McFARLANE v McFARLANE; PARLOUR v PARLOUR [2004] EWCA Civ 872

[2004] 2 FLR 893

Court of Appeal

Thorpe, Latham and Wall LJJ

7 July 2004

Financial provision – Periodical payments – Capital element – Clean break – Substantial future surplus of income over expenditure – Whether periodical payments could include an element of capital

In two cases, the issue arose whether the court was entitled to order a division of future income by way of a periodical payments order which exceeded current needs. In both cases the division of the family capital had been agreed, but both wives were seeking periodical payments in excess of needs, on the basis that fairness required that they have a share of future earnings which had been made possible by their past contribution to their husbands' careers. Both husbands earned very large sums of money, substantially in excess of the combined household expenditure of husband and wife. In the first case, the income of the husband, who was a chartered accountant, had increased considerably year on year, and seemed likely to continue to do so for a number of years. In the second case, the income of the husband, a professional footballer, was very large, but was likely to reduce dramatically once his present contract expired.

Held –

(1) There could be no doubt of the court's power to order periodical payments to reflect more than the recipient's mere aliment, provided that all the criteria in s 25(2) of the Matrimonial Causes Act 1973, all the circumstances of the case and overall fairness so required. Clearly, in assessing periodical payments, as in assessing capital provision, the overriding objective was fairness. Over the years, the hallowed distinction between capital and income had been eroded, if not eliminated, and was not now very relevant. In exceptional cases, and on the basis of term rather than joint lives orders, periodical payments could be used by the recipient to accumulate capital (see paras [99], [106], [107], [109], [136]).

(2) The original once-for-all capital division that resulted in the dismissal of capital claims might now be supplemented by a later transfer of capital, agreed or judged to be the fair consideration for the dismissal of the surviving claim to periodical payments. In any case in which, despite a substantial capital base available for division, clean break was not presently practicable, a court had a statutory duty to consider the future possibility of a clean break. That duty assumed particular prominence in cases where there was a certain and substantial surplus of future income over future needs, which surplus could provide the consideration for the dismissal of the wife's outstanding claims. Quantification of those outstanding claims would depend on the size of the surplus in each of the future years (see paras [53], [56], [66]).

(3) Neither case should have been argued primarily as a claim for indefinite and continuing periodical payments. In both cases the past surplus which had been converted into capital assets had been divided by agreement, and it was the scale of the contemplated future surplus that prevented the clean break dismissing all claims. In both cases the agreement as to capital was seen, or should have been seen, as but the first stage in the progress to clean break. If, as in one of the cases, the surplus would be predictably short-lived, the first option for consideration should have been the planned progress to clean break by means of a substantial term order open to a later application for extension (see paras [53], [54], [56], [66]).

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(4) The obligation on the parties to achieve financial independence was mutual. The earner must give the proper priority to making payments on account out of the surplus income. The payee must invest the surplus sensibly, or risk that her failure to do so might count against her on an application for discharge under s 31(7A) and (7B) of the Matrimonial Causes Act 1973. Given the mutuality of the obligation, the opportunity and responsibility to invest should be shared. It was discriminatory and, therefore, wrong in principle, for the earner to have sole control of the surplus through the years of accumulation. The preferred mechanism by which the surplus was to be divided annually must be periodical payments, which were, unlike lump sum orders, variable. The practicality of such an order would depend upon many factors. Essentially

the completion of the process must be foreseen within a relatively short span; a term of 5 years might be towards the limit of the foreseeable (see para [66]).

(5) The focus in the first of the two cases, in which the husband's income was likely to increase year on year, should have been on termination and not on post-retirement provision. The husband could borrow, using his home as security, to finance a clean break years before either party approached retirement. The district judge had recognised the wife's entitlement to a fair share of the husband's surplus income, although she failed to identify the overriding purpose to which it had to be put, wrongly identifying pension provision and insurance, rather than the greater priority to achieve financial independence. The district judge should not have provided for a joint lives order (see paras [70], [73], [74]).

(6) In the second case, in which the husband's very large income was likely to plummet within 4 or 5 years, a substantial periodical payments order should have been made over a 4-year extendable term, at which time a clean break might then be achievable on the basis of an assessment of the husband's earning capacity thereafter, and of the wife's independent fortune derived from the original capital settlement and augmented by the substantial annual surplus built into her periodical payments order in the interim (see para [77]).

(7) In cases such as the present, the calculation of the amount of surplus income could not be achieved without first establishing what both the payer and the payee needed in order to meet their projected expenditure. In preparation for the trials below, both wives advanced budgets which were generously cast and which at trial were subjected to rigorous cross-examination. In both cases the husbands failed to complete the relevant section of the Form E, and one refused subsequent requests for information. The practice had apparently grown for substantial earners to decline any statement of their needs on the grounds that they could afford any order that the court was likely to make. An end must be put to that practice (see paras [78], [79], [83]).

Per curiam: these were exceptional cases. In the majority of cases the income of the earner was insufficient to cover the outgoings of the two households. In many others the single income was sufficient only to provide for both households at a standard below that which the family enjoyed before separation. In many others the income would provide for both amply. In many more it would provide for both and a measure of luxury which each contended was not disproportionate to the standard enjoyed before separation. In all such instances, the court's discretionary judgment would be dominated by an assessment of needs or, for the more affluent, reasonable requirements (see para [86]).

Statutory provisions considered

Matrimonial Causes Act 1866, s 1
Married Women's Property Act 1882
Matrimonial Causes Act 1965
Matrimonial Proceedings and Property Act 1970, ss 1, 6
Matrimonial Causes Act 1973, Part II, ss 22, 23, 25(2), 25A, 27, 31(7A)-(7F)
Matrimonial and Family Proceedings Act 1984
Family Law Act 1996
Access to Justice Act 1999, s 55
Family Proceedings Rules 1991 (SI 1991/1247), r 8.1(3)

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Cases referred to in judgment

A v A (Maintenance Pending Suit: Provision for Legal Fees) [2001] 1 WLR 605, [2001] 1 FLR 377, FD
Boylan v Boylan [1988] 1 FLR 282, FD
Campbell v Campbell [1998] 1 FLR 828, CA
Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207, CA
Cornick v Cornick (No 2) [1995] 2 FLR 490, CA
Cornick v Cornick (No 3) [2001] 2 FLR 1240, FD
de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore) [1980] AC 546, [1979] 3 WLR 390, (1979) FLR Rep 223, [1979] 3 All ER 1146, PC
Doherty v Doherty [1976] Fam 71, [1975] 3 WLR 1, [1975] 2 All ER 635, CA
G v G (Financial Provision: Equal Division) [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143, FD

G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71, FD
Martin (BH) v Martin (D) [1978] Fam 12, [1977] 3 WLR 101, (1977) FLR Rep 444, [1977] 3 All ER 762, CA
Minton v Minton [1979] AC 593, [1979] 2 WLR 31, (1978) FLR Rep 461, [1979] 1 All ER 79, HL
N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69, CA
O'Brien v O'Brien (1985) 66 NY 2d 576
Pearce v Pearce [2003] EWCA Civ 1054, [2004] 1 WLR 68, [2003] 2 FLR 1144, CA
Trippas v Trippas [1973] Fam 134, [1973] 2 WLR 585, [1973] 2 All ER 1, CA
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

Barry Singleton QC and *Deepak Nagpal* for Mrs McFarlane
Jeremy Posnansky QC and *Stephen Trowell* for Mr McFarlane
Nicholas Mostyn QC and *Deborah Bangay* for Mrs Parlour
Nicholas Francis QC and *Brent Molyneux* for Mr Parlour

Cur adv vult

THORPE LJ:

Introduction

[1] On 3 October 2003 Bennett J gave judgment on an appeal brought by Mr McFarlane, the husband, against a periodical payments order at the rate of £250,000 pa made by District Judge Redgrave in the Principal Registry on 19 December 2002. For reasons which I will subsequently examine critically, Bennett J allowed the husband's appeal and, in the exercise of his own discretion, substituted the lesser order of £180,000.

[2] On 23 January 2004 Bennett J gave judgment on a contested periodical payments claim brought by Mrs Parlour.[1] He awarded her periodical payments at the rate of £212,500 pa.

[3] In each case there were three children of the marriage and orders for periodical payments to the children augmented the liability of the husband. There were further orders in each case dealing with ancillary issues that had been contested. However, in each case the only fundamental and difficult issue was the quantification of the wife's periodical payments.

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1 Editor's note: see *J v J* [2004] EWHC 53 (Fam); [2004] Fam Law 408.

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[4] The outcome of these two cases has been much debated by specialist practitioners. It has been said that the cases raise a novel point of principle which may be formulated thus: if the decision in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 introduces the yardstick of equality for measuring a fair division of capital why should the same yardstick not be applied as the measure for the division of income?

[5] Mr Singleton QC's skeleton argument supporting his permission application of 16 October on behalf of Mrs McFarlane resulted in the grant of permission on 4 December 2003. The order was an acknowledgement that the case raised important issues that this court needed to consider, since the permission application fell to be judged by the stricter standards that s 55 of the Access to Justice Act 1999 imposes.

[6] The application for permission on behalf of Mrs Parlour was filed on 6 February 2004. Permission was granted and arrangements made for the two appeals to be heard together. At a later stage Mr Francis QC, for Mr Parlour, sought permission to cross-appeal. That application was adjourned to be heard together with the two

appeals.
[7] Subsequently at an informal directions hearing it was agreed that Mr Singleton would present Mrs McFarlane's appeal followed by Mr Mostyn QC for Mrs Parlour. Thereafter Mr Posnansky QC would respond for Mr McFarlane and Mr Francis would then advance his permission application and respond for Mr Parlour. Further agreement was reached for the division of territory between the advocates, particularly foreign authority, to make the best use of the 2 days allocated to the appeals.

McFarlane v McFarlane

The facts
[8] The parties are 44 years of age. They married in September 1984 after 2 years of cohabitation. Their three children are aged respectively 15, 13 and 8 and are educated at fee-paying schools.
[9] At the outset of their cohabitation in 1982, the husband was a trainee chartered accountant working for a leading international firm; and the wife was a trainee solicitor with a leading city firm. By the date of their marriage they had both qualified in their respective professions. The husband has throughout remained with the firm with which he trained. In advancing her career the wife moved to work for a large venture capital company and then in due course moved to another leading city firm. She returned to work soon after the birth of her first child but the couple agreed that she should not return to work after the birth of her second child in 1991. The husband had become a partner in 1990 and the understandable agreement was that the wife should abandon her legal career in order to devote all her time and energy to their two babies and the developing family. The husband's prospects would amply provide for the family's financial needs. In one sense this was a substantial sacrifice on the wife's part, since in the years prior to the husband achieving partnership she had earned as much or more than he.
[10] In 1994 the couple bought in the wife's name a house in Barnes which remains the home for the wife and the children to this day. It was purchased with a substantial mortgage which they planned to discharge over 5 years. Shortly after that was achieved in 1999 the couple purchased in their joint names a holiday home in Salcombe. At the date of the trial before the district

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judge the house in Barnes was valued at £1.5m and the Salcombe home at about £250,000. In January 2001 the parties separated, the husband having purchased in June 2000 a flat in Clerkenwell for £415,000, financed by a tax-efficient partnership loan paid off over approximately 18 months.
[11] The husband formed a relationship with one of his partners and in August 2002 they purchased in the ratio of their respective financial contributions a house in Barnes for £2.94m inclusive of costs. The husband sold his flat in Clerkenwell and his new partner sold her flat. Again the purchase was largely financed by a substantial mortgage and by tax-efficient partnership loans. Their anticipation is that the mortgage will be paid off over 5 years. The husband planned to spend nearly £350,000 from his net income in payment of interest and repayment of capital. This was plainly an achievable target given that the husband's net earned income as a partner had increased over the 5 years between 31 May 1999 and 31 May 2003 along the following route expressed in thousands: 272–427–579–633–753.

