

Family Law Reports/2007/Volume 1 /S v S (Non-Matrimonial Property: Conduct) - [2007] 1 FLR 1496

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S v S (Non-Matrimonial Property: Conduct)

[2006] EWHC 2793 (Fam)

FAMILY DIVISION

BURTON J

10 NOVEMBER 2006

Financial relief - Divorce - Conduct - Clean break - Disposition of property and assets - Amount of lump sum to be awarded

The husband and wife were married for 7½ years and had two children aged 8½ years and 3 years. The marriage ended after the husband was arrested, convicted and sentenced to a Community Rehabilitation Order following his guilty plea for his assault occasioning actual bodily harm on the wife. In the instant case, evidence was, however, accepted that the marriage had been tumultuous since its outset due to the conflicting personalities of husband and wife. The wife brought no assets into what was her first marriage and the husband, following a successful 30-year career and a 23-year first marriage, brought substantial assets into what was his second marriage. The husband and wife had agreed the amount of maintenance to be paid by the husband to the wife in respect of the children and accepted that a clean break was required in respect of the division of their assets. Accordingly, the issue in the case concerned the disposition of the property and assets and the amount of the lump sum to be paid by the husband to the wife. The total net amount of the assets and liabilities was £7,017,260 falling into five categories including: matrimonial and former matrimonial or intended matrimonial homes; retained properties purchased by the husband before his marriage to the wife; other commercial properties not held within the husband's self-administered pension fund, deriving from sales of commercial properties which were purchased by the husband before the marriage and sold during marriage, or purchased from the proceeds of the husband's sale of his partnership interest; the husband's pension portfolio; and the balance of the husband and wife's assets and liabilities. Treating the former matrimonial home, albeit only lived in for 17 days before the assault, as cash, the wife sought an order for £4,016,546, alternatively £3,509,029 and the husband argued for £2,007,916.

Held - awarding the wife an approximate sum of £3m - approximately 35% of the total of matrimonial and non-matrimonial property -

(1) No allowance was to be made in favour of the wife in respect of either conduct or compensation (see para [65]).

(2) No separate consideration was made arising from the duration of the marriage, neither so as to decrease nor increase the wife's entitlement to the £1,015,035 of pre-matrimonial property (see para [66]).

(3) An allowance should be made in respect of the husband's substantial financial contribution to the marriage over and above the norm, and after taking into account the wife's contribution as carer and homemaker, by virtue of the husband's pension portfolio and the proceeds from the sale of the husband's

partnership interest. The husband's contribution was sufficient to justify his entitlement to 60% of the matrimonial property and 100% of the pre-matrimonial property (see para [67]).

(4) The yardstick of equality against which the conclusion was to be tested was by reference to 50% of the matrimonial property. The non-matrimonial property was to be excluded and only brought into consideration if needs dictated. Accordingly, the total figure awarded to the applicant was approximately 40% of the matrimonial property and 35% of the total of matrimonial and non-matrimonial property (see para [69]).

(5) The latter, lesser percentage was more than justified as the husband's financial contribution would then have to be considered to be all the greater, if it included, not

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only his financial contribution to the matrimonial property, but his deemed contribution of the entirety of what was otherwise non-matrimonial property (see para [69]).

Statutory provision considered

Matrimonial Causes Act 1973:s 25(1)

Matrimonial Causes Act 1973:s 25(2)

Matrimonial Causes Act 1973, s 25(1), (2)

Cases referred to in judgment

A v A (Financial Provision: Conduct) [1995] 1 FLR 345, FD

Al-Khatib v Masry [2001] EWHC 108 (Fam), [2002] 1 FLR 1053, FD

Armstrong v Armstrong (1974) 4 Fam Law 156, (1974) 118 Sol Jo 579, CA

Bateman v Bateman [1979] Fam 25, [1979] 2 WLR 377, FD

C v C (unreported) 12 December 2001, FD

Charman v Charman (No 2) [2006] EWHC 1879 (Fam), [2007] 1 FLR 593, [2006] All ER (D) 32 (Aug), FD

Duxbury v Duxbury (Note) [1992] Fam 62, [1991] 3 WLR 639, [1987] 1 FLR 7, [1990] 2 All ER 77, CA

Evans v Evans [1989] 1 FLR 351, CA

Fournier v Fournier [1998] 2 FLR 990, CA

GW v RW (Financial Provision: Departure from Equality) [2003] EWHC 611 (Fam), [2003] 2 FLR 108, FD

H v H [1994] 2 FLR 801, FD

H v H (Financial Provision: Special Contribution) [2002] 2 FLR 1021, FD

H v H (Financial Relief: Attempted Murder as Conduct) [2005] EWHC 2911 (Fam), [2006] 1 FLR 990, FD

Hall v Hall [1984] FLR 631, CA

Jones (MA) v Jones (W) [1976] Fam 8, [1975] 2 WLR 606, [1975] 2 All ER 12, CA

K v K (Conduct) [1990] 2 FLR 225, FD

Kyte v Kyte [1988] Fam 145, [1987] 3 WLR 1114, [1988] 1 FLR 469, [1987] 3 All ER 1041, CA

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, [2006] 3 All ER 1, HL

Parra v Parra [2002] EWCA Civ 1886, [2003] 1 FLR 942, CA

Rossi v Rossi [2006] EWHC 1482 (Fam), [2007] 1 FLR 790, FD

S v S (1982) Fam Law 183, FD

S v S [2006] EWHC 2339 (Fam), [2006] All ER (D) 118 (Oct), FD

Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis [1998] QB 498, [1997] 3 WLR 420, [1997] 2 All ER 762, CA

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, [2003] ICR 318, CA

W v W [1976] Fam 107, [1975] 3 WLR 752, [1975] 3 All ER 970, FD

Wachtel v Wachtel [1973] Fam 72, [1973] 2 WLR 366, [1973] 1 All ER 829, CA

White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL

Nicholas Mostyn QC and Ann Hussey (and on 13 October 2006 Roger Stewart QC) for the applicant

Philip Moor QC and Justin Warshaw for the respondent

BURTON J:

[1] The marriage between Mrs S (the applicant) and Mr S (the respondent) took place on 20 August 1997, after they had lived together for some 6 months. He was then nearly 52 (he is now just 61) and it was his
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second marriage: he was divorced from his first wife A, whom he had married in 1971, in 1997, although they had by then been separated for more than 2 years, and he had three grown-up children by that marriage, two girls, J and L, and one boy, D. For the applicant it was her first marriage. She was nearly 20 years younger than he, then 32, now 41. They had met at work, at Weatherall Green & Smith (Weatheralls) the well-known chartered surveyors, where he was an equity partner and she a trainee.

[2] The marriage effectively ended on 27 December 2004, when he was arrested for assaulting her on that evening, for which he was subsequently convicted, upon his plea of guilty to assault occasioning actual bodily harm, and sentenced to a 12-month Community Rehabilitation Order on 13 May 2005. The decree nisi was on 23 September 2005. The marriage effectively lasted some 7½ years. They had two children, H, born in 1997, now aged 8½, and a probationary choral scholar, and E, born in 2003, now 3, and at a private nursery school.

[3] The parties first lived together in Essex Road in Islington, but after the purchase in February 2000 of a house in Alwyne Square, Canonbury (Alwyne Square), a four-bedroom neo-Georgian house of about 2,000 square feet, they moved there with H in May 2000: Essex Road was disposed of. On 10 December 2004, only 17 days before the fateful 27 December, the family moved into a house in Northampton Park (Northampton Park), a five-bedroom period house of approximately 2,700 square feet. Since the separation, the applicant has remained in Northampton Park with H and E, and the respondent has moved back to Alwyne Square. Although he made an application for contact with the children on 18 August 2005, it was opposed by the applicant, and, in the light of her opposition, the respondent withdrew his application and, as a result, the present position is that he and the children have not been in contact since December 2004. After the French takeover of Weatheralls, to which I shall refer, the respondent was made redundant in April 2002, and he has been working as a consultant for Richard Ellis, in receipt of £25,000 pa. The applicant has not worked since the marriage.

[4] The application before me relates to the disposal of the assets as between the applicant and the respondent. There has been no dispute as to his continuing to pay £15,000 per year maintenance for the children, and their school fees. He has been paying voluntary maintenance to the applicant at £2,000 per month, together with all outgoings, save the telephone, but it is common ground between the parties that there should now be, save of course in respect of the children's position, a clean break, and the issue before me has been as to the disposition of the property and assets and the amount of the lump sum to be paid by the respondent to the applicant.

[5] The respondent was a wealthy man when he married the applicant, after a successful working life at Weatheralls since he joined them in 1971, 26 years earlier. The applicant was not wealthy. Her parents were comfortably off, and had given some money to her and her siblings, which enabled her to pay for or towards the wedding. But he was the breadwinner and the provider. He purchased, as I have described, the successive matrimonial homes. The assets in issue before me are as follows:

- (i) The 'property portfolio'. This portfolio is based upon properties acquired by the

respondent, before the marriage, over the years,

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for the purpose primarily of obtaining income from rentals and capital appreciation. There were commercial properties in Dagenham, Wolverhampton, Bury St Edmunds, Rochester and Telford, all of which he retains, together with a piece of land which, it is common ground, is of no value, called Marlow Bottom (the retained properties). In addition there were commercial properties in Peckham and Ipswich, which were sold in 2001 and 2002, and in Barrow, which was, in 2001, transferred into a trust he set up for H: Essex Road, the first matrimonial home, sold when Alwyne Square was purchased: and a holiday home in Sandbanks (Marina Court), which is still retained. During the marriage he acquired some further properties. This arose as a result of the fact that his firm, Weatheralls, was taken over, and his interest, and that of his partners, bought out, in 2001, for a sum payable over a period but which eventually totalled some £1.2m. With the proceeds, he acquired further commercial properties, still retained, in Gloucester and Worthing, and a residential property at Canford Cliffs (Brudenell), which was intended to be a retirement home for him and the applicant when he gave up work and H left school.

(ii) The 'pension portfolio'. At the outset of the marriage he had a pension fund valued at £435,524, which substantially increased in value, particularly in the years after 2001. He converted the pension funds, which, when cashed in, amounted to more than £970,000, into a property portfolio within the pension wrapper. There are now four such commercial properties within the pension fund, in Poole, Wigan, Watford and Brighton.

(iii) There are then other minor assets: there are shares and cash, belonging to the respondent, the applicant has a pension worth £7,000, and there are substantial liabilities, including both parties' liabilities for costs relating to these proceedings.

