of separating couples had anything like the resources necessary to enable a Duxbury calculation to be relevant to the computation of an award – this was essentially the province of the wealthy and the comfortable professional classes. It required the parties to have available to them sufficient capital to provide homes for them both and have sufficient surplus capital to render the capitalisation of any needs-based revenue claim feasible.

45. The legal landscape in that period meant that in moderately large and very large money finance cases, the applicant's award was usually computed as the sum of their housing requirement (usually the purchase price and ancillary expenses) and the sum necessary to compensate for the clean break imposed by reason of s 25A and the dismissal of what would otherwise have been their claim to periodical payments (as mentioned, at that time, frequently on a joint lives basis).

46. That all changed in October 2000 when the House of Lords in the case of *White v White* [2000] UKHL 54, ruled that the general rule should be that the

ancillary relief award should be measured against the 'yardstick of equality'. That in turn led in 2006 to the identification by the Supreme Court, in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 of the 'sharing principle'.

47. In larger cases, in which there were significant capital assets to be divided, 'needs' – usually characterised as 'reasonable requirements' – no longer provided a limit to the quantum of claims against the wealthier spouse's resources. Duxbury was to a large extent relegated to cases in which – for whatever reason – the sharing principle was not engaged. Examples of cases in which the sharing principle was less likely to curtail the relevance of needs/periodical payments and therefore Duxbury calculations were those in which:

47.1. the overall wealth was largely non-matrimonial having been inherited or brought into the marriage by one spouse (e.g. from a previous marriage or a pre-existing business);

47.2. the capital claims had already been dealt with and the current application was for the capitalisation of an existing periodical payments award; or

47.3. (after 2010 and the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42) there was a prenuptial or postnuptial agreement to which effect was to be given, under which the sharing principle had been disapplied by agreement, but which left the needs of the claimant spouse at large.

48. Duxbury calculations were also frequently carried out in sharing cases as a means of cross-checking whether an applicant's sharing award would meet their needs in moderately large to large money cases. The common practice, which remains in place today, is to identify the appropriate portion of an award necessary to meet an applicant's capital need (often housing), and then use Duxbury, or a bespoke calculation adopting the Duxbury assumptions, to check whether the remainder of the award is sufficient to meet the applicant's income need. This analysis sometimes precipitates argument about the fair assumptions to be adopted in the bespoke Duxbury calculation – most often when, and the extent to which, an applicant should be expected to amortise their 'free' capital fund to meet their annual income needs in circumstances where the other party is able to better preserve their capital share by meeting their needs from earned income.

49. The Court of Appeal has declined to endorse a default approach and considers that it is a fact specific evaluation to be carried out in each case (*Waggott v Waggott* [2018] EWCA Civ 727). In contrast, in *CB v KB* [2019] EWFC 78 at [53] Mostyn J was in no doubt that a recipient of a Duxbury fund should almost invariably be expected to amortise it. [11] Of course, a conventional Duxbury calculation presumes complete amortisation of the capital fund.

50. Another trend in the law, or at least in the application of the law, over the period from 1985 to the present day, has been the almost total disappearance of the previously ubiquitous 'joint lives' periodical payments order. While such orders are still made from time to time, they are of increasing rarity. [12] This has been a consequence of a combination of socio-economic and legal developments. The strengthened status of women in the workplace, the increased proportion of women, but in particular mothers, who continue in employment after marriage and the increasing expectation that even those who do not stay in employment remain potentially employable following a divorce, no doubt all played into the decline in joint lives order. On the legal side it was the combination of the greater embracing by the court of the desirability of the clean break, the introduction of pension sharing as well as the sharing principle, which have all contributed to the near extinction of the 'joint lives' periodical payments order. This is exemplified by the decision in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [13] following which joint lives maintenance orders have become an endangered species, and secured joint lives periodical payments for a claimant in middle-age virtually extinct.

51. One potentially significant reason for the decline in the making of joint lives periodical payments orders is, of course, the availability of the power to make a lump sum order, typically quantified on the basis of a Duxbury calculation. However, even allowing for this the advent of the pension sharing order (with effect from 1 December 2000) would surely have greatly reduced the number of cases in which periodical payments would ever be ordered to continue beyond the normal retirement age of the payer.

52. Nonetheless, the published Duxbury methodology has continued to provide figures – at least in the print versions – exclusively on the basis of a whole-of-life entitlement of the payee, by fixing the duration of the dependency to be capitalised to the actuarial life expectancy of the payee. This might be thought to be of marginal relevance in the general run of cases and to cater only for a minority clique.

53. That is the background against which the Working Party has focussed its discussions leading to the recommendations in this provisional report.

The issues

54. Central to the discussions amongst the members of the Working Party have been the following questions:

541. What is – and what should be – the proper rationale and basis of a Duxbury calculation?

542. Is the overall algorithmic model apt or inapt for such calculations?

543. If inapt, what recommendations might we make for its replacement?

5.44. What is a realistic long-term average rate to assume for inflation, or otherwise factor into the calculation?

5.45. What are realistic income yield and capital returns to assume on an investment portfolio representing a Duxbury award to achieve the appropriate objectives?

5.46. How, in answering that question and if at all, should the annual costs of investing, including fund management, platform costs and adviser fees (which we shall refer to collectively as management costs), be taken into consideration and at what stage?

5.47. Should the courts be encouraged or discouraged from abandoning reliance on published tables and seeking bespoke evidence in individual cases?

5.48. Should the individual characteristics and proclivities of the payee be taken into account in such an exercise (for example real or claimed reluctance to take investment risk, or considerations of familial longevity or the opposite)?

5.49. Does the practice of publishing tables of Duxbury figures based only on 'whole-of-life' provision lead to a disproportionate number of awards or settlements being based on the false premise that the alternative would have been a 'joint lives' order?

5.410. With what 'health warnings' should Duxbury calculations be endorsed better to educate both lawyers and, more importantly, lay parties about the differences between such a fund and a guaranteed income for life as if from an annuity?

The rationale for a Duxbury calculation

55. Jurisprudentially it is beyond doubt that the Duxbury calculation has been deployed, or should have been deployed, in substitution for what – in the absence of sufficient capital to make a lump sum order – would otherwise have been a periodical payments order.

56. This was undoubtedly its function in the case of Duxbury itself, although precious little consideration appears to have been given to the implausibility or unlikelihood of a joint lives periodical payments order actually subsisting during joint lives in that case, bearing in mind that Mrs Duxbury was already cohabiting with a new partner. As already mentioned above, the Court of Appeal considered that fact to be 'irrelevant'.

57. *Pearce v Pearce* [2003] EWCA Civ 1054 was a case which concerned the capitalisation under s 31(7B) Matrimonial Causes Act of what was undoubtedly a joint lives order, in which there were also undertakings by the husband as to the continuation of payments to the wife in the event of his death before hers effectively rendering the periodical payments order 'secured'. Thorpe LJ was quite clear, at [20], that in such an exercise: [14]

> 'What the judge is endeavouring to do is to express as a capital sum what is a fair capital sum in the circumstances in substitution for the periodical payments which would otherwise have been appropriate.'

58. This was not an original thought. Thorpe LJ was there quoting with approval what Pill LJ had previously said in *Harris v Harris* [2001] 1 FCR 68 at [44].

59. No one has contradicted or improved upon that concise summary of the objective of the Duxbury calculation in the intervening 23 years.

60. This simply stated objective belies the numerous considerations which might impact on the 'fair capital sum in the circumstances'.

61. The bare Duxbury model itself, as epitomised by the table appearing annually in *At A Glance*, considers only two case specific circumstances viz the age and (latterly) sex of the payee. All other factors are, necessarily in that particular exposition, overlooked in the arithmetic.

62. More sophisticated modelling tools, such as Capitalise, can factor in a variety of other circumstances, most obviously whether or not the recipient will be entitled to the full State Pension assumed in the printed tables, but also any other anticipated capital or income receipts and whether the annual spending power might fairly be adjusted (usually by way of reduction) at some stage in the future. It can also be used to calculate capitalisation figures based on anticipated dependency shorter or, theoretically, longer than actuarial life expectancy.

63. Whilst those considerations must plainly exclude entirely subjective criteria such as re-marriageability, we do consider that the model should properly err on the side of under- rather than over-generosity in the computational phase, to reflect the much greater likelihood that 'circumstances' would in practice lead to a termination or reduction of the hypothetical underlying periodical payments order rather than to an increase or extension. The law now – much more than it did in 1985 – encourages financial independence rather than life-long financial support. It will not be in every case, even when the payer has abundant resources, that the 'start on the road to independent living' [15] would require that the traveller is armed with a fund liberating them from all financial responsibility and risk for the rest of their life.

64. We have already commented that genuinely joint lives periodical payments orders, and a fortiori joint lives secured periodical payments, have reduced in popularity and prevalence, perhaps almost to the point of becoming an endangered species. Why then, we have wondered, has the default computation of a Duxbury award remained stubbornly based on the actuarial life expectancy of the payee and even that based solely upon their date of birth?

65. We venture to posit that were the Duxbury case to be reheard now, regardless of the revolutions to financial remedy proceedings wrought by the decisions in *White* and *Miller*, but in the light also of the changed approach to

independent living, it might well have resulted in a different outcome. Mrs Duxbury was only 45, the parties' youngest child already 20 following a 22-year marriage. As already mentioned, she was living with a new (and much younger) partner. It is hard to imagine in 2024 the starting point for Mrs Duxbury's provision being a secured periodical payments order for the rest of her life. Of course, the difference, in the modern era, is that Mrs Duxbury would very likely have received a substantial sharing award which might have obviated the need for the additional consideration of her needs.

66. In our proposals for change we canvass a new presentation of the capitalising algorithm which is no longer based on the assumptions of (i) a full State Pension nor, more importantly, (ii) whole-of-life provision.

67. Rather, we propose that the judge should consider what is an appropriate duration to assume for continuing financial support from the payer, which may not be 'whole-of-life', and select the guideline figure from a new table based on that duration rather than the specific age of the payee.

The algorithm - what it isn't

68. Before discussing what the Duxbury algorithm is, and how it works, we want to emphasise what it is not.

69. The Duxbury methodology is sometimes mistaken for an estimate of the cost of something with the qualities of an annuity to produce a guaranteed net income for life. Certainly, there are at least anecdotes of recipients of such funds visiting financial advisers and demanding an investment portfolio designed to achieve the same outcome as such an annuity. One can only assume that such recipients had not been advised by their lawyers that the fund would not be able to achieve the equivalent of an annuity return, at least not without considerable risk.

70. Even the most copper-bottomed of purchased annuities (e.g. using a SIPP fund) are only of a guaranteed gross annuity – sometimes, but not always, indexed or otherwise increasing to mitigate the effects of inflation – and so will always remain subject to the vagaries of the tax system even if the gross income is guaranteed.

71. An annuity is the purchase of a guaranteed, usually annual or monthly, receipt of money from an annuity provider, almost always an insurance company. The annuity purchaser pays a cash lump sum (these days almost always from a pension fund and known as a 'compulsory purchase annuity' even though the previous compulsion no longer exists) in return for lifelong, guaranteed, fixed, regular payments until their death.

72. There are variations on the annuity theme including:

72.1. joint annuities where the payments will continue (sometimes at the same rate, sometimes at a reduced rate) after the death of the first annuitant and

until the death of the second annuitant, typically a spouse or civil partner;

722. index-linking, or flat rate (typically 3.0% p.a.) increases in the regular payments intended to off-set the effect of inflation; and

723. guarantees, typically of five years, so that even if the annuitant dies during the guaranteed period, the payments will continue to their estate or nominated payee until the end of the guarantee period.

73. Each of those variations comes, of course, at a cost resulting in initially lower regular payments from the same capital purchase price for an annuity. Index linking might, for example, reduce the gross payments of an annuity purchased at age 55 by around 45%, at age 65 by around 36% and at age 75 by around 27%, so only those annuitants who live a substantial period after the purchase of the annuity would recover enough from the beneficial effect of the index linking (particularly in periods of low inflation) to make up for the much lower payments received initially. Other factors, such as tax, might nonetheless make deferral or index-linking financially astute even in low inflationary times.

74. Although there was once a thriving market in open market purchased life annuities (i.e. cash purchased annuities where the purchase price does not emanate from a pension pot), at the current time and for many years past, the only widely available annuities in the UK are those purchased using pension funds.

75. When an annuity is bought with a pension fund the entirety of the regular payments are taxed as income in the hands of the recipient even though, in reality, the bulk of the payments in fact comprise a return of the capital used to purchase the annuity. This is because the payments into the pension to accumulate the fund were (almost invariably) of untaxed income as a result of the income tax relief available on pension contributions whether made personally or by an employer.

76. Purchased Life Annuities (for which there are presently only two active providers in the UK market), are subject to a different tax regime which is much more onerous on the annuity provider (which may partly account for their scarcity) but much more beneficial for the annuity purchaser. The annuity provider has to provide the annuitant with a figure each year for the part of the regular payment which is return of capital (on which there is no tax) and the part which is income (or yield) on which the annuitant is to pay income tax. The part that is original capital will – for a long-lived annuitant [16] – eventually be exhausted, so that the annuitant would end up suffering tax on effectively the whole of the annuity payments in their later years (as with a pension annuity), having suffered almost no tax in the early years. The administrative costs for the providers are correspondingly higher and customer satisfaction presumably correspondingly lower.

77. The Annuities Table in *At A Glance* (page 66 of the 2024–2025 edition) shows that typical Purchase Life Annuities are seemingly less good value than Pension

Annuities, paying out around 17% less if purchased at age 55, 11% less at age 65 and 3% less at age 75 than the corresponding Pension Annuities which could be purchased at those ages, possibly in many instances negating the tax advantage of receiving the tax free return of capital.

78. The annuity market depends on the fact that a significant proportion of annuitants will die before they have received even the return of their original purchase capital. Others (another sizeable minority and together with the earliest casualties, a majority) will die before receiving the whole of the income and capital growth that the annuity provider earns from their original purchase capital. The early mortality 'profits' (from the annuity provider's perspective) have to be sufficient to meet their obligations to the long-lived annuitants amongst their customers, as well as to fund their corporate operations and provide a commercially viable profit for their shareholders.

79. Thus, annuities depend on a collective market, where the profits from the short-lived fund the continuing payments for the long-lived.

80. This is not the case in relation to financial remedy orders, where there is no such collectivity. Rather, in each case, the fairness has to be as between the payer spouse and the payee spouse – two individuals engaged in a nil-sum game. In fairness, there must be anticipated to be as many winner payees (who receive too much) as there are loser payees (who receive too little), so that the same balance is struck for the payers.

81. The crucial fact in relation to annuities is that once they have been purchased the capital purchase price is gone. Subject to any guarantee period, on the death of the annuitant the payments cease, and the purchase price cannot be recovered from the insurers. Naturally, some annuitants will die very soon after buying their annuity leaving their estates much smaller than had they died without purchasing the annuity. It is perhaps for this reason, as well as others discussed shortly below, that annuities have never been the mechanism of choice in the family court for providing for the income needs of a claimant for financial remedies.

82. Other reasons for eschewing annuities as the mechanism for providing for the needs of a claimant in financial remedy proceeding include at least the following:

821. income provision on divorce has always been, by its nature, subject to variation in the event of changes in circumstances. Such changes might include changes to the situation and economy of the payee or those of the payer;

822. the most obvious of such changes include the death or remarriage of the payee, either of which would, under the Statute, end a periodical payments order, even a secured periodical payments order. Neither of those things can be regarded as unusual or unexpected, indeed the first is inevitable save only as to timing and the latter a common occurrence; [17] and

823. while there will be those cases in which the position and financial standing of the payer might be so secure that it is inconceivable that they would ever be able to secure a variation based on a diminution of their capacity to pay, in the overwhelming majority of cases the payer will be subject to the vicissitudes of life including as to their health, earning capacity, investment outcomes and the macro-economic environment.