The case before the district judge
[12] Equal division of the family capital of about £3m was agreed. The wife retained the former matrimonial home which represented her half-share. Nor was there any disagreement as to the available income. The only question was how the husband's net income of £753,000 pa should be divided. It was common ground that the husband would pay the school fees and periodical payments fixed at £20,000 pa per child by the district judge. What should be the wife's share was the question for the court.

[13] The wife in her Form E quantified her spending needs at about £128,000 a year. The husband failed to complete this section of his Form E and declined subsequent requests to do so.
[14] In her Form E the wife sought the payment of instalment lump sums to enable her to accumulate capital in order to fund a clean break. However this approach was soon abandoned.
[15] It was common ground that neither the husband nor the wife had any significant pension provision and that provision had to be made from future income for the years of retirement. It was not disputed that the wife was entitled to a conventional joint lives order.
[16] As to standard of living it was agreed that the family had enjoyed a comparatively modest standard of living, certainly until the mortgage on the matrimonial home had been discharged. In the circumstances the husband was able to contend that the budget sought by the wife was considerably greater than the family's spending during the marriage. Questions directed to the wife's budget were to dominate her cross-examination.
[17] None of the other criteria in s 25(2) of the Matrimonial Causes Act 1973 was of particular application. On those battle lines the wife sought an order of £275,000 pa and the husband an order of £100,000 pa.

The judgment of the district judge
[18] Having heard the oral evidence the district judge made some important findings on the disputed areas. These were her findings on contributions:

(a) 'In terms of contributions, from 1991 to date the husband has been the breadwinner for this family. He has worked extremely hard and has been and continues to be very

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successful. In 1991 the parties made a joint decision that their children would be brought up by the mother on a day-to-day basis and she would abandon her career. It has been suggested on behalf of the husband that the wife did not enjoy her work and found it stressful; that she willingly gave up her career; implying thereby that it diminished the value of her contribution in running the home and protecting the husband from the day-to-day stresses of the child rearing. I reject this argument. The value of the wife's contribution is derived from what she did and how well she did it, rather than her motivation for doing it and, in any event, she disputes that she did not enjoy her job. There has not been a scintilla of criticism of the wife, either as a partner or as a mother. The parties' contribution to this long marriage has been different but of equal value.'

(b) 'Part of the overall circumstances of this case is that the joint decision of the parties to concentrate on the husband's career in order to provide the funding of the family's lifestyle has resulted in the greatest fruits of his endeavours being available towards the end of the marriage and after its breakdown. In effect, the spadework for these rewards was carried out over a long period and it would be unfair to take the view that recent increases in the husband's earnings since the breakdown of the marriage have not been contributed to by the wife. The wife's contributions enabled the husband to create a working environment which has produced greater rewards, in respect of which she should have her fair share. She also continues to make a contribution to the family in her nurturing of the children in a single-parent household. That contribution did not come to an end when the parties separated.'

[19] Of the husband's proposed future expenditure the district judge had this to say:

(a) 'The husband has estimated his own financial needs, exclusive of housing costs, at £60,000–£80,000 pa, giving no particulars. He plans to pay off his share of the borrowings incurred in the purchase of [his new home] over a 5-year period, which will require payments of approximately £347,500 pa. This is an entirely voluntary responsibility which he is perfectly entitled to take on, but it is not a reasonable one ... Doing the best that I can I therefore conclude that he has paid almost half a million pounds more for his housing than, in my judgment, is reasonable.'

(b) 'This would have resulted in the husband having to service less debt than he has actually incurred and I do not consider that the wife and children should be penalised because of the husband's decision with his partner to buy [his new home] which was beyond his reasonable requirements.'

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[20] In relation to the wife's earning capacity this was the finding:

'In the context of this case, the joint decisions made by the parties about how these children should be brought up and financially supported and the husband's earning capacity, it is, in my judgment, unreasonable to expect this wife to take steps to acquire or improve her earning capacity in the foreseeable future, and that is, at the very least, until [the youngest child] reaches secondary school age, when the matter might be very different.'

[21] This is how the district judge dealt with pension provision:

'The taxation concessions available to the husband in obtaining partnership loans to finance the purchase of property are very generous. Tax relief is available to him on all interest repayments on these loans at higher rates and this is how he has financed part of purchase of [his new home]. I take the view that, after determining what is a fair outcome in respect of the wife's claim for maintenance, taking into account the eight factors specified in s 25(2) of the Matrimonial Causes Act 1973, none of which predominates over the others, and against the background of all these circumstances of the case, that how the parties choose to spend their available income is a matter for them. I am far from satisfied that either of them intends to provide for their later years by way of conventional pension fund investments.'

[22] Finally I record the district judge's direction and conclusion:

(a) 'The court's fundamental duty is to apply s 25 of the Matrimonial Causes Act 1973 as amended to all the circumstances of the case in order to arrive at a fair outcome, and I remind myself that fairness does not necessarily mean equality, even where the parties have agreed in principle to an equal division or thereabouts of capital assets.'

(b) 'In my view, the appropriate maintenance award for this wife is £250,000 pa which equates to 33.18% of the husband's present net income. This reflects her needs, obligations and the contribution that she has made over the years of the marriage. It may well need to be revised in later years for a variety of reasons. It is a matter for her whether she chooses to make pension provision, but she will not be able to avail herself of tax-relief on pension contributions while she is

> not an income tax payer and it is a matter for her whether she takes out insurance to protect her and the children's position in the event that the husband dies or is ill and unable to work.'

[23] Implicit within the district judge's reasoning is first, the conclusion that the wife should have the same opportunity as the husband to make provision for the years of retirement, and secondly, the conclusion that she should have

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the means with which to insure herself and the children against the risk of premature cessation of the husband's high professional earnings.

The judgment of Bennett J

[24] Mr Posnansky advanced his appeal to Bennett J on six grounds:

(1) The order was manifestly excessive given that the wife had not put her annual requirements at more than £128,000 pa.
(2) The district judge had wrongly allowed for the wife to build up a retirement fund and/or to insure herself against the husband's incapacity or premature death.
(3) The district judge had taken insufficient account of the standard of living during the marriage.
(4) The district judge had taken insufficient account of the husband's need to make provision for his retirement out of present income.
(5) Fresh evidence as to the husband's income for the year ending 31 May 2004 invalidated the rate of £250,000 a year.
(6) The district judge's finding that the husband had unreasonably overspent in housing himself was wrong and miscalculated.

[25] Miss Lucy Stone QC countered all these criticisms to the judge's satisfaction save one, namely Mr Posnansky's second ground, which, during the course of argument, emerged as a submission that the judge had impermissibly subverted a periodical payments order as a mechanism to provide the wife with additional capital.
[26] Furthermore it is important to emphasise that Bennett J adopted all the district judge's findings of fact and did not otherwise criticise her approach or her conclusions. That is plain from the paragraph of his judgment in which he explained his decision not to remit to the district judge but to exercise his discretion afresh. In that paragraph he said:

> 'In doing so I shall give the same weight to the s 25 factors as did the district judge. She saw and heard the wife and the husband. She has made important findings to which I propose to be completely loyal. It is clear to me, as I have endeavoured to set out in this judgment, that she placed considerable weight on the wife's contribution both past, present and future.'

[27] The judge's reasons for concluding that the district judge had fallen into error of principle are explained succinctly in the following three paragraphs of the judgment:

> '[53] The effect of the order of £250,000 pa by way of periodical payments for the wife is to give her a sum of money which is arithmetically way, way above her needs. I repeat: her budget of £128,000 pa is not a historical one, but is designed, and has been carefully thought out, for current and future needs. Her needs, of course, are not the be all and end all of her application, for, if they were, that would fly in the face of s 25. The court must apply all the criteria, giving such weight to each factor as the court determines is appropriate in the particular circumstances of the case. However, the

fact is that the wife has been awarded a sum so much over her needs that there are only two possible results. Either she spends the difference or she saves the difference. If she saves it, as the thrust of her case suggests she will and she wants to, she is thereby in fact accumulating capital.

[54] Miss Stone, in her excellent submissions to me, specifically conceded that the size of the award gives the wife the opportunity to save if she so wishes. Thus the reality, in my judgment, is that the husband will be paying over to the wife from his resources monies which are likely to be directed into financial vehicles for the accumulation of capital. In my judgment, Mr Posnansky has made good his submission that the effect of the order is to subvert the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical payments is maintenance.

[55] It is my judgment, with all due respects to the district judge, that, having given the wife an award from which she is likely to be able to save large sums of money and thereby accumulate capital, it is no answer to say, as she did, that it is a matter for the wife whether she chooses to make provision for pension and other matters.'

[28] In exercising his discretion afresh Bennett J substituted the figure of £180,000 pa for the district judge's figure of £250,000 pa. His reasons are set out in the following five paragraphs of his judgment which I must cite in full:

'[58] I wholly reject Mr Posnansky's submission that the fair award for the wife is £100,000 pa. To suggest that the wife in all the circumstances of this case should walk away with £100,000 pa when set against the husband's net income of £753,000 pa is, in my judgment, thoroughly mean and would be unfair. It goes nowhere near reflecting the s 25 factors as, I repeat, evaluated by the district judge.

[59] At the end of the marriage the husband's income was rising and rising pretty rapidly. The standard of living was increasing. The husband's income and his standard of living has resulted from what the district judge described at p 20 in her judgment as a result of the "spadework". The wife's contribution is continuing and will continue in the future vis-à-vis the children, something which, following a divorce, is a contribution that is sometimes overlooked or even played down. The district judge did neither and properly, in my judgment, gave it appropriate weight.

[60] What figure should then be substituted for £250,000? The quantification of periodical payments is more an art that a science. The parameters of s 25 are so wide that it might be said that it is almost impossible to be "scientific". In my judgment, I would be doing justice to both parties if I award the wife £180,000 pa by way of periodical payments.

[61] The husband may say that still exceeds her budget by a significant amount and thereby I am falling into the same error as did the district judge. I agree that the figure I propose to order does exceed her budget and significantly. But if I am right to reject the husband's case, then I ask the rhetorical question: how else are all the s 25

factors, as evaluated by the district judge, to be given full weight other than by making the kind of award that I propose? The more that an award is refined down closer and closer to £100,000, the greater would be the criticism that I would be devaluing the s 25 criteria (other than the wife's needs) as evaluated by the district judge.