[6] I shall turn to address what the issues have been before me, but should first explain how it has come about that a judge of the Queen's Bench Division has been hearing this case. One of the witnesses of fact relating to the events of the marriage is a neighbour of the parties, Her Honour Judge Hughes, who is a circuit judge, experienced and well-known in the Family Division. The result has been that it was thought right by the parties and the court that a judge with no knowledge of Her Honour Judge Hughes should hear the case, and this required a judge from outside the Family Division (and Mr Roger Stewart QC was brought in to cross-examine Her Honour Judge Hughes). Consequently, I have sat as a judge of the Family Division, and have been very well educated in the law relating to the issues which I have to decide by counsel in the case, Mr Nicholas Mostyn QC and Miss Ann Hussey for the applicant, and Mr Philip Moor QC and Mr Justin Warshaw, for the respondent, to all of whom I am extremely indebted, as I am indeed to the solicitors on both sides, for the thoroughness with which this case has been prepared and argued.

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[7] I turn to the issue which falls to be decided, which is the split of the assets of the applicant and respondent between them, so as to effect a clean break, subject to the agreement that the respondent will continue to pay £15,000 annual maintenance for the children (there is an issue as to whether this order should be indexed linked at RPI or left to be varied as and when necessary), and their school fees (and extras). These latter are estimated at present, for the purpose of any analysis of the position, at £18,000 pa, though they are at the moment less than that, because H has the probationary choral scholarship and E is not yet in full-time education. The position as to school fees is agreed by the respondent on the basis that: (i) he should have credit for such payment if, contrary to his contention, the applicant were to receive 50% of the total assets in issue (see *Parra v Parra* [2002] EWCA Civ 1886, [2003] 1 FLR 942, which provided in such a situation for the school fees to be borne equally); (ii) the assumption upon which he is agreeing so to pay is by reference to London private day school fees and extras; if H were to go, as the applicant presently suggests may be considered, after his present school, to a secondary boarding school, then, if that were to

be considered appropriate, the financial burden would have to be readdressed.

[8] It is also agreed between the parties that, whatever the outcome of this application, there shall be no order for costs, on the basis that (with one caveat) the liability to costs to date of both parties should, in accordance with the recent practice of the Family Division, be taken into account as present liabilities of the parties and, so far as the applicant's legal costs are concerned, be treated as her liabilities to be paid by the respondent as part of the lump sum payment to be made by him. The applicant's net debts (inclusive of £460,911 legal costs) are agreed at £515,003, and that sum is to be paid off by the respondent, after credit for the applicant's pension asset of £7,087. The caveat arises from my concern that this new approach, which, albeit that this case antedates the new rules, it is agreed should be adopted in this case, should not oust the opportunity for challenge to any apparently excessive costs which would otherwise arise on a solicitor-client taxation/assessment at the instant of a paying party. Clearly, as a matter of principle, there must be some protection for the other party and some check on a solicitor's bill. The applicant and her solicitor have agreed, confident that, in this case, although the applicant's legal bill is higher than that of the respondent, that bill will survive scrutiny, to provide a schedule of such costs, similar to that provided on an application for summary assessment by the court, and that, if there be any particular challenges, they can be resolved by me.

[9] Somewhat unusually, as I am advised by the experienced counsel in this case, a consolidated schedule of assets and liabilities has been agreed by the parties; save that there are four items of dispute, all of them relating to the valuation of properties purchased by the respondent (there is also a dispute about chattels, not directly relevant to the issues I am now having to decide, which will, by agreement, be resolved by the compilation of a Scott schedule and the fixing of a separate hearing before me in a few weeks time). These disputes relate to the valuation of:

(i) Two properties which are conceded to be matrimonial properties: Marina Court, acquired in 1993 by the respondent on a 99-year lease (with 69 years now unexpired), and used both
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during the respondent's first marriage and his second marriage as a holiday home, and Brudenell, a freehold property acquired by the respondent in August 2001 for the purpose referred to above of its being their ultimate retirement home.

(ii) Two commercial properties held within the respondent's self-administered pension fund (SIP): a headleasehold department store block at 169-175 Western Road and 25-32 Crown Street, Brighton (Brighton), and a freehold two-floor retail unit at 118 High Street, Watford (Watford). Expert evidence was adduced by the parties in relation to the commercial properties, on behalf of the applicant by Mr Duncan Preston FRICS, a National Director of Jones Lang LaSalle Ltd, and on behalf of the respondent by Mr Paul Wolfenden FRICS, a Director of DTZ Debenham Tie Leung. As to the residential properties, expert evidence was adduced on behalf of the applicant from Mr Howard Gross FRICS, employed as part time senior surveyor by Goadsby (Survey and Valuation) Ltd, the specialist valuation division of the Bournemouth-based Goadsby group: no independent expert was instructed by the respondent, who relied on his own evidence, on an informal market appraisal and the fact that Marina Court has been on the market, and on the comparables referred to by Mr Gross.

[10] It was necessary, before the split of the assets could be properly assessed and resolved, for me to reach a decision on those disputed issues of valuation. After hearing the evidence of the expert and of the respondent, the issue as to Brighton - where the basic valuation had been agreed between the experts, but Mr Preston had contended for, and Mr Wolfenden and the respondent had rejected, an additional sum for 'hope value' in respect of an alleged possible accretion to the value in the context of marriage of the long

leasehold and freehold, if that could be negotiated - was sensibly conceded by Mr Mostyn QC. That left the issues as to Watford, Brudenell and Marina Court for me to resolve, to which I now turn.

The disputed valuations

Watford

[11] Number 118 is not in what is now the main shopping area, the Harlequin Centre, although in its vicinity, and is situated on a semi-pedestrianised part of the High Street (ie with right of entry for traffic for access only) but at what is, it is common ground, the less favourable end: although Mr Preston referred to it as what he called fringe prime, I prefer the evidence of Mr Wolfenden that it is better described as secondary, retail property. The present rent is £75,000 (categorised as £70 per square foot Zone A). Prior to the respondent's purchase of it in February 2004 for £1m, it failed to be acquired at two separate auctions. At the last rent review date in 2001, there was no rent increase: the negotiations dragged on over a lengthy period to no avail, and it appears to have been common ground that the property was over-rented. The next 5-year rent review date is now imminent, and it is likely, once negotiations begin, to drag on as before, if necessary being resolved by

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third party assessment, so that the likely earliest date at which the new rent will be known will be in some 6-8 months. It was not a matter of challenge that, where a property is being valued and a rent review is not yet agreed or completed, such uncertainties are normally reflected by a purchaser requiring, and a valuer assessing, a higher yield. The respondent put a figure on what he thought the rent should now be of £85,000 per year (which would equate to £80 per square foot Zone A).

[12] The applicant, through Mr Preston, made two strong points:

- (i) the rent was recently agreed in respect of 114C High Street, between the existing landlord and tenant, as a result of a September 2005 rent review, at £95 Zone A;
- (ii) in respect of premises at 114 High Street, a new lease was negotiated in May/June 2006 at £95 Zone A, and the property was then sold with the benefit of that new lease at a yield of 5%.

Mr Preston believes that the rent will be reviewed for 118 at £93 Zone A, which would equate to a rent of £100,000 pa, and, at a 5.1% yield, he gives a valuation of £1.85m.

[13] Mr Wolfenden considers that his client, the respondent, is optimistic in expecting a rent of as much as £85,000, and certainly disagrees with Mr Preston:

- (i) He concludes that the information as to 114 High Street not only does not support a figure of £93 Zone A for the subject premises, but argues for a figure of considerably less. 114 is further up the High Street, towards the favourable end, and in particular is in a prime site with a shop front on three sides. The £95 rent was arrived at as part of a deal which gave a very much more favourable new lease to the tenant. As for the £95k agreed in respect of 114C, that negotiation was not between a willing buyer and willing seller, but between an existing landlord and tenant, and antedated the comparable, which he submits points to a considerably lower figure, of 114.

That is his response to Mr Preston's two bull points, but he then makes two further strong points of his own.

(ii) The property 116A, next but one to the subject property, failed to sell at auction. This property has a present rent of £80 Zone A (higher than the subject property) with a March 2007 rent review. It was withdrawn with a purported highest bid of £950,000, which Mr Preston accepted, knowing of the circumstances, was not a genuine bid. Thus it was not sold for a figure of less than £950,000.

(iii) Mr Wolfenden points, in the context of whether this property is substantially marketable at a price much higher than that, to the fact that there are a number of vacant properties in this very area. 114D has been vacant for two years (although Mr Preston suggests there may be other reasons for that), as are

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111 opposite (and nearer to the entrance of the Harlequin Centre), 106-108, further down towards the favourable end of the High Street, and, further up, 132 and 136. The relevance of such vacant properties is not only that this may indicate a lack of commercial interest in buying such properties as the subject property in that very area, but may well also affect any imminent rent reviews (including that of the subject property).

[14] There were some other arguments made by both sides, which appeared to me to an extent to cancel each other out: on the one hand that the subject property is nestling in an area of the High Street where the only travel agencies in that part of Watford can be found, so that they may feed off against each other, but on the other hand the suggestion that travel agencies are suffering from competition with internet booking.

[15] I found the evidence of Mr Wolfenden more persuasive than that of Mr Preston. I am bound to accept that, when it comes to a rent review, a landlord will certainly be in a position to support his case by reference to the 114C rent review. However I conclude that a purchaser would: (i) note the availability of a considerable amount of vacant property in the area; (ii) note the risk of a rent review which is patent from the matters I have discussed above; (iii) be looking for a higher yield.

[16] Mr Preston's valuation of £1.85m would constitute an 85% increase in 2½ years over the respondent's purchase price, when there are vacant properties in the area and the subject property is at best fringe prime. Mr Wolfenden deduced from the (non-genuine) bid of £950,000 for 116A a yield of 5.22%, and he applied that yield to the present rental of the subject property of £75,000 to arrive at his valuation of £1.35m. I conclude, doing the best I can, that the valuation should be arrived at by applying that yield of 5.22% to the £85,000 rent which the respondent hopes, perhaps over-optimistically, to achieve. That arrives at a figure of £1.539m, which I round up to £1.55m.

Brudenell

[17] The difference here between the two sides is somewhat less. Mr Gross says £1.4m, the respondent £1.3m. Mr Gross's valuation, on the basis of a sale to an ordinary purchaser, of £1.3m is agreed. The dispute is whether there is an element of development potential. It is common ground that, if the property were demolished and redeveloped to a standard consistent with the most modern properties in the very desirable Canford Cliffs area, the valuation of the new property would be £2.5m. Mr Gross accepted that in a developer's ordinary assessments of development value the 'rule of thumb percentage' is that costs (of land purchase, demolition and construction) should be round about 40-45% of the eventual price. £1.4m is 56% of £2.5m. There was some considerable discussion in examination and cross-examination of costs and profits, in part by reference to another development in the area with which Mr Gross's company was involved, but it is plain that costings would be very tight indeed, and leave little room for a sensible developer's profit, at

£1.4m. I conclude that there may be an element of hope value or 'development potential', such that a developer might be persuaded to put in a bid slightly

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over the ordinary market value - but not much. I assess the value, including development potential, of Brudenell, as £1.35m.