83. Having regard to those matters the family court has been understandably reluctant to impose on payers the obligation to fund the purchase of a copper-bottomed revenue stream by way of an annuity or of a sum calculated to achieve the same net effect as such an annuity. Rather, and as already mentioned, the Duxbury mechanism amounts to a discount for advance payment of what would otherwise be a continuing obligation serviced over time.

84. It is perhaps fair, however, to regard the cost of a net annuity equivalent to the initial spending requirement as an absolute ceiling on the assessed capital equivalent of a periodical payments order. A formula or approach which gave rise to a higher figure would be self-evidently too generous, since the payee could purchase the annuity and pocket the change, assured in their position for the rest of their life be it long or short.

85. Establishing figures for that ceiling is problematic because we have not been able to track down any providers of index-linked or otherwise inflation proofed Purchased Life Annuities and, even if such were available, the progressive increase in the (variable) portion that is subject to tax would render the arithmetic beyond the competence of our working party.

86. Thus, we now turn to consider and explain the workings of the Duxbury model as now properly understood and adopted by the courts.

The algorithm - what it is

87. As already mentioned, we consider that the Duxbury calculation is properly viewed as a rationalisation for the discounting of a lump sum payment to reflect the benefit(s) to the payee of having the money paid upfront rather than over a period of years.

88. The essential algorithm underlying the Duxbury calculation has been a constant since inception. It has experienced some very modest refinements but has proved durable and easily adaptable. It is also, perhaps something of a mystery to many users.

89. It is neither reasonable nor fair to assume that even all family law practitioners, let alone parties to litigation, could glean even a basic understanding of the methodology from the widely available material.

90. The text in *At A Glance* has for some years contained this explanation:

> 'Duxbury relies on an iterative computation, seeking the amount which if invested to achieve capital growth and income yield (both at assumed rates and after tax on the yield and realised gains) could theoretically be drawn down in equal inflation-proofed instalments over a period (usually the recipient's actuarial life expectancy) but would be completely exhausted at the end of the period.'[18]

91. The underlying 'assumptions' are summarised in *At A Glance* as follows:

91.1. a uniform income yield of 3% p.a. (1.5% in the first year),

91.2. a uniform rate of capital growth of 3.75% p.a.,

91.3. a uniform rate of inflation at 3% p.a.,

91.4. a consistent regime of taxation – with bands/allowances increasing in line with inflation save that allowances are assumed to be frozen until 2027–28,

91.5. a constant level of drawdown in real terms,

91.6. a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure),

and that the recipient will:

91.7. survive for precisely the expected average of their contemporaries, and

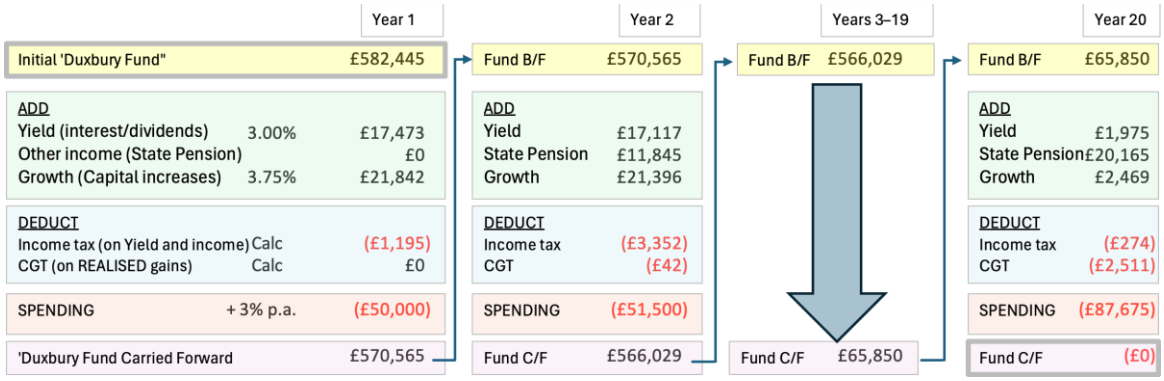
91.8. be or become entitled to a 'full' State Pension, and

91.9. that pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock'), and

91.10. the age from which the State Pension is payable will not alter in the meantime.

92. A moment's reflection about those assumptions would quickly lead to the conclusion that few, if any, of them will hold true over even a short period, let alone the typical 15–50 years of a Duxbury calculation. They are, at best, approximations or guesses at what might on average happen over such a period and stand as a proxy for the unknowable future figures. Some of the assumptions have been the subject of challenge by authors of articles published in various legal journals and blogs over the years.

93. While so far as it goes, that is an accurate – if very simplified – summary, even a well-educated and reasonably numerate new-comer might have difficulty envisaging precisely how it works. This infographic is an attempt to de-mystify the algorithm:



94. This very inexact example shows the first, second and final years of a calculation based on a spending requirement of £50,000 p.a. assuming that a State Pension becomes available in the second year. The tax calculations in this example are illustrative only. The amount carried forward at the end of each year is brought forward to the start of the next. At the end of the chosen period (by default the life expectancy of the payee) the fund is exhausted.

95. The tax calculations are necessarily estimates, based on the current and already announced future rates and allowances, save that beyond any already announced period of freezing such allowances, they are assumed to begin increasing in line with inflation (at 3% p.a.), as is the State Pension. The calculation of Capital Gains Tax (CGT) on realised gains is also necessarily approximated, but under the model all gains made are eventually subject to tax, subject only to the (now much reduced) personal CGT annual allowance.

96. The calculation is always undertaken by starting with a 'guess' for the figure at the top left (£582,445 in this example), and the guess is repeatedly refined ('iterated') until the figure in the bottom right is, as in this example, £0.

The algorithm – is it fit for purpose?

97. In a wide range of accounting and statistical applications derivative iterative calculations haven proven their worth as an aid to understanding values. For example, in Discounted Cash Flow valuations with which many family law practitioners will be familiar in the context of private companies, and projecting or calculating returns on investments more generally, including calculating Internal Rates of Return on investments and projecting potential 'carried interest' or other performance related returns.

98. Such calculations, albeit using different underlying assumptions reflecting the difference between an injured person's empirical need for continuing care and a divorced spouse's subjectively assessed reasonable requirements to maintain a given lifestyle, also underlie the Ogden Tables used in personal injury cases.

99. The members of the Working Party are unanimous in our view that the essential algorithm underlying the Duxbury calculation is arithmetically sound,

subject to (a) the appropriateness of the underlying assumptions and (b) a proper understanding of what the Duxbury calculation aims to achieve.

Are the assumptions appropriate?

Real returns and inflation

100. It is convenient to take the first three 'key assumptions' together. By way of recap they are:

100.1. a uniform income yield of 3% p.a. (1.5% in the first year);

100.2. a uniform rate of capital growth of 3.75% p.a.;

100.3. a uniform rate of inflation at 3% p.a.

101. Together those produce a 'real' or 'inflation adjusted' assumption of investment return of around 3.75% p.a. over the period of the calculation. The concessionary yield rate of 1.5% in the first year is intended to reflect the inevitable delay in compiling an overall balanced portfolio. This is a crude and somewhat simplistic approach which could be open to criticism as being either too 'generous' or too 'mean' but it has the virtue of simplicity and only a modest impact on overall outcomes.

102. We have obtained data and analysis from Dimensional Fund Advisors [19] for the period 1 January 1990 to 30 November 2023, examining all periods of 15, 20, 25 and 30 years during that 34-year period (i.e. covering returns affected by supposedly 'black swan' events of the recent past including the Global Financial Crisis of 2008, the Brexit Referendum in 2016, Covid-19 in 2020/21 and the 'mini-budget' of the Truss-Kwarteng administration). The analysis is summarised in this table, which shows 'real' rates of return based on an assumed investment portfolio of either 50:50 equities and bonds, or 60:40 equities and bonds:

	15 years	20 years	25 years	30 years
50% Portfolio	3.492%	2.94%	2.57%	3.49%
60% Portfolio	4.41%	3.56%	2.90%	3.81%

103. Those figures show that over the relatively recent past, some investors would have achieved more than the 3.75% assumed real return, while others would have achieved somewhat less. Timing is everything with investment, and a claimant who received a Duxbury based award in (say) 1999 – immediately prior to the bursting of the so-called dot.com bubble – would have achieved relatively disappointing returns compared to someone who received their award in say 2010 – immediately after the worst impacts of the Global Financial Crisis had been absorbed. This is a natural and well-understood phenomenon in the investment world. Equally obviously these figures are of average returns and

individual investors will have achieved better or worse outcomes depending on the investment choices that they made, and the timing of those choices.

104. In contrast, a comparison with average returns for the same periods from 1915 to 2022 (which includes two World Wars, the Three-Day-Week of 1973/74, the miners' strike of 1984/85 and numerous other market distorting events) show that the more recent returns referred to above have been modern-historically anomalous: [20]

	15 years	20 years	25 years	30 years
50% Portfolio	5.32%	5.27%	5.26%	5.26%
60% Portfolio	5.69%	5.66%	5.67%	5.69%

105. This in turn begs a question, which we cannot answer, which is whether the most recent investment experience represents a 'new norm' or a deviation from the longer-term realities of the markets which will in due course be corrected. [21]

106. We acknowledge and agree that most Duxbury recipients will have little or no prior investment experience, and their instincts will usually be for security rather than return maximisation, so their actual risk profile will be cautious to very cautious. However, security and caution come at a cost, and the issue is whether that cost should be borne by the payee or the payer in the Duxbury assumptions. To some extent this 'issue' is one of education and explanation by financial advisers, who need to be able to justify their investment advice (and the cost of it) in a way which makes it acceptable to the Duxbury fund recipient.

107. We have considered whether it is fair and reasonable to assume that the recipient of a Duxbury based award would or should invest that fund in a mixed portfolio of equities and bonds, and in what proportions, and concluded that the above figures represent a fair band, even if the reality is that such funds are perhaps more likely to be invested more cautiously, and therefore with potentially lower returns. The individual risk profile of the payee – i.e. seeking more rather than less security, in return for the likelihood of lesser rather than greater investment returns – should, we think, not be relevant to the computation of the fair sum to compensate for the forgoing of a periodical payments order. It is not unreasonable to assume that in many potential 'Duxbury' cases the ability of the payer to satisfy such an award has depended on their willingness to take entrepreneurial risks and have their own exposure to the vagaries of the markets. We do not consider it appropriate to regard a cautious (or very cautious) investment strategy in an individual case as a reason to adopt lower than reasonably achievable investment returns.

108. That does leave a question about the weighting appropriate as between the more recent figures and those achievable historically. Plainly the more recent figures deserve greater weight as a guide to what might happen in the immediate future, but not in our view to the exclusion of any weight being

attributed to the longer-term history. Thus, notwithstanding the shortfall that will have been experienced, on average, by Duxbury fund payees who received their awards more than 15 but less than 25 years ago, we consider that the overall weight of the data supports the continued reasonableness of assumed average real returns of at least the 3.75% p.a. currently assumed, and arguably somewhat higher returns.

109. While those figures broadly support the status quo in terms of overall real investment return assumed there are two important caveats:

109.1. the above figures do not take account of investment management costs, whereas the original assumptions made by Mr Lawrence in 1985 were for returns net of the (then lower) cost of managing the funds; and

109.2. because inflation also affects the other parts of the calculation, including taxation reliefs and allowances and, most importantly, spending, it is necessary also to consider inflation separately as well as part of the real rate of return.

Inflation

110. It would be unusual for a Duxbury fund recipient also to be responsible for funding a mortgage,[22] which means that the more appropriate measure of inflation for the purposes of these calculations is the Consumer Prices Index (CPI) rather than the mortgage inclusive Retail Prices Index (RPI).

111. The CPI in July 2024 stood at 171.3:

111.1. 15 years earlier in July 2009 it stood at 110.9 – an overall difference over 15 years of 54.46%, or 2.94% p.a. almost exactly the 3% figure assumed in Duxbury.

111.2. Over 20 years, 25 years and 30 years the CPI measure of inflation has been 2.84%, 2.52% and 2.42% respectively – all of which are lower than the figure assumed in the Duxbury calculation.

112. That inflation (as measured by the CPI) has consistently undershot the assumption made in Duxbury of 3% is a factor which has been favourable to payees, since the assumption has included that their spending requirement would increase annually at a rate greater than inflation. Conversely, but much less significantly, it has also assumed that tax bands and allowances would increase more than they have in fact done.

113. Broadly, therefore, it can be seen that subject to management charges (discussed below) average real returns of a balanced portfolio have approached (and in some cases exceeded) the assumptions, and – at least as measured by the CPI – inflation in relation to expenditure has lagged behind the assumed rate. Overall, although the assumptions may have been marginally more favourable to payees rather than payers, they continue in our view to represent a fair estimate, insofar as such can be made based on historic figures, for deployment in future calculations.

Taxation

114. The next assumption is that of a consistent regime of taxation – with bands/allowances increasing in line with inflation (save that allowances are assumed to be frozen until April 2026 as announced in 2021 by then Chancellor Rishi Sunak and not altered by any of the several successive Chancellors).

115. This assumption is both necessarily simplistic and knowingly wrong. Rates of taxation, and the overall tax 'take' vary considerably over time and in both directions. In the most recent past the trend has been unmistakeably upwards overall, the headline rates for income tax (including on dividends) and CGT have been relatively stable in the recent past. [23]

116. Changes to National Insurance, Corporation Tax and VAT have little, and usually no, impact on the Duxbury calculation, and most other indirect taxes are captured in the computation of the CPI measure of inflation.

117. However, the freezing of bands and allowances leading to so-called 'fiscal drag' has resulted in a higher overall tax burden on recipients of Duxbury based awards than assumed at the time they were computed.

118. Although the freezing of the bands and allowances for income tax will have had some impact on the real-life working out of the tax for Duxbury fund recipients, it is the reduction in the tax-free allowance for Capital Gains and the reduction in the tax-free allowance for Dividend income, [24] which will have had most impact in practice. Those changes are, of course, accounted for in the Duxbury model looking forward, but the assumptions made in earlier calculations have been falsified to the detriment of the cohort of payees.

119. There was, at the time of writing of the provisional report, considerable media speculation that the new Labour Government was likely to increase the headline rate of taxation on Capital Gains – perhaps to as much as the corresponding rates of income tax as previous Labour Governments have done. If implemented, such a change would have been taken into account for future Duxbury calculations, but those whose awards were computed at a time of a more benign regime will have lost out, just as those who had awards calculated at higher rates prevailing under previous Governments benefited when rates of taxation were later reduced. In fact, the increase in the rate of CGT was much more modest.

120. The uncertainty as to the impact of tax is to some extent, and in some cases no doubt completely, off-set by the absence in the Duxbury calculation of any assumptions that recipient investors will take steps to mitigate tax on their investment returns. If nothing else, even the most inadequate of financial advisers would recommend that the maximum subscription be made each year to ISAs, removing all yield and capital gain from the ambit of tax. The assumptions include that a significant proportion of the fund will be invested in equities, the income from which is taxed at preferential dividend rates,

significantly lower than earned income or interest income, but the tax calculation in Duxbury has never descended to the level of precision by seeking to allow for this beneficial rate of tax. Other strategies, for example in relation to Capital Gains on Government Bonds, could serve to shelter other returns. In short, subject to the caveats above about the constantly shifting burden of tax, Duxbury has historically taken a pessimistic view of tax, and in that regard has significantly favoured payees.

121. Taking that rough with the smooth, while at the same time seeking not to over-complicate what is already a multi-faceted computation, we consider that the present approach of adopting the current bands and allowances, and inflating them by the same inflation factor as is used for expenditure save where there has been a pre-announced freeze or other change (in which case the announcement is assumed to end up being implemented) is a fair and reasonable assumption to continue to make, albeit one acknowledged to favour payees.