[62] I am sure the parties will understand that no family judge in exercising this jurisdiction can achieve perfection given the width of s 25. He or she can only

do his best to get as near to it as possible in the circumstances of any particular case.'

[29] Bennett J also removed the order for the index linking of the periodical payments for the wife and the children imposed by the district judge. That point of detail has not been challenged on this appeal.
[30] It is important to bear in mind that the judge exercised powers confined by the decision of this court in *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207. That subsequently found expression in an amendment to r 8.1(3) of the Family Proceedings Rules 1991 which now provides that on an appeal from a district judge of an order made on an application for ancillary relief:

> 'The appeal should be limited to a review of the decision or order of the district judge.'

[31] Accordingly once Bennett J concluded that the award was not manifestly excessive and that the judge's findings of fact were not open to criticism, only if he was satisfied that the district judge had erred in law was he entitled to substitute his figure for hers.
[32] The error identified by Bennett J is defined in para [54] of his judgment, cited above. The district judge had subverted 'the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical payments is maintenance'. Mr Singleton, in arguing the appeal, essentially submits that there is no such principle. Mr Posnansky submits that the principle is elementary and recognised by all ancillary relief lawyers. I will return to this essential question in due course.

Parlour v Parlour

The facts
[33] The issue in this appeal can be relatively briefly stated. Again the division of capital between the parties had been agreed at the financial dispute resolution (FDR) appointment. The only issue that went to trial was the quantum of the wife's periodical payments order. That issue was directed to be tried by a judge of the Division and accordingly, in giving judgment on 23 January 2004, Bennett J was exercising his own discretion rather than reviewing the prior discretion of a district judge. The case had much in common with the case of *McFarlane v McFarlane* and by the date of the hearing on 12 January both Mr Mostyn, for the wife, and Mr Francis, for the husband, were armed with Bennett J's previous judgment. Since the point at issue could not be distinguished, Mr Mostyn had the difficult task of attempting to persuade Bennett J to reconsider and reject his previous statement of principle. Of course he failed, and he then applied to this court

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for permission to appeal and for the appeal to be heard together with the pending appeal in *McFarlane v McFarlane*.
[34] The case before Bennett J took 4 days and a number of factual issues were contested. However the judge's findings on those issues (such as whether the husband was a gambler and whether he had conspired to conceal one of his streams of income) are of no relevance to the issue of principle raised by this appeal. In the circumstances the relevant facts can be briefly summarised.
[35] The parties met in February 1990 when the wife was a 20-year-old employed by a local optician. The husband, 3 years her junior, was an apprentice footballer, having signed a contract with Arsenal Football Club in July 1989. Their relationship developed swiftly and, although they did not cohabit, the wife generally slept with the husband at his parents' home several nights a week. The husband progressed with Arsenal to become a full-time professional in March 1991 and to reach the first team in

January 1992. At the end of 1994 the wife gave up her employment with the husband's encouragement and thereafter became financially dependent upon him. They had announced their engagement earlier in the year. However they did not cohabit until May 1995 when they moved into their first home. Their first child was born in October 1995. In October 1997 their second child was born and they upgraded into their final matrimonial home. The marriage was not in fact celebrated until June 1998. In May 1999 their third child was born. In November 2001 the husband left the home. He has since found another partner with whom he has a one-year-old child.

[36] Under the agreement reached at the FDR hearing the wife took the matrimonial home, a property of modest value in Norfolk, and a lump sum of £250,000. Her share represented about 37% of the available capital assets. The affluence all results from the husband's success at Arsenal. On 16 August 2001 he signed his current contract which expires on 30 June 2005. His gross earnings at Arsenal for the season 2001/2002 amounted to just over £1.5m. The forensic accountant called by Mr Mostyn estimated the husband to have earned an average of almost £1.2m net for the 3 years ending 2004/2005. The judge accepted Mr Mostyn's submission that the husband will continue to receive a net income of the order of £1.2m pa until the expiry of his current contract. The scale of the husband's net income is explained by the fact that such bonuses as he receives in addition to his salary are made available to him through sophisticated and tax-efficient channels.

The findings of Bennett J

[37] I turn now to the judge's findings on the s 25(2) criteria. In para [26] Bennett J dealt with the age of each party and duration of marriage. His finding comes in the last sentence of para [26]:

> 'Accordingly although the marriage only lasted some 3½ years it would not be just, in my judgment, to ignore the fact that their relationship endured for 7 or slightly more years.'

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[38] Bennett J's assessment of the standard of living during the relationship was as follows:

> 'I am satisfied that compared to the lifestyles of other footballers in the same bracket as the husband, the wife and husband in this case did lead a comfortable but not an extravagant way of life.'

[39] Of the wife's contribution he said at para [15]:

> 'She is a full-time mother of three children aged 8, 6 and 4. I am satisfied that she bore the brunt of bringing the children up whilst the parties cohabited. Furthermore it is obvious that she will have to bear the burden of bringing them up during their childhood. Thus by the time the youngest child is 16 the wife will have had a further 12 years of caring for the children. If the youngest remains at home until she is 18 then the period would be 14 years. That I recognise at once is, together with her past caring for the children, an enormous contribution. I am satisfied too that she has no earning capacity. She told me in evidence that she made no sacrifices in giving up her work with the opticians in 1994 nor has she been disadvantaged in staying at home. She accepted that she had not given up any career. There is no dispute, as I understand it, that the wife was a marvellous mother and ran the household efficiently and looked after the children and the husband to the very best of her considerable ability.'

[40] In his assessment of the husband's contribution Bennett J gave further credit to the wife, as appears from the following paragraphs:

'As to the husband's contribution he was and is a very talented footballer. That sprang from his natural talent, being a member of the Arsenal Football Club, and having the good fortune to be coached by Arsène Wenger, a top-class coach. So, strictly speaking, the financial wealth of the family was created by the husband. However, in my judgment, there is a very significant factor in the success of the husband in which the wife played a vital role. The wife has suggested in her evidence that the husband was and is a drinker. From what I have read in the papers and been told by the husband and wife in evidence, I am satisfied that the husband was in an environment where, before the advent of Arsène Wenger in 1996, there was very considerable drinking amongst certain players in the Arsenal Football Club. In the early days I am satisfied that the husband did participate in some of those drinking sessions. However the wife realised that that was the way to ruin and unhappiness and I am satisfied that in about the mid-1990s or slightly later she took a grip on the situation and encouraged and persuaded her husband to move away from that style of living. That rather bland description of what she did probably understates her contribution in this respect. In the mid-1990s the husband gave interviews to the press in which he publicly praised the wife for all that she did to bring him back from the brink.

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Thus the wife did make a contribution to the husband's success as a footballer for Arsenal and also for England (in the late 1990s and in 2000 the husband played for England and was capped 10 times).'

[41] Bennett J's assessment of the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future is crucial. I, therefore, set out para [32] of his judgment in full:

'The wife has no income or if she can invest what she has not spent of the lump sum, such income would, in the circumstances of this case, be insignificant. I am satisfied, as I have already said, that she has no earning capacity now or in the foreseeable future. Her life is bound up with her children and will be for some considerable time in the future.

I have already set out [the husband's] income and other financial resources. He is secure in a very large income until June 2005. What will happen thereafter is unknown. The husband told me in evidence, which I accept, that after a player reaches the age of 31 and his contract expires, he will not be given a contract which lasts for more than a year but it may be renewed for a year at a time. In June 2005 the husband will be 32 years old. So, if Arsenal retain his services, he will be given a year's contract, renewable thereafter. The husband has no plans for his future thereafter. However, it may be that any new contract might not contain such high remunerations, and/or discretionary payments under EBTs [employee benefit trusts] may decline or possibly cease. After he has ceased to be a professional footballer – at least with Arsenal – it is likely that his income will decline very considerably.'

[42] Of financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future, the judge recorded that the wife's major responsibility now and in the foreseeable future was to look after her children and herself. Having considered the rival submissions as to her requisite budget he concluded:

'However, I am satisfied, looking at needs alone, generously construed, the figure of £180,000 pa for the wife and the three children is substantially too high. If I were to allow £30,000 for all of the three children and £120,000 for the wife, in my judgment that would be fair and just.'

[43] Bennett J's corresponding finding in relation to the husband is to be found in para [37] of his judgment:

> 'So far as the obligations and responsibilities of the husband are concerned he now has two families to maintain. However, in fairness to him, he has not suggested that the wife and the children should be in any way disadvantaged by the fact that he has to maintain his partner and their child. In any event I am satisfied that now and for the foreseeable future there will be more than adequate income to properly
>
> [2004] 2 FLR 906
>
> maintain his partner and child without in any way affecting his primary obligation and responsibility to the wife and the children.'

[44] For completion Bennett J recorded that none of the other s 25(2) criteria was relevant to his decision.

Bennett J's conclusions

[45] Bennett J then carefully reviewed Mr Mostyn's extensive submissions, designed to persuade him that his judgment in *McFarlane v McFarlane* was erroneous, and Mr Francis's submissions in response. He succinctly stated his conclusions on counsel's submissions in eight numbered paragraphs:

> '(1) In exercising the powers under s 23(1)(a) and (d) of the 1973 Act the court must have regard to all the circumstances of the case, first consideration given to the welfare of the children.
>
> (2) The court must, in particular, have regard to the matters set out in s 25(2).
>
> (3) In carrying out that exercise, the court is entitled to place such importance and weight on each matter in s 25(2)(a) as it thinks appropriate in the circumstances of the case (see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981).
>
> (4) However, "needs" or "reasonable requirements" is not a determinative or limiting factor in cases where the payor has an ability to pay more than the payee's needs (see *Cornick v Cornick (No 2)* [1995] 2 FLR 490, *White v White*, and *Cornick v Cornick (No 3)* [2001] 2 FLR 1240).
>
> (5) Thus the objective implicit in the exercise of the court's discretion under s 25 is to achieve a fair outcome in the financial arrangements between the parties (see *White v White*).
>
> (6) In seeking to achieve a fair outcome there is no place for discrimination between the spouses and their respective roles. There should be no bias in favour of the money-earner and against the home-maker and child-carer (see *White v White*).
>
> (7) The English statutory code allows of only one allocation of capital between spouses. Where, as in this case, capital claims are compromised and receive the court's approval by way of order, they cannot be revisited or reissued (see *Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 2 FLR 1144 and the House of Lords and Privy Council cases referred to therein at para [17]).
>
> (8) Where there has been or is to be capital provision made in favour of a spouse then, generally speaking, a subsequent or concurrent award of periodical payments ought to be for that spouse's maintenance, and ought not to be used to further distribute monies to the payee so as to give her (or him) savings, ie capital. But such a factor must yield to

> a greater or lesser extent to the particular circumstances of
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> [2004] 2 FLR 907
>
> the case if fairness so dictates. Thus, with that qualification, I broadly accept the thrust of Mr Francis's submissions.'

