PEARCE v PEARCE [2003] EWCA Civ 1054

[2003] 2 FLR 1144

Court of Appeal

Dame Elizabeth Butler-Sloss P, Thorpe and Mantell LJJ

28 July 2003

Financial provision – Periodical payments – Capitalisation – Ambit of judge's discretion – No jurisdiction to reopen capital claims – Narrow discretion to depart from Duxbury tables

The wife's financial claims were settled under a consent order which included periodical payments of £36,000 per annum during joint lives or until the wife's remarriage, and an undertaking permitting the wife's occasional use of a holiday home now owned by the children of the marriage. Shortly after the consent order was made, the wife moved from an unmortgaged flat in central London to a property in Ireland. Two years later she sold the Irish property at a loss, and moved back to a lower level of accommodation in London, partially financed by a mortgage. In the meantime the husband had prospered, earning considerably more than had been expected, and growing his capital assets. However, the husband was now largely retired and his income had therefore much reduced. The parties made cross-applications for an increase in the periodical payments order and for capitalisation of such payments under s 31(7B) of the Matrimonial Causes Act 1973. The wife claimed that she was entitled to a current periodical payments order at the rate of £60,000 per annum, to be capitalised as a lump sum of over £800,000. At trial the husband accepted that the wife's periodical payments should increase, but argued that he should not be forced to capitalise them. It was also accepted by the husband that the attempt to share the holiday home had not been successful and that the wife should be compensated for the loss. The judge found that the wife's reasonable future needs were £47,000 per annum, which included the cost of servicing the mortgage, and that the *Duxbury* capitalisation of those needs was £635,000. The judge also gave the wife £25,000 to compensate her for the loss of the use of the holiday home. However, he awarded her more than this – £740,000 – because he considered, on the authority of *Cornick v Cornick (No 3)*, that fairness required an uplift to the *Duxbury* capitalisation. The husband appealed, arguing that the judge had no jurisdiction to redistribute capital assets on an application for capitalisation of periodical payments, and that in any event the judge had been wrong to include the wife's mortgage repayments.

Held – allowing the appeal and substituting the lesser sum of £655,000 for the judge's order –

(1) On dismissing an entitlement to future periodical payments the court's function was not to reopen capital claims but to substitute for the periodical payments order such other order or orders as would both fairly compensate the payee and at the same time complete the clean break. There was simply no power or discretion to embark on further adjustment of capital to reflect the outcome of unwise or unfortunate investment on one side or prudent or lucky investment on the other. The opinions expressed by the judge in *Cornick v Cornick (No 3)* between paras [109] and [118] were obiter and erroneous (see paras [28], [36], [45]).

(2) On these applications for variation and capitalisation there had been three questions to be decided: (i) what variation, if any, to make in the order for periodical payments; (ii) the date from which any variation should take effect; and (iii) when to substitute a capital payment, calculated in accordance with the *Duxbury* tables, for the income stream being terminated, albeit with a narrow discretion to depart from those tables to reflect special factors generated by the individual case (see paras [37], [38]).

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(3) The judge should have restricted himself to capitalisation of the increased periodical payments order and abstained from the addition of a substantial uplift (see para [36]).

(4) The judge's inclusion of the wife's mortgage repayments as part of her reasonable expenditure violated the principle that capital claims which had been decided could not be revisited. The judge should not have allowed the wife to discharge her mortgage at the husband's expense (see

para [36]).

Per curiam: in surveying what substitute order or orders should be made, first consideration should be given to the option of carving out of the payor's pension to fund a pension for the payee equivalent to the discharged periodical payments order (see paras [15], [45]).

Per curiam: the court was required, not only by authority but also by policy, to guard against the temptation to adjust further the capital division between the parties to reflect factors which were not foreseen or which did not pertain at the date of the original division. A relatively simple, certain and predictable method for the calculation of the capital sum that could fairly be substituted for a periodical payments order enabled parties to see where they stood and to weigh the relative advantages and disadvantages of finality, contributing to the compromise of the issue and thus to a reduction in contested cases (see para [39]).