A constant level of drawdown in real terms

122. It is the essence of the Duxbury calculation when presented in tabular form (i.e. as per the Table in *At A Glance*) that the assumed rate of required funding remains constant, in real terms, for the whole of the recipient's remaining life expectancy.

123. Leaving aside the question to which we turn below about the appropriateness of the whole-of-life expectancy assumption, it is more or less obvious that no one will ever, in practice, have a constant and unaltered spending requirement for the rest of their lives or, indeed, over any appreciable period. Life does not work like that. What may appear to be desirable or even necessary items of expenditure for a person in their 50s or 60s, may be quite undesirable and certainly unnecessary when they are in their 70s let alone their 80s. Of course, as items fall away they may well, indeed almost certainly will, be replaced by other items of expenditure the cost of which need bear no relation at all to the items of expenditure which they replace.

124. Certainly since 1995 and the decision of Thorpe J in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 there has been awareness, at least in 'big money' cases, that levels of expenditure are likely, in real terms, to reduce rather than increase in what he described as 'the years of dower' beyond the period of the 'flood' of an expensive lifestyle.

125. It is a societal norm – and not only in the UK – that older people, and certainly those beyond retirement age, will tend to have less available to spend than younger people at the height of their earning power (in the case of bread winners) and usually the height of their domestic obligations (in the case of home makers). Accordingly, retirement income and expenditure are normally expected to be lower than pre-retirement income and expenditure. To some extent this is facilitated by the reliefs and 'concessions' available to older

people, and – of course – the receipt of State Benefits in the form of pensions on an entitlement rather than means-tested basis.

126. More sophisticated Duxbury calculators (such as Capitalise by Class Legal) allow for the tailoring of expenditure requirements, in both directions, but in a two-dimensional tabular form as in *At A Glance*, the assumption of a constant real rate of drawing is in our view favourable to recipients/payees in the majority of cases.

Churn

127. The calculation assumes a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure) equal to 3% p.a. This is a sophistication to the calculation to reflect the 'real world' fact that sometimes gains will be realised other than to fund expenditure, which will serve to increase by bringing it forward, the taxation of such gains.

128. We have not considered it necessary to examine whether this assumption, which has never been the subject of criticism or even discussion in any of the many articles written about Duxbury over the years, should be revisited.

Life expectancy

129. Duxbury, certainly as published hitherto in *At A Glance*, has always assumed that the recipient will survive for precisely the expected average of their contemporaries.

130. Life expectancy is the age by which 50% of the population of a particular age can be expected to have died.

131. On one level this is a necessary and knowing simplification. It would plainly be impracticable for even bespoke Duxbury calculations fairly to be undertaken on a case-by-case individualised assessment of life expectancy. Even taking account of family history, personal medical history and more or less hazardous lifestyle choices, the art of predicting how long an individual is likely to live, other than by reference to their statistical and actuarial life expectancy is a fool's errand – rightly eschewed even in the small number of cases where it could be confidently asserted that a life expectancy was greater or, more usually, lesser than the actuarial table would dictate.

132. Moreover, there is no such thing as a single 'life expectancy'. Rather there are various different projections from various bodies, most notably (in the UK) by the Government Actuaries Department based on data from the Office for National Statistics (ONS). At any one time there will be several different tables available of estimated life expectancies of different cohorts based on social class, membership of pension schemes and a variety of other factors. The variance between such datasets may be great or small for a person of a specific age.

133. Were it not for our main conclusion (as discussed below) relating to the inappropriateness of the assumption of whole-of-life computations, we might have sought outside assistance from the Government Actuary as to whether the current selection of the ONS20 whole UK national projections, as used in the computations in *At A Glance*, is appropriate, although we have no reason to consider that it is not. A choice has to be made which is of general application to the population as a whole, and ONS20 seems to us to be as rational a choice as any other.

134. However, we are unanimous in our view that while whole-of-life is a permissible, and in some cases appropriate, basis for a Duxbury calculation, it should not, in the light of societal changes and in particular the near extinction of the whole-of-life periodical payments order, be as hitherto the default.

135. Rather, we are of the view that the process should become one of two stages – as it presently is in a continuing periodical payments case:

135.1. What is the appropriate level of financial support to be made for the benefit of the payee by the payer?; and

135.2. What is the appropriate duration for such support to be provided?

136. Considering those two stages separately will throw up a figure based on the number of years in the second stage, which may be quite different from the actuarial life expectancy. The figure may be affordable by the payer (in which case there can be a clean break on payment of the appropriate figure) or it may not be affordable in which case either a hybrid award (periodical payments for a period followed by a smaller lump sum) or a continuing periodical payments award would follow.

137. In considering the quantum and/or duration of the required support the court would be able to take into account whether the recipient was entitled to a State Pension (rather than the current default that such entitlement exists), and the impact of any pension sharing award or pre-existing pension held by the recipient. Pension sharing was not available in 1985 when Duxbury was decided.

138. There will, of course, continue to be cases in which whole-of-life provision is appropriate, but we cannot see why it should be the default assumption. That assumption was perhaps fairly made under the old, pre-White, regime of paternalistic protection by the court of otherwise financially disadvantaged claimants. But in the modern era, and regardless of proposed reform to the law of financial remedies limiting periodical payments to a relatively short timeframe, it appears to us to be an anachronistic legacy inconsistent with the development of the law more generally.

139. To put it another way, if in a case where capital has been shared, but where (per *Waggott v Waggott* [2018] EWCA Civ 727) income is not to be shared but is to be allocated by way of needs-based provision as periodical payments subject to the enjoinder for the court to consider 'whether it would be appropriate to

require those payment to be made … only for such term as would … be sufficient to enable the party in whose favour the order is made to adjust without undue hardship …' then why should a payment in substitution for such a periodical payments order be calculated on a whole-of-life basis by default?

140. We therefore propose a new presentation of the now familiar Duxbury calculation table, based on a number of years for a fixed annual spend. The table would be age and gender neutral, and not include the hitherto built-in discount for an assumed full State Pension. The existence or not of such an entitlement would be factored into the duration of the provision (or perhaps the quantum) rather than hard-baked into the calculation. The differences in life expectancies between men and women could be, but does not have to be in every case, reflected in the selection of the duration element of the award. This feeds directly into the next assumption to be discussed.

The full State Pension

141. The Duxbury calculation has always assumed that the recipient is or will become entitled to a 'full' State Pension at their current pension age.

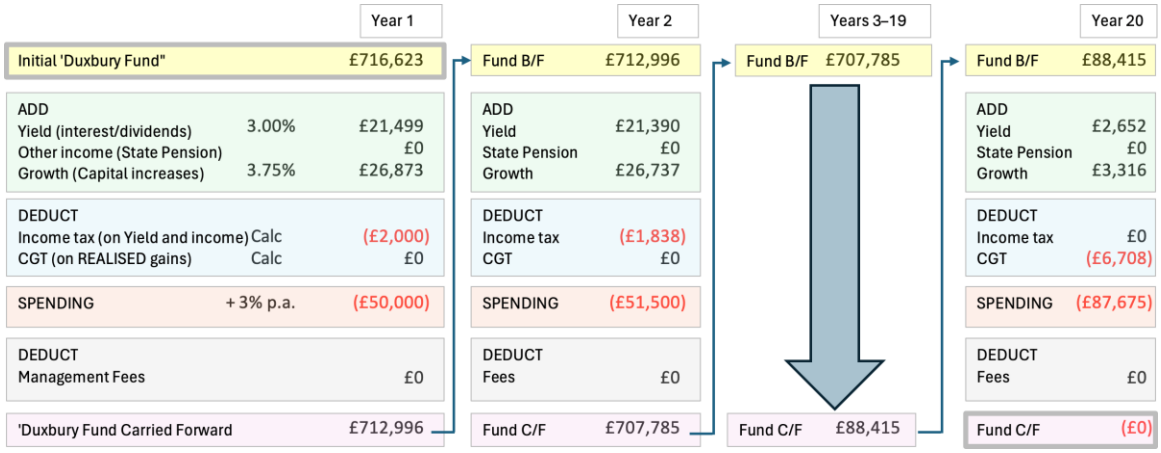
142. As the Women Against State Pension Inequality (WASPI) campaign has made widely known, that assumption – even in the case of those women who had built up the necessary entitlement to receive such a pension – has not necessarily held good as the pension age has progressively moved backwards from 60 to a presently fixed, but likely to be further extended, age of 68.

143. Moreover, while in 1985 almost all divorcing wives would have been entitled to a State Pension based on their husband's National Insurance contributions, such entitlement now accrues only based on their own contributions.

144. Although it is also true that a large proportion of the adult population, including married women and mothers, are now in employment outside the home and likely to be making the necessary National Insurance contributions for at least the majority of the necessary contribution period, there will still be a sizeable number of claimants in financial remedy proceedings who do not have any State Pension entitlement, or less than the full amount.

145. We consider that it is relatively easy when considering the duration of a proposed periodical payments or capitalised (Duxbury) award to take account of the existence or not of such entitlement, and particularly so when coupled with a pension sharing award or pre-existing pension entitlement, to arrive at a fair outcome. On the other hand, we consider that it was and is more difficult for a court or legal adviser to consider what increase should be made to a conventionally ascertained Duxbury award, based on a two-dimensional table of the kind appearing in *At A Glance*, to reflect any shortfall in the individual's State Pension entitlement. It is one thing to know that it should increase the award, but quite another to work out by how much.

146. Removing the State Pension element from the illustration at paragraph 93 above results in an increase (for a calculation undertaken over 20 years) in the fund required from £582,445 to £716,623, an increase of about £134,000 or about 23%. This divergence is towards the top of the range previously identified in *At A Glance* for the adjustment necessary when a State Pension is not, in fact, going to be received:



Pension inflation

147. The Duxbury assumption has been that the State Pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock').

148. Given our conclusion as to the appropriate mechanism as discussed in the previous section, this assumption is rather less significant under our proposed model than under the existing model.

149. It is an assumption which has been extremely favourable to payees (except a small class of the WASPI age-group), to the cost of payers. State Pension inflation has outstripped inflation over the last 15, 20, 25 or 30 years – even allowing for the later date of commencement for some recipients. Particularly for those entitled to the 'new' State Pension (i.e. men born after 5 April 1951 and women born after 5 April 1953) pension inflation has been substantial.

150. The effect of the 'triple lock' is that in reality pension inflation will continue to outstrip general inflation.

Pension age

151. As already mentioned, the assumption made in Duxbury has traditionally been that the age from which the State Pension is payable will not alter in the meantime. Like all of the assumptions, this is a knowingly false assumption, made because some assumption has to be made.

152. Pre-announced changes are already built into the calculation.

153. Insofar as, contrary to our proposal, pension entitlement continues to be part of the algorithm, we consider that it is fair to assume that the existing and pre-announced changes to pension ages will apply to the individual under consideration. Naturally, the younger the individual the more likely it is that this assumption, and any or all of the others, will be falsified by events unfolding over the ensuing decades.

154. To the extent that old Duxbury awards were based on an assumed State Pension age which has been falsified by the progressive increases in that age, that will have been to the detriment of payees and the benefit of payers. In practice, such changes were announced and taken into account by the Duxbury calculation many years (and in some cases decades) earlier, so whatever may have been the state of ignorance of the WASPI complainants, any Duxbury payees in that rank will probably not have been disadvantaged.

Conclusion on the assumptions

155. Subject only to the questions of (i) fund management charges (ii) the continued reliance on a default of whole-of-life support and (iii) the default inclusion of a full State Pension, we therefore conclude that the 'assumptions' continue to represent a reasonable basis for the undertaking of capitalisation calculations.

156. While there will be those cases – we anticipate very much a minority – in which the facts, including for example the security of the paying party's financial position (the super-rich) or the age of the claimant (already at or close to retirement age) might justify the court adopting a whole life approach to capitalisation, we are collectively somewhat mystified that this has been the tacit default in almost all reported 'Duxbury' cases over the last three decades.

Management charges

157. Our enquiries have revealed that charges, including both fees for advice and management and the costs associated with dealings, might typically be in the order of 1.5% p.a. on a medium sized portfolio, but somewhat less on a larger portfolio.

158. There appears to be very considerable variance in relation to fees including at least the following factors:

158.1. some fees are calculated on the basis of the funds under management or in respect of which advice is given, while others or other providers, charge fixed or pre-agreed fees;

158.2. some providers have published stepped rates, with a lower percentage charge for larger portfolios, while others publish only flat rates;

158.3. some providers are amenable to individual negotiation on fees, perhaps particularly for larger portfolios and will 'compete on price';

1584. some investors (payees) will be willing to engage in negotiation and/or be prepared to change providers in search of a better deal, while others, through inertia, or loyalty, or lack of knowledge, will remain with the same advisers and the same platforms regardless of price; and

1585. in periods of high returns, as have been enjoyed in the immediate past, investors are willing to tolerate levels of fees which might be less palatable during periods of lower returns.

159. Those charges are not in general allowable against tax on yield or capital gains.

160. Historically, as stated in 'Reflections on Duxbury' in the 1995 edition of *At A Glance* (see paragraph 17 above), and as recently accepted by Moor J in his judgment in *MN v AN* [2023] EWHC 613 (Fam), the 'assumptions' in Duxbury have been inclusive of management charges. We are concerned that the data does not necessarily support the average achievability of such returns after charges.

161. The impact of such charges (say 1.5%) on the real rates of return illustrated at paragraphs 102 and 104 above is obvious and potentially significant.

162. The average real rate of return of the 50:50 (equities to bonds) portfolio would be reduced to about 1.62%, and for the 60:40 portfolio to about 2.17% if relying on the historic data only since 1990.

163. Taking the longer view relying on data over the period since 1915 would reveal long-term real returns net of charges of 1.5% p.a. to be 3.77% (50:50 portfolio) or 4.18% (60:40 portfolio).

164. The former – and arguably the more relevant data being the most recent – shows a sharp divergence from the assumptions presently adopted in the Duxbury calculation, whereas the latter tends to show that the present assumptions may be conservative.

165. We have not found it easy to reach any firm conclusions on how, if at all, the Duxbury calculation should be adjusted to reflect the impact of management charges and fees.

166. A purist approach – seeking to attribute arithmetical justification for every variable and to further complicate the computation – holds a certain appeal, and we have considered whether an additional allowance should be introduced into the algorithm to deduct such charges after computation of the annual tax charge.

167. Some of us have concluded that the overall algorithm is already quite materially slanted in favour of the majority of claimants/recipients for the reasons which we have explained above relating to the exclusion of the factors would which be likely to have led to a reduction or termination of the periodical payments order had such an order been made rather than capitalised. This is true whether the current default of whole-of-life is retained or replaced, as we

recommend, with the two-stage approach in which the amount and duration are assessed separately as part of the capitalisation calculation, although perhaps less so if the reforms we propose were to be adopted.

168. We acknowledge that this would result – as Duxbury always has – in winners and losers amongst the recipients. Those who are long lived and remain single will, as now, be at risk of being underpaid by reference to the fund necessary to enable them to live at the given rate for the rest of their lives. They are the losers. Those who are either short-lived (dying before their fund is exhausted despite being drawn as anticipated) or who remarry or otherwise adjust their living arrangements so as to end their entitlement to dependence on the payer are the 'winners'. To the winners must also be added the payees in those cases in which the fortunes (including health) of the payer take a downward turn so that the periodical payments order, had one been made and not capitalised, would have been reduced or terminated as a result of the change in their circumstances.

169. Some of us consider that the potential investment return shortfall, if indeed there is such a shortfall, whether as a result of macro-economic factors, investment decisions or fund management charges, is a fair risk for the cohort of recipients to be required to assume to balance the advantage that the same cohort has by reason of the non-variability of the capitalised award.

170. However, others of us consider that the impact of management charges is a separate 'assumption' which should be baked into the computation. If the computation is to be based on investment returns which can realistically only be achieved with the assistance of professional fund managers, allowance must be made for the deductions from the fund to meet their costs.