[46] Applying those principles to his earlier findings these then were his reasons for awarding the wife and children periodical payments in the global sum of £250,000, to be split between the wife and the children by the court in default of agreement between the parties:

> 'In my judgment, to confine in this instant case an award of periodical payments for the wife to a ceiling of "needs" or "reasonable requirements" where the husband has the ability to pay more, indeed far more, than the wife's needs would be a faulty exercise of the court's discretion. For that could be to determine her application by reference to one only of the matters in s 25(2) and ignore the other matters. I accept that the wife's contribution (as I have found it to be) made a significant difference to the success of the husband. She was part of the circumstances that persuaded the husband to drop the laddish culture and, as she put it, "grow up". Her contributions to the home, and the children, both now and in the future must not be underestimated, overlooked, or played down.
>
> [107] The husband's open offer of periodical payments is equivalent to about 10% of his net income. To suggest that in the circumstances of this case the wife should walk away with £120,000 (for her and the children) when set against the husband's net income of about £1.2m is thoroughly mean and would be unfair. However, to award her £444,000 because that represents 37.5% of his net income which is the same percentage of the capital she received, would be an unprincipled and unfair award on the facts of this case. She would in one year receive sufficient monies, which, after making provision for her and the children's needs, would leave her with a sum equivalent to her present lump sum or more. If the award were backdated to March 2003 and were to run to June 2005, a period of 2 years and 3 months, she would effectively have acquired further capital to the tune of £500,000 and more. That, in my judgment, could be seen to be blowing a large hole through the middle of *Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 2 FLR 1144 and in the instant case would be quite unwarranted.
>
> [108] Thus, in my judgment, the court must seek a way that does justice to the parties and which does not, so far as is possible, impose a glass ceiling on the one hand but which does not hand out capital on the other. It surely must be implicit in the concept of periodical payments when placed next to the concepts of lump sum and property adjustments that where there has been a capital adjustment between spouses in accordance with *White v White* [2001] 1 AC 596, [2000] 2 FLR 981, as it was in the instant case, the function of periodical payments should not then or at some later date be seen to further the claimant spouse's ability to mine the paying spouse's income for further capital. I see the force in Mr Mostyn's submissions that my decision in *M v M* contains irreconcilable tensions and contradictions. Indeed the decision that I will make in the instant case may be subject to the same criticism. But as I endeavoured to explain in *M v M*, the quantification of periodical payments is more of an art than a science,
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> [2004] 2 FLR 908
>
> given the width of the discretion expressly given to the court by Parliament.'

Counsel's submissions on the appeals

[47] The skeleton arguments prepared for the appeals demonstrate a great deal of industry, erudition and originality. They address the very general question: what should be the principles governing an award of periodical payments during joint lives or until remarriage in any case where the net income of the payer significantly exceeds what

both parties need in order to meet their outgoings at the standard of living which the court has found to be appropriate? Mr Singleton has advanced the arguments unsuccessfully advanced by Miss Stone in the court below. He has reviewed the development of the statute law over the past 150 years and he has analysed the manner in which the judges have interpreted and applied those provisions, particularly in recent years. He submits that academic commentators and judgments in the USA support his conclusions.

[48] Mr Mostyn has repeated the submissions that he advanced unsuccessfully in the court below. He advances this cogent criticism of Bennett J's judgment: in *McFarlane v McFarlane* were the principle asserted by Bennett J sound, then, as he himself partially recognised, his order breached it, albeit to a lesser extent than that of the district judge. What was the rationalisation for the uplift of over £50,000 that Bennett J allowed the wife above her annual need for expenditure? If there were no need that could be categorised as 'income' then the surplusage has to be categorised as capital or as income available for the acquisition of capital. He also relies upon the trend of the authorities in Canada, Australia and New Zealand, which he submits demonstrate a global shift which Bennett J dismissed out of hand. Mr Mostyn and Mr Singleton each adopted the submissions of the other in areas which, by sensible agreement, only one had tackled.

[49] Mr Singleton and Mr Mostyn contend for models that emphasise entitlement based on past contribution or continuing compensation for a sacrificed career or for the loss of benefits which the payee would have enjoyed but for the breakdown of the marriage. That last consideration they submit has statutory recognition in s 25(2)(h).

[50] Mr Posnansky repeated the submissions which succeeded before Bennett J. Although criticising Bennett J's award to Mrs McFarlane above Bennett J's generous assessment of her needs, he did not at any stage seek to cross-appeal.

[51] Equally Mr Francis repeated the submissions accepted by Bennett J at the trial. In advocating his application for permission to cross-appeal he made it plain that he was no longer contending for orders totalling £120,000 pa and would accept the judge's quantification of the needs of the wife and children at £150,000 pa.

[52] Mr Posnansky and Mr Francis assert that the court's simple task is to order such proportion of the income as will enable the carer to discharge the outgoings on the single-parent family home and the other anticipated family expenses.

[2004] 2 FLR 909

Conclusions

The principle that governed the judgments of Bennett J

[53] In a narrow sense Bennett J's principle that an award of capital can be made once and once only is undoubtedly correct. Capital orders were described as 'once-for-all orders' by Lord Diplock in the case of *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* [1980] AC 546, (1979) FLR Rep 223. Bennett J quite rightly pointed out that I had emphasised the principle in my judgment in the recent case of *Pearce v Pearce* [2003] EWCA Civ 1054, [2004] 1 WLR 68, [2003] 2 FLR 1144. However since the decision in *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* we have seen the amendments to the Matrimonial Causes Act 1973 that introduced s 25A and ss 31(7)(A)–(F). The effect of those amendments, in cases where capital claims have already been dismissed, is first to impose upon the court a duty to terminate the only continuing financial relationship as soon as that can be achieved without undue financial hardship; and secondly to empower the court to compensate the payee for the discharge of the periodical payments order with additional capital. So the old principle has to be qualified thus: the original once-for-all capital division that resulted in the dismissal of capital claims may be supplemented by a later transfer of capital, agreed or judged to be the fair consideration for the dismissal of the surviving claim to periodical payments. So much is implicit in the decision in *Pearce v Pearce* and would no doubt have been acknowledged by Bennett J if the cases had not been argued before him primarily as claims for indefinite and continuing periodical payments.

[54] For reasons which I will develop, in my judgment neither case should have been approached on that basis. In both cases a clean break had been partially achieved and a proper concentration on s 25A both by the parties and by the court would have provided a short answer to the issue of principle so extensively debated.
[55] The present appeals are far removed from any norm. In one case the single net income probably exceeds the expenditure of the two households (at a very high standard but excluding housing costs for the husband) by about £550,000 pa. In the other, the single net income probably exceeds the expenditure of the two households by about £900,000 pa. It is only the huge excess over need that creates the debate as what are the principles governing the quantification of the payee's award. Only that excess allows the advancement of the appellants' ambitious models. Only that excess renders the respondents' contrary propositions unconvincing.
[56] There is another feature of the present appeals that must be emphasised. In both cases the past surplus which had been converted into capital assets was divided by agreement. In the one case the division was equal, in the other the earner took about 60%. It was the scale of the contemplated future surplus that prevented the complete agreement, namely the clean break dismissing all claims. In both cases the agreement was seen, or should have been seen, as but the first stage in the progress to clean break. The future surplus could provide the consideration for the dismissal of the wife's outstanding claims. How many years of garnering of surplus would be necessary could not be calculated but only estimated. All depended on the surplus in each of the future years.

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Section 25A of the Matrimonial Causes Act 1973
[57] Of the amendments achieved by the Matrimonial and Family Proceedings Act 1984 the insertion of s 25A far outweighs in importance the deletion of the cosmetic minimal loss objective. Section 25A provides:

> '*Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage*
> (1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
> (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.
> (3) Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for a periodical payments or secured periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the court may dismiss the application with a direction that the applicant shall not be entitled to make any future application in relation to that marriage for an order under section 23(1)(a) or (b) above.'

[58] Its origins can be traced to the case of *Minton v Minton* [1979] AC 593, (1978) FLR Rep 461 where Lord Scarman said in his speech at 608F and 471 respectively:

> 'There are two principles which inform the modern legislation. One is the public

interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other - of equal importance - is the principle of "the clean break". The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.'

[59] The Law Commission in its 1981 report (Law Com No 112) advocated three policy objectives for the reform of the Matrimonial Causes Act 1973 as follows:

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- priority for the needs of the children;
- greater weight to be given to the divorced wife's earning capacity and to the desirability of both parties becoming self-sufficient; and
- imposing a 'clean break' where practicable and appropriate.

[60] In relation to the second objective there are in paras 26 and 27 the following passages:

'There was, however, a wide-spread feeling amongst those who commented on the Discussion Paper that greater weight should be given to the importance of each party doing everything possible to become self-sufficient, so far as this is consistent with the interests of the children; and we believe that the statutory provisions should contain a positive assertion of this principle.

The court has, under the existing law, power to make orders for a limited term, and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not or should not expect to rely on continuing support from her husband. We think that it would be desirable to require the courts specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, given the increased weight which we believe should be attached to the desirability of the parties becoming self-sufficient.'

[61] In relation to imposing a clean break the report recommended in para 28:

'Nevertheless, the response to the Discussion Paper showed strong support for the view (with which we agree) that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between a husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division.'

[62] Then there is this conclusion in para 30:

'The response to the Discussion Paper indicated wide support for the view that the court should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit - as distinct from periodical payments made to her to enable her to care for the children - should be primarily directed to secure wherever possible a smooth transition from marriage to the status of independence. We believe that this general objective should be embodied in the legislation.'

[63] In my judgment the underlying policy of the legislature in inserting s 25A into

the statutory scheme is not open to doubt.

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[64] The court's duty to seek a clean break was replicated in s 31 of the Matrimonial Causes Act 1973 to make plain that it applied not only at the stage of making the financial provision orders but equally at any later stage when the court considered its variation.

[65] The court's powers to bring about the clean break objective that had not appeared practicable at the first stage were significantly strengthened by the addition to s 31 of subss (7A)–(7F) by the Family Law Act 1996 with effect from 1 November 1998. The additional powers were set out and considered in the case of *Pearce v Pearce* [2003] EWCA Civ 1054, [2004] 1 WLR 68, [2003] 2 FLR 1144 and it is unnecessary to repeat that review here.

[66] In any case in which, despite a substantial capital base available for division, clean break is not presently practicable, the court has a statutory duty to consider the future possibility. That duty assumes particular prominence in cases where there is a certain and substantial surplus of future income over future needs. If, as in one of the present appeals, the surplus will be predictably short-lived, the first option for consideration should be the planned progress to clean break by means of a substantial term order open to a later application for extension. The obligation on the parties to achieve financial independence is mutual. The earner must give proper priority to making payments on account out of the surplus income. The payee must invest the surplus sensibly, or risk that her failure so to do might count against her on an application for discharge under s 31(7A) and (7B). Given the mutuality of the obligation, the opportunity and responsibility to invest should, in my judgment, be shared. It strikes me as discriminatory, and, therefore, wrong in principle, for the earner to have sole control of the surplus through the years of accumulation. The preferred mechanism by which the surplus is to be divided annually must be periodical payments. They are variable, which lump sum orders are not. They can, therefore, reflect fluctuations in the payer's income. They are determined by the court in the event of dispute. They terminate on the remarriage of the recipient. The practicality of such an order will depend upon many factors. Essentially the completion of the process must be foreseen within a relatively short span. A term of 5 years which these cases illustrate may be towards the limit of the foreseeable.