Marina Court

[18] The property is on a lease with something short of 69 years to run, and is only a two-bedroom property (on a fairly quick analysis it did not appear very likely that anything attractive could be done to convert it into a three-bedroom apartment). The applicant's valuation is £340,000, and the respondent's £315,000. It is on the second floor of Marina Court, and is on the market for £359,950. Flat 2, a similar flat in the same block but on the ground floor, recently sold for £258,500, but it seemed to be common ground that, although there is some positive advantage to being on the ground floor, at least by way of access to the (not particularly enticing) garden, that is outweighed by the disadvantage of a ground floor flat both overlooking the car park and, in particular, thus not having such good views as a second floor flat like Flat 9. Consequently it appeared to be common ground that Flat 9 would be considerably more valuable than Flat 2. However there were other comparables produced by Mr Gross: a three-bedroom apartment in Salter Rise, which was sold for £348,500 (after an asking price of £372,500), and an apartment at Sandcastles, sold for £305,000 (asking price £315,000). What appeared to me to be significant, was that, as is very normal, if not expected, not only did both these two properties sell at less than the asking price, but Flat 2, referred to above, which sold at £258,500, had an asking price of £295,000. Flat 9 is on the market for £359,950 and Mr Gross expressly said in evidence that this was, in his judgment, a correct asking price. My conclusion of the value is £330,000.

[19] In the light of my findings above, there are now clear figures upon which I can base my conclusions. The total (net) amount of the assets (and liabilities) in play between the parties, is £7,017,260. They can be said to fall within five categories:

(i) Matrimonial, or former matrimonial or intended matrimonial, homes: Northampton Park, valued net of sale costs at £1,818,750 (with an outstanding mortgage of £700,000), Alwyne Square, the former matrimonial home, to which the respondent moved back after the separation, and where he now lives during the week while he is working with Richard Ellis, valued at £775,000, less sale costs of £23,250 (with an outstanding mortgage of £347,806), Brudenell and Marina Court (Category 1).

(ii) The retained properties, which were all purchased by the respondent well prior to his marriage to the applicant (and were disclosed in the form M1 in his first divorce). The total agreed value of the retained properties, net of sale costs and capital gains tax, is £1,015,035 (Category 2).

(iii) Other commercial properties not held within the respondent's SIP, deriving either from the sales of the commercial properties which were, like the retained properties, purchased before this

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marriage, but which were sold in 2001-2002 or from the proceeds of sale of his partnership interest in Weatheralls (Category 3).

(iv) The pension portfolio, being properties (including Watford and Brighton) and a relatively

immaterial amount of cash. It is agreed that the pension portfolio falls to be valued as part of the available pool, although the respondent will, as a matter of law, only be allowed to access 25% of its value as capital, in order to assist in the raising of a lump sum. At the time of his first divorce, the pension funds were all in the then normal form of investments with profits or other discretionary bonus schemes, and were valued at £435,324. These RAP funds grew to a total value of £972,528 when they were, between 2001-2004, liquidated and transferred into the property-based SIP, managed by the respondent, whose present agreed net value (including my valuation of Watford) is £3,432,978 (Category 4).

(v) The balance of the parties' assets and liabilities which are, apart from the substantial liabilities for costs, not material (Category 5).

[20] The respective positions of the parties are as follows:

(i) The applicant seeks to continue to live in Northampton Park, and consequently requires it to be transferred to her outright, net of mortgage: she accepts that it may be appropriate to expect her to move out once the younger child, E, completes tertiary education, and to 'trade down' - which would be in 20 years time. As set out above, the agreed net value of Northampton Park is £1,818,750. Fifty per cent of the total asset figure of £7,017,260 is £3,508,630, although in the alternative a lesser sum is sought of £3,001,112, being 50% of £6,002,225, namely the total assets less the value of the retained properties. Consequently the applicant seeks an order which in cash terms amounts to £1,818,750 (Northampton Park) plus £1,689,980 (the balance of £3,508,630) alternatively £1,182,300 (the balance of £3,001,112): with the respondent additionally paying the agreed liabilities of £507,916 (thus a total cash sum on top of the transfer of Northampton Park of £2,197,796, alternatively £1,690,279) and paying off the Northampton Park mortgage of £700,000.

(ii) The respondent does not accept that it is appropriate for the applicant and the two children to remain in Northampton Park, to which they moved only 17 days before the separation, and which, with four storeys and five bedrooms, will be too large for them. He submits that it should be sold, and that there should consequently be no transfer. His case is that there should be a net lump sum payment of £1.5m: net of liabilities, so that the agreed sum of £507,916 falls to be added.

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[21] The battle lines are thus drawn, leaving aside the agreed position so far as the children are concerned, between the applicant, who brought no assets into what was her first marriage, and the respondent, who, after a successful 30-year career and a 23-year first marriage, brought into his second marriage substantial assets, after a marriage between them which lasted 7½ years and brought two children. Treating Northampton Park as cash, the applicant seeks an order for £4,016,546 alternatively £3,509,029, and the respondent contends for £2,007,916.

The law and the issues

[22] The starting point is s 25 of the Matrimonial Causes Act 1973 (the 1973 Act) as amended, which, by s 25(1), provides that the duty of the court in deciding whether and how to exercise its powers to make financial provision or property adjustment orders, is to have regard to 'all the circumstances of the case'. Aside from the welfare of the children, s 25(2) then draws particular reference to:

'(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has

or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(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;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) ... the value to each of the parties to the marriage of any benefit ... which, by reasons of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'

[23] The most recent and authoritative analysis of the law is contained in the two decisions of the House of Lords of *White v White* [2001] 1 AC 596, [2002] 2 FLR 981 and *Miller v Miller. McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 WLR 1283, [2006] 1 FLR 1186. In *White* the leading speech was given by Lord Nicholls of Birkenhead, the only other substantive speech being given by Lord Cooke of Thorndon. In *Miller* there were two leading speeches, those of Lord Nicholls of Birkenhead and Baroness Hale of Richmond: Lord Mance pointed out differences between those two speeches, but agreed with both of them: Lord Hope of Craighead agreed with them both: Lord Hoffmann agreed only with Baroness Hale of Richmond. If therefore

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there be indeed any material differences, particularly for our purposes, between Baroness Hale and Lord Nicholls, the former appears to have the majority vote.

[24] No presumption of equal division. It is firmly said by Lord Nicholls of Birkenhead in *White* that there is no presumption of equal division which indeed would 'be an impermissible judicial gloss on the statutory provision' (at 990), even if such presumption were rebuttable, and 'a presumption of equal division would go beyond the permissible bounds of interpretation of s 25'. Nevertheless - and although more often than not there would not be a more or less equal division of the available assets, and the judge's decision would mean 'one party will receive a bigger share than the other' (989) - 'a judge would always be well advised to check his tentative views against the yardstick of equality of division' and 'as a general guide equality should be departed from only if, and to the extent that, there is good reason for doing so' (all at 989). Lord Cooke of Thorndon, at 999, also stated, in agreement with Lord Nicholls, that 'as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so'. In *Miller*, Lord Nicholls of Birkenhead put the position as follows, at para [16]:

'When their partnership ends, each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule.'

[25] Baroness Hale of Richmond, at para [136], related that:

'the House [in *White*] was careful to point out ... that the yardstick of equality did not inevitably mean equality of result. It was a standard against which the outcome of the s 25 exercise was to be checked.'

[26] In fact, in *Miller*, where there was a short childless marriage of less than 3 years' duration, of the £32m assets, an award of £5m, less than one sixth of the total, including the matrimonial home, was made to the wife.

[27] As a result of the statute, but also as a result of their Lordships' analysis in *White* and *Miller*, a number of factors can be identified which may, in an appropriate case, constitute good reason for moving away from, or indeed back towards, the yardstick of equality. In this case, the issues appear to be as follows:

(i) The first question, and the first issue in this case, is what the matrimonial assets are to which the yardstick is to apply. There is, as will be seen, substantial discussion, particularly in *Miller*, as to what assets, eg deriving from a source prior and/or external to the marriage, qualify to be kept, at least in the first instance, separate and apart in considering the division of assets between competing spouses (Non-matrimonial property).

(ii) The second issue is contribution - financial or non-financial. So far as financial contribution is concerned, this issue may overlap with the last, for, if one party is the sole or main source of the

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assets, even if, on analysis, they do not qualify as 'non-matrimonial property', they will, or may, constitute a substantial unmatched contribution by that party. In the consideration of this issue, the duration of the marriage may play a part (Contribution).

(iii) The third issue is conduct - which only exceptionally arises so as to impact upon the division of property, but is prayed in aid by the applicant in this case (Conduct).

(iv) The fourth issue is new, and has its genesis in the speeches in *Miller* of Lord Nicholls of Birkenhead, at para [13] and Baroness Hale of Richmond, at para [140], namely, in her words: 'compensation for relationship-generated disadvantage', on the basis that 'the economic disadvantage generated by the relationship may go beyond need' (Compensation).

(v) The fifth issue can be generically labelled as 'Need', but is to an extent an amalgam. Consideration of need used to be in the forefront of financial provision cases, at least where there was more than a sufficiency of assets, and the aim was to scoop out of the pool sufficient to cope with the need of the less well-resourced party (generally the wife), whether her needs were in a given case assessed generously or stringently. It is now, particularly in the light of the decisions of the House of Lords, clear that need is no longer the yardstick, if it ever was, and that, by concentrating upon need, there has been insufficient account taken, not only of the general principles now so clearly enunciated by their Lordships in *White* and *Miller*, but of such a party's non-financial contribution to the marriage, particularly in a long marriage. The issue of need is, however, still material, for at least the following reasons. First if there is non-matrimonial property, but the matrimonial property is inadequate to provide for the needs of the payee, then that is a ground for 'dequarantining' the non-matrimonial property, which becomes available for general distribution (see *White* per Lord Nicholls of Birkenhead, at 994). Secondly, addressing the issue of need is a necessary check to ensure that enough is given to the payee, or left with the payer, to enable each of them to live and meet their obligations.

Within the confine of this amalgam issue there are included the following:

- (a) What are, and are likely to be, the living expenses and obligations of the parties, particularly of the payee?
- (b) What is the earning capacity of the payee and of the payer (including consideration of their ages)?
- (c) Is the likely expenditure to be capitalised on a lifelong basis, in accordance with the *Duxbury* tables (derived from *Duxbury v Duxbury (Note)* [1992] Fam 62, [1987] 1 FLR 7, and now the subject of detailed and helpful calculations in the book *At a Glance* produced by the Family Law Bar Association), whether as modified eg to allow for sale of the matrimonial home and thus the release of additional capital at a given future point, or
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- otherwise, or on the basis of some shorter duration such as exemplified in *Fournier v Fournier* [1998] 2 FLR 990)?
- (d) In this case, is the applicant to be enabled to stay in the matrimonial home, Northampton Park?

The answers to any or all of these five issues may constitute a good reason for a move away from or towards equality. In some cases, the shortness of the marriage may be a self-standing reason for reducing a payee's entitlement.