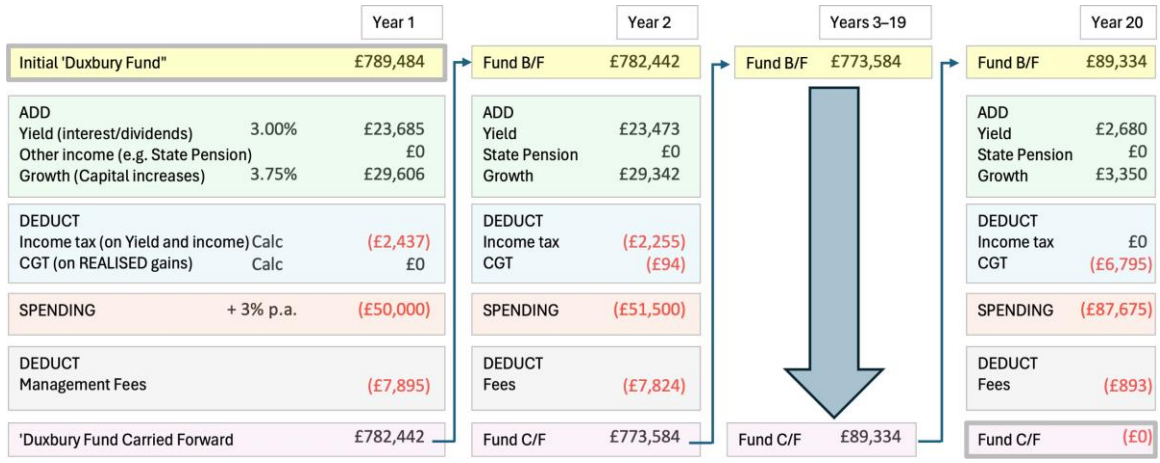
171. Establishing what those costs are likely to be is problematic for the reasons just given. Different platforms and different advisers have different charging rates. We have obtained anecdotal and informal soundings from various potential managers and advisers, and the range is wide and the pattern inconsistent.

172. Aware that this is something of a compromise our conclusion has coalesced around making some allowance in the basic computation, by allowing for a deduction while leaving the other underlying assumptions unchanged. We have opted for a graduated charge, with funds under £1m suffering 1% p.a., and funds over £1m suffering 1% on £1m and 0.5% on the value of the funds in excess of £1m. Thus, a fund of £3m would suffer annual charges of £1m x 1% + £2m x 0.5% = £20,000 or 0.67% overall. We propose that as with tax allowances, the £1m band is 'inflated' each year in accordance with the general rate of inflation adopted. By the end of any fund the rate will be 1% as the amount in the fund dwindles below the inflated first ceiling of £1m in real terms. We consider that this compromise effectively allocates some of the likely actual charges to the payee and some to the payer. In any individual case that is likely to strike a fair balance. Requiring the payee to shoulder some of the charges is an additional counterbalance to a powerful but unquantifiable imponderable operating in their

favour namely that they do not have to repay any part of the Duxbury fund if they remarry or re-partner before the expiration of the assumed term or if the payer dies in that period.

173. There may be individual cases in which a party might be able successfully to argue for a bespoke calculation based on different assumptions, including in relation to management charges, but for the purposes of the vast majority of cases in which a two-dimensional Duxbury table is utilised as the guideline for the appropriate figure, we commend the compromise in the previous paragraph.

174. Reworking the calculation illustrated at paragraph 146 above by allowing an additional deduction for management charges increases the initial fund required to £789,484 (an increase of c. £207,000 (or +35.5%) on the original requirement calculated in accordance with the current assumptions illustrated at paragraph 93 above):



175. However, we would not envisage that the 'new' Duxbury Calculation for a payee would be undertaken without regard to whether the payee did in fact have an entitlement to a State Pension.

176. The example we have been using is based on a female payee aged 66 or 67 at the commencement of the period. For reasons we have explained above, we anticipate that a court approaching such a case would assess the spending need first, and in doing so would be able to consider to what extent that might be met by a pension if the payee had any such pension (whether State Pension or as the result of a pension sharing order or from an occupational or otherwise self-funded pension) before fixing the amount of spending to be met from the capitalised part of the award. The court would then consider over what period that financial support should be provided – which might be based on life expectancy but, more usually we suggest, some lesser period.

177. In our example, if the court was aware that the payee would soon become entitled to a full State Pension of (say) £11,500 p.a. it might assess the spending requirement at perhaps £50,000 less 80% of £11,500 (to allow for the tax on the pension) = £40,800. It might also assess that the appropriate duration of the award was – in view of the payee's age and despite our overall recommendation to move away from whole of life awards, to be taken as their life expectancy of 20

years. It would thereby arrive at a figure of about £638,000 – or around £56,000 (10%) more than under the current assumptions. This is the effect of allowing separately for the management charges.

178. But for a much younger payee, say in their late 40s or early 50s, the court might entirely disregard any entitlement to a State Pension, allow for a full 'budget', and management charges but at the second stage limit the term of the financial provision to, perhaps the number of years of the payer's remaining working life prior to their State Pension age. That would, for younger payees, potentially significantly reduce the overall term over which the sum was calculated, eliminating or mitigating the so-called Duxbury paradox (the younger the claimant the higher the award and vice versa). We discuss this further in the section 'The whole-of-life assumption' below.

Bespoke calculations

179. Consistency and predictability militate strongly against encouraging or even permitting bespoke calculations in relation to 'assumptions' in individual cases in the absence of some special factor taking the case out of the usual run. Obviously bespoke calculations dealing with earnings, changes in spending requirement, capital injections and things of that sort, which do not depend on adjusting the 'assumptions' are often required and helpful.

180. It would be time and costs wasteful to have, or encourage, bespoke calculations in standard cases, and the easy availability of published tables from which guideline figures can be ascertained should, in our view, be sufficient in nearly all cases.

181. While the previously published tables – including, and most notably, those in *At A Glance* – have stood the test of time, as we have mentioned above we consider that the time has come for a revised presentation to be made available for use in our proposed two-stage computation abandoning the whole-of-life default.

182. Even if bespoke calculations were to be permitted in an individual case, we consider that a judge accepting evidence based on the subjective characteristics of the proposed payee (for example the longevity of their parents) would be entering dangerous and uncharted waters. For one thing the admission of such evidence would be difficult to distinguish from the admission of evidence tending to show that the payee had a shorter than statistically average life expectancy, by reason of a pre-existing condition or habit (such as alcoholism or smoking) or family history. For another, such evidence would have to be scientifically robust [25] and would amount to expert evidence requiring the court's permission to adduce and meeting the necessity threshold test. It is also difficult to see how a judge would be able to avoid case specific evidence about prospects for remarriage or cohabitation. We perceive this to be a slippery slope towards unpredictability and inconsistency which should be discouraged.

The whole-of-life assumption

183. At the risk of unwelcome repetition, we return to our main conclusion which is that while the algorithm as a whole, and the underlying assumptions taken as a whole, remain viable and reasonable, we are troubled by the default of whole-of-life provision.

184. Duxbury has for many years come with a warning against its deployment in cases where, by reason of the advanced age of the payee, the life expectancy is less than about 15 years. This is for the very obvious reason that once life expectancy is that short it becomes possible to outlive it by a very substantial margin in proportionate terms. A woman of 78 years with a life expectancy of 11.5 years, might well live to 101 – more than double her expectancy. A woman of 58 with a life expectancy of 29 years has almost no chance of living to 116.

185. We consider, in the surely very rare case where an assessment of the needs of a claimant over (about) 75 is undertaken, the consequences of the unfolding facts differing from the initial assumptions could be so severe, that a Duxbury capitalisation would not be appropriate. In such a case the purchase of an annuity, or the fixing of the award by reference to the cost of doing so, may well be apt. An alternative may be to adopt a Duxbury calculation utilising a longer-than-life-expectancy basis, perhaps with the 'balance' held on trust to revert to the payer on the payee's death provided the payer was the survivor, or to their estate if they were not. Such outlier cases should not lead to the tail wagging the dog of the great majority of cases.

186. The problem of the whole-of-life default is particularly acute in relation to younger payees – i.e. those with an actuarial life expectancy of more than about 30 years – i.e. men under about 54 and women under about 58 years of age, and spectacularly so for those with a life expectancy greater than 40 years (men under 45 and women under 47), since the practical likelihood a periodical payments order remaining in payment for such periods is self-evidently slim to non-existent.

187. It is not for us to devise new defaults, and any proposal for which would need to be fully argued and the subject of consultation if not judicial determination. It may be that future legislative reform in relation to periodical payments will render this discussion moot, but for the moment we recommend that parties and courts might consider arguably more generous quantum, perhaps (in an appropriate case where pension assets are insufficient to meet relationship-generated retirement need and resources are sufficient to render a stockpiling element fair) to include an element of 'stock piling'[26] coupled with less than whole-of-life durations, taking into account factors such as the anticipated working life of the payer, the presence or absence and duration of the remaining domestic contributions of the payee and the length of the relationship relative to ages of the parties, as factors which might lengthen or curtail the duration. This would enable the known or anticipated pension position of the payee to be

taken into account in assessing both quantum and duration of the dependency to be capitalised.

188. To this end we have created and placed in Appendix 5 a 'new' Duxbury table which, with interpolation, enables the easy computation of a capitalisation award for a wide variety of plausible amounts and durations, but would force the separate consideration of the latter without the default of whole-of-life.

Education and 'health' warnings

189. As we have adverted to above, we perceive that a good deal of the disquiet in relation to past Duxbury awards has arisen from a misunderstanding of what the computation aims to do, and the necessary balance to be struck between payees and payers.

190. In this report we have first addressed the inconsistency that while a joint lives maintenance order is a now an exceedingly rare bird, the whole-of-life Duxbury award has been the court's almost invariable approach. We have sought to resolve that inconsistency by devising a revised Duxbury table which gives capitalisation figures for various terms (which, of course, could correspond, as before, to the subject's life expectancy). The figures in the revised table have been calculated using, for the first time, management charges as an additional discrete key assumption.

191. The following points should be included in advice to clients:

191.1. A Duxbury calculation is not designed to identify (and will not achieve) a sum necessary to guarantee a particular level of expenditure and precision of calculation is never achievable. It must be clearly distinguished from a pension which will pay out indefinitely.

191.2. The calculation is based on a range of assumptions as to life expectancy (if that is the term being used); inflation, management charges; rates of income yield and inflation; and tax rates. It may also allow for receipt by the subject of a full State Pension. None of these may be fully accurate for that individual. This should be clearly pointed out to clients.

191.3. Financial planners/advisers often make the point that a cautious investor payee will not have the appetite for risk that will achieve the illustrated income. In contrast, the payer, perhaps a more adventurous investor, may argue that a higher return could be achieved. This is the key point with Duxbury. It is a tried and tested, judicially accepted and endorsed, illustration giving a capital figure for the sum required to meet the recipient's income needs over a specified term. But, like Heather Mills, [27] the recipient might remarry within that term. Had the payee been in receipt of periodical payments they would have terminated automatically. So, in that scenario the payee has 'beaten' Duxbury. Similarly, the payer could lose their job and successfully apply for a downwards variation or discharge of a joint-lives maintenance order. In that case the payee of a Duxbury

fund has beaten it again. Conversely, the payee may invest more cautiously, or use more expensive advisors, or live for longer than the actuarial age. In those scenarios the Duxbury sum will not be enough, and it will be exhausted before the expiration of the utilised term, or more likely the payee will have had to rein in their expenditure to prevent that from happening. The mathematical initial number will not turn out to be the right number in the events that unfold – that is the only guarantee. As Ward J stated in *B v B* [1990] 1 FLR 20 'The only certainty is that it will not happen as we have predicted'. And Baroness Hale in *Simon v Helmot* [2012] UKPC 5 at [72]:

> 'However, Duxbury calculations do suffer from the uncertainties of prediction. Nothing will in fact turn out exactly as it is predicted to turn out, whether in family law or in personal injuries law.'

1914. Financial advice could be sought before making proposals or reaching an agreement, so that the payee might have a financial adviser's perspective (but which is still only an estimate) on what income the payee might expect to receive from a given capital sum using different assumptions. But the payee should be made aware that it is unlikely that arguments proposing the use of different assumptions (let alone a different method of calculation) will be accepted. Clients should be told that while the calculation is a 'tool not a rule', experience shows that it is tends to be closer to the latter than the former.

The Duxbury Working Party

Michael Allum
Simon Bruce
Sarah Hoskinson
Lewis Marks KC (Chair)
Sir Nicholas Mostyn
Joseph Rainer
Mary Waring

Appendix 1: Short biographies of the members of the reconstituted Duxbury Working Party

Michael Allum

Michael is a solicitor at The International Family Law Group LLP. He specialises in financial issues which arise on relationship breakdown, with a particular focus on cross border and international cases. He is also a member of the *Financial Remedies Journal* editorial board.

Simon Bruce

Simon Bruce is a solicitor and Partner at Dawson Cornwell LLP. He is also a pro bono lawyer at law clinics in London. Simon has practised for over 41 years.

He's on this Duxbury Committee as he had the cheek to write a critique on Duxbury more than a decade ago. Simon writes the 'Thought Leader' in *Family Law*. He comes from Lancashire.

Sarah Hoskinson

With over 20 years' experience in complex financial remedy cases, Sarah is a Partner and Head of Burges Salmon's Family & Divorce practice. She sits on a number of financial remedy and other technical groups, including the Family Justice Council Financial Remedy Working Party, FJC Working Party on Needs, the Pension Advisory Group (PAG and PAG2) and the IAFL Pensions Committee, which she chairs.

However, it is through her membership of Resolution's Financial Remedies, Tax and Pensions Committee that she became involved in the Duxbury Working Party in 2023. Her approach to all of the work she has done in these groups, the Duxbury Working Party included, is to focus on relevant and practical education for family lawyers on the technical issues, and how they apply in practice.

Lewis Marks KC (Chair)

Lewis has been a barrister for over 40 years, a QC (now KC) since 2002 and has specialised in financial remedy cases for most of that time. He has appeared in many of the leading cases (including as junior counsel in *White* in the House of Lords, as leading counsel in the Court of Appeal in *Miller* and dozens of influential cases at first instance in the High Court and on appeal to the Court of Appeal).

He has been an editor of *At A Glance* since 1999, and is also a founder editor of the *Financial Remedies Practice*.

He was an original member of the Duxbury Working Party in 1998 and has authored a number of papers on the subject of Duxbury calculations. He has acted a Chair and convenor of the reconstituted Duxbury Working party. He has no judicial aspirations.

Sir Nicholas Mostyn

Nicholas was a barrister for 30 years specialising in matrimonial finance cases, appearing as a QC in the foundational decisions of the House of Lords in *White v White* (2000) and *Miller v Miller* (2006) and of the Supreme Court in *Granatino v Radmacher* (2010).

He became a High Court judge in 2010 and sat in the Family Division, where he gave many judgments of importance in the financial remedy field.

He was a founder editor of *At A Glance* in 1992 (now in its 33rd edition) and of Financial Remedies Practice in 2011 (now in its 13th edition) and continues as editor-in-chief of both publications.

He was also a judge of the Court of Protection and of the Administrative Court of the King's Bench Division of the High Court where he heard many judicial reviews of government decisions. Renowned for his independent, outspoken style, he frequently challenged the received wisdom of the law in favour of justice.

He retired from the Bench in July 2023, three years after being diagnosed with Parkinson's Disease, since when he has become an acclaimed podcaster. In July 2024 he was awarded a Doctorate of Laws honoris causa by his alma mater Bristol University.

Joe Rainer

Joe is a barrister who specialises in financial remedy cases. He is a (relatively new) editor of *At A Glance*, a co-author of the fourth edition of Pensions On Divorce: A Practitioner's Handbook, and a member of the *Financial Remedies Journal* editorial board and the Pension Advisory Group.