[67] I recognise the validity of Mr Posnansky's argument that because orders for periodical payments terminate on the death or remarriage of the payee the payer's future liability is to that extent contingent. Thus it can be said to be unjust to the payer to order the immediate sharing of surplus on account of a liability which may never materialise. That argument, however, is of little force where the sharing of the surplus is effected by a periodical payments order and where the duration of the scheme for sharing surplus income on account of the capitalisation of a periodical payment claims is relatively short term. Furthermore there is an element of speculation involved in any scheme for the capitalisation of periodical payments whether undertaken at the time of divorce or on a subsequent application for variation by discharge.

Outcome in McFarlane v McFarlane

[68] How then do these generalisations apply to the facts of these appeals? In my judgment the resolution of the contest in *McFarlane v McFarlane* was flawed by a failure to give sufficient weight to the duties created by s 25A.

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That is perhaps the result of the way the wife's case was advanced. In her Form E the wife sought 'to achieve a clean break in retirement' and to that end applied for annual instalment lump sums of £64,000 pa until the year 2017 (a span of 15 years).

[69] Three months later that part of her case was abandoned in correspondence on the ground that the scheme presented too many potential complications to be viable. At the hearing before the district judge, 5 months later, what was sought in Miss Stone's

skeleton was 'as part of her periodical payments a sum which she too can invest towards her old age'.

[70] It is of course easy to criticise with the advantage of hindsight, but the focus should have been on termination and not on post-retirement provision. The key was the husband's capacity to borrow in a tax-efficient way on the security of his home. Although he had borrowed very substantially to acquire an excessively expensive home, his proposal was to discharge the mortgage over 5 years by annual instalments of £347,500. Plainly on completion of that exercise he could remortgage his interest to finance the clean break. Over the intervening years he could make what would effectively be payments on account. The alternative presentation of a joint lives order adopted by both husband and wife diverted the court's attention from the opportunity to achieve a clean break years before either party approached retirement. Were this an appeal from a first exercise of judicial discretion I would set aside the judgment below and in the exercise of this court's discretion substitute an order for periodical payments at an increased annual rate for an extendable term of 5 years. Within the life of the order either side would be free to apply for variation dependent on the fluctuation of the husband's earnings. After 5 years the court could reassess the prospects of clean break in the light of:

(i) The husband's capacity to remortgage.
(ii) The extent to which the wife had built up a capital reserve from the surplus of income over expenditure in the intervening years.
(iii) The revival of the wife's earning capacity, the youngest child having reached secondary school age.

[71] However this is a second appeal in which we must review the error of principle in the district judge's judgment identified by Bennett J. Accordingly there may be no basis for a fresh exercise of discretion. The discretion exercised by the district judge, if held to be without error of principle, must be restored.

[72] Additionally I would emphasise that the focus on achieving independence without financial hardship at the earliest practicable date is inconsistent with the liberty which the district judge attached to the wife's joint lives order. At p 12 of her judgment she said:

> '... How the parties choose to spend their available income is a matter for them.'

Later she said:

> 'It is a matter for her whether she chooses to make pension provision ... and it is a matter for her whether she takes out insurance to protect

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> her and the children's position in the event that the husband dies or is ill and unable to work.'

[73] In my judgment the wife's responsibility to contribute to the financing of the clean break requires her to put the surplus periodical payments above needs (on the district judge's figures £122,000 pa) to achieving financial self-sufficiency. The evidence advanced was that the premium on a policy to secure her against the husband's death or disability would be £40,000 pa. Given the reduction of the years of risk, it would not seem to me reasonable for the wife to spend surplus on insurance. The greater priority is to achieve financial independence.

[74] It follows from the conclusions which I have already expressed that I am not persuaded that the district judge did fall into error of principle in making the order that she did. I acknowledge that her reasoning created the opportunity for the argument successfully advanced by Mr Posnansky before Bennett J but it is implicit in her reasoning that she recognised the wife's entitlement to a fair share of the husband's

surplus income, albeit that she did not correctly identify the overriding purpose to which it had to be put.

Outcome in Parlour v Parlour

[75] In the case of *Parlour v Parlour* the imperative to achieve finality is even stronger. The husband's income is substantially greater but the graph is likely to plummet within 4 or 5 years, in contrast to Mr McFarlane's prospect of steady ascent until retirement.

[76] Unfortunately the argument at the trial was directed as to the quantum of the joint lives order. The judge was not urged to focus on terminating the wife's financial dependency and it is, therefore, entirely understandable that he approached the case as he did. However in fairness to Mr Mostyn, in his final written submissions he concluded with these paragraphs:

> '32 The court should have little difficulty in concluding that in about 4 years' time H will enter his twilight years and that there is a real risk that he will not have husbanded his income responsibly so as to make proper long-term support for his family.
>
> 33 The court should also conclude that the prognosis of net income set out by JW in her second report is reasonable (about £1.2m net pa until June 2003).
>
> 34 Thus the court should conclude that to award W £444,000 from March 2003 to June 2004 from this income, which derives in large measure from a contract signed during the marriage, is wholly fair. It is a reasonable sharing of income. If it enables W to make savings then that is right and proper, on the facts of this case.
>
> 35 W will accept in any future capitalisation that she should bring into account such sum of periodical payments that she is awarded in excess of her aliment. The judgment can make this explicit.'

[77] Mr Francis in his submissions was at pains to say that his client was approaching the end of his career at its present exalted height; he was prone to injury; his contract might not be renewed at its conclusion when he will be 32 years of age. These considerations only underline the obvious need for a substantial proportion of the income in the present fat years to be stored up

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against the future famine. Again I conclude that it would be wrong in principle to leave the responsibility and opportunity to the husband alone. The wife's and the children's needs were put at £150,000 by the judge. To award her the global figure of £444,000 pa sought by Mr Mostyn allows her and obliges her to lay-up £294,000 pa as a reserve against the discharge of her periodical payments order. I would in this case order a 4-year extendable term. Hopefully a clean break will be achievable then on an assessment of the husband's earning capacity at 35 years of age and the wife's independent fortune derived from the original capital settlement augmented by the substantial annual surplus built into her periodical payments order in the interim.

Reciprocal assessment of needs

[78] It is obvious that in cases such as the present the calculation of the amount of surplus income cannot be achieved without first establishing what both the payer and the payee need in order to meet their projected expenditure. In preparation for the trials below both applicants advanced budgets which were generously cast and which at trial were subjected to rigorous cross-examination. In both cases the trial judge then assessed the applicant's needs, endorsing the majority of the total sought.

[79] In both cases the husbands failed to complete the relevant section of the Form E and in one case the husband refused subsequent requests for information.

[80] Mr Posnansky submits that *Campbell v Campbell* [1998] 1 FLR 828 justified that refusal. That is certainly not the effect of the decision. The relevant observation

provoked by the facts of the case appears at 833G where I said:

> 'It has never been the custom in ancillary relief litigation to look with scrupulous care at the budget items of the prospective payer. Of course, it is incumbent on the judge to cross-check to ensure that the adjudication that meets the applicant's needs is an adjudication which the respondent can afford. But that essential task the judge specifically performed, as is plain from the passage which I have already cited.'

[81] I do not resile from that. It is the converse of passages in other authorities that deplore excessive investigation of the payee's budget.

[82] The cavalier disregard of the obligation to complete that section implies precisely the discriminatory vice identified by the House of Lords in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 in condemning the quantification of a wife's capital share in a big-money case solely by reference to her reasonable requirements. More fundamental is the implicit rejection of the application of s 25(2)(b):

> '... The financial needs ... which each of the parties to the marriage has or is likely to have in the foreseeable future.'

[83] We were told by the Bar that a practice has grown up for substantial earners to decline any statement of their needs on the grounds that they can afford any order that the court is likely to make. These appeals must put an end to that practice.

[2004] 2 FLR 916

The wider issues

[84] The disposal of the present appeals which I propose is achieved by giving what I believe to be the proper emphasis to s 25A and the amendments to s 31(7) introduced by the Family Law Act 1996. That route circumvents the arguments developed both before Bennett J and in the written skeletons submitted on these appeals. That wider presentation examines:

- (a) the evolution of the statutory powers between 1857 and 1970;
- (b) the definition of periodical payments;
- (c) the principles governing the assessment of periodical payments;
- (d) the guidance to be derived from judgments and academic analysis in other jurisdictions.

[85] I recognise that these areas are of some relevance to the present appeals and are likely to be of greater relevance to a number of other cases, either pending or certain to arise, in which s 25A is, for one reason or another, not prospectively engaged. A relatively benign tax regime has now been in force for many years and there is ample evidence of an increasing band of very high earners who may not possess a matching capital base. Accordingly I will express my opinion on each of the above topics briefly, in the context of cases in which the income of the party who earns is significantly greater than the combined outgoings of himself and the payee.

[86] It is worth re-emphasising that these are exceptional cases. In the majority of cases the income of the earner is insufficient to cover the outgoings of two households. In many others the single income is sufficient only to provide for both households at a standard below that which the family enjoyed before separation. In many others the income will provide for both amply. In many more it will provide for both and a measure of luxury which each contends is not disproportionate to the standard enjoyed before separation. In all the above instances the respondents are correct in their submission that the court's discretionary judgment will be dominated by an assessment of needs or, for the more affluent families, reasonable requirements.

The evolution of the statutory powers and the definition of periodical payments

[87] The statutory power to order periodic sums by way of maintenance first appeared in the Matrimonial Causes Act 1866. At that date a wife was incapable of property ownership, the corollary being that her husband was ordinarily liable for her debts, since she contracted as his agent of necessity. Section 1 of the Matrimonial Causes Act 1866 reads:

> 'In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable.'

[88] There can be no doubt that such payments were for the wife's maintenance, that is to say for her necessities, her needs, her aliment. The Married Women's Property Act 1882, which allowed the wife the power to own property independently, did not alter this construction. Nor did the

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statutory language vary greatly through succeeding reforms. The relevant section of the Matrimonial Causes Act 1965 still provided:

> 'An order requiring the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance as the court thinks reasonable.'

[89] There is no doubt, in my judgment, that to that date the court's power did not extend beyond ordering maintenance payments to meet the wife's needs.