Statutory provisions considered

Matrimonial Proceedings and Property Act 1970
Matrimonial Causes Act 1973, ss 24, 25, 31
Matrimonial and Family Proceedings Act 1984
Family Law Act 1996
Welfare Reform and Pensions Act 1999, s 85(3)

Cases referred to in judgment

Brooks v Brooks [1996] AC 375, [1995] 3 WLR 141, [1995] 2 FLR 13, [1995] 3 All ER 257, HL
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, sub nom *de Lasala v de Lasala* (1979) FLR Rep 223, [1979] 3 All ER 1146, PC
Harris v Harris [2001] 1 FCR 68, CA
Minton v Minton [1979] AC 593, [1979] 2 WLR 31, (1978) FLR Rep 461, [1979] 1 All ER 79, HL
S v S [1986] Fam 189, [1986] 3 WLR 518, [1987] 1 FLR 71, [1986] 3 All ER 566, FD
White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL

Lewis Marks QC and *Philip Marshall* for the petitioner
Florence Baron QC and *Charles Atkins* for the respondent

Cur adv vult

THORPE LJ:

[1] The parties to this appeal married in 1963. The marriage was dissolved on 13 November 1997. However, I will for convenience refer to them throughout this judgment as respectively the husband and the wife. The wife's financial claims were settled by a compromise that was made the subject of an order dated (appropriately, as Hedley J was later to observe) on

11 November 1997. By its terms all capital claims between the parties were resolved. However, for various reasons the accumulated family assets were not commensurate with the husband's considerable income. Accordingly the order provided that the wife should receive periodical payments at the rate of £36,000 per annum on conventional terms 'during their joint lives until the petitioner shall remarry or further order'. Furthermore by his second undertaking preceding the order the husband agreed that the wife should enjoy in addition the use of the holiday home in Italy, the ownership of which had been transferred to the two daughters of the marriage. There can be no doubt that the wife's continuing entitlement to income was accepted to be for her life since the fourth and fifth undertakings covered provision for the wife out of the husband's pension funds to cover any period by which she survived him.

[2] At the time of this compromise the wife was living in a recently acquired flat in Chelsea. However, in the following year she exchanged it for a property in Ireland which no doubt had potential but which required extensive renovation. It proved an unfortunate speculation. After

2 years it was sold at a loss of £50,000. Accordingly when she returned to London and to a changed market she could afford no more than a flat in Fulham, and even that was partially financed by a £30,000 mortgage repayable over 10 years.

[3] These misfortunes may have contributed to her request, by solicitor's letter of 26 April 2001, for an increase in her periodical payments order. The husband countered with an application dated 21 September 2001 for an order under s 31(7B) of the Matrimonial Causes Act 1973 for the dismissal of her outstanding claims. As the husband put it in his Form E of 6 December 2001:

> 'Due to a change in my financial circumstances (I have more capital but my income has reduced and is reducing further) I would like to apply to capitalise my former wife's maintenance.'

[4] The wife's reply was an application of 15 March 2002 for an increase in her periodical payments order and for capitalisation of such periodical payments. In Part III of her Form E she stated her reasonable future income needs to be £48,138 per annum, a figure particularised in the accompanying schedule of expenditure. The schedule was extensive covering 60 individual heads.

[5] The cross-applications came on for hearing before Hedley J on 26 November 2002. In the intervening 5 years since the consent order the wife had sustained capital losses and had lost the advantage of the escalation of the London property market during the years of her Irish venture. Her income had remained unchanged. By contrast the husband had prospered. He had earned considerably more after the making of the consent order than had been expected. He had also managed his capital assets astutely, with the result that his net worth excluding pensions exceeded £1.25 million. However being 69 years of age, his income was declining. Whilst it had been approximately £270,000 per annum at the date of the consent order it had reduced to about £130,000 per annum by the date of the trial.

[6] In those circumstances it was common ground that the wife should receive an increase in her periodical payments but the husband's position at trial was that he should not be forced to capitalise them because he could not afford so to do in the light of a potential outstanding tax liability. The wife

submitted that she was entitled to a current periodical payments order at the rate of £60,000 per annum to be capitalised as a lump sum of over £800,000 on the application of the *Duxbury* tables. In contending for a periodical payments order of £60,000 per annum she elevated item 58 in her schedule of expenditure (holidays/weekends away) from £4,000 to £20,000 per annum. For the husband it was submitted that the judge should ignore the annual cost of servicing both her mortgage and also a debt of just over £9,000. However, it was common ground that the attempt to share the holiday home had not been successful and that the judge should also compensate the wife for the discharge of the husband's second undertaking. There were a number of subsidiary issues which have now fallen away.

[7] The judge's broad conclusion was that the wife had established her reasonable future needs at the rate of £47,000 per annum. Although that resulted in a *Duxbury* capitalisation of £635,000, from that starting point the judge advanced to a final figure of £740,000, inclusive of £25,000 to compensate her for the future loss of use of the holiday home. The judge explained his conclusions in an extempore judgment at the end of which he refused the husband's application for permission to appeal. A notice of application was lodged on 30 December 2002 and permission was granted on paper on 24 February 2003.