Mary Waring

Mary is a chartered financial planner, chartered accountant and Resolution Accredited Specialist.

She is the founder of Wealth for Women, an award-winning company, specialising in financial advice to women going through divorce, especially those who haven't been responsible for the finances during their marriage. She supports clients through this particularly challenging time who need trustworthy expertise and guidance. She works with her clients, so they understand the options available to them based on their financial situation and know how to improve their future.

Mary was interested in joining the Duxbury Working Party since her clients are typically non-earning spouses and have been for maybe 25+ years. They are therefore unlikely to become major income earners post-divorce.

Appendix 2: Key assumptions adopted in *At A Glance* 1992-2025

Edition	Income yield %	Capital growth %	Inflation %	Real rate of return %	
1992	6.00	6.00	7.00	5.00	
1993	5.00	4.00	4.00	5.00	
1994	4.50	2.00	2.00	4.50	
1995	4.25	2.00	2.00	4.25	

1996	4.25	3.00	3.00	4.25	
1997	4.25	3.00	3.00	4.25	
1998–1999	4.25	3.00	3.00	4.25	
1999–2000	3.25	4.00	3.00	4.25	
2000–2001	3.25	4.00	3.00	4.25	
2001–2002	3.25	4.00	3.00	4.25	
2002–2003	3.25	4.00	3.00	4.25	Note 1
2002–2003	3.00	3.75	3/00	3.75	Note 1
2003–2004	3.00	3.75	3.00	3.75	
2004–2005	3.00	3.75	3.00	3.75	
2006–2007	3.00	3.75	3.00	3.75	
2007–2008	3.00	3.75	3.00	3.75	
2008–2009	3.00	3.75	3.00	3.75	
2009–2010	3.00	3.75	3.00	3.75	Note 2
2010–2011	3/00	3.75	3.00	3.75	Note 3
2011–2012	3.00	3.75	3.00	3.75	Note 3
2012–2013	3.00	3.75	3.00	3.75	Note 3
2013–2014	3.00	3.75	3.00	3.75	Note 3
2014–2015	3.00	3.75	3.00	3.75	Note 3
2015–2016	3.00	3.75	3.00	3.75	Note 3
2016–2017	3.00	3.75	3.00	3.75	Note 3
2017–2018	3.00	3.75	3.00	3.75	Note 3
2019–2020	3.00	3.75	3.00	3.75	Note 3
2020–2021	3.00	3.75	3.00	3.75	Note 3
2021–2022	3.00	3.75	3.00	3.75	Note 3
2022–2023	3.00	3.75	3.00	3.75	Note 3
2024–2025	3.00	3.75	3.00	3.75	Note 3

Note 1 – two tables were published: one with a 4.25% RRR, the other with a 3.75% RRR.

Note 2 – income yield for year 1 set at 0% and for year 2 at 1.5%.

Note 3 – income yield in year 1 set at 1.5%.

Appendix 3: A list of the articles which we have considered

- Singer and others, '*Duxbury – The Future*' [1998] Fam Law 741. (Paper of the Duxbury Working Party: Singer J, Nicholas Mostyn QC, Lewis Marks, Peter Lobbenberg, Timothy Lawrence, Adrian Gallop, Dominic Wreford and Nicola van Lennep)
- Woelke, '*Is Duxbury the Answer?*' [1999] Fam Law 766
- Mostyn, '*Is Duxbury the Answer? Yes is the Answer*' [2000] Fam Law 52
- Merron, Baxter and Bates, '*Is Duxbury Misleading? Yes It* Is' [2001] Fam Law 747
- Marks, '*Duxbury – The Future? Episode II*' [2002] Fam Law 408
- Gold, '*Civil way*' 159 NLJ 1030, 17 July 2009
- Phillpotts and Bruce, '*An Alternative View of Duxbury*' [2010] Fam Law 161
- Marks, '*An alternative view of Duxbury: A Reply*' [2010] Fam Law 614
- Hitchings, '*Reconsidering the Duxbury default*' [2021] 33 CFLQ 275
- Allum, Jenkins and Gilbert, '*Looking back at Duxbury 30 Years On'* [2023] FRJ 11
- The commentary on Duxbury in each edition of *At A Glance* as listed in Appendix 2

Appendix 4

The indices used to generate the figures in paragraphs 102 and 104 were as follows.

Dimensional used the Bloomberg Aggregate Bond Index for the bond element in each example. The bond element was reduced by 2% held as cash as most platforms require a cash balance to cover upcoming fees. The MSCI All Country World Index was used for the equity element.

For their analysis, Timeline used the Morningstar Global All Cap Target Market Exposure Index for the equity element and the Global Aggregate Bonds Unhedged – Morningstar Global Core Bond index for the bond element.

Appendix 5: Capitalisation in whole thousands of pounds to three significant figures

Quantum £ p.a.

Duration (years)	£ 10,000	£ 15,000	£ 20,000	£ 25,000	£ 30,000	£ 40,000	£ 50,000	£ 60,000	£ 75,000	£ 100,000	£ 125,000	£ 150,000	£ 175,000	£ 200,000	£ 250,000	£ 300,000	Duration (years)
3	28	42	56	70	84	112	141	169	211	282	353	424	494	565	707	848	3
4	37	55	74	92	111	148	186	223	279	372	466	559	653	746	934	1,120	4
5	46	68	91	114	137	183	229	276	345	461	576	692	808	924	1,160	1,390	5
6	54	81	108	135	163	218	272	327	410	547	684	822	961	1,100	1,380	1,650	6
7	62	93	125	156	188	251	314	378	473	631	790	950	1,110	1,270	1,590	1,910	7
8	70	105	141	177	212	284	356	427	535	714	895	1,080	1,260	1,440	1,800	2,170	8
9	78	117	157	196	236	316	396	476	595	796	998	1,200	1,400	1,610	2,010	2,420	9
10	85	129	172	216	260	347	435	523	654	876	1,100	1,320	1,540	1,770	2,220	2,670	10
11	93	140	187	235	283	378	473	569	713	955	1,200	1,440	1,680	1,930	2,420	2,920	11
12	100	151	202	254	305	408	511	614	770	1,030	1,290	1,560	1,820	2,090	2,620	3,160	12
13	107	162	217	272	327	437	548	658	826	1,110	1,390	1,670	1,960	2,240	2,820	3,400	13
14	114	172	231	289	348	466	584	702	882	1,180	1,480	1,790	2,090	2,400	3,010	3,630	14
15	121	182	245	307	369	494	619	745	936	1,250	1,570	1,900	2,220	2,550	3,210	3,870	15
16	127	192	258	324	389	521	653	787	989	1,320	1,660	2,010	2,350	2,700	3,390	4,100	16
17	134	202	271	340	409	548	687	828	1,040	1,390	1,750	2,110	2,480	2,840	3,580	4,330	17
18	140	212	284	356	429	574	720	869	1,090	1,460	1,840	2,220	2,600	2,990	3,770	4,560	18
19	146	221	297	372	448	599	753	908	1,140	1,530	1,920	2,320	2,730	3,130	3,950	4,780	19
20	152	230	309	387	466	624	785	948	1,190	1,590	2,010	2,430	2,850	3,270	4,130	5,010	20
21	158	239	321	402	484	648	816	986	1,240	1,660	2,090	2,530	2,970	3,410	4,320	5,220	21
22	164	248	332	417	502	672	847	1,020	1,280	1,720	2,170	2,630	3,080	3,550	4,490	5,440	22
23	169	256	344	431	519	696	877	1,060	1,330	1,780	2,250	2,730	3,200	3,680	4,670	5,650	23
24	175	264	355	445	536	719	907	1,100	1,370	1,850	2,330	2,820	3,310	3,820	4,840	5,850	24
25	180	273	366	459	552	742	937	1,130	1,410	1,910	2,410	2,920	3,430	3,950	5,010	6,060	25
26	185	280	376	472	568	764	965	1,160	1,460	1,960	2,480	3,010	3,540	4,080	5,170	6,260	26
27	190	288	386	485	584	786	994	1,190	1,500	2,020	2,560	3,100	3,650	4,220	5,340	6,460	27
28	195	295	397	498	599	808	1,020	1,230	1,540	2,080	2,630	3,190	3,760	4,340	5,500	6,650	28
29	200	303	406	510	614	829	1,050	1,260	1,580	2,140	2,700	3,280	3,870	4,470	5,660	6,850	29
30	204	310	416	522	628	850	1,070	1,290	1,620	2,190	2,780	3,370	3,980	4,590	5,820	7,040	30

% discount factors

Quantum £k p.a.

Duration (years)	£ 10	£ 15	£ 20	£ 25	£ 30	£ 40	£ 50	£ 60	£ 75	£ 100	£ 125	£ 150	£ 175	£ 200	£ 250	£ 300	Duration (years)
3	93.3	93.6	93.5	93.5	93.6	93.3	94.0	93.9	93.8	94.0	94.1	94.2	94.1	94.2	94.3	94.2	3
4	92.3	92.2	92.3	92.4	92.5	92.5	93.0	92.9	93.0	93.0	93.2	93.2	93.3	93.3	93.4	93.3	4
5	91.0	91.1	91.2	91.2	91.3	91.5	91.6	92.0	92.0	92.2	92.2	92.3	92.3	92.4	92.8	92.7	5
6	89.8	89.9	90.0	90.0	90.6	90.8	90.7	90.8	91.1	91.2	91.2	91.3	91.5	91.7	92.0	91.7	6
7	88.7	88.9	89.3	89.1	89.5	89.6	89.7	90.0	90.1	90.1	90.3	90.5	90.6	90.7	90.9	91.0	7
8	87.6	87.5	88.1	88.5	88.3	88.8	89.0	89.0	89.2	89.3	89.5	90.0	90.0	90.0	90.0	90.4	8
9	86.6	86.7	87.2	87.1	87.4	87.8	88.0	88.1	88.1	88.4	88.7	88.9	88.9	89.4	89.3	89.6	9
10	85.4	86.0	86.0	86.4	86.7	86.8	87.0	87.2	87.2	87.6	88.0	88.0	88.0	88.5	88.8	89.0	10
11	84.4	84.8	85.0	85.5	85.8	85.9	86.0	86.2	86.4	86.8	87.3	87.3	87.3	87.7	88.0	88.5	11
12	83.3	83.9	84.2	84.7	84.7	85.0	85.2	85.3	85.6	85.8	86.0	86.7	86.7	87.1	87.3	87.8	12
13	82.3	83.1	83.5	83.7	83.8	84.0	84.3	84.4	84.7	85.4	85.5	85.6	86.2	86.2	86.8	87.2	13
14	81.4	81.9	82.5	82.6	82.9	83.2	83.4	83.6	84.0	84.3	84.6	85.2	85.3	85.7	86.0	86.4	14
15	80.7	80.9	81.7	81.9	82.0	82.3	82.5	82.8	83.2	83.3	83.7	84.4	84.6	85.0	85.6	86.0	15
16	79.4	80.0	80.6	81.0	81.0	81.4	81.6	82.0	82.4	82.5	83.0	83.8	83.9	84.4	84.8	85.4	16
17	78.8	79.2	79.7	80.0	80.2	80.6	80.8	81.2	81.6	81.8	82.4	82.7	83.4	83.5	84.2	84.9	17
18	77.8	78.5	78.9	79.1	79.4	79.7	80.0	80.5	80.7	81.1	81.8	82.2	82.5	83.1	83.8	84.4	18
19	76.8	77.5	78.2	78.3	78.6	78.8	79.3	79.6	80.0	80.5	80.8	81.4	82.1	82.4	83.2	83.9	19
20	76.0	76.7	77.3	77.4	77.7	78.0	78.5	79.0	79.3	79.5	80.4	81.0	81.4	81.8	82.6	83.5	20
21	75.2	75.9	76.4	76.6	76.8	77.1	77.7	78.3	78.7	79.0	79.6	80.3	80.8	81.2	82.3	82.9	21
22	74.5	75.2	75.5	75.8	76.1	76.4	77.0	77.3	77.6	78.2	78.9	79.7	80.0	80.7	81.6	82.4	22
23	73.5	74.2	74.8	75.0	75.2	75.7	76.3	76.8	77.1	77.4	78.3	79.1	79.5	80.0	81.2	81.9	23
24	72.9	73.3	74.0	74.2	74.4	74.9	75.6	76.4	76.1	77.1	77.7	78.3	78.8	79.6	80.7	81.3	24
25	72.0	72.8	73.2	73.4	73.6	74.2	75.0	75.3	75.2	76.4	77.1	77.9	78.4	79.0	80.2	80.8	25
26	71.2	71.8	72.3	72.6	72.8	73.5	74.2	74.4	74.9	75.4	76.3	77.2	77.8	78.5	79.5	80.3	26
27	70.4	71.1	71.5	71.9	72.1	72.8	73.6	73.5	74.1	74.8	75.9	76.5	77.2	78.1	79.1	79.8	27
28	69.6	70.2	70.9	71.1	71.3	72.1	72.9	73.2	73.3	74.3	75.1	76.0	76.7	77.5	78.6	79.2	28
29	69.0	69.7	70.0	70.3	70.6	71.5	72.4	72.4	72.6	73.8	74.5	75.4	76.3	77.1	78.1	78.7	29
30	68.0	68.9	69.3	69.6	69.8	70.8	71.3	71.7	72.0	73.0	74.1	74.9	75.8	76.5	77.6	78.2	30

- This version allows for easy interpolation of any number of years or quantum. The figures shown are the overall discount on simply multiplying the quantum by the duration in years.

- For example, £40k x 15 years (bare multiplication gives £600,000).
- The discount factor (shown boxed) is 82.3%.
- 82.3% x £600,000 = £493,800.
- Compare with £494,000 on the detailed table.
- Thus one could interpolate for £45,000 for 15 years by taking an average of 82.3% and 82.5% = 82.4% x £45,000 x 15 = £556,200, say £556,000.

Appendix 6: Representations and Responses to Consultation

1. The Working Party received nine separate responses during the consultation period, from groups and individuals. We have decided not to publish the responses themselves, even in anonymised form. Instead, this appendix contains a summary of the key issues raised, and our responses to the same.

2. Only one respondent expressed opposition to the largest change recommended by the Working Party: the reformatting of the tables to enable capitalisation of term orders rather than those set to endure for joint lives. Most of the other responses expressed positive approval of this recommendation.

3. However, two headline criticisms in respect of the formula emerged from the responses:

31. the blended management costs added to the algorithm (1% for funds under £1m, 0.5% for funds above £1m) were a welcome addition, but set too low; and

32. the real rate of return (RRR: 3.75%) was and always has been too bullish.

4. We are grateful to all who provided feedback, which provoked further debate in the group. Nonetheless, we were not persuaded, individually or collectively, to modify our recommendations in respect of the Duxbury assumptions. By a majority the group resolved to leave our recommendations unaltered; one member would have increased the figures for management charges by 0.5%. The group has reworked the tables in Appendix 5 of the original report in the light of the changes to the rates of CGT announced in the Budget.

Summary of feedback

5. Several respondents criticised the accuracy of the assumed management costs and RRR and argued that they tilted the formula too steeply against payees. Interestingly, very few respondents criticised other assumptions that operate in favour of payees, which the Working Party has acknowledged to be unrealistic but recommended their retention as necessary to balance risk fairly. The two most obvious are:

a. the unrealistic taxation assumptions which predicate that the payee will receive no dividend income from the fund and will not undertake even the simplest tax mitigation; and

b. the rate of assumed inflation, set at 3%.

6. One respondent pointed out that the Duxbury inflation figure was 1% higher than the Bank of England's medium-term inflation target, and another noted that the idea that individuals increase their spending in line with inflation was unrealistic and out of line with real world data. Not a single respondent argued that the Duxbury tax and inflation assumptions were unfair to payers and needed to be 'fixed' as a consequence.