[90] The Matrimonial Proceedings and Property Act 1970 was a major reforming statute heralded by the 1969 Law Commission Report. The following paragraphs are of some relevance:

- (i) Paragraph 17(a) makes plain that the Law Commission advocated new terminology rather than new powers. Financial provision was the generic term for periodical and lump sum payments.
- (ii) Financial provision was contrasted with provision by property adjustments.
- (iii) Whilst the primary objective of financial provision orders was 'to provide income for the maintenance of spouses' the introduction of the lump sum order had 'blurred the line between provision from income and provision by way of adjustments to capital': see para 49 of the report.

[91] Thus I find nothing in the report that suggests the limited role for periodical payments for which the respondents have contended.

[92] Furthermore the statutory language itself clearly demonstrates the limitations of the respondents' submissions. The power to order periodical payments is to be found in s 23 of the Matrimonial Causes Act 1973. In awarding periodical payments the court has to have regard to the s 25(2) criteria in that Act, amongst which the recipient's needs are only one of a multi-factored checklist.

[93] Furthermore the abolition of the agency of necessity by the Matrimonial Proceedings and Property Act 1970 supports the view that 'maintenance' was not being used by Parliament in the sense given to it when a wife could take advantage of the agency of necessity.

[94] The term 'maintenance' survives only in s 22 and s 27 of the Matrimonial Causes Act 1973. In those contexts the term might be thought to have the traditional meaning. However, the judges have rejected that approach.

[95] The argument that the court's power under s 22 to order maintenance pending suit was confined to sums necessary for the recipient's daily support was considered by Charles J in the case of *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71. In para [48] of his judgment Charles J said that:

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'I do not accept that argument for the following reasons:

(1) The purpose of the 1970 Act was to change statutory provisions that were outdated and inadequate and to make a new start.

(2) Although the word "maintenance" was used in both ss 1 and 6 of the 1970 Act (now ss 22 and 27 of the MCA 1973) there are changes between s 6 of the 1970 Act (s 27 of the MCA 1973) and its predecessors and the word "maintenance" is not used in the predecessors to s 1 of the 1970 Act (s 22 of the MCA 1973).

(3) The subsequent amendments to s 27 of the MCA 1973 confirm or clarify that "maintenance" was not used by Parliament to refer to the old common law duty of a husband to maintain his wife.

(4) The report (read alone and together with the Working Paper) supports the conclusion that "maintenance" was not used by Parliament to refer to the old common law duty of a husband to maintain his wife.'

[96] Furthermore Charles J in *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 followed the earlier decision of Holman J in *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 establishing that the court had power to provide funds for the wife's contemplated litigation costs by adding substantial monthly instalments to what she needed for her aliment.

[97] The cases that have considered the boundary of the court's power in ordering periodical payments are to the same effect. In *Cornick v Cornick (No 2)* [1995] 2 FLR 490 Sir Stephen Brown P in upholding the decision of Hale J (as she then was) stated:

> 'I do not believe that Hale J erred in her approach in principle to this case, and I reject the submission which Mr Mostyn has made that there was a delimiting factor (as he termed it) which should have had the effect of restricting a judge hearing an application for variation to what he termed the budgetary or marital standard.'

[98] In so deciding the court endorsed and followed the earlier decision in *Boylan v Boylan* [1988] 1 FLR 282. In *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 Charles J stated in para [106] of his judgment:

> 'In my judgment, just as it is on the first application for orders for financial provision, *White v White* [2000] 2 FLR 981 is clear authority on an application for variation (and for an order for a lump sum on a discharge or variation of a periodical payment) for the following points, namely that (a) the court should not rely on the judicial concept of "reasonable requirements" as a determinative or limiting factor in cases when a payor has, or acquires, an ability to pay more than the payee's financial needs even when they are interpreted generously and called "reasonable requirements", and (b) the court should exercise its discretion by applying the words of the statute.'

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[99] Thus there can be no doubt of the court's power to order periodical payments to reflect more than the recipient's mere aliment, provided that all the s 25(2) criteria, all the circumstances of the case and overall fairness so require.

The principles upon which periodical payments are to be assessed

[100] This question I have partially addressed in considering the definition of

periodical payments. The respondents' submissions take us back to the 1969 Law Commission report. They cite the following passage from para 83:

> 'Of the criteria mentioned in para 82(a), (i) [the respective means, needs, earning capacity and financial responsibilities of each spouse] and (ii) [the standard of living of the parties] will be especially relevant to periodic cash provisions; the others to property adjustments and lump sum awards.'

[101] The appellants' submissions point out that the force of that citation is diluted by adding the next following sentence:

> 'But, as already emphasised, the two types of financial provision cannot and should not be kept wholly distinct, and all criteria are, or may be, relevant.'

[102] Thus I do not derive help on this issue from that source. It is almost trite to emphasise that the assessment of periodical payments must be governed by the language of s 25. No one factor in the s 25(2) checklist predominates. The submissions of the respondents seek to elevate the applicants' needs to a dominant priority. However, in deference to authority they accept that it cannot be aliment or bare needs but some form of enhanced needs. That acceptance leads them into a position that is difficult to defend. How is the surplus above needs to be defined or assessed? Bennett J recognised the difficulty in his judgment and met it by saying that the assessment of periodical payments was an art and not a science. However, practitioners rightly complain that art depends greatly upon the individual judge and consequently art imports unpredictability of outcome.

[103] The same difficulty confronted Mr Posnansky. He was fluent in negative statements. He said that there must be no reference to entitlement based on some contribution during marriage without which the payer would not be able to achieve his elevated future earnings graph. Equally proscribed, he submitted, was any reference to compensation for an earning capacity either sacrificed or irretrievably abandoned by agreement during the marriage. The only positive consideration that Mr Posnansky was able to advance as the basis for the assessment of surplus over needs was the planned progress to clean break in implementation of the s 25(A) duty. Mr Posnansky's inability to suggest any other positive consideration leads me to understand his concept of 'needs plus' as the old concept of reasonable requirements, which was the measure for an applicant's capital award for about 20 years.

[104] But why should Lord Nicholls of Birkenhead's demonstration of the discriminatory nature of the reasonable requirements measure in capital awards not apply equally to income awards? To cite again the familiar paragraph:

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> 'But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the

yardstick of equal division.'

[105] Although this paragraph was not written with periodical payment assessment in mind, why should the principle defined not be of equal application?
[106] My present view is that in this jurisdiction we should not flirt with, still less embrace, any of the categorisations of the defining purposes of periodical payments advanced by academic authors. The judges must remain focused on the statutory language, albeit recognising the need for evolutionary construction to reflect social and economic change. The statutory checklist and the overall circumstances of the case allow the judge to reflect factors which are said to be inherent in either the entitlement model or the compensation model. But to adopt one model or another or a combination of more than one is to don a straitjacket and to deflect concentration from the statutory language. Clearly in the assessment of periodical payments, as of capital provision, the overriding objective is fairness. Discrimination between the sexes must be avoided. The cross-check of equality is not appropriate for a number of reasons. First, in many cases the division of income is not just between the parties, since there will be children with a priority claim for the costs of education and upbringing. Secondly, Lord Nicholls of Birkenhead suggested the use of the cross-check in dividing the accumulated fruits of past shared endeavours. In assessing periodical payments the court considers the division of the fruits of the breadwinner's future work in a context where he may have left the child-carer in the former matrimonial home, where he may have to meet alternative housing costs and where he may have in fact or in contemplation a second wife and a further child.
[107] Returning to the specific question considered by Bennett J, I doubt the modern relevance of the distinction sought to be drawn between income and capital.
[108] In the twentieth century social and economic shifts broke down the hallowed distinction which our Victorian forbears drew between capital and income. In days of zero inflation, or even deflation, and before the introduction of income tax, capital assets were invested for the steady yield

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which produced the income from which family expenditure was met. The spending or the reduction of capital signalled the road to ruin.
[109] In the aftermath of the Second World War rates of tax upon unearned income approached 100%. The avoidance of such penal rates became for some a paramount objective. In an age when the annual rate of inflation spiralled, the acquisition of capital by substantial borrowing, which could often be set-off against earned income otherwise liable to tax, became the ordinary means of acquiring substance, particularly as the rise in property values frequently outstripped the rise in inflation. The consequence has been the erosion, if not the elimination, of the hallowed distinction between capital and income. What people spend is money which is likely to be derived from a variety of sources. Spending needs may well be met from the sale of capital assets or the realisation of capital appreciation. Provision for the future may be by investment in an income fund or by the acquisition of capital assets held for subsequent realisation. All these realities are well illustrated by the financial arrangements and choices that the McFarlane family have made.

The guidance to be derived from judgments and academic analysis in other jurisdictions

[110] In my judgment these sources were of only passing relevance to the two appeals presently before us. The respondents stressed that in any event the Australian, New Zealand and Canadian decisions are founded on statutory criteria that differ from the provisions of the Matrimonial Causes Act 1973. Nevertheless there can be no doubt that the trend in these common law jurisdictions is towards the recognition of wider purposes, objectives and factors in the quantification of spousal support orders. Nowhere are the needs of the applicant the dominant consideration. I would, therefore, mark these common law decisions and guard against any approach that would put this

jurisdiction out of step where the application of our statutory provisions is open to more than one interpretation. It seems inevitable that a future appeal will require a closer analysis of Commonwealth authority.

[111] The New York case-law is, in my judgment, plainly of lesser relevance. Mr Mostyn sought to persuade us to follow the approach reflected in what he described as the leading and landmark case of *O'Brien v O'Brien* (1985) 66 NY 2d 576. There the court assessed the likely excess over average earnings of the husband's future earnings as a medical practitioner. It then capitalised that anticipated achievement and awarded the applicant 40% of the capital sum payable by 11 equal annual installments. That approach seems to me to be open to obvious criticism in any jurisdiction in which the recipient's entitlement terminates on death or remarriage. I share the misgivings expressed by Coleridge J in recent decisions. In *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 he said:

> 'In the current climate now, where the court is engaged more in dividing up assets than in calculating a party's reasonable needs, there would be logic in trying to calculate and include a figure for any asset which generates a secure income. At its most extreme that might include the valuation of a party's earning capacity. However, in my judgment, the evaluation of such an ephemeral item would be pregnant with problems and lead to endless debate incapable of fair resolution.

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> It would be even more problematic where there was ongoing provision for children.'

[112] In *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143 Coleridge J said in para [27] of his judgment:

> 'The valuation of a person's earning capacity by its reduction to a fixed figure is not an exercise that can usefully be embarked upon. There are too many imponderables. However, it seems to me perfectly proper to pray in aid, by way of makeweight to an argument in relation to any particular capital division, an earning capacity available to one party or another over and above income generated from the capital being divided.'

Orders

[113] Given the views which I have expressed on the two appeals, Mr Francis's application for permission to appeal is manifestly hopeless. I would dismiss it. In *McFarlane v McFarlane* I would set aside the order of Bennett J and restore the order of the district judge without the provision for index linking but for a term of only 5 years from the date of her order. In the case of *Parlour v Parlour* I would allow the appeal and substitute the order sought by Mr Mostyn for the term of only 4 years from the date of the trial. Obviously during that term the value of the wife's percentage share will fluctuate, and probably reduce, as the husband's earnings vary from their present level.