[8] Mr Lewis Marks QC, who was brought in to prepare and conduct the appeal, submitted that Hedley J had erred in principle in saddling his client with the future costs of servicing the mortgage and the debt. He further submitted that the judge was plainly wrong to have provided the wife with the annual cost of the mortgage repayment for the remainder of her life when the mortgage had only 8 years to run. However, Mr Marks' principal submission was that the judge had no jurisdiction to add an additional sum of at least £70,000 which was not directly referable to the capitalisation of the wife's periodical payments.

[9] Miss Baron QC, who equally was brought in for the purposes of the appeal, contended that the

judge's uplift of the *Duxbury* capitalisation was legitimate following the decision of Charles J in the case of *Cornick v Cornick (No 3)* [2001] 2 FLR 1240. She submitted that junior counsel at the trial had agreed that the judge should direct himself on that authority. She also contended that much of the argument in relation to the wife's mortgage had not been advanced at the trial. Finally she submitted that any lesser award would have been plainly unfair given that, even if the judge's order stood, her client would have only 27% of the joint assets.

[10] This brief summary hardly does justice to the fluent and skilful oral submissions advanced by both Mr Marks and Miss Baron. I shall touch on some of them further in considering the issue that lies at the heart of this appeal, namely what is the ambit of the judge's discretion in determining a payer's application for an order under s 31(7A) and (7B)? Is his task simply to capitalise the respondent's ascertained periodical payments order at the level at which it stands immediately prior to discharge or is he entitled to redistribute capital assets more liberally in the respondent's favour? Mr Marks contends that the judge's watchwords must be compensation and substitution. Miss Baron submits that following the evolution of the court's approach initiated by the decision of the House of Lords in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 the judge is not confined to substitution but may readjust the division of family assets to ensure a fair outcome. In support of

her proposition she of course relies on an apparent decision in her favour, namely that of Charles J in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240.

[11] Before coming to that authority it is important to set the statutory scene. Although the Matrimonial Causes Act 1973, itself consolidating the Matrimonial Proceedings and Property Act 1970, has never been substantially reformed, it has undergone considerable piecemeal modernisations to enable it to keep pace with social change. For present purposes I need refer to only three.

[12] The Matrimonial and Family Proceedings Act 1984 with effect from 12 October 1984, removed from s 25 what has been described as the 'minimal loss objective' and by s 25A imposed upon the court a duty to endeavour to terminate financial obligations as soon as that could be done without undue hardship. That principle was duly reflected in an amendment to s 31(7) which thereafter required the court in exercising its powers to vary periodical payments orders not only to have regard to all the circumstances of the case (including any change in any of the matters to which the court was required to have regard when making the original order) but also to search for finality without undue hardship.

[13] The second development was effected by the Family Law Act 1996 with effect from 1 November 1998. Into s 31(7) were inserted subss (7A)–(7F). These of course include the powers specifically reviewed in this judgment. Accordingly I set them out in full:

> '(7A) Subsection (7B) below applies where, after the dissolution of a marriage, the court—
>
> (a) discharges a periodical payments order or secured periodical payments order made in favour of a party to the marriage; or
>
> (b) varies such an order so that payments under the order are required to be made or secured only for such further period as is determined by the court.
>
> (7B) The court has power, in addition to any power it has apart from this subsection, to make supplemental provision consisting of any of—
>
> (a) an order for the payment of a lump sum in favour of a party to the marriage;
>
> (b) one or more property adjustment orders in favour of a party to the marriage;
>
> (c) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for—
>
> (i) a periodical payments or secured periodical payments order, or
>
> (ii) an extension of the period to which the original order is limited by any variation made by the court.'

[14] The third extension was the addition to s 24 of the pension sharing provisions contained in

s 24B–D. These were introduced by the Welfare Reform and Pensions Act 1999 with effect from 1 December 2000. The consequential amendment to s 31(7B) was the introduction of an additional

subs (ba) which gives the court jurisdiction to substitute for a discharged periodical payments order 'one or more pension sharing orders'. However, this latest addition to the judge's armoury is of no application to the present case since s 85(3)(b) of the Welfare Reform and Pensions Act 1999 provides that a pension sharing order may only be made on the discharge of a periodical payments order where the order sought to be discharged was made in divorce proceedings commenced on or after 1 December 2000.