7. Respondents proposed a range of alternative management charges. One proposed that the rates proposed by the Working Party be upped to 1.5% on funds up to £1m, and 1% over £1m. Another suggested a more realistic range was 1.25% to 2.6%, but did not comment on how charges should be stepped according to fund size. Another respondent suggested any arbitrarily fixed management charge was wrong, and a bespoke approach should be applied in each individual case, although stopped short of explaining how this would work in practice, or how tables for publication in At A Glance might be prepared. This underscores the point we made at paragraph 158 of our report, namely that 'there appears to be very considerable variance in relation to fees …'.

8. Six respondents suggested (with varying degrees of assertiveness) that the RRR was too high, and that the Working Party had missed an opportunity to reduce it. Specific criticisms included the following.

a. It was out of line with FCA guidance.
b. To achieve such returns in practice would require a significantly more aggressive investment strategy than that contemplated by the Working Party, which would not be recommended to Duxbury payees by wealth managers.
c. The blanket application of the same RRR to funds of all durations and sizes did not properly recognise the greater market and drawdown risks inherent in shorter-term funds, nor the greater ability of wealthy payees to weather financial turbulence.
d. The blanket application of the RRR failed to recognise changes in the composition of an investment portfolio over time to reflect decreasing risk tolerance nearing retirement. [28]
e. Data of historical returns was not a sound basis for stress-testing the robustness a present day RRR.
f. The historic return data used was in any event from index-based investment strategies rather than average multi-asset funds.
g. The median end values returned by stochastic modelling of Duxbury funds demonstrated that the risk of payees running out of funds before the end of a term was greater than the deterministic Duxbury model would suggest.

Response to feedback

9. Prior criticisms of the RRR were already recognised at paragraph 27 of the report, and we addressed the rationale behind our assumed management costs at paragraph 171. Just as with the RRR, we explained that our proposed management cost rates were not supposed to reflect an average real-world blended charge. Rather they were a compromise that made a specific allowance in the computational inputs of the calculation in circumstances where some members of the Working Party thought they should simply be subsumed within the shortfall risk borne by payees.

10. The majority view of the Working Party was that the 'new' criticisms of the RRR and assumed rates for management costs fell into the same category: the 'unlikelihood, in reality, of a payee of a Duxbury fund … actually being able to invest their fund so as to enable them confidently to spend at the rate assumed as the starting point of the computation of the capital sum, without risking running out of money during their life'. As stated above, one member would have increased the figures for management charges by 0.5%.

11. We addressed the conceptual problem with these criticisms under the subheadings 'The algorithm – what it isn't' at paragraph 68, and 'The algorithm – what it is' at paragraph 87. It is not an estimate of the cost of something with the qualities of an annuity to produce a guaranteed net income for life. It is and has never been anything more than a 'rationalisation for the discounting of a lump sum payment to reflect the benefit(s) to the payee of having the money paid upfront rather than over a period of years'.

12. It is perhaps worth putting these points in even starker terms:

a. A Duxbury fund is not intended to produce, on the balance of probabilities, the target level of inflated income for the duration of a payee's life expectancy.
b. A Duxbury fund is intended to incorporate a discount for early receipt beyond that already inherent in an adjustment for the time value of money. This additional discount is priced into the underlying assumptions, which are necessarily tilted on average towards payers, although there are individual winners and losers.

13. These are two sides of the same coin. If a Duxbury fund were calculated more conservatively so that on balance, the fund was more likely than not to produce the target income for the intended fund term, there would be no financial benefit to offset the risk assumed by the payer in giving that capital sum to the payee up front.

14. The Duxbury formula is intended to reflect the risks inherent in the trading of a periodical payments order for a capital sum. Almost all those risks (remarriage/cohabitation of the payee, premature death of the payee, premature death of the payer, the worsening of the payer's economic position and the improving of the payee's economic situation) fall on the payer. Realistically, capitalisation entails only two risks for the receiving party. The first is a change in their circumstances for the worse that might warrant upward

variation or extension of a maintenance order. To persuade a court on a variation application to increase the payee's reliance on the payer in the face of the statutory steer towards a clean break would require the payee to prove that absent such a variation they would suffer 'undue hardship'. The second is a payee significantly outliving their life expectancy, but the comparative rarity of joint lives order and the presentational transition of the tables to reflect term funds mitigates this factor.

15. If the Duxbury formula were calculated to all but guarantee the level of target income for the intended term, it would fail to reflect the significantly greater risk to the payer inherent in capitalisation.

16. One needs only to turn to the Ogden Tables for an illustration. Those tables are intended to place the victim of a tort in the position that they would be in but for the injury inflicted. The current Ogden discount rate is set to give the victim a copper-bottomed guaranteed income akin to that of an annuitant. To that end it is set at minus 0.25%. Applying the Ogden rate as the RRR in a simplified Duxbury calculation, the sum required to produce £50,000 for 5 years is £251,886 (i.e. £1,886 more than £50,000 x 5). Doing the same simplified Duxbury calculation using a RRR of 2.75% (i.e. 3.75% less 1% for management charges as proposed), the required sum is £230,629. The difference between those two sums is £21,257, amounting to an 8% discount of the near-annuitant Ogden figure, which we consider eminently reasonable.

17. Two respondents suggested (with different degrees of specificity) that the risk discount should be removed entirely from the underlying assumptions and considered on a case-by-case basis by the court, primarily to reflect chances of remarriage and cohabitation. The Working Party unanimously considered this to be problematic [29] and practically undesirable. But in any event, we think that discounts for early receipt in the Duxbury range are well within the parameters the court would apply if it were required to decide an applicable rate on a case-by-case basis.

18. The Duxbury tables exist to create a starting point for use in most cases where capitalisation arises. They exist to meet the need for legal certainty and to have a workable rule. The Working Party considers that it would be contrary to the public interest for the tables to be abandoned in favour of an unpredictable exercise by the court of fact-specific evaluative decision making, in every case.

19. Looking sideways to other relatable areas, Duxbury discounts are generally well within the bounds of the so-called 'utility discounts' recommended by the Pension Advisory Group for application during pension offsetting (0–25%), to reflect one party receiving cash now versus pension later. They are low by comparison to the accountancy and court discounts frequently applied where one party is to receive cash in lieu of an interest in a private company. If anything, the discount to be applied to capitalised maintenance (an entitlement to receive variable periodic sums) should generally be higher than the discount applied to

cash received in lieu of an illiquid asset and/or risky asset to which the receiving party has a solid, quantifiable sharing entitlement.

20. As a matter of arithmetic, the size of the discount increases with the term of the fund. Returning to the example above – the Ogden sum for an equivalent 10-year term would be £506,944 versus a 2.75% RRR Duxbury sum of £432,003: the capital discount between the two grows to 15%. But (1) such a discount is still undoubtedly within reasonable range, and (2) as multiple respondents have pointed out, payees of shorter-term funds are more exposed to market and drawdown risk, so an organic expansion of the risk delta with the term of the fund is reasonable.

21. The Working Party acknowledges, but does not accept, the criticisms that it is insufficiently representative. Three women and two financial planners were originally members of the group, but one member (a female financial planner) unfortunately withdrew. While there was an imbalance between the sexes in the composition of the group the female members take the opportunity of stating here that throughout its deliberations, they were able to make their contributions emphatically, clearly and convincingly, and that they suffered no disadvantage in the debates whatever by virtue of that factor. The group is satisfied that its composition did not prevent it from taking all considerations properly and fairly into account.

22. Whilst grateful for the high-quality responses received, the Working Party has not been persuaded to amend its initial recommendations.

– Blog – Journal

– Duxbury Capitalisation

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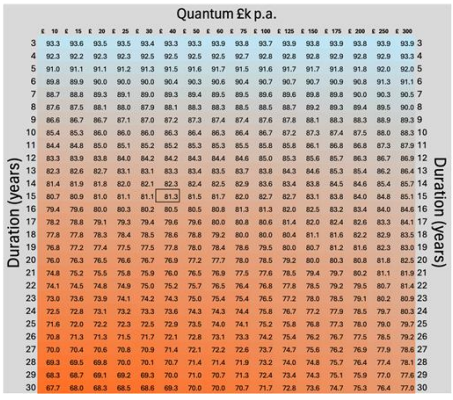

Report of the Duxbury Working Party (provisional), September 2024

The Duxbury Working Party have just released their provisional report. It has been prepared without any prior public consultation and is published provisionally to allow interested parties to respond. Responses should be emailed to j.rainer@qeb.co.uk by 1 November 2024 and will be considered by the Working Party ahead of publication of their final report which is intended to be on 15 November 2024.

Duxbury Capitalisation

Michael Allum Simon Bruce Sarah Hoskinson Lewis Marks KC
Sir Nicholas Mostyn Joe Rainer Mary Waring

02/10/2024

Looking Back at Duxbury 30 Years On

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.

Michael Allum Megan Jenkins Amy Gilbert

27/03/2023

Child Maintenance and Mortgage Payments – New Guidance: *LM v SSWP & NM* [2024] UKUT 259 (AAC)

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What happens if the Child Maintenance Service (CMS) has determined that a non-resident parent (NRP) is required to pay child maintenance to the parent-with-care (PWC), but payments are also being made towards the mortgage secured on the property in which PWC still lives with the qualifying child/children (QC)? Does it matter if the property is jointly owned by NRP and PWC? Will those mortgage payments reduce the amount of child maintenance?

Guidance for parents on the gov.uk website states that:

> 'If you're the paying parent, you can ask for the following types of expenses to be taken into account … mortgage, loan or insurance payments for the home you used to share with the receiving parent – if the receiving parent and your child still live there.'

For the CMS to consider this, a 'variation' application has to be made, *after* the child maintenance calculation has been received. The CMS will consider representations from both parties and make a decision.

The role of the First-tier Tribunal (Social Entitlement Chamber)

Any dispute regarding a CMS decision as to variation may be resolved by either parent making an application to the First-tier Tribunal (Social Entitlement Chamber) (FtT(SEC)). The tribunal is inquisitorial (as opposed to adversarial). This is oddly referred to as an 'appeal', despite it being a non-tribunal decision that is being challenged. Appeals from the FtT(SEC) are to the Upper Tribunal (UT). No-one under any circumstances may recover costs of litigating in the

FtT(SEC) (or the UT) and consequently the attendance of lawyers is not commonplace.

On 11 September 2024 UT Judge Kate Marcus KC provided clarity in *LM v SSWP & NM* [2024] UKUT 259 (AAC) as to two subtly different regulations in the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) (the CSMC Regs 2012) that determine how the CMS treats mortgage payments.

Relevant facts

The parties, formerly a couple, LM and NM, had jointly purchased a home in 2018 with the assistance of a joint mortgage. They had lived in it, and jointly discharged equal proportions of the mortgage payments due. Their child was born in 2019, but the couple separated in 2020. LM (the PWC) and the child remained living in the home, with NM (NRP) moving out, but of course remaining a joint owner and a party to the joint mortgage.

The CMS determined in November 2020 that NM was liable to pay child support, but in February 2021 the CMS varied the decision and allowed a 'special expenses' downward variation to NM's liability, pursuant to reg 65 of the CSMC Regs 2012 in respect of the mortgage payments which he continued to pay.

LM appealed this decision, contending that reg 67 prevented NM from benefiting from payments towards a joint mortgage.

Legal framework

By way of brief digression, child maintenance law is (unfortunately) complicated. There have been three statutory regimes since the Child Support Act in 1991, and for several years different rules applied depending on the date of the initial application. This has largely settled now with most cases being determined under the third regime. The voluminous legislation is supplemented by case-law, but the case-law is not (all) easily accessible on the commercial legal databases. UT Decisions may be found in this database by filtering for 'Child Support' under 'Categories', and then selecting appropriate sub-categories (such as 'Child support – variation/departure directions: other'). In recent years there have been around four or five UT decisions each year. Pre-2016 decisions are in a different database, to which there is a link at the top of the (current) 'Administrative Appeals tribunal decisions' page.

Secondly, many lawyers find the legislative complexity of multiple statutory instruments and hard-to-locate case-law confusing and opaque. Imagine how lay parties feel, many of whom also have their vision clouded by a heightened, but understandable, sense of injustice and incomprehension at the complex child maintenance regime. It can also be very difficult for parents to accept that child maintenance under the CMS regime in England and Wales is a function of 'ability to pay' as opposed to 'need'.

That sense of injustice is compounded by the fact that certain factors are not considered in the initial maintenance calculation but require one or other of the parties to make an application for a 'variation'.

Variation applications

Variations have their statutory origin in s 28F(1) of the Child Support Act 1991, which enables variations to be agreed by the SSWP if various criteria in Part 1 of Schedule 4B to the CSA 1991, or in Regulations, are met and it is 'just and equitable' to agree to the proposed variation.

Variations can be made with respect to the following items (in summary form – there are many nuances to the list below, and a few additional unusual expense considerations: bespoke advice should be taken by anyone making anything but the most straightforward variation application).

Reductions in child maintenance may arise from the CMS taking account of:

> (1) Special expenses (as identified in §2(2) of Schedule 4B to the Child Support Act 1991) of the paying parent, namely:
>
> > (a) costs of maintaining contact with the qualifying child(ren);
> >
> > (b) costs of a long-term illness or disability of a 'relevant other child' (namely, a child who lives with the paying parent);
> >
> > (c) previous debts, incurred before the couple separated;
> >
> > (d) boarding school fees paid for qualifying child(ren);
> >
> > (e) costs of repaying a mortgage on the home of the parent with care and the qualifying child(ren).

Alternatively, liability to pay child maintenance may increase upon the CMS considering:

> (2) Additional income (of the paying party, thus potentially increasing child maintenance due), being:
>
> > (a) Unearned income (subject to UK income tax) from:
> >
> > > (i) land or property (e.g. rent or licence income);
> > >
> > > (ii) savings and investments (e.g. interest, dividends, payments from a trust, payments from the estate of someone who has died);
> > >
> > > (iii) other miscellaneous sources (e.g. microgeneration of domestic electricity, a

lottery or gambling win etc); and

(b) Diverted income

(i) i.e. if the paying party can control, directly or indirectly, the income received / the amount that is taken into account as their gross income; or

(ii) where there has been an unreasonable reduction in income as it has been diverted to a third party or diverted for some other purpose. Examples of diversion are:

(1) where income is diverted to a family member or new partner;

(2) where a reduced income is being taken as a result of excessive pension contributions; or

(3) where business funds are used for personal expenditure or company assets deployed for personal use.

c) Notional income from assets:

(1) a variation may be made by the CMS / FtT(SEC) if a parent is asset-rich: a notional income (currently at the statutory rate of 8% per annum) may be attributed to an asset or class of assets (including property, shares, cryptocurrency, trust assets) whose value exceeds £31,250.

The effective date of a variation application varies according to whether or not the facts underlying it existed at the time of the initial maintenance calculation, and according to various other bespoke factors.

Joint mortgage liabilities

So, considering just one of the above variation conditions, the common situation of joint mortgage liabilities, we return to *LM v SSWP and NM*.

Judge Markus KC set out the relevant jurisdiction, starting with paragraph 2 of Schedule 4B to the CSA 1991 which 'provides for a special expenses variation of a variety of descriptions to be prescribed by variation'.

Paragraph 2(3) states:

> '(3) In prescribing descriptions of expenses for the purposes of this paragraph, the Secretary of State may, in particular, make provision with respect to – …
>
> > (c) debts of a prescribed description incurred, before the non-resident parent became a non-resident parent in relation to a child with respect to whom the maintenance calculation has been applied for:
> >
> > > (i) For the joint benefit of both parents; …
> >
> > (e) the cost to the non-resident parent of making payments in relation to a mortgage on the house he and the person with care shared, if he no longer has an interest in it, and she and a child in relation to whom the application for a maintenance calculation has been made still live there.'