LATHAM LJ:

[114] The vast majority of the problems which the courts have to resolve in relation to matrimonial finance involves a difficult exercise in ensuring that limited resources are distributed in such a way as to reduce the financial hardship of divorce as much as possible. But we are dealing in the present appeals with cases where the position is very different. In neither case, however, is there sufficient capital for there to be an immediate solution by way of a clean break. But in both there is, in *Parlour v Parlour* at least at present, annual income far in excess of the needs or reasonable requirements of the parties. As Thorpe LJ has pointed out, that excess amounts in one case to approximately £550,000 pa and in the other approximately £900,000 pa.

[115] Counsel for the husbands both accepted that the wives' entitlement was not restricted to their reasonable requirements, accepting as they did that that would be an unwarranted restriction on the court's discretionary powers bearing in mind the matters set out in s 25(2) of the Matrimonial Causes Act 1973. Their submissions, however, came perilously close to submitting that there is little room for other considerations. That applies in particular to Mr Posnansky's argument that a periodical payments order cannot be used as a means to enable a wife to build up capital, as this would cut across the principle established in *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* [1980] AC 546, (1979) FLR Rep 223.
[116] I have considerable sympathy, in one sense, for the view that the 'reasonable requirements' approach has the merit of being both flexible, in that the word 'reasonable' can take into account a number of the matters set out in s 25(2) and also being capable of pragmatic evaluation. The problem

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quite simply is that it does not give proper effect to the words of s 25(2). In particular, in the context of Mr Posnansky's argument, it does not give effect in any way to the provisions of s 25(2)(b) and (f) which require the court to look to the future. This not only permits, but in an appropriate case, may also require the use of income to generate capital for future eventualities. It is clear that there will be cases where the assessment of the parties' reasonable requirements will be the only sensible route to a fair division of limited resources. But where, as here, there is an excess of income, that can only be part of the inquiry.
[117] It is, however, a necessary part of the inquiry. For it is only by examining the reasonable requirements of both parties that the quantum of the excess can be identified so as to enable sensible decisions as to its disposal to be made. That necessarily involves the husband providing the relevant information to the court. The practice which has developed of not providing that information in cases such as these is, in my view, not only discriminatory but also demeaning to the wife. It concentrates the forensic battle on an examination of the wife's claim in a way which is, in my view, inappropriate. The exercise required by statute is one which is intended to produce a fair result. I consider that *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 applies as much to claims for periodical payments as to capital provision. And an examination of the husbands' reasonable requirements will be part of that exercise.
[118] The problem is that the concept of fairness is elastic and often subjective. Attempts to identify what society would consider to be an appropriate yardstick to use to determine fairness have found the answer elusive and the material with which we have been provided from other jurisdictions has merely underlined how difficult the search for the answer has proved to be. In the absence of a consensus, decisions will have to continue to be made on a pragmatic and individual basis, which is inevitably unsettling for litigants and their advisors.
[119] But in the present cases, I agree with Thorpe and Wall LJJ, both of whose judgments I have read in draft, that the solution is to be found in s 25A. The duty imposed on the court by that section requires us to consider the extent to which it is possible within the family resources to achieve a clean break. In the present cases, this can only be done by use of periodical payment orders enabling the respective wives to accumulate capital. For the reasons that I have already given, that seems to me to be a perfectly proper use of such an order. Like both Thorpe and Wall LJJ, I recognise that this is an approach which was not argued either before Bennett J, or us. I am satisfied, however, that it is the right route to take in order to resolve these appeals. For the reasons that they give, I would allow these appeals in the terms proposed by Thorpe LJ, and dismiss the application for permission to appeal in *Parlour v Parlour*.

WALL LJ:
[120] I agree that these two appeals should be allowed for the reasons given by Thorpe LJ, whose judgment I have had the advantage of reading in draft. I also agree with the orders he proposes. I add a short judgment of my own partly to reflect the

interest which the two cases have generated within the profession, but primarily because we are disagreeing with an experienced judge of the Family Division, who conscientiously applied himself to the

arguments addressed to him, and decided both cases on the basis of those arguments.

[121] It is a frequent (albeit informally expressed) complaint of judges at first instance that cases argued before them bear little resemblance to the decisions which emerge after the self-same cases have been argued in the Court of Appeal. Bennett J would, I think, be entitled to voice that complaint in relation to these two appeals.

[122] Both decisions, one arising by way of appeal from the district judge and the other by way of the exercise of a first instance discretion, were, it seems to me, dictated by what appears to have been an analysis agreed at the Bar and then put to the judge. That analysis appears to have been that because there had been in each case (1) a consensual capital distribution by way of lump sum and property adjustment orders and (2) an agreement that the capital distribution was insufficient to bring about a clean break, it therefore followed (3) that there should be indefinite orders for periodical payments expressed to last during joint lives or until the remarriage of the payee or further order of the court.

[123] For ease of reference, although it is not strictly accurate, I will refer to such orders as 'joint lives' orders. In my judgment, proposition (3) in para [122] above is both a non sequitur and contrary to the statutory objective contained in s 25A of the Matrimonial Causes Act 1973.

[124] With the exception of the concluding paragraphs of Mr Mostyn's closing submissions on behalf of Mrs Parlour (set out by Thorpe LJ in para [76] of his judgment, and which go to future capitalisation rather than to s 25A), no consideration appears in either case to have been given to, and no substantive argument addressed to the judge on, s 25A(1) and (2) of the Matrimonial Causes Act 1973, which Thorpe LJ has set out in para [57] of his judgment, but which bears repetition:

> '*Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage*
>
> (1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under s 23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.'

[125] In *McFarlane v McFarlane*, the district judge recorded the parties' agreement that there was insufficient capital to achieve a clean break, and dealt summarily with s 25A(2) simply stating her satisfaction that this was not a case where the wife could adjust, without undue hardship, to the termination

of periodical payments in her favour. Although Mrs McFarlane had at one point posited a clean break by lump sum instalments of £65,000 pa indexed linked until 2017, she abandoned that approach before the hearing, and her case was put to the district judge on the basis that there was no reason why she should not receive income at the level of

£275,000 pa net index linked on an indefinite basis to enable her to make provision for the future for herself, for as long as such a level of periodical payments was within Mr McFarlane's means. Accepting the district judge's award of £250,000 pa, her case was advanced both to the judge and to this court on the same basis. Section 25A receives only a passing mention in two and a half lines of Mr Singleton's erudite and exhaustive 131-paragraph skeleton argument prepared for this court. It was only in his written submissions in reply that Mr Singleton addressed s 25A directly.

[126] As Mr Posnansky points out, both his skeleton arguments before the judge in the court below and in this court make reference to s 25A and to the statutory aim of the clean break. But the former does so in the context of it being common ground that *McFarlane v McFarlane* was not a clean break case, and in the context of a submission that joint lives maintenance fixed at a high level was both inimical to the achievement of a clean break and wrong in principle because it included an element for future long-term provision by way of capital accretion or pension fund. The same argument, in a slightly more sophisticated form, appears in his skeleton argument prepared for this court.

[127] The absence of any reference to s 25A of the Matrimonial Causes Act 1973 in *Parlour v Parlour* is, in my judgment, even more surprising because it was manifest that a substantial question mark hangs over Mr Parlour's future earning capacity. The judge, being invited to make a joint lives order at a fixed percentage of the husband's net income (a global sum of £444,000 pa for the wife and the three children) declined to do so, as it seems to me, on two bases. First, on the facts, he held that the husband was likely to put aside significant sums from his income and other interests in the next year and a half, and there would, accordingly, be a 'greater capital pot of the husband for the support of the wife and children if his income thereafter declines significantly'. Secondly, the judge expressed the view that 'the time for (Mrs Parlour) to seek the court's assistance in mitigating as far as possible risks to her economic livelihood, both present and future, was at any final hearing as to capital. She was not obliged to settle her capital (or any other) claims at the FDR but she did so'. Why then, the judge asked rhetorically, should it be possible for her to seek an award for periodical payments way, way beyond her needs (generously interpreted) the effect of which, on her own evidence, would give her substantial savings and thus capital? He therefore concluded:

> '... It surely must be implicit in the concept of periodical payments when placed next to the concepts of lump sum and property adjustments that where there has been a capital adjustment between spouses in accordance with *White v White*, as it was in the instant case, the function of periodical payments should not then or at some later date be seen to further the claimant spouse's ability to mine the paying spouse's income for further capital.'

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[128] At the same time, of course, the judge recognised the tension between that statement, and the actual order he made which – almost exclusively because of the size of Mr Parlour's income – substantially exceeded Mrs Parlour's needs.

[129] In my judgment, Bennett J's approach is a reflection of the manner in which the cases were presented to him. It is an approach which, in the vast majority of modest income cases, is likely to be correct. However, in my judgment, the conventional joint lives order approach to periodical payments does not fit easily with the highly unusual facts of these two cases, and in particular the two critical factors common to each, namely (1) the absence of sufficient capital to produce an immediate clean break; and (2) the fact that in each case the payer's income is easily able to accommodate periodical payments to the payee, in the judge's words 'way, way beyond her needs (generously interpreted)'. In this context, it seems to me that s 25A was of direct application, and it is unfortunate that its proper application did not form part of the argument.

[130] In his written submissions in reply, Mr Singleton, it seemed to me, was

dismissive of s 25(A). Although a clean break is a 'desirable objective', s 25A does not, he argued, justify reducing a wife's entitlement in order to effect a clean break. Thus, he submitted, the obligation on the court is only a duty to 'consider' effecting a clean break where 'appropriate' and there is not a presumption that there will be a clean break. The correct approach, therefore, is to establish the wife's entitlement by reference to s 25 and then consider whether or not a clean break is possible.

[131] I cannot accept this analysis of the role of s 25A of the Matrimonial Causes Act 1973. Of course, any order predicated on s 25A must be fair, and by reference to the terms of the section itself will be an exercise of the court's powers which involves the application of the criteria contained in s 25(2) of the Matrimonial Causes Act 1973. In my judgment, however, the philosophy of the clean break contained within s 25A, clearly identified by Lord Scarman in his speech in *Minton v Minton* [1979] AC 593, (1978) FLR Rep 461, at 608 and 471 respectively (well before the repeal of the s 25 tailpiece) as one of the two principles which inform the modern legislation, is at the heart of the amended statute.

[132] Section 25A of the Matrimonial Causes Act 1973 was enacted at the same time as the tailpiece to the old s 25 was repealed. It is, of course, the case, as Lord Nicholls of Birkenhead points out in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981, at 604G and 989 respectively, that when the tailpiece to s 25 was repealed, nothing was inserted in its place as a mandatory overarching statutory imperative as to the manner in which the court was to exercise its powers under s 25. This does not, however, in my judgment, detract either from the fact that s 25A is a statutory embodiment of the principle enunciated in *Minton v Minton* or from the fact that the clean break, in Lord Scarman's phrase, represents one of the two principles informing the modern legislation.