Issue 1: non-matrimonial property

[28] It is in the definition of 'non-matrimonial property' that there appears, as perceived by Lord Mance in his speech in *Miller* (paras [167]-[168]) to be a difference between Lord Nicholls of Birkenhead and Baroness Hale of Richmond. Lord Nicholls, as interpreted by Lord Mance, concluded that non-matrimonial property consists of: (i) properties which the parties brought with them into the marriage (which I shall define as 'pre-matrimonial'); and (ii) property acquired by inheritance or gift during the marriage (which I shall define as 'extra-matrimonial'), together 'perhaps' (but the perhaps has been overtaken by persuasive subsequent first instance judgment, as will be seen) with the income or fruits of that property (para [167]). 'Income or fruits' have been subsequently interpreted and adopted by Mr Mostyn QC, sitting as a deputy High Court judge, in *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR (forthcoming) and approved by Singer J in *S v S* [2006] EWHC 2339 (Fam), [2006] All ER (D) 118 (Oct) as referable to 'passive economic growth'. It is to these two types of 'non-matrimonial property' that Lord Mance summarises Lord Nicholls' approach as being limited.

[29] Baroness Hale of Richmond, according to Lord Mance, takes a 'more limited conception of matrimonial property' - and thus a broader concept of non-matrimonial property. She includes the two categories which I have defined as pre-matrimonial and extra-matrimonial, but then she adds. She includes as matrimonial property 'family assets' (as defined by Lord Denning in *Wachtel v Wachtel* [1973] Fam 72, at 90) and 'family businesses or joint ventures in which both parties work'. But she identifies additionally as being non-matrimonial property 'business or investment assets generated solely or mainly by the efforts of one party during the marriage': which I could perhaps define as 'unilateral assets'. She is thus seen by Lord Mance as allowing for a wider category of non-matrimonial property. Admittedly she says, as Lord Mance points out, at para [152], that 'the source of the assets may be taken into account, but its importance will diminish over time', and that is naturally of obvious relevance where there has been a long marriage, and

such intermingling of assets that their source can no longer be identified (see also Lord Nicholls of Birkenhead, at para [25]). However, that would not be of relevance in this case, where, as discussed above, after 7½ years, there is no difficulty whatever in identifying the source of the assets: on the contrary they plainly derive from, and in many cases are the very same as, the assets brought into the marriage by the respondent, and insofar as they have been developed, enhanced or transformed, that is generated solely or, at any rate mainly, by his efforts, and they remain wholly compartmentalised, and entirely in his name.

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[30] It seems to me however that the difference between Lord Nicholls of Birkenhead and Baroness Hale of Richmond identified by Lord Mance may not in fact be so great or be material:

(i) Lord Nicholls refers to matrimonial property (as defined by him, which would include what I have called unilateral assets) as being 'the financial product of the parties' common endeavour' (para [22]) as contrasted with pre-matrimonial and extra-matrimonial property. It seems to me that he is thereby regarding assets worked on, even wholly by one of the parties during the marriage as being, by virtue of the other's contribution, or of the marital partnership, achieved in common.

(ii) Lord Denning's well-known definition of family assets in *Wachtel* is specifically approved by Baroness Hale, at para [149]:

'It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.'

Thus, on this definition, even assets which might otherwise be described as unilateral assets fall, on Baroness Hale's definition, by virtue of being family assets, within matrimonial property if 'used for the benefit of the family as a whole' (or, indeed, if 'acquired with the intention that there should be continuing provision' from them for the family).

(iii) Again Baroness Hale herself defines, in para [149], as a 'prime example' of a family asset, a party's 'earning capacity': and where, as here, that earning capacity arises out of developmental skills, the product, albeit a unilateral asset, would appear to be brought by Baroness Hale within matrimonial property.

(iv) Further, she seems to play down or delimit the impact or effect of unilateral assets yet further in para [150], as she refers to them as being 'difficult', when she recites the 'intrinsic incommensurability' between commercial and domestic contributions.

[31] It appears to me that Lord Nicholls of Birkenhead and Baroness Hale of Richmond have come to the same bourn, albeit by different routes, and that it is pre-matrimonial (or - not relevant here - extra-matrimonial) property (plus income or fruits) which are non-matrimonial, and source is indeed therefore significant. But this is not yet an answer to the case which I have to decide, because, by reference to the categories of property set out in para 19 above, and leaving aside category 1 - matrimonial homes being matrimonial property whatever their source - all of categories 2, 3 and 4 are said to be non-matrimonial by the respondent and matrimonial by the applicant. Mr Mostyn QC would have liked to draw comparisons or contrasts with the law of Scotland or New York, but, as Mr Moor QC forcefully pointed out, not only is there no evidence of foreign law in proper form before me, but to consider solely those jurisdictions would, in any event, be selective, and such

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broadbrush arguments are thus of little assistance. It is also important not to descend too far into what might be called Chancery technicalities in this area. Is the asset 'untouched'? (a New York question). Is it transformed or metamorphosed? Has there been more than a 'passive economic growth' (Singer J in *S v S*, at para [111]) or 'natural capital growth' (Mr Mostyn QC, at para [17] of *Ross*). An example was raised by me in argument, as to what would arise if a party owned and brought into the marriage a Canaletto (plainly pre-matrimonial) and was then advised, due to the vagaries of the art market, to sell that Canaletto and buy a Renoir instead. Is the Renoir now matrimonial property? Would it make any difference if the other spouse had come to the art auction at which the replacement old master was bought? There was exploration, and cross-examination of the respondent, with regard to the retained properties, the commercial properties brought into the marriage by him, and still retained, as to whether there had been rent review negotiations or schedules of dilapidation and, if so, who had dealt with them. Mr Moor QC would have none of this. He pointed out that the only issue raised in *Miller* with regard to non-matrimonial property (at any rate of the Lord Nicholls variety) was as to its source, and that (para 9 of his closing submissions) 'source is what makes an asset non-matrimonial. If any proposition of law can be deduced from *Miller* in this regard, it is limited to: (a) erosion over time; and (b) use of an asset as a matrimonial home'. I turn then, against this background, to the assets falling within categories 2-4 in para [19], above, and deal first with category 2, the retained properties.

[32] These were brought into the marriage by the respondent and still remain unsold and in his name. Although the applicant made no assertion of any contribution in relation to these (nor indeed any other properties apart from the matrimonial home(s)) in her response to Box 4.3 in Form E, where such assertion would be expected, she sought to assert in evidence that she had played some role in relation to the commercial properties by setting up (as being more computer literate than her husband) a format on the home computer for rent returns, which the respondent then ported to his office and used: and in relation to one of the pension properties (Poole) it appears that what was asserted by her as some involvement was limited to walking past it to have a look from the outside, when they were staying at Marina Court. It is plain that she made no contribution. As for the respondent, I am satisfied that nothing he did can be counted as any more than sufficient to generate passive economic growth, or natural capital growth, in the sense of performing the landlord's ordinary duty to collect rents, and, where necessary, instructing a managing agent to deal with such matters as rent reviews and schedules of dilapidation. If that might have been relevant, there was not in fact any development of any of the properties. Insofar as he did any minimal such work in relation to the retained properties, it was not work which can be said to have been contributed to in any way by the non-financial contribution of the applicant in running the home, as might be said to be the case with regard to the operation of a business by a breadwinner, while the homemaker or carer remains at home. I am satisfied that the retained properties were and remain non-matrimonial assets.

[33] Categories 3 and 4. There does not appear to me to be any relevant distinction arising as to whether the properties are or are not within the SIP wrapper. The question relates to the source, and the source is threefold:

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- (i) sale of commercial properties which the respondent brought into the marriage and their replacement by others;
- (ii) the pension funds, in cash, at the outset of the marriage;
- (iii) the Weatheralls partnership proceeds.

[34] The issues relating to the first and second of these are intertwined. At various stages in the marriage, the respondent liquidated the cash pension funds and sold the relevant commercial properties and purchased other or different assets. Mr Moor QC categorises this as an example of a technical Chancery

argument, as opposed to a dramatic metamorphosis, and equates what occurred to the situation in which, for example, pension assets held within a wrapper by a fund manager are bought and sold, as must occur every day of the week. In such a case, I would accept that it would be probable that what was important was the interest in the fund, and if the underlying assets were sold, that would have no impact upon whether the wrap did or did not remain pre-matrimonial property: and I would accept that it would be highly arguable that the same might apply to the Canaletto/Renoir switch. But in this case, property is the respondent's life-blood and expertise. He is an expert in respect of the purchase and sale of properties, and with an obvious eye for substantial increase in value. Once he was made redundant by Weatheralls, and had only a part time job with Richard Ellis, this was now his main earning capacity. Had the pension funds remained as they were, with the seemingly substantial increase in value since 1998 from £435,524 to £972,528, they would, in my judgment, have remained pre-matrimonial, and therefore non-matrimonial, property. However, they were liquidated, just as the other commercial properties were sold, and the respondent entered into the exercise of replacing the sold properties, but above all investing the substantial cash in properties which have, indeed, proved very successful investments. Of course the inclusion of these assets, totalling, in the case of the pension portfolio alone, a net value of more than £3m, makes a very substantial difference to the available pot. However:

(i) If they were excluded from the available pot, there might well have been - almost certainly must have been - insufficient assets for the applicant's needs, in which case they would have once again come back into play (Lord Nicholls of Birkenhead in *White*, at 994).

(ii) Because of the issue of contribution, to which I shall be turning, there is room at that stage for consideration of the *original* source of these properties, and the substantial financial contribution by the respondent.

[35] As to the Weatheralls proceeds, it can be seen that the answer must be the same, although here the applicant puts forward two contentions leading to the same result. The partnership interest in Weatheralls was sold to the French, by virtue of the takeover, and the proceeds, as they came through over a substantial period, were used to buy properties (including Northampton Park). It is obvious that it is not a mere Canaletto/Renoir technicality that the interest in the asset has been cashed in, and, once again as a result of the respondent's continuing expertise and involvement, the proceeds invested in

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properties, so that the properties so purchased are plainly matrimonial property. However, in the case of Weatheralls, there was another reason put forward by Mr Mostyn QC for concluding that the proceeds of the asset resulting from the respondent's 20-year partnership constituted matrimonial property. Although, of course, technically ownership of the income stream from the partnership at Weatheralls was, at the outset of the marriage, an asset, it is plain that - not least because Weatheralls were going through a bad time - the respondent did not so consider it, or at any rate did not consider it an asset of any value. He did not include his interest in Weatheralls, or any value for it, in his Form M1, or at all, on his first divorce. Although, in evidence, the respondent spoke of occasional discussions with his partners as to whether there might be merger possibilities, it seems to me clear beyond doubt that what occurred with the offer from the French was a wholly unexpected and enormous windfall for the Weatheralls partners, not unlike the sudden and dramatic increase in the New Star shares in the case of *Miller*, which were valueless at the outset of that marriage (*Miller*, paras [69]-[73]). I do not in the event need to decide whether this further argument, that the fortuitous event during the course of the marriage (which, unlike the position relating to the increase in the New Star shares, cannot be said to result from any particular efforts during the marriage by the respondent) can be said to mean that the pre-matrimonial asset was of no value, and that, as it had only become of value during the marriage, it thus became, in its transformed state, a matrimonial asset (or perhaps, as an alternative, whether the massive accretion in value of that asset from nil to more than £1.2m can be said to be more than, or different from, passive economic growth). The fact that the interest was realised and the proceeds invested in properties, renders the question moot.