The Secretary of State has indeed made provision, and it is to be found in reg 65 of the CSMC Regs 2012 headed 'Prior debts' and reg 67, entitled 'Payments in respect of certain mortgages, loans or insurance policies' (relevant parts of which are annexed below).

The CMS had decided that the mortgage qualified as a 'prior debt' under reg 65(2)(a) ('repayment of debts … incurred ... for the joint benefit of the NRP and the PWC'), and that the mortgage debt was not to be disallowed pursuant to reg 65(3)(a), which prevents the CMS taking account of a debt where the NRP 'has retained for the NRP's own use and benefit the asset in connection with the purchase of which the debt was incurred'.

The wording of reg 67(2)(a)(i) covers:

> 'payments, whether made to the mortgagee, lender, insurer or the [PWC] … in respect of a mortgage or loan … taken out to facilitate the purchase of, or repairs or improvements to, a property…by a person other than the [NRP].'

The PWC (NM) was arguing that reg 67 should have applied, it specifically referring to mortgages, and that it was clear that, because LM retained a legal and equitable interest in the home, there should be no variation, because of the prohibition associated with such retained interests in reg 67(2)(a)(iv).

NM also pointed out that publicly-available documents from the CMS supported her position, [1] as did letters sent directly to her by the CMS.

The FtT(SEC) agreed with the CMS as to the mortgage being caught by reg 65, and also found that the information provided by the CMS about mortgages was incorrect ('incorrect or misleading' per the UT).

Considering reg 67, the FtT(SEC) also found that the mortgage was not taken out by 'a person other than the [NRP]' as it was taken out *jointly* (i.e. NRP was a party to the mortgage): therefore the mortgage payments did not fall within reg 67 (§18).

On appeal to the UT, the CMS argued that 'the strict wording' of reg 67 'suggests that the mortgage should have been taken out by the PWC'. NM's somewhat hard-to-follow argument was that the words 'not taken out' in the FtT(SEC) Statement of Reasons added a 'different meaning' from the wording in reg 67 and that a joint mortgage should have been considered under reg 67 (that argument in any event didn't persuade the UT). The UT decided that 'The plain meaning of the words used is that the [NRP] should not have been involved in taking out the mortgage. That meaning is compatible with subparagraph [67(2)(a)](ii)'. The FtT(SEC):

> 'had to decide whether the mortgage was taken out by a person other than the non-resident parent, and the FtT found that it had not been. In any event, LM's submissions on [r]egulation 67(2)(a)(i) do not advance her case because a) the mortgage was excluded from [r]egulation 67 by virtue of subparagraph (iv) and b) this is the result for which LM contends, i.e. that the debt was not a special expense.' (§35)

Retention for 'own use and benefit'

NM also argued (amongst other weak arguments that are not traversed here) that, as LM retained the benefit of the asset (his continued legal and beneficial interest) and as LM was due to receive a share of the net proceeds upon sale, reg 65(3)(a) applied (i.e. the home was retained for NRP's 'own use and benefit').

The UT agreed with the FtT and with the CMS. However, it devoted some time to the interpretation of 'use and benefit' (§27): 'Parliament has used two words deliberately and they are plainly intended to denote different things' (§27).

> '28. There are two other important features of the provision. First, it requires a finding as to the purpose for which the asset was *retained* and this may be different to the purpose for which it was acquired. Second, the sub-paragraph requires a finding as to the *purpose* for which the asset was retained by the [NRP]: "the [NRP] has retained [the asset] *for* the [NRP]'s own use and benefit" (original emphasis).
>
> 29. The same phrase in the predecessor to [R]egulation 65 ([R]egulation 2 of the Child Support (Variations) Regulations 2000) was addressed by Commissioner Williams in *CCS/3674/2007*. He said this at paragraph 19:
>
> > "The second area of contention is whether A retained the assets for his own use and benefit. To be caught by this

test, it is not enough that A has retained the assets. That may be simply because – as was one contention here – someone must retain them until they are sold, but they are retained solely to ensure an orderly sale. It must be considered whether that retention was, at the time of the retention, for the retainer's own use and benefit (emphasis mine). That is a question of fact, but it involves forming a view on the facts about the retainer's intention at the relevant time. It is not enough that the retainer has some use and benefit at some later time. Nor is it enough the other way to show that someone else has some use and benefit at some later time."

30. In that case A (the [NRP]) was still living at the property, but that did not of itself mean that the asset was retained for his use and benefit.'

The UT considered that in the present case the purpose had indeed changed: in 2018 that purpose had been to provide a home for LM and NM, but 'the purpose for which it was retained was for LM and the child to live in. It was not retained for NM's use' (§31).

The UT pointed out that it was arguable that the property was not retained for NM's benefit and:

'[t]he fact that NM would ultimately have a share in the proceeds of sale does not mean that that was the purpose of retaining the asset. However, in the light of my decision that the FtT was correct in concluding that the asset was not retained for NM's use, I do not need … decide that matter.' (§32)

Finally, the mortgage was not excluded by reg 65(3)(h):

'The wording of the provision is clear and its application on the facts was without doubt. The mortgage was taken out to purchase the property which was and continued to be the home of LM and the child' (§34).

Conclusion

The CMS, and then the tribunals, are faced with many unrepresented parties addressing them on complex points of law. Those cases likely take longer than they would do were the parties represented, and in any event the perfect storm of the opacity of the law on 'variations', perception of injustice by one or both parties, and the overall complexity surrounding child maintenance is presumably a burden on tribunal judges.

It is perhaps no wonder that (according to anecdotal evidence from various child support lawyers) there is a considerable delay (c. three years) in cases being

heard by the tribunal.

This appeal provides some clarity, the key points being that:

> 'Regulations 65 and 67 address different situations in regard to mortgages. Regulation 65 is capable of including a joint mortgage held by the two parents whereas I have found that regulation 67 is not (see above). In addition and in any event, regulation 67 does not apply where the non-resident parent has a legal or equitable interest in the property but regulation 65 may do so' (§37)

To conclude:

- Beware of the guidance emanating from the CMS itself, which is incorrect (until it is hopefully soon updated).
- Child maintenance may be reduced by way of a 'variation' application in the following circumstances:
  - The NRP retains an interest in the property, the mortgage payments are a joint liability, and the NRP is contributing to them: Regulation 65 applies – co-ownership of the property is not enough by itself to activate the prohibition in Regulation 65(3)(a) – retention for the NRP's 'own use and benefit';
  - Even if the NRP is *still living at the property* 'that [does] not of itself mean that the asset was retained for his use and benefit (where reg 65 applies) and so child maintenance may still be reduced;
  - The NRP is making contributions to PWC's (or a third party's) mortgage on a property solely owned by the PWC in which the PWC is living with the qualifying children: reg 67 applies;

Annex A - Extracts from Child Support Maintenance Calculation Regulations 2012, SI 2012/2677

> '65 Prior debts
>
> (1) Subject to the following paragraphs of this regulation and regulation 68 (thresholds), the repayment of debts to which paragraph (2) applies constitutes special expenses … where those debts were incurred—
>
> > (a) before the non-resident parent became a non-resident parent in relation to the qualifying child; and
> >
> > (b) at the time when the non-resident parent and the person with care in relation to the child referred to in sub-paragraph (a) were a couple.
>
> (2) This paragraph applies to debts incurred—

(a) for the joint benefit of the non-resident parent and the person with care;

(b) for the benefit of the person with care where the non-resident parent remains legally liable to repay the whole or part of the debt; …

(3) Paragraph (1) does not apply to repayment of—

(a) a debt which would otherwise fall within paragraph (1) where the non-resident parent has retained for the non-resident parent's own use and benefit the asset in connection with the purchase of which the debt was incurred; …

(h) amounts payable by the non-resident parent under a mortgage or loan taken out on the security of any property, except where that mortgage or loan was taken out to facilitate the purchase of, or to pay for repairs or improvements to, any property which was, and continues to be, the home of the person with care and any qualifying child;…'

'67 Payments in respect of certain mortgages, loans or insurance policies

(1) Subject to regulation 68 (thresholds), the payments to which paragraph (2) applies constitute special expenses …

(2) This paragraph applies to payments, whether made to the mortgagee, lender, insurer or the person with care—

(a) in respect of a mortgage or a loan from a qualifying lender where—

(i) the mortgage or loan was taken out to facilitate the purchase of, or repairs or improvements to, a property ("the property") by a person other than the non-resident parent;

(ii) the payments are not made under a debt incurred by the non-resident parent and do not arise out of any other legal liability of the non-resident parent for the period in respect of which the variation is applied for;

(iii) the property was the home of the applicant and the person with care when they were a couple and remains the home of the person with care and the qualifying child; and

(iv) the non-resident parent has no legal or equitable interest in and no charge or right to have a charge over the property; …"

–Mortgages –Child Maintenance

Avoiding the Bear Traps of Arbitration – Some Tips from the Coalface

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Arbitration is the form of ADR on everyone's lips – even more so now with the new NCDR provisions that have come into force. Slow to get going, after its launch in 2012, and after *Haley v Haley* ironed out people's concerns about routes to appeal, arbitration is sometimes hailed as being the silver bullet solution – a client-pleasing way to avoid the challenges that come with the court service. Providing a confidential and streamlined process for those wanting to avoid the delays and potential publicity of a court process, its attraction for clients, other than the additional fees of the arbitrator, are obvious.

However, there are traps that one can fall into, and stumbling blocks we have identified which prevent people from arbitrating, cause difficulties in the process and can add to the cost for clients, which can tarnish the lustre of our proverbial silver bullet.

Here are our lessons learned over the past few years.

Why are people not arbitrating more

Choice of arbitrator

- A key attraction of arbitration for clients and lawyers alike which sways people towards arbitration is the ability to choose the arbitrator, but availability is an issue and can be a moving target. Even drawing up a shortlist can be difficult once you start filtering by seniority, fees and dates. The identity of the arbitrator might be agreed, only to find that their availability has changed, sending the parties back to the drawing board. Some might say that a potential solution is to ask IFLA to choose the arbitrator, but that detracts from one of the main advantages of arbitration – selecting and knowing your tribunal.
- When recommending arbitration, the clients look to their legal team to guide them about the selection of arbitrator and will often ask if a certain arbitrator will be a 'good judge'. With barristers (more often than solicitors) who have an established track record as a PFDR evaluator, it can be relatively easy to work out how they might approach the issues for determination in arbitration. But without that first-hand knowledge, they are an unknown 'judge' quantity as any judge will be in court. Over time, each firm is building up a bank of institutional knowledge, but potentially missing out on exposure to really good arbitrators with less experience or lower profiles, including the trained solicitor arbitrators, whose daily practice will equip them well for understanding and getting to the heart of the parties' concerns.
- So, what is the solution to the first two points? More people should train to be arbitrators (so that there is increased choice and availability), and perhaps firms and chambers should have 'open evenings' to provide a showcase for their practice. In reality though, if there is limited take up, particularly for solicitor arbitrators, it can be difficult to justify the time and costs of training.

Delay

- Another reason that we often see thwarting arbitration is that delay suits one party, or they want a less stringent form of NCDR where the outcome is in their hands to agree rather than imposed on them. The new NCDR provisions go some way to addressing the delay issue, but in practice it will have little effect in circumstances where the delaying party can feign compliance by proposing engagement with other forms of NCDR such as mediation, whilst having no intention of actually resolving the dispute.

Administrative hurdles

- There are administrative hurdles along the way that need to be overcome which can, at any stage, cause the brakes to be put on by one party and in our experience add to the cost. If the parties are in particularly contentious proceedings, getting over the administrative hurdles can be daunting and difficult. The parties need to (a) agree an arbitrator, (b) find and agree a date, (c) agree on who is paying the fees, and (d) fill in the ARB1FS and agree and sign off on its content including, crucially, the nature of the dispute and the parameters of all the issues to be determined. Once this has been done, the appointment must be approved by IFLA and it is only then that you have got the process secured, including the hearing dates. It is not always the quick fix that it might be expected or useful for it to be.

Cost

- Finally, the cost. Whilst it is possible for legal teams to see the overall cost benefit to a client of bringing the process to an end swiftly rather than costs continuing to run in protracted proceedings, the cost of arbitration can be prohibitive and off-putting, even when shared by the parties. It can be difficult for clients to acknowledge that the overall costs could be lower in arbitration, particularly when they are at the latter stages of their proceedings.

Once the arbitration has been lined up, effort and focus needs to be put into the practicalities to ensure that the process runs smoothly.

Practicalities in the lead up

- Remember to think about whether the arbitration should be recorded, in case a transcript is needed. This could be an additional cost but being able to turn to a neutral record of the evidence and submissions might be invaluable when drafting the order later.
- Make sure the ARB1FS form is filled in comprehensively with all the steps that you will require the arbitrator to take. Make sure you always add to the form that you want the arbitrator to adjudicate on any disagreement about the wording of the order as well as whether it might become necessary for them to consider costs issues. Spell all of these out even if you feel that you should not have to do so. If it does not form part of the arbitration form, most arbitrators (in our experience) will say that they need the consent of both parties to deal with that issue – consent that can be hard to obtain if one party is unhappy with the arbitrator's approach. Think about how judgments in court proceedings are in style – they often do not descend into the kind of detail that the order arising from that judgment goes into, and the same is true for arbitral determinations. If detail is going to be important, it should be made clear in the ARB1FS that the arbitrator is being asked to descend into such detail. The possibility of a dispute arising when it comes to the drafting of the order is significant, so this is an important issue to bear in mind.

- Think about whether you want the arbitrator to make a direction that the draft order needs to be provided within a certain number of days of the award being handed down, so that they are case managing the drawing up of the order as well.
- Whilst flexibility of start and end times of an arbitration 'hearing' can be helpful, being clear on an agreed time estimate and the witness template is important. The parties will have invested in the process, not least financially, and they need to feel as if they have been given enough time.

Practicalities on the day

- If possible, it is best to have the room laid out like a court. This assists during cross examination (no awkward examining someone next to you or directly opposite you in reaching distance), and also helps the client to remember that they need to treat the process with the same level of formality that they would if they were in court. It also has the added benefit of ensuring that everyone can clearly see what is happening.
- Make sure there are at least three rooms available, in relatively close proximity to each other. One of the rooms will be used for the hearing and for the arbitrator if the hearing is not at their office or chambers, and the others for each party. It helps to have the rooms near each other so that discussions can take place between counsel, although the people hosting the arbitration will need to use common sense as to whether the rooms are suitably soundproof! If there are any witnesses, it is helpful to ensure there is a room set aside for them as well.
- Our view is that it works better when the arbitrator's style is such that they adopt the persona of an actual judge, rather than making it more informal. Some clients (and legal representatives) forget the importance of the arbitration if the arbitrator is too informal, and it can make the other party feel like the whole process isn't being taken seriously as well.

Arbitration: silver bullet or not?

With the current state of the court system, it is clear that we all have to make arbitration work and that it is a useful form of NCDR. In our experience, we all need to be realistic about what is involved. Good preparation on the part of the parties / solicitors can make all the difference as to whether it is effective in properly resolving the dispute. It is hoped that this post will help parties and their legal teams make the most of arbitration and avoid some of the unexpected pitfalls that take the shine off, what is often seen as, a silver bullet.

– Blog

–arbitration –NCDR

Arbitrating Costs Provision Applications

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There have been few seismic changes in family law that reshaped everything. Much as we would love suddenly to have a new landscape for our professional work, most of us can only hope to find small solutions that work for some small corner of one field. However, bit by bit this may all contribute to an evolving and improving climate in which families change and start their new chapters. Here we hope is one more such.

One feature in that vista is that separating partners generally need advice and support to reach good agreements and oftentimes, one party has access to the funds for advice and the other does not. In the absence of agreement and co-operation an intervention will be needed, without which there cannot be fairness in the litigation or negotiations, in other words a level playing field.