[133] It is, of course, the case that s 25A of the Matrimonial Causes Act 1973 uses the word 'consider'. The omission of the words 'to consider whether it would be appropriate' in s 25A(1) would be to cause manifest injustice in those many cases where a clean break is not possible. But the statutory obligation, in my judgment, is clear. The court has a duty, in every case in which it makes orders for ancillary relief, to consider the

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appropriateness of exercising its powers in order to bring about a clean break within a reasonable time. This includes in s 25A(2) the particular duty to consider fixed-term orders for periodical payments. It seems to me, with respect, that this exercise was simply not undertaken in these two cases.

[134] Mr Singleton and Mr Mostyn are, however, I think, right when they submit that a payee's right to periodical payments is to a share of the payer's income which the payee (in each of the current cases the wife) has, through her domestic contribution, helped the payer develop. I, therefore, agree that where the payer's income is sufficiently large (as here) a cut-off point for periodical payments based on generously interpreted needs, thereby leaving a large surplus of income for the payer to do with as he pleases, has no foundation in the statute and is discriminatory. But the danger of this approach seems to me to be that it runs the risk to reintroducing the repealed tailpiece of s 25 of the Matrimonial Causes Act 1973 by the back door. If the payee has, in effect, a vested, life-long interest in such an income, is she not being placed in the position in which she would have been if the marriage had not irretrievably broken down? And is the principle contained in s 25A not being simply by-passed?

[135] I am the first to acknowledge that periodical payments based on a proportion of joint incomes (for example, the old 'one-third' rule) was discriminatory and may well have caused injustice to women payees. The balance which, it seems to me, needs to be struck in a case such as the present, is the need to achieve fairness to both wives whilst fulfilling the obligation imposed by s 25A. In my judgment, that is not achieved by open-ended orders of the type sought by both Mrs McFarlane and Mrs Parlour. It is achieved by orders which exceed need in amount, and which divide equitably the very large income enjoyed by both husbands. But with that division, in my judgment, comes

a responsibility on the payee to use the surplus over needs towards financial independence and self-sufficiency.

[136] Thus, in exceptional cases such as the present, and on the basis of term orders, I have no difficulty in contemplating periodical payments being used by the payee as a means of accumulating capital. That is because I perceive Part II of the Matrimonial Causes Act 1973 (as indeed it has been perceived from its inception as the Matrimonial Proceedings and Property Act 1970) as a flexible code designed to ensure that its various components are used imaginatively to produce a fair result. In *Wachtel v Wachtel* [1973] Fam 72, at 91, this court described the Matrimonial Proceedings and Property Act 1970 as:

> '... a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages have been dissolved ... We regard the provisions of ss 2,3, 4 and 5 of the Act of 1970 as designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end ...'

[137] The theme of flexibility was mirrored in *Trippas v Trippas* [1973] Fam 134 (see, in particular, the judgment of Scarman LJ (as he then was) at 144) and in many of the cases in this court dating from the early days of the statute. Thus in *Doherty v Doherty* [1976] Fam 71, this court eschewed technicality when considering the distinction between lump sum and property adjustment

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orders. Ormrod LJ (whose judgments, as Lord Nicholls of Birkenhead commented in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981, at 607 and 991 respectively, are a valuable source of the jurisprudence of the period) said at 79:

> 'Whether it is right, or not, to accept counsel for the husband's submission that a clear distinction should be drawn between notices of application for financial provision under s 23 and notices of application for property adjustment orders under s 24, may be doubted. These two sections are, in effect, a statement by Parliament of the code to be adopted by the court in dealing with ancillary relief after divorce generally. The fact that they are two separate sections seems to me to be much more a matter of convenience and drafting than anything else. There is no reason that I can see why any distinction should be drawn between those two classes of relief which the court is now empowered to grant. In my view, these two sections should be, as far as possible, regarded as part and parcel of a single code. It may be very important in many cases when the matter comes to be investigated by the court that the court should be free to make either a property adjustment order or a lump sum order, whichever turns out to be the more convenient in the circumstances. It would be unfortunate, I think, if that degree of elasticity were lost for some technical reason. It is quite plain that the same principles apply in the assessment of claims under each of these two sections. That appears from s 25, and it is equally plain from the judgments in *Trippas v Trippas* of Lord Denning MR and Scarman LJ. Lump sum orders are alternatives to property adjustment orders, and in many cases one order may prove more convenient than another. I do not think there is any greater difference than that. So, in my judgment, the court should keep technical points of the kind with which we are dealing in this case to an absolute minimum.'

[138] Of course it is the case that the statutory imperative which both *Wachtel v Wachtel* [1973] Fam 72 and *Doherty v Doherty* [1976] Fam 71 were serving was the now repealed tailpiece to s 25. But, in my judgment, the incremental changes to the statute over the years since 1970 which have changed its direction and remedied a number of injustices (notably in the field of pensions) have not altered the fundamental approach. The statute is a flexible code designed to enable the court to achieve a fair

outcome. Periodical payments are one part of that code. The principle of the clean break is now, in my judgment, contained in s 25A. If, in exceptional cases such as the present, periodical payments can be used to enable a payee to accumulate capital and thus facilitate a termination of financial obligations within a reasonable time, such a use seems to me fair and square within the statutory objective. What do not, however, seem to me to be within the statutory objective in the present two cases are indeterminate and unfocused joint lives orders very substantially in excess of needs.

[139] Speaking for myself, I do not see this approach as inconsistent with the decision of this court in *Pearce v Pearce* [2003] EWCA Civ 1054, [2004] 1 WLR 68, [2003] 2 FLR 1144. In that case the court was considering capitalisation of periodical payments under s 31(7B) of the Matrimonial Causes Act 1973. The judge had construed that section as giving him the

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power to make an additional capital award over and above that required to capitalise the wife's order for periodical payments. Such an additional award was in conflict with the principle that the capital distribution ordered or agreed on dissolution was once and for all. The present cases seem to me quite different. An award of periodical payments designed to enable the payee to accumulate capital which can then be taken into account when consideration is being given to the sum required to achieve the termination of the order for periodical payments, seems to me wholly consistent with the terms of both s 25A of the Matrimonial Causes Act 1973 (and for that matter, s 31 (7B)) and does not conflict with the principle that capital awards are once and for all.

[140] For all these reasons, therefore, I am in agreement with Thorpe LJ that neither order made by the judge can stand. I have found more difficult the question as to what orders this court should put in their place. In *McFarlane v McFarlane*, however, it seems to me that the outcome is effectively dictated by the fact that the case reaches us as at second appeal, and that the appeal from the district judge to Bennett J was governed by *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207. Since I agree with Thorpe LJ that the judge was wrong to interfere with the order of the district judge on two bases: (a) that her order wrongly required the husband to pay over to the wife 'monies which were likely to be directed into financial vehicles for the accumulation of capital'; and (b) that the effect of her order was to 'subvert the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical payments is maintenance', it follows that the only course properly open to this court is to restore the order of the district judge.

[141] Despite the affluence of the parties, I am very conscious of the high cost of this litigation to them, and in any event, in practical terms I have doubts about the utility of a further hearing designed to identify a proper level of payments designed to fulfil the objectives of s 25A. In the event, therefore, I am persuaded by paras [68]–[74] of Thorpe LJ's judgment that whilst the district judge did not address her mind to s 25A(1) and left to Mrs McFarlane the use to which she put the surplus over needs in the order for periodical payments, that is not an error of principle, and thus the proper course is not to remit the matter but to restore the district judge's figure for periodical payments and to substitute for the joint lives order an extendable term of 5 years. At the conclusion of that period, which should coincide with the elimination of the husband's commitment to repay the mortgage on his property, it will be for the parties to negotiate, or for the courts to determine, whether a clean break can then be achieved, and if so on what terms, or whether the term of the order should be extended.

[142] I have found the outcome in *Parlour v Parlour* more difficult. Whilst Mr Mostyn's global percentage has the attractive neatness of matching the level of capital distribution, I am less sure that an arbitrary figure calculated without reference to s 25A will necessarily produce a fair result in 4 years. At the same time, a further inquiry into the figures is likely to be both expensive and time-consuming, and may well encounter many of the unknown factors which currently confront us. Once again, therefore, I am in the event persuaded that the course proposed by Thorpe LJ in para [77] of his judgment is the correct one.

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[143] I end by reiterating a theme of this judgment, namely that these two cases are, in my view, exceptional. It may well be that the specialist profession has a number of cases in which a spouse has a high six-figure or even seven-figure net income which is not matched by sufficient capital to achieve an immediate clean break at the point when the wealth of the family falls to be distributed at the end of the marriage. No doubt, in certain professions (including sport), incomes of the magnitude demonstrated by these appeals are more common than heretofore. However, such incomes remain exceptional. As Thorpe LJ has pointed out, in the overwhelming majority of cases, the income (whether generated by one spouse or jointly by both) on which the husband, wife and children have lived together is stretched to meet the needs of two households, and is frequently inadequate to do so. In such cases, the approach of the judge would be unimpeachable. I, therefore, repeat my agreement with Thorpe LJ that these two appeals arise on exceptional facts.

[144] That said, however, such cases have to be fitted into the statutory framework. In my judgment, the profession, in attempting this exercise, asked itself the wrong question in these two cases. The question was not: what are the principles governing an award of periodical payments during joint lives or until remarriage in any case where the net income of the payer significantly exceeds what both parties need in order to meet their outgoings at the standard of living which the court has found to be appropriate? This question ignores the clear statutory language of s 25A.

[145] The profession inevitably craves certainty so that it can advise its clients appropriately. That, of course, is not a new aspiration. In *Martin (BH) v Martin (D)* [1978] Fam 12, (1977) FLR Rep 444 in which this court upheld the right of a wife to remain indefinitely in a very modest matrimonial home against the claim of her former husband that it should be sold and the proceeds equally divided, Ormrod LJ said, at 20 and 449 respectively:

> 'I appreciate the point he (Mr Aglionby, counsel for the husband) has made, namely that it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973. It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore, it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word. There is bound to be an element of uncertainty in the use of the wide discretionary powers given to the court under the 1973 Act, and no doubt there always will be, because as social circumstances change so the court will have to adapt the ways in which it exercises discretion. If property suddenly became available all over the country many of the rationes decidendi of the past would be quite inappropriate.'

[146] No doubt ancillary relief has become more sophisticated since 1977, but the speech of Lord Nicholls of Birkenhead in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 is a timely reminder that the only principled approach

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is the application of the words of the statute to the pursuit of fairness. For the reasons given by Thorpe LJ, I agree that this approach applies to both capital and income. In my judgment these two cases went awry because the terms of s 25A of the Matrimonial Causes Act 1973 were not properly considered, with the consequence that an attempt was made to impose joint lives orders in exceptional circumstances to which they were not fitted.

[147] For these reasons, in addition to those given by Thorpe LJ, I would,

accordingly, allow these appeals.

Appeal allowed; a minute of order be lodged with court.

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Clintons for Mrs Parlour
Alexiou Fisher Philipps for Mr Parlour

PHILIPPA JOHNSON
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