Contribution

[36] It is a central theme underlying *White* and *Miller* that the non-financial contribution of the homemaker/carer must be properly recognised (Lord Nicholls of Birkenhead in *White*, at 990 and in *Miller*, at para [11], Baroness Hale of Richmond in *Miller*, at para [150]) even in a relatively short marriage. The applicant made contributions in this case, not only in that regard, but also in the respects set out by her in Box 4.3, to which I have referred, including a considerable number of prize competitions which enabled them on occasion to travel on free, or subsidised, holidays as a result. However, as Baroness Hale makes expressly clear in para [147], and as exemplified in *H v H (Financial Provision: Special Contribution)* [2002] 2 FLR 1021, there is room for recognition of a substantial financial contribution, derived from pre-marriage sources, by a man who had previously worked successfully for 30 years, and not just in relation to a very short marriage such as in *Miller*, as can also be seen from the approval by Lord Mance, in para [171] of *Miller*, of the words of Mr Mostyn QC as a deputy High Court judge in *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108, at para [51] - subject of course to being overridden by the other party's financial needs (*White*, at 994).

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Conduct

[37] It is common ground that for conduct to be taken into account in the assessment of financial provision/property adjustment, either by way of enhancement of the position of the 'innocent' party, or reduction or elimination of the entitlement of the 'guilty' party, such conduct must be exceptional. The statutory provision in s 25(2) of the 1973 Act I have already set out in para [22] above, namely by reference to subs (g) that the court shall have regard to conduct 'if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. The exceptional nature of this course is referred to by Lord Nicholls of Birkenhead in *Miller*, at para [65], and again by Baroness Hale of Richmond, at para [145]:

'It is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in *Wachtel v Wachtel* [1973] Fam 72 at 80 the conduct had been "both obvious and gross" ... It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.'

[38] I have been told by counsel that there are only rare cases in the reports where this has occurred. I have been taken to what I believe must be all of them. The examples given include:

- (i) *Armstrong v Armstrong* (1974) 4 Fam Law 156: wife shoots husband with his shotgun with intent to endanger life.
- (ii) *Jones (MA) v Jones (W)* [1976] Fam 8: husband attacks wife with a razor and inflicts serious injuries: there are financial consequences (wife rendered incapable of working).
- (iii) *Bateman v Bateman* [1979] Fam 25: wife twice inflicts stab wounds on her husband with a knife.
- (iv) *S v S* (1982) Fam Law 183: husband commits incest with children of the family.
- (v) *Hall v Hall* [1984] FLR 631: wife stabs husband in the abdomen with a knife.

(vi) *Kyte v Kyte* [1988] Fam 145, [1988] 1 FLR 469 : wife facilitates the husband's attempted suicide.

(vii) *Evans v Evans* [1989] 1 FLR 351: wife incites others to murder the husband.

(viii) *K v K (Conduct)* [1990] 2 FLR 225: husband's serious drink problem and 'disagreeable' behaviour led to the forced sale of the matrimonial home and serious financial consequences to the wife.

(ix) *H v H* [1994] 2 FLR 801: serious assault and an attempted rape of wife by husband: and financial consequences because the consequent imprisonment of husband destroyed his ability to support her.

(x) *A v A (Financial Provision: Conduct)* [1995] 1 FLR 345: husband assaults the wife with a knife.

(xi) *C v C* (unreported) 12 December 2001, per Bennett J: wife

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deliberately drugged husband to make him very sleepy and then while he was in a somnolent state placed a bag over his head, which she held in such a way that the husband could not breathe. Although it was found that the wife did not have an intent to kill, Bennett J concluded that the husband did believe that she was trying to kill him, and that her aim was to make him so believe.

(xii) *Al-Khatib v Masry* [2001] EWHC 108 (Fam), [2002] 1 FLR 1053: husband guilty of 'very grave' misconduct in abducting the children of the marriage in contempt of court.

(xiii) *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990: very serious assault by husband on wife with knife, leading to 12 years' imprisonment for attempted murder and with financial consequences, namely destroying her police career.

[39] As will be seen, it is not suggested that there were any financial consequences from the conduct of which the applicant complains in this case, which factor may have exacerbated, in the judgment of Scott Baker J, the facts in *K v K* referred to at (viii) above. However, that case apart, all of the conduct found in those cases appears of manifest seriousness. Apart from the statutory provision, and the words of Ormrod J in *Wachtel* quoted by Baroness Hale of Richmond above, there is a certain amount of recurrent phraseology: 'If the courts were in these circumstances not to discharge the order, the public might think that we had taken leave of our senses' (per Balcombe LJ, at 355 in *Evans* at (vii) above): Sir Roger Ormrod in *Hall* at (v) above describes (at 632) the conduct as 'gross and obvious' which has 'nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage' and which the judge's 'sense of justice required to be taken into account': Bennett J in *C* at (xi) above, asks whether 'it would be repugnant to any sense of justice for the wife to receive any award at all'. Mr Mostyn QC pointed to the words of Sir George Baker P in *W v W* [1976] Fam 107, at 110D, when he referred to the sort of conduct which would cause the ordinary mortal to throw up his hands and say '... surely that woman is not going to get a full award': and, in the course of submissions, he suggested a test of applying what he called the 'gasp factor'.

[40] I have heard evidence over some 4 days, out of the 7 in which the case was before me, on the issue of conduct, and must make up my own mind. The applicant relies, for the purposes of the 'gasp factor', only on the events of 27 December. The respondent has adduced, and relies upon, evidence going back to June 1998 in order both, as Mr Moor QC submits, to set those events in context, and to seek to persuade me, by reference to Baroness Hale's dictum in para [145] of *Miller* that it cannot be said that the respondent 'has been very much more to blame than' the applicant. The applicant, while, as I have indicated, not relying on those earlier events, submits that nothing in them excuses, and some may exacerbate, the conduct of the respondent on 27 December.

[41] There is no real guidance as to what would be the effect if I concluded that there has been such conduct by the respondent as it would be 'inequitable to disregard': it is described by Mr Mostyn QC as a 'moral test involving no particular science'. The exercise of such a sweeping power, which could

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deprive a party of all entitlement, or multiply or magnify what would otherwise be the entitlement of the other party, is of concern to me. It seems to me that the use of what Coleridge J has, in the context of other adjustments that fall to be made pursuant to s 25, called 'the sharp carving knife rather than the salami slicer' (*Charman v Charman* [2006] EWHC 1879 (Fam), [2007] 1 FLR (forthcoming), at para [125]) ought to be regulated by guidance, such as has for example been given in relation to such much less drastic jurisdictions as the grant of exemplary damages (eg *Thompson v Commissioner of Police of the Metropolis*; *Hsu v Commissioner of Police of the Metropolis* [1998] QB 498) or of damages for injury to feelings in discrimination cases (*Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318). In the 'conduct' cases I have referred to above, substantial increases and decreases of entitlement have been made without particular justification. I have been shown by counsel two modern approaches of first instance judges, though with the caveat that they may neither of them comply with what the court is intended to do under s 25 of the 1973 Act. The approach of Munby J in *Al-Khatib*, at 105-107 and 123-126 ((xii), above) was to be persuaded that the husband's conduct could - though in the event it did not - drive him to 'the very top end of the applicable discretionary bracket applicable to the case'. Coleridge J in *H v H* [2005] (para [38](xiii), above) put his conclusion in this way:

'[43] ... it is, in my judgment, essential when considering this case to appreciate the gravity of the conduct which is involved. [Counsel for the wife] says that this is conduct at the very top end of the scale under subsection (g). He says he cannot imagine anything worse short of actually having murdered the wife. I am inclined to agree with him about that.

[44] How is the court to have regard to his conduct in a meaningful way? I agree with [Counsel for the husband] that the court should not be punitive or confiscatory for its own sake. I, therefore, consider that the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered.'

[42] If, in particular, the latter approach is adopted, submits Mr Mostyn QC, then, for example, I would not be persuaded to move away from equality, if I might otherwise have been persuaded that there was good reason to do so, or would not move as much away as I would otherwise have done; or would not make as much finding or allowance as I otherwise might do in respect of pre-matrimonial property or any contribution by the respondent; or I would be more generous in my approach to the needs of the applicant or of any case she may have for compensation. In any event, Mr Mostyn QC does not seek an order for more than half the assets, whether by reference to conduct or otherwise.

[43] I turn to my findings in respect of conduct. I heard the applicant and the respondent examined and cross-examined at length, and I shall turn to them in due course. There was a number of other witnesses, and I accept the evidence of Her Honour Judge Hughes, who lived locally and attempted to

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mediate between them, Mrs Fox, the next-door neighbour at Alwyne Square, Mr Philipson and Mrs Fudge,

neighbours at Marina Court and Mr O'Neill, a close friend of the respondent, called on behalf of the respondent, and of Mrs Mackay, a close friend of the applicant, called on her behalf, as truthfully, honestly and helpfully given. I found the evidence of Mrs Edwards, a former babysitter and a friend of the applicant, called on her behalf, unreliable and of no use: she was, in my judgment, exaggerating and embellishing - even beyond the evidence which the applicant herself gave - in an endeavour to assist her client and friend. Much of the evidence from these witnesses went to the issue of how the applicant and respondent behaved to the children, and in particular H. This issue was not strictly before me, but suffice it to say that nothing that I heard would have stood in the way of the respondent's claim for contact, had it been pursued. I accept the evidence of Her Honour Judge Hughes that, when (inappropriately) in May 2002 the applicant complained in H's presence to Her Honour Judge Hughes of the respondent having kicked her (incident 3A referred to below, at para [46]) H volunteered that it was in fact she, the applicant, who had kicked the respondent first: of Mrs Mackay that H said in front of and about his parents 'here they go again': of Mrs Fox that she was sufficiently upset by what she saw and heard of the applicant's approach to H that she called social services (including one incident when, as I accept, the applicant left H locked out in the street): of Mrs Fudge that the applicant in August 2004 launched a lengthy and upsetting tirade against H in the Marina Court car park (for which the explanation that he had previously thrown a scooter at her was hardly a justification): and of Mr Philipson that he too was concerned at the applicant's treatment of H.

[44] All this I am sure is well in the past, and was exacerbated by the constant tension and unpleasantness of the marriage, and the respondent accepts that the applicant is a devoted mother: but it leads me to believe and hope that, with these proceedings out of the way, agreement can and should now be reached in respect of the children.