We are conscious that there is a difference between:

- the matrimonial situation where one party is simply seeking access to the resources in which they are entitled to share; and

- the Schedule 1 case, where the applicant is seeking provision for their child out of the respondent's resources.

We anticipate that in time these differently nuanced case-types will (and should) lead to different jurisprudence. We do not explore that aspect here. This article asks the question, 'in the light of PD 9A, can't we do these cases a little bit better?'

Problems with fees funding applications

Litigation funding as we have all experienced comes at a price and with difficulties. The LASPO solution is not a cure all; there is an immediate bind:

- Court dates are hard to come by and involve long waits.
- The court is reluctant to provide for payment of historic costs (which are inevitably incurred in the preparation of the application, and in progressing the case and/or dealing with interim issues pending the hearing).
- The process designed to address the question of costs actually exacerbates them as it comes at significant expense for both parties.

It is not helpful that the case has to stall until the court date arrives. Families move on and waiting months for the hearing that may then provide the funding – or funding but not enough of it – is far from ideal. In cases where there is an abusive dynamic, the financially stronger party may use the delay to their advantage knowing the absence of funding is placing the other party under strain.

Quantification of the claim

Then is the issue of the automatic assessment of costs:

a. 15% in *BC v DE* [2016] EWHC 1806;
b. 30% in *X v Y Re Z (No 1)* [2022] EWFC 80 at [39];
c. Confirmed again in May 2024 as 15% in *JK v LM* [2024] EWHC 1442.

Just pausing to reflect on this point, how this may play out could be particularly challenging for solicitors. Many counsel are generous about their fees. However, if you take the view that it is solicitors who take on the case and counsel who are appointed under a cab rank rule, then it is not for counsel to assist with the funding of the case. If they are paid in full then, the quasi-assessment falls disproportionately on the solicitor. For example:

	Actual	30% discount		effective payment	effective assessment
solicitors' costs	30,000	21,000		16,800	56%
counsel's fees	14,000	9,800		14,000	100%
total	44,000	30,800		30,800	

We don't understand why, when the purpose of the application is to provide access to justice and a careful assessment as to the likely spend has been carried out, that there is then a mechanical deduction below that figure, particularly where the other party is left free of such restrictions.

This is why the alternative approach is so welcome

- In DR v ES [2022] EWFC 62 (a judgment that appeared March 2023, although delivered in 2022), Francis J said at 59:

  'Mr Hale, on behalf of the husband, made the very valid point that when one goes through an assessment of costs, you get about 30 per cent knocked off. Well, that may be true in civil litigation, it may be true where one party is ordered to pay the other's costs in some family litigation, but my job at the moment is not assessing costs in that sense of somebody being made to pay an order for costs, it is dealing with debt. The wife's debt to her solicitors is a debt that she has to pay, and if she does not pay it, there is a serious risk that they will not continue to act. There is no reason why solicitors should act as creditors or bankers to litigants, and many firms are unable or unwilling to do so, particularly when the numbers are in six figures, as they are here.'

- Peel J took the same approach in HAT v LAT [2023 EWFC 162 from [34] onwards:

  '34. In my judgment, a LSPO should be made in order to level a playing field which would otherwise lean heavily in H's favour.

  35. I considered applying a notional reduction to reflect what would occur on a standard basis assessment, a technique which has on occasions been used by judges of the Division (see, for example, Cobb J in BC v DE [2016] EWHC 1806 (Fam). But on balance my view is that to do so would be the wrong approach in this case. This is not an inter partes costs order where such a deduction is routinely applied. It is a solicitor/client sum sought by W to enable her to litigate in circumstances where she cannot reasonably be expected to access her own limited resources.

  36. The approach to quantum, in my view, is simply whether the costs sought are reasonable, in the context of the nature of the litigation, the issues, the resources, and how each party is approaching the proceedings …'

Until these two approaches are reconciled, it adds uncertainty of approach to an already unpredictable domain.

Still, this is our law (or these are the two approaches in our law) and until changed that is what must be applied. Perhaps the biggest challenge is that the applicant ('party A') only gets their case off the ground at all if they can persuade a lawyer to carry out the preliminary work and run the risk that they are not paid for it. For most firms with any sort of commercial interest in staying in business, the message may well be clear:

- Monied parties? 'This way sir.'
- Parties A? 'Let me provide you with a list of excellent law firms for you to call.'

Not a great outcome for a system that holds at its heart the 'equality of arms'. [1]

Other problems with our law

Fast forward to the costs application itself and the court awards a sum of money for party A to litigate the case to an FDR. Irrespective of the sum ordered, we might see a strange version of the level playing field:

	The monied party ('party B'), generally has:	Whilst the applicant for provision ('party A') may:
1.	Freedom of choice of lawyer.	Immediately following the LASPO hearing party A might find themselves without a lawyer because: (a) the court has reduced party A's budget to such an extent that the solicitor cannot do the necessary work within the budget; and/or (b) the court refused to order that party B pays the full costs party A incurred in making the application, and the solicitor's firm's credit policy might not permit them to work whilst carrying an unpaid debt on their file. Realistically this debt could be unpaid on the file for the next 12–18 months (or however long it might take for the case to the resolved, and for party A to receive an award from which the debt can be paid).
	And those lawyers and the client enjoy:	If party A's lawyers are willing to take on the case, they will have to contend with:
2.	No need for costs estimates to the court or other side going forward.	Being stuck with an inflexible estimate which operates as a fixed fee.
3.	No containment on hourly rate.	The inability to increase hourly rates during the LASPO.
4.	Freedom to manage the case strategically and flex spends on fees as required.	The litigation strategy being substantially limited by the imposed budget, creating a potential conflict between party A and their lawyer.
5.	Costs usually paid in full on the usual 'as you go' basis.	Having historic costs paid only if there is evidence that otherwise the applicant will not be able to access representation (*X v Y re Z* [2020] EWFC 80).
6.	Freedom in case and costs planning.	Having to repeat an application after FDR; and the need for party A's solicitors to undertake all the work that immediately follows the FDR order on credit.
7.	No scrutiny applied with regards to the way a funded	The possibility that provision may be refused if:

	litigant uses their legal spend.	• The court takes the view that party A is not managing their case reasonably; see for example *G v G* [2009] EWHC 2080 (Fam). • The case does not have merit (*MG v FG* [2016] EWHC 964) or jurisdiction is in doubt (*Rubin v Rubin* [2014] EWHC 611 at [13](iv)). • There is an undischarged costs order (*MG v FG* again). • Party A has had financial support for their costs in the past.

The incentives to enter NCDR

Is there a solution?

Well, 'of course' to at least part of it. We trailed that in our opening paragraph. We take a leaf out of PD 9A, which surely creates the expectation/default that where safe, unresolved disputes will generally find their resolution in arbitration (see paras 17a & 25(v) for example.)

In our view, generally, these cases should not be troubling the court at all.

Party A will welcome the new procedure: quicker and cheaper will help a lot.

Party B will refuse at their peril. Surely properly directed, the court would say in terms:

> 'You had a chance to sort this out 3 months ago
>
> So how can you fairly complain about Party A incurring historic costs during this period?
>
> Had you taken up this offer to arbitrate, this, it would have all been completed at a fraction of the cost and on papers. And perhaps as importantly, it probably could have been a conversation between solicitors (who, after all are the ones with expertise in formulating costs estimates) rather than involving another layer of professional fees through [no disrespect to their value] counsel.
>
> So regardless of the award I am about to make, it is right that party B picks up the additional costs of this process.'

Party B will also reflect that starting on that (likely) footing is no safe way for them to enter a discretionary exercise. It is this norm that should provide the incentive to respondents to requests for funding (parties B) to enter this NCDR process: they will do so because of how it may affect their case if they do not. The upsides for the court and for society's aspiration to fair outcomes is promotion of somewhat fairer litigation and a small contribution to reducing the queues at court.

A procedural route map - the LASPO arbitration protocol

We see arbitration running on fixed tracks with a tested process at relatively minimal cost and with minimum delay (the possible directions are in the panel below) – where the process can begin immediately the need is identified:

	For example
Party A proposes adopting the costs provision protocol and provides the form ARB1FS ('the commencement date').	Jan 1
Party B signs form ARB1FS within 7 days.	Jan 8
Party A sends the signed arbitration form to:	
- the agreed arbitrator; or	
- to IFLA to select an arbitrator marked URGENT seeking a selection within 7 days.	Jan 15
Within 3 weeks of the commencement date, the parties provide each other with:	
- Their signed terms of business with their lawyer;	
- A detailed cost estimate;	Jan 22
- An account on spending on lawyers to date; and	
- The standard information required in the Rubin run of cases (if not provided already).	
Within 14 days party B indicates:	
- whether they agree Party A's cost estimate and if not, their reasons for this; and	Feb 5
- whether they are prepared to adopt matched funding.	
Without prejudice save as to costs offers might be made at this stage.	
The parties then provide written submissions to the arbitrator, with party A providing theirs within 7 days of Party B's indication of their provision and Party B providing theirs 7 days later.	Feb 12 Feb 19
Party A may reply only to new matters arising within 3 days.	Feb 22
Adjudication on paper within 7 days.	Mar 1

Incidentally, it is a short step from considering the steps and stages to giving directions in the case and one could see the benefits of this process becoming the entrée to the arbitral process, with its benefits of faster, cheaper and more focused resolutions.

Conclusion

We acknowledge that this does not immediately solve all of the problems set out in the first table but in arbitration it is the law that must be applied, rather than the arbitrator's view of what the law ought to be. In addition, the benefits of a decision being secured more quickly and cheaply are significant – as is the benefit of the opportunity for considered and expert input. As we said at the start, greater change may come through incremental steps and solutions for specific situations. We leave the issues in the first table to others for now.

– Blog

–arbitration –Costs

A Divorced Christmas Carol: A Story of Reflection and Change

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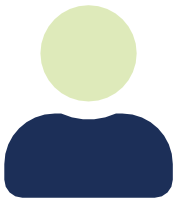

David Emmerson

David Emmerson is an accredited, hybrid trained mediator, collaborative practitioner and part-time family law judge. Anthony Gold Solicitors LLP.

A reworking of a well-known classic

Carol's marriage was dead. You will therefore permit me to repeat, emphatically, that Carol's marriage was as dead as a door-nail.

Carol lay awake in bed alone on a chilly December night, staring up at the dark ceiling, feeling the weight of the divorce upon her. The legal wrangling, the arguments, and worry left her feeling exhausted and disheartened. Even worse, she worried about the impact it was all having on her two children, who seemed more withdrawn and anxious with each passing week.

As she drifted asleep, she was startled awake at midnight by the sound of someone clearing their throat. A figure cloaked in mist appeared before her – solemn, with a gaze that seemed to peer right into her soul. The figure looked like her friend Kiran who had a most difficult and messy divorce a couple of years ago.

'Carol,' the figure intoned, 'I am the Ghost of Divorces Past.'

The Ghost of Divorces Past

Before Carol could react, the room swirled around her, and she found herself standing in a courtroom, watching herself and her ex-partner, David, seated on opposite sides. She recognised the tense expressions, the stacks of documents, and the air of hostility.

'This was the beginning of your journey,' the ghost said. 'The court battles, the cross-examinations, the days and nights consumed by legal fees and bitter arguments.'

Carol remembered Kiran's story all too well. The constant back-and-forth, each side determined to 'win', which had drained Kiran emotionally and financially. Tens of thousands of pounds had gone into this process – money that could have been used for her children, for their future. Instead, she'd poured it into legal fees, court dates, and endless correspondence that moved Kiran and her husband nowhere forward.

'I lost myself in that fight,' Kiran told her, 'and the kids... they saw it all.'

The ghost nodded, showing her images of her own children, Tanya and Tim, small and afraid, overhearing whispered arguments and sensing the anger that filled the home. She thought they were too young to understand, but they felt it all.

With a solemn bow, the Ghost of Divorces Past faded, leaving Carol alone once more.

'Bah,' said Carol, 'Humbug. There is no other way.'

The Ghost of Divorces Present

Carol fell asleep once more, exhausted. She dreamt of the judgment she would surely receive in the family court. Carol dreamt Judge Balance saying, 'I found Carol to be the keeper of the truth and David to be a dirty rotten liar. Carol has been a martyr throughout this 20-year relationship and how she put up with him, I will never know. I find her budget for her income needs to be undervalued and I will add a further 10%. I award her much more than half of the assets and David much less than half, indeed barely anything because that is obviously fair, and Carol deserves it.'

Those judgments are only dreams. They never happen in reality.

The clock struck one in the morning, and another figure appeared, more vibrant but still shadowed. This was the Ghost of Divorce Present, who beckoned Carol to follow. They soon found themselves in a cluttered waiting area of a court where there was a long, long queue, again papers piled high and people seated, exhausted, glancing anxiously at their watches. Some appeared as if they were in chains.

'These are the court backlogs,' the spirit said. 'The delays and congestion in family courts today mean months, sometimes years, of waiting for resolutions. There is no more money coming from the Government for the courts. It will not get better.'

Carol felt her chest tighten. She was living this reality. The endless waiting, the uncertainty – it all weighed heavily on her. More than once, she had wondered if it would ever end. The ghost held up a mirror, showing Carol her reflection – eyes weary, shoulders slumped with stress. Then it turned to show her children, young and impressionable, absorbing the tension around them.

'The children are suffering too,' the ghost continued. 'The longer this goes on, the harder it is for them to feel safe, to trust.'

Carol realised how deeply this ongoing conflict was affecting her children. Each time she and David argued, each court date that passed without resolution, was another layer of stress on their young hearts. It wasn't fair, she thought, that they should bear the brunt.

As the Ghost of Divorces Present faded, the ghost said 'At 2 o'clock in the morning you will be visited by another spirit'. Carol braced herself, wondering what this spirit would bring.

The Ghost of Divorces Future

The clock struck 2 am. The final spirit appeared with a warm glow. The Ghost of Divorces Future smiled at Carol, extending a hand and leading her to a scene she

hadn't dared imagine: a peaceful room, brightly lit, where she and David sat round a table – not as a couple, but as co-parents and partners, creating a good future for their children.

'Welcome to the path of non-court dispute resolution,' the ghost said with a smile. 'You and David have chosen mediation. The mediator can help you both talk about what you want and need. Discuss what is best for your children and your finances. You can make decisions together.'

In the vision, Carol saw herself speaking calmly, listening as David shared his thoughts. A mediator sat between them, guiding the discussion, giving them information about what the law is, helping them find common ground on their children's needs and their own financial futures.

'Can this work?' Carol asked, marvelling at the atmosphere of cooperation.

'It usually does,' the spirit replied. 'Mediation is a way to resolve issues with a neutral third party who helps you both work together. No judges, no courtrooms – just honest discussions aimed at finding solutions that work for everyone.'

Carol watched, hopeful, as her future self and David created a parenting plan, mapping out their children's schedules, working through the financial asset schedule that the mediator had prepared and dividing the assets fairly.

The Ghost of Divorces Future turned to her with a kind smile. 'The choice is yours, Carol. You can continue as you have been or choose a future where you and David resolve things outside the courtroom, putting your children first and preserving your peace of mind.' The spirit led Carol back to her bed.

A New Dawn

With a start, Carol awoke back in her living room, the visions fresh in her mind. The choices before her felt clear. She could cling to the past and the bitterness it brought, or she could choose a path where respect, cooperation, and a focus on her children's wellbeing would lead her to a brighter future.

The next morning, Carol went to the window and opened it. It was a bright clear morning. She saw a boy in the street below. 'You my fine fellow – are those marvellous mediators at Anthony Gold solicitors still available? Call them now.'

This was her second chance, and she was determined to make the most of it.

'I will honour mediation in my heart, and try to keep it all the year. I will live in the Past, the Present, and the Future. The Spirits of all Three shall strive within me. I will not shut out the lessons that they teach.'

- Blog

- divorce