[45] As for the applicant and the respondent, as I listened to the evidence, it did seem to me wholly distressing that what could and should have been a comfortable and successful second marriage in his fifties for the respondent, and a first marriage for the applicant which would bring her both substantial material benefits and companionship and children, went so badly and so quickly wrong, due to the conflict of their personalities. The respondent is, in my judgment, dogmatic, domineering, demanding, intolerant and a cold fish. He attempted to control his temper, though, once roused to anger, found it difficult to exercise restraint, and he seems to have regarded it as his role as the older man to criticise a younger wife who seemed to him to be making no effort to play the role that he had expected. The applicant is hyper-emotional, uncompromising, quick-tempered and sharp-tongued, quick to lash out, particularly when criticised, whether with violence towards the respondent - though it became soon apparent that that was counter-productive by virtue of his response - or, once she realised the way she really could rile him, by an attack on his possessions. She was, aptly in my judgment, described by Her Honour Judge Hughes, as a 'drama queen', and is and was prone to exaggerate or embellish: for example I accept Her Honour Judge Hughes' evidence that, in describing the events of 27 December 2004 to her, she said that she had had to have 14 stitches when, in fact as will appear, unpleasant as

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the injury to her was, she had no stitches. Both the applicant and the respondent were not prepared to make the necessary compromises for an easy relationship, and there were, as I am satisfied, constant rows between them almost from the outset of the marriage. I accept Mrs Fox's evidence - indeed it was not really challenged - that there were frequent arguments between the applicant and the respondent, which she could hear or see. Mrs Mackay accepts that there were rows between the two of them, although she believed that, on the whole, such rows would have been provoked by the respondent. This of course depends on what is meant by 'provoked', for I find it easy to accept that the applicant found the respondent irritating. But I accept the independent evidence of both Her Honour Judge Hughes and Mrs Fox that both of them were to blame.

[46] I propose to make findings in relation to the events and incidents prior to 27 December 2004 in relatively schematic form. I do not want it to be thought that I minimise the unhappiness of both parties to the marriage by making skeletal findings, and they fall to be set against what I have had no difficulty in accepting above, that there were constant rows throughout the period. Nevertheless, particularly because, as set out in

para [40], above, it is the 27 December incident upon which the applicant relies for the 'gasp factor', it is most convenient to set out the earlier incidents in this manner. Mr Mostyn QC, in his skeleton, identified, and numbered, 10 incidents, starting in June 1998, of which the last is the 27 December incident itself. In the course of the evidence, a number of other incidents were explored, and, in order to preserve Mr Mostyn QC's numbering, we began, in the course of argument, and I have now expanded, the use of subordinate numbering, As, Bs, etc. I make these findings on the basis of what I conclude, on the balance of probabilities, occurred, after hearing the evidence of both the applicant and respondent - much of which, though not all, is not in dispute - and the evidence, where relevant, of the other witnesses, which I have accepted. I have also taken account of the diary that the respondent kept. The applicant accepts that he kept what she called a 'dossier', which she discovered, and which she made him burn. He then started to compile, unknown to her, a new one, as from July 2003. Although it seems a somewhat unemotional and self-serving thing to do, the diary records a great many of the incidents referred to below, and the contents turned out, on the evidence being given and tested, to be largely accurate and often unchallenged:

- Incident 1: June 1998. The respondent criticises the way in which the applicant is dealing with the baby (H). The applicant slaps him. The respondent slaps her back: inevitably, because of his larger size, with greater effect. The police are called.

- Incident 2: February 1999. The applicant and respondent are arguing. In frustration the applicant picks up a glass and smashes it, so that the glass showered over the respondent. The respondent retaliated by slapping her hard to the head, causing a bruise.

- Incident 2A: May 2000. The applicant after an argument, and upset at the death of a friend, throws a champagne glass against the wall and smashes it (overheard by the neighbour Mrs Fox).

- Incident 3: August 2001. Another argument. The respondent is

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cooking steak in a frying pan. The applicant grabs the pan from the respondent and throws it and its contents into the garden. The respondent picks up the steak and throws it at the applicant. The applicant then leaves the house, taking the respondent's car keys, preventing him from taking H in the car down to Marina Court as planned: the respondent then leaves the house with H to go to Waterloo Station and travel down by train (notifying the applicant's mother that they would be arriving by train rather than car). The applicant then follows the respondent and H to Waterloo and there is a fracas at the railway station. The police are called.

- Incident 3A: May 2002. An argument as to whether the respondent could take H for a walk to Greenwich Park. In frustration the applicant follows them and kicks the respondent's leg. He kicks her back.

- Incident 3B: June 2002. Argument in front of H: the applicant throws a port glass at the respondent, which smashes.

- Incident 3C: Summer 2002. Another argument. The applicant throws her wedding ring into the square and it is lost.

- Incident 4: October 2002. The applicant and respondent are at lunch with friends. There is

a dispute about whether it is time to leave. The respondent pulls the applicant off the sofa onto the floor, hurting her leg. They leave together and on their return home the applicant is insistent on an apology, and while the respondent is in the bathroom, bathing H, with the door locked, the applicant kicks at the door with her heel, causing a small hole, and when he comes out of the bathroom, she slaps at him, causing a small cut to his face because she is still holding the door keys in her hand.

- Incident 5: April 2003. Another argument. The applicant picks up and smashes a fruit bowl. She picks up the respondent's antique walking stick by the open front door, and he grapples with her seeking to recover it: there is a struggle, in which with one hand he seeks to grasp the stick, and with the other hand he digs into her neck and shoulder, leaving red marks. She smashes the stick. Police are called.

- Incident 6: July 2003. The applicant comes into the respondent's bedroom and there is a long row into the night. She says that he hit her head against the door, while he says that she hit her own head against the door - I am unable to resolve this dispute. She accepts that she pulled a small radiator off the bathroom wall.

- Incident 6A: July 2003. Another argument. The applicant smashes a glass and throws coffee and cereal over the floor.

- Incident 6B: July 2003. Another argument. The applicant suggests it is because the respondent was saying that she should have an abortion, but that cannot be right as E was born only 1 month later. In any event, the applicant went into his bedroom and tore up his framed wedding photograph, and then went downstairs and poured away the contents of two of his bottles of port and sherry down the sink.

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- Incident 7: August 2003. A row while the respondent is driving the car; the applicant pulls his glasses off his face while he is driving, and throws them out of the car window. Later at Marina Court, he criticises her for shuffling the baby in her cot across the floor with her feet, and accuses her of kicking the baby, and says he is going to telephone her mother. She grapples with him to take the telephone off him, pulling the telephone wire out of the socket, and throws a speaker at the French windows, smashing one of the panes. He shoves her out of the way and she falls against the coffee table, bruising her right elbow.

- Incident 7A: November 2003. The respondent is eating, and continuing to do so when the applicant is determined to attract his attention, and throws a glass of wine over him. He retaliates by kicking her on the bottom (although, as I accept, this was not with any force - it appears in his diary, and was not a matter complained of by the applicant).

- Incident 7B: December 2003. The respondent alleges that the applicant threw a plate of food at the wall and smashed it, as to which I make no finding: but she accepts that she tore up the plans for the basement of the new house, which the respondent had been working at on his drawing board, because, she says, she was unhappy with them.

- Incident 7C: Christmas Day 2003. The applicant did not like the earrings that the respondent had bought her for Christmas, and threw them through the open door out into the street. The respondent locked himself into the bathroom, and the applicant hammered at the

bathroom door, as was heard by Mr O'Neill.

- Incident 7D: January 2004. Applicant accuses the respondent of using a coffee mug reserved for her. The respondent tries to throw the contents of the mug at her (it is not suggested that such contents landed on her). The applicant picks up and smashes the respondent's single lens reflex camera.
- Incident 7E: March 2004. When the parties were packing up at Marina Court, the applicant became angry with the respondent and threw food at him, smashing eggs and stamping on an orange juice carton.
- Incident 7F: July 2004. The applicant throws a colander at an antique table, damaging both.
- Incident 7G: September 2004. The applicant threw a scooter down the stairs at the entrance of Marina Court, breaking Mr Philipson's glass landing partition window. On another occasion, or other occasions, Mr Philipson saw the applicant kicking in a glass pane in their own front door - the applicant explains because the respondent would not let her in; and he also saw her breaking off the mirror from the respondent's Jaguar and throwing it over a garden wall - the applicant explains because she did not want the respondent to leave the flat.
- Incident 8: 29 September 2004. The applicant criticised the respondent for leaving the kitchen in a mess, and smashed his Wedgwood mug on the floor. He smacked her hard on the

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bottom in response. She smashed a large cut glass flower vase and threw his brief case out of the front door, and went up to the bedroom, where she threw his cufflink box, a conch shell and his bedside lamp onto the floor. He struggled to prevent her and threw her hard onto the bed. Either as a result of the incident in the kitchen, or in the bathroom, the applicant suffered injury to her back, necessitating a visit to an osteopath.

- Incident 9: 17 December 2004. The applicant came in to the respondent's bedroom in Northampton Park, 7 days after their moving in, waking him up at 2 am to complain that the heating had gone off. She abuses him for incompetence, and, as he lay in bed, landed several blows with her right fist on his face, giving him a black eye. He subsequently wrote to her parents to tell them what had occurred, as he had done on two previous occasions, including after incident 7. The photograph of the respondent's black eye is in the papers.

[47] It is clear that, even before the move to Northampton Park, and certainly by the time of incident 9, the marriage was, if not doomed, certainly, as the applicant has herself in evidence accepted, in crisis. I shall now record my findings as to what occurred on 27 December. I do not accept in full either party's account. It is clear to me, not least from comparison of their accounts before me with accounts both of them have previously given, with police records and with the evidence of Mrs Mackay, that, due to the passage of time, and because of the heat of emotion, both at the time and subsequently, the applicant has overplayed, or over-remembered, what occurred and the respondent has underplayed and under-remembered. I make my findings, taking into account all the evidence, including what I saw on the view of the house, and, in particular, of the basement, hall and bathroom, and I set out what I conclude took place.

[48] I accept that the incident arose after the applicant, upstairs at her computer, discovered that the respondent, downstairs in the basement watching television, with E asleep on a chair in the room, had been

at best offhand to her friend Mrs Mackay when he answered the telephone to her, fobbing her off when she called to speak to the applicant. I conclude that Mrs Mackay probably then telephoned the applicant on her mobile, and, when she learned what had occurred, she came angrily downstairs. I do not accept that what happened thereafter was 'wordless' as the respondent now states, though contrary to what he said to the police at the time, but that the argument lurched from her being angry with him for having been, as she saw it, rude to her friend Mrs Mackay, to his being critical of her for not agreeing to allow his friend Mr O'Neill to come to the birthday party which he was arranging for her. He was sitting in the chair facing the television, and she was standing slightly behind the chair. She clearly became frustrated with him, as so often in the past, and she spat once or twice at the back of his head. It is common ground that she was behind him, but I am satisfied that she was close enough to him that, when he held up his hand to ward off the spit, it came into contact with her face, and hit her lip, and that it was not a deliberate attack on her.

[49] I am satisfied that she then immediately accused him of having hit her, and that he denied it, and that, in a temper, she then raced into the basement

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hall and began to pick up the first of two pots which were precious to him, on the sideboard in the basement hall. I am satisfied that she picked up his father's tobacco pot and smashed it on the floor, and was in the process of picking up the other pot when he then grabbed her and flung her hard across the basement hall, so that she landed at the bottom of the stairs, causing some bruising as she hit the stone floor, and carpet burns to that part of her body which landed on the stair carpet.

[50] The applicant says that the respondent now immediately pursued her up the stairs. I find that it is much more likely that, while she picked herself up and raced up the stairs, he turned his attention, as he has said in evidence, to his father's tobacco pot, and trying to recover the pieces. I am satisfied that, in her temper, she grabbed the first thing of his that she saw, namely the grandfather clock at the top of the stairs, and pulled it off its moorings, so that it fell crashing to the ground. I do not find that she was doing that because he was at the time closely pursuing her: I conclude that it would have to have been pushed against quite vigorously to have been forced away from its connections, and that that would have taken more time than would have been available to her if he was in hot pursuit - not least because, in fact, if he was in hot pursuit, given that she would have taken time to pick herself up from the bottom of the stairs, he would probably have caught up with her even before she got to the clock. It was then, on hearing the crash and realising that it was his clock, and because of what she had done to the clock, that he did indeed pursue her and was, as he accepts, 'absolutely furious'. By the time he reached the ground floor, where the clock lay, she was already well on her way upstairs, and he leapt up the next flight after her. By the time he reached the top of the stairs, he knew she was in the bathroom, and he pursued her in. Unknown to her, as they had only just moved in, there was in fact no lockable bolt on the bathroom door and she was thus unable to secure it behind her, as she intended, and attempted, but she strove hard to hold the door shut, while he pushed hard against it to get in.

[51] The next few moments in the bathroom form the nub of the applicant's case against the respondent. Her case is that, when he burst into the bathroom, she was standing in the middle of the room and that he deliberately smashed her head against the shower post at the corner of the shower cabinet, just inside the bathroom behind the door, causing her injury, which consisted of a jagged cut from above the bridge of her nose up to the hairline. The cut was, in the event, only superficial, and required no stitches (contrary to what she subsequently told Her Honour Judge Hughes), but oozed a great deal of blood; and the photograph of her head covered in blood, taken some time later that night, is obviously a distressing sight. The respondent pleaded guilty, as set out in para [2] above, to causing her actual bodily harm, and his mitigation was put by his defence counsel on the same basis as his case before me, that is that he did not deliberately smash her head against the pole, but that she must have incurred the injury, as he accepts recklessly caused by him, in the course of the struggle when he forced his way in against her opposition. At the outset of the hearing we had a rough plan of the bathroom, which was inaccurate in two respects, one of which was known and one not. The first inaccuracy was that the bathroom door was shown opening to the left, whereas it was common

ground that it opened to the right, ie up against the shower cabinet. The other inaccuracy only became clear as a result of the view, and in

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consequence an accurate plan was prepared. It is now clear that, contrary to the original plan that showed the shower cabinet only projecting into the bathroom as far as the opening of the door, in fact the shower cabinet continues out further, so that the post at the corner of the shower cabinet is in a position 11 inches beyond where the door when fully open makes contact with the shower cabinet.

[52] Mr Moor QC, operating on the basis of the inaccurate plan, in order to postulate how it was the applicant's right temple must have come into contact with the shower pole, had to suggest that the applicant had been attempting to keep the door closed by standing with her back to the door, and had then been swung 90 degrees when the door opened, causing her left temple to come into contact with the pole. The suggestion that the applicant had her back to the door is not consistent with any of the contemporaneous accounts. Now the true position is known, it is possible for the applicant to have been facing the door and to have been swung around as the door opened, and as she fell away, due to the force exerted by the respondent, for her left temple to have come into contact with the shower pole 11 inches on the bathroom side of the fully opened door, causing her to collapse in a heap in the middle of the floor.

[53] I accept that that is indeed what occurred:

(i) That the applicant was using all the strength she could to barricade the door to prevent the respondent entering is clear from her own statement in these proceedings at para 67:

'I realised to my horror that there was in fact no lock on the door as the bolt was very old and I put all my weight against the door.'

Her statement made to the police at the time reads as follows:

'As I tried to barricade myself in, James forced the door and I was petrified - I thought he wanted to kill me. James quickly got in, all I can remember is being smashed against the shower pole. I hit the pole with the right side of my head and I began to bleed.'

And:

'I ran upstairs to the bathroom because I thought it had a lock. When I got in I saw the lock wouldn't work so I leaned my weight against the door. I was leaning with my front against the door. James was pushing the door open.'

The note recorded in the police notebook is:

'The suspect broke in through the door and began to repeatedly strike the [victim] to the head: this caused her to bang her head on the pole, and a bump which bled a lot.'

(ii) The applicant gave an account to me that she was standing in the 'centre of the bathroom' when the respondent burst in. I do not see how she can have got there so quickly or so

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straightforwardly, after her failed desperate attempt to prevent the respondent entering. She

said in cross-examination that she was 'very, very close' to the post - but the centre of the bathroom is 2ft 6in away. He would need to have picked up her and carried her at least some distance so that he could thwack her head against the shower pole, but:

(a) Her account in examination in chief was that he 'grabbed me from behind like a rag doll ... and he smashed [me] deliberately against the pole' and when asked on what part of her body he grabbed her from behind, she said '*my shoulders and upper arm*'. It is thus not suggested that he held her round the waist in order to pick her up, as would have been more likely if he was to move her any distance.

(b) In her statement at para 67, she said that he 'grabbed me by my upper arms, lifted me slightly': and she again confirmed in cross-examination that 'I was slightly raised off the floor'. Notwithstanding her description of herself as a rag doll, I do not find it easy to picture him being able to get her from the centre of the bathroom so as to smash her head against the pole: (a) without lifting her more than slightly off the floor; and (b) by the waist, rather than by the shoulders and upper arm.

(iii) As for her accounts at the time, I have already recited her statement to the police and the police notebook, neither of which specifically suggests or mentions his having deliberately smashed her head against the pole: and the hospital notes record that she 'was beaten about head with fists and has been thrown against shower of cupboard'. His accounts to the police at the time are consistent with the case he now makes. The records in the policeman's notebooks are that 'he wasn't sure how she had injured her head as she could have hit her head when he slapped her or she was not knocked over after being behind the bathroom door as he tried to get in': and 'he slapped me twice with the palm of his hand. He denied causing her to hit her head although conceded that when he opened the door he could have caused her to hit her head'. In his interviews, he stated that:

'She had fallen when I pushed the door open. I was on the other side of the door so I didn't see what happened.'

And later:

'Q: So is it possible that you by opening the door quickly, ... propelled her into the shower pole.

A: Yes that's highly likely. I can't remember which way the door opens but I think it opens towards the shower pole ...

Q: So it is possible that you opened the door with such force that you sent your wife careering into the shower pole which caused the cut.

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A: Yes, that explains rather than hitting the bath. No, if she says it's the shower pole then that's how it happened. I opened the door.'

(iv) Mrs Mackay, both in chief and in cross-examination, confirmed that when, immediately after the incident, the applicant rang her up and, albeit in an emotional state, explained what had happened, she had described the incident by saying to her that the respondent had been beating her head against the floor.

[54] Once she was on the floor, after what I am satisfied was her collision with the shower pole, then the respondent, in his absolutely furious state hit her several times on the back of the head. He says he did not see any blood at that stage, and it seems to me perfectly possible that that is the case, as:

- (i) He was obviously in a blind rage as a result of the smashing of the clock.
- (ii) She was away from him face down on the floor.
- (iii) As the cut was superficial, it may be that the blood did not pour out immediately, but only started to ooze out, and continued to do so while she first lay there on the floor and then went to make her phone calls.

[55] There then occurred a series of extraordinary occurrences. The respondent, rather than assisting the applicant as she lay there, tried hard to force the engagement ring off her finger. I am satisfied that:

- (i) He did indeed do so, as he had previously accepted, although in the witness box he was determined now to say that he had merely thought of doing so, no doubt as he is now thoroughly ashamed of such an unprepossessing occurrence.
- (ii) He did so immediately, in his furious state, perhaps since his mind was indeed set on safeguarding the ring in the light of what the applicant had done previously, including throwing away the wedding ring, or perhaps because he was subconsciously demonstrating what, so far as he was concerned, was the end of the marriage. Neither is a creditable explanation of what occurred, and it perhaps exemplifies his cold personality, to which I earlier referred. But I am satisfied that he did so immediately, and did not return to the bathroom for that purpose (his return to the bathroom was for the purpose of his recovering his sponge bag - while the applicant continued to lie on the floor - as he had decided to leave the house and go down to Marina Court, as he had done after previous incidents). Although the applicant now believes that he went out of the bathroom and came back in again to try and remove her ring, she was not so certain about it at the time she made her statement in these proceedings (para 67) and when she made her statement to the Police at the time, she gave a clear description that the respondent's sudden attempt to pull at her engagement ring followed on immediately after his blows, before he left the bathroom, and that his return to the bathroom was to collect the

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sponge bag. This is consistent with the evidence that the respondent gave in his witness statement in these proceedings, in his evidence in chief (although, at that stage, asserting that he had only thought of doing so), and again in cross-examination.

[56] What occurs thereafter is again strange, and only explicable, if at all, on the basis that neither of them at that stage was treating the incident as one in which he had deliberately smashed her head against the pole. On the one hand the respondent, after a conversation with her, in which he unfeelingly said that, if she could not cope with the children, they would have to go into care, simply left the house. On the other hand she did not, although she says that she thought she was dying, call either an ambulance or the Police, but made calls first to Mrs Mackay, who has given the account to which I have referred in para [53](iv), above, and then to her parents.

[57] If I had been satisfied that he had deliberately smashed her head against the shower pole, that might have had an effect on my conclusion, but I am not satisfied: indeed I am satisfied that he did not do so. It is

plain that the respondent was indeed *absolutely furious*, and that he did assault her by hitting her several times when she was lying on the floor in the middle of the room. However, although the whole sad history of the marriage, which I have sketched, and which Her Honour Judge Hughes made unavailing attempts to save, may leave me with what might be called a 'gulp factor', arising out of what each of these two parties did to each other, verbally and physically, I am not left with Mr Mostyn QC's 'gasp factor'. I do not conclude that the conduct of the respondent on 27 December 2004 was such that it would be inequitable to disregard it in making my orders as to proper financial provision.

Compensation

[58] I have already referred in para [27](iv), above, to Baroness Hale of Richmond's explanation at para [140] of *Miller* of this new ground. Lord Nicholls of Birkenhead' exegesis at para [13] of *Miller* is fuller:

[13] Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional roles as home-maker and childcarer.'

[59] I have listened carefully to the evidence of the applicant, particularly in the context of the cross-examination of her on the basis that she could and should take up employment - in the area, it was suggested by Mr Moor QC, of some £50,000 per year, and, he suggested, quite soon, after a short period of training or retraining - in any number of jobs, including surveying where she

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spent time as a trainee at Weatheralls. I am quite satisfied that she gave no sign of what might be the case in other circumstances, a thwarted ambition or an irrevocably damaged career. I do not believe that this head of loss can be said to arise in every circumstance. It is not an unfamiliar situation, eg in employment tribunals, where it is said to be the consequence of an unfair dismissal that a claimant can never recovery satisfactory employment, although in that forum there is the statutory cap to compensation. In this case, I am not persuaded at all that anything has been lost by the 7½-year gap in the applicant's employment, or as a result of the mutual agreement between the parties that she would not work: indeed the understanding, and her own desire, as was plainly in evidence, was that this arrangement of her not working would not be limited to the period when she might have to be the carer of the children, but would extend to their joint enjoyment of his retirement at Brudenell, where she would choose to spend her time in sailing and painting.

[60] I make no award, or allowance, for compensation under this head.

Need

[61] I have had a considerable amount of evidence and submission about the applicant's needs, both by reference to a first, and then a second very substantially increased, estimated budget, and by reference to the respondent's evidence as to what the joint expenses were in their last year together, and his comments on the applicant's budget(s) which has all been put together in a very helpful consolidated schedule. It is plain that there is no call for a line by line analysis of these estimated figures by a judge: and it is important to bear in mind what the standard of living in fact was during the marriage. Sympathetic as one must be for a single parent, it is not the job of the court in this regard to compensate her for the loss of her husband by enabling her to have a social life which is an improvement upon that which she had during the marriage. I take the following into account:

(i) The applicant will have £15,000 from the respondent for the two children, plus payment of all school extras. Now that H is at boarding school, his home expenses will be limited to the holidays and, until he has to go in on Sundays for the services, weekends, but then will in any event be, in my judgment, sufficient to cover both odd trips to the kind of restaurants that children enjoy (so as to render it double-counting if provision for such eating out is also included in the respondent's budget) and holiday expenses.

(ii) The applicant herself said that during the marriage her 'personal freedom to spend as [she] wanted to' was very controlled - at least for a substantial part of the marriage. I am entirely clear that the family lifestyle, the high standard of accommodation and holidays apart, was not a luxurious one involving either any material entertaining (save as to her own charitable coffee mornings) or eating out. Equally there is no indication whatever of any visits to the opera or the theatre, at any rate on any more

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than a very occasional basis. As set out above, the applicant is not entitled to an improvement on her standard of living with the respondent.

(iii) There was, in my judgment, a substantial exaggeration and/or overlap between food (not challenged at £9,200) alcohol (£1,200) and entertaining at home (not suggested to be on any catered basis and, thus, presumably only the cost of the food/alcohol - £5,200) and restaurants (£8,840): and as to car expenses (£10,858) and taxis and public transport (another £3,520). In any event I do not conclude that two cars are necessary, whether for a potential au pair (none has been employed up to date, and now H is at boarding school and E will be at full time school) or otherwise. There is a substantial element included for staff: the applicant's only justification in relation to a charge for gardener at £4,680 (no gardener having previously been employed, although the respondent did such gardening as was necessary) is that (in relation to a garden which, upon the view, could be seen largely to consist of lawn) the applicant 'does not have time', not now likely to be a problem.

(iv) In my judgment, the amounts included in the applicant's budget for shoes (£3,000 per year), clothes (£8,400), hairdressing, beautician and cosmetics/toiletries (£8,040) in respect of what I was told was a monthly appointment with the hairdresser, plus waxing and necessary toiletries - are, on any view, substantially excessive, as are the suggested sum of £1,200 for books and CDs, and the claims for medical insurance and dentist of £2,800, when the applicant does not have private insurance and National Health provision is available.

(v) The expenses estimated for electricity, gas and insurance appear to exceed the actual expenses paid by the respondent.

[62] In analysing the applicant's needs, I approach my conclusion from the following two points of view:

(i) I am persuaded that the applicant has no great earning capacity. I am satisfied, having heard what I have described above as her own negative reaction to the suggestion of what talent she may have, that, notwithstanding her obvious intelligence, there are no particular openings available for her: but I feel sure that she can, at any rate, earn £15,000 pa starting in a year's time.

(ii) I am not persuaded that it is necessary that she and the children stay in Northampton

Park. Plainly it would be an advantage by way of providing some short-term stability, and that may consequently lead to a more amenable approach to access to the children: but the house is, in my judgment, larger than they need, and is not one to which, by virtue of the last 17 days of the marriage, it can be said that the family was habituated. I am also far from persuaded that, simply because the applicant has become a no doubt valued committee member of the Canonbury

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Society, she has to remain in Canonbury - as opposed for example to moving to Highbury and becoming an equally valued member of the Highbury Society: and in any event it was their plan that, within a few years, she and the respondent would be moving to Poole. However, if by making economies here and there, the applicant can enable herself to remain in Northampton Park, then a transfer to the applicant of Northampton Park free of mortgage would enable her to do so - but it is not my intention to give her provision so as to ensure that that is the case.

[63] I am satisfied that, if I make such provision as gives her a sum of £50,000 net pa for her reasonable expenditure, to which will be added the £15,000 for the children and, once she finds some suitable job, another £15,000 pa, that may in practice enable her, by making necessary economies, to stay in Northampton Park. If, however, she finds herself unable to do so, or indeed feels it more sensible and preferable to trade down, then she would release for herself the agreed estimated sum of £800,000 now, rather than in 20 years time. A lump sum of £700,000 would, on the 'modified' *Duxbury* basis, ie postulating sale of Northampton Park in 20 years time, secure for her approximately £50,000 pa net. If she decides to trade down now, then that would immediately free up the £800,000 from Northampton Park, which would give her (by reference to the *Duxbury* tables) an additional £35,000, namely a total of £85,000, which is a more than an adequate sum pa for her needs, without any economies, to which the children's maintenance, and a reasonable sum by way of net earnings, would fall to be added.

Conclusions

[64] Fifty per cent of the matrimonial property is £3,001,112.

[65] I conclude, for the reasons I have given above, that there is to be no allowance in favour of the applicant in respect of either conduct or compensation.

[66] I make no separate consideration arising out of the duration of the marriage, neither so as to decrease the applicant's entitlement (7½ years was a reasonably long marriage and there were and are two young children, and the respondent has no residual responsibilities in respect of his first marriage) nor by way of increasing her entitlement by reference to any blending of what I have concluded to be the £1,015,035 of pre-matrimonial property.

[67] I conclude that there should be an allowance for the substantial financial contribution of the respondent to the marriage, over and above the norm, and after taking into account the applicant's contribution as carer and homemaker, by virtue of the pension portfolio and the Weatheralls proceeds. This contribution is, in my judgment, at least sufficient to justify an entitlement of some 60% of the matrimonial property (while he retains the pre-matrimonial) which would itself make no allowance for the fact that the respondent will be, as is agreed, paying off the entirety of the applicant's debts.

[68] If I order, as I am minded to do, and on the basis of the payment off of the debts, the transfer, free of mortgage, of Northampton Park (valued at approximately £1.8m) plus a lump sum of £700,000, that would:

(i) constitute

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approximately 40% of the matrimonial property; (ii) leave the applicant with the opportunity to retain Northampton Park in addition to a sum which, by reference to the *Duxbury* tables as modified, would equate to £50,000 pa, together with the £15,000 maintenance for the children, plus any earning capacity, to which I have already referred. If, as I am satisfied she may well be able to do, she can manage comfortably on that sum, then she will be able to retain the matrimonial home as she would wish. If it turns out that she cannot, then she can dispose of, or deal with, Northampton Park and will, as I have set out in para [63], above, in those circumstances, have what I am satisfied would be more than adequate for her requirements. I am satisfied that this amount both meets her needs and constitutes her entitlement.

[69] Mr Mostyn QC submitted that the effect of Lord Nicholls of Birkenhead's words in *White*, at 989 is that the judge must test his conclusion against the yardstick of equality of all the property, including the non-matrimonial property. I do not agree. I consider that the yardstick is by reference to 50% of the matrimonial property, and that the non-matrimonial property is excluded, and only brought into consideration if needs dictate. However, if I am to measure my conclusion against that yardstick, then the total figure I award to the applicant (exclusive of the payment off of the £500,000 debt) would fall from approximately 40% of the matrimonial, to approximately 35% of the total of matrimonial and non-matrimonial, property. This latter, lesser, percentage would be, in my judgment, more than justified by virtue of the fact that the respondent's financial contribution would then have to be considered to be all the greater if it included, not only his financial contribution to the matrimonial property, but his deemed contribution of the entirety of what is otherwise non-matrimonial property. In either event, against whichever yardstick my award is measured, there is, in my judgment, and by reference to the factors in s 25 of the 1973 Act, ample good reason for it.

[70] I turn to look at the position of the respondent, who I would intend and expect if at all possible to be in a position to retain Brudenell for his intended retirement (and for his present weekends) and, if he so chooses, Alwyne, at least for the present, while he is working in London; and to fund the outgoings for the properties, in addition to his own living expenses, any debt he may have to continue, including the mortgage on Alwyne if so advised, and the maintenance for the children. He will need to find £700,000 in respect of the lump sum, plus the £500,000 to pay the appellant's debts including her legal costs, and the £700,000 to pay off the Northampton Park mortgage, a total of approximately £1.9m. He has net non-pension assets, excluding Alwyne and Brudenell, of approximately £2.3m. He would thus be in a position, given time, to fund those capital outlays entirely out of his non-pension assets, leaving a small balance, which would continue to earn him some income, while he would still have 100% of his pension assets as income earning, together with his net earnings for his last 4 years, as presently planned, with Richard Ellis, which should more than cover his own expenses and outgoings.

[71] My award, including the transfer of Northampton Park, is consequently not £2m, for which the respondent contended, nor the £4m, alternatively £3.5m, for which the applicant contended, but an approximate sum of £3m.

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[72] I shall ask counsel to draw up a consequential order, and hope that agreement may be reached as to time to pay. There is only one financial dispute remaining, given that the parties have already agreed that there should be (subject to my caveat) no order for costs, and that relates to whether the £15,000 agreed for the children should be index linked to RPI. I consider that that would be appropriate, in order to avoid any continuing dispute between the parties, which I hope (subject to resolution of the question of chattels) can now be put behind them, while they dedicate themselves to the interests of the children, and this will hopefully entirely avoid any need for any applications for variation now or in the future.

Order accordingly.

Solicitors: Ayesha Vardag for the applicant

Hughes Fowler Carruthers for the respondent

NATASHA WADSWORTH

Law Reporter