[15] Section 85(3) of the Welfare Reform and Pensions Act 1999 was principally enacted to ensure that the addition of the jurisdiction to make a pension sharing order should not apply retrospectively and should be confined to cases commenced after 1 December 2000. The rationality of that provision is clear. The need for the same limitation on the exercise of the court's jurisdiction under s 31(7B)(ba) is less clear. After all as a matter of principle as well as practicality there is great attraction in a mechanism to achieve a clean break by substituting for an income stream that locks the parties in continuing relationship an income stream that permits finality, severance and independence. Often the application for the exercise of the jurisdiction under s 31(7B) will not be opposed. The only issue is the nature and extent of the financial benefit to be substituted for the periodical payments order. The substitution of an alternative income stream in the shape of a pension involves a much simpler and less speculative exercise. Substituting like-for-like offers much less scope for debate, disagreement and ingenuity of argument. Accordingly, in my judgment, in any case in which the court can exercise jurisdiction under s 31(7B)(ba), it should endeavour to conclude the issue by so doing, only considering capital orders, whether alternatively or additionally, where the circumstances would not permit the court to achieve a fair outcome by substituting a pension sharing order for the periodical payments order. Of course I recognise that it is likely to be many years before the typical case invoking the court's jurisdiction under s 31(7B) has cleared the restriction imposed by s 85(3)(b). That is regrettable. In this outpost of the ancillary relief territory the task of the practitioners and the judges would be much eased by the option of providing for the former wife a personal pension carved out of the former husband's pension portfolio. By way of instance, without the restriction of s 85(3)(b) would the present case have ever gone to trial? However, my criticisms of the policy underlying s 85(3)(b) are necessarily tentative since I have not carried out any independent research into its genesis and neither counsel addressed the point in submissions. Furthermore, in the interim pending the wider availability of s 31(7B)(ba) the court may nevertheless be empowered to substitute a pension for a discharged periodical payments order by a variation of settlement order, provided that the pension plan can be construed as a post-nuptial settlement: see *Brooks v Brooks* [1996] AC 375, [1995] 2 FLR 13.

[16] The antecedents of s 31(7A)–(7B) are very clear. The 1984 amendment had imposed upon the court a duty to search for the termination of the continuing financial obligation when deciding an application for the variation of a periodical payments order under s 31. But how could the court effectively terminate in many cases without the power to order capital in lieu, either by way of a lump sum or property adjustment order? The case of *S v S* [1986] Fam 189, [1987] 1 FLR 71 well illustrated the deficiency. Accordingly the Law Commission in its report: *Family Law – The Ground for Divorce,* Law Com No 192 (TSO, 1990) had recommended in para 6.10 that the court

should have a power to order a transfer of property or a lump sum where this would be appropriate in order to bring about a clean break in substitution for a continuing periodical payments order. That recommendation of October 1990 found its fulfilment in the 1996 Act.

[17] The need to legislate an additional jurisdiction at the later stage of variation has its origins in the words of s 24(1)(a), (b) and (e). In each case the court's jurisdiction is to make 'an order' whether it be for a lump sum, transfer of property or settlement of property. The subsequent decisions of the House of Lords in *Minton v Minton* [1979] AC 593, (1978) FLR Rep 461 and *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* [1980] AC 546, sub nom *de Lasala v de Lasala* (1979) FLR Rep 223 (a Privy Council case) established that where, as here, capital claims are

compromised in a once-for-all court order they cannot be revisited or reissued. Thus in a typical case where at the stage of divorce the family's finances permitted only a partial clean break (capital but not income) the court's jurisdiction to redistribute capital was exhausted by the making of orders and/or the express dismissal of all claims under s 24.

[18] It is against that background that I turn to the only two reported cases that consider the court's function in determining an application under s 31(7A) and (7B).

[19] The first is *Harris v Harris* [2001] 1 FCR 68. In that appeal the proper function of the trial judge was simply not in issue. The proposition that the essential task of the judge was to substitute a one-off capital payment for a continuing income stream was never questioned. The essential features of the case were that after the wife's claim to secured provision had been dismissed, she sought capitalisation of her joint lives periodical payments order which the husband resisted. Johnson J had acceded to the husband's application for downward variation of the wife's periodical payments to £9,000 per annum but had then acceded to the wife's application and substituted a lump sum of £120,000 for the future periodical payments order. In this court the argument focused in part on whether the judge had sufficiently reduced the rate of periodical payments but primarily on the methodology of capitalisation. In upholding the judge I emphasised that although he had not been furnished with the relevant *Duxbury* calculations his figure was almost exactly in line with what the *Duxbury* tables would have suggested. In the course of my judgment I emphasised the essentially speculative character of the judicial assessment. The future periodical payments determined on the dropping of the first life. The husband had been struck down by a serious illness that had compelled his retirement in 1999. On the other side of the equation the wife's future earning capacity was uncertain as was the future of her relationship with her current partner. Accordingly I said:

> 'So the judicial conclusion will always be vulnerable. Either party may feel, with the advantage of hindsight, that the judge failed. The wife may feel that she has been under compensated when accident or illness befalls. The husband may resent the capital paid over when the former wife finds a new husband. These considerations are familiar to ancillary relief specialists, since they apply equally to the negotiation or determination of claims at the stage of the divorce. It follows, in my judgment, that the discretion exercised by the judge in this new jurisdiction must be very broad. Unless some clear error of approach

> or calculation has been demonstrated, I do not believe that this court should lightly interfere with the judge's figures.' (at para 22)

[20] Of course in emphasising the extent of the judge's discretion I pointed out the breadth of the path that he trod and did not suggest a choice of some other path. In his concurring judgment Pill LJ expressly defined that path when he said:

> 'What the judge is endeavouring to do is to express as a capital sum what is a fair capital sum in the circumstances in substitution for the periodical payments which would otherwise have been appropriate.' (at para 44)

[21] I come now to the judgment of Charles J in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240. Between paras [109] and [118] Charles J considered the case of *Harris v Harris* [2001] 1 FCR 68. He rejected the proposition that the judge's discretion is limited to replacing a statutory right to income by capitalising those payments. His contrary conclusion is expressed as follows:

> '[113] In my judgment as a matter of language s 31(7B) clearly introduces a wide discretionary power to be exercised by applying the words of the statute to make by way of supplemental provision (and thus to quantify and define) further lump sum orders, property adjustment orders and pension sharing orders if and when the court discharges or varies an order for periodical payments. Potentially this power could be exercised some considerable time after the original orders for financial provision, including a lump sum order and necessarily a periodical payments order, were made and the power means that an original lump

sum order, or property adjustment order or pension sharing order although a once-and-for-all order cannot be regarded as the only order of that type that can ever be made if an order for periodical payments is also made and is continuing.

[114] In my judgment none of the following, namely:

(a) the passages I have cited from the report of the Law Commission and thus their recommendation and the problem identified in *S v S* [1986] Fam 189, [1987] 1 FLR 71;

(b) the Parliamentary material I was shown;

(c) the established and continuing background to the amendment that a provision of a capital nature, or one calculated by reference to the capitalisation of an income stream and made through the payment of a lump sum that was not deferred or payable by instalments, cannot be varied; or

(d) the principle and approach set down by the House of Lords in *Barder v Caluori* [1988] 1 AC 20, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480 as to appeals out of time against orders for financial provision

leads to the different conclusion that the court has to regard an initial lump sum order (and property adjustment order or pension sharing

order) as an inviolate and final capital provision and future lump sum orders (and property adjustment orders or pension sharing orders) only as a capitalisation of an income award that would otherwise continue.'

[22] There are a number of criticisms to be made of this conclusion. The first is that it is a judicial digression. The basis upon which the judge was invited to decide the case is clearly recorded later in his judgment as follows:

'[130] Also her counsel expressly disclaimed an approach based on a different methodology or reasoning to one that applied an increase to her periodical payments and capitalised the increased sum and thus effectively invited me to adopt the same approach as adopted by *Harris v Harris* [2001] 1 FCR 68.

[131] Mr Cornick adopted an equivalent approach in that he argued that I should capitalise the existing periodical payments using an approach based on *Duxbury*.

[132] Both sides therefore took what can be described as a traditional approach which treated periodical payments as income payments and asked me to capitalise those payments using an approach based on *Duxbury*.'

[23] The second is that, as the judge records in para [110], he had not heard argument on the construction of s 31(7B) and the judge's proper function in applying the section.

[24] Third I find the judge's reasoning in paras [113] and [114] of his judgment unconvincing. In para [113] reliance is placed upon the terms of s 31(7B) 'as a matter of language'. But I do not find anything within the language of s 31(7B) to support the judge's conclusion. I appreciate that it can be said that subs (7B) is but an extension of subs (7) which requires the court:

'In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case ... and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates ...'

[25] Subsection (7) undoubtedly confers upon the court a wide discretion as has been established in a line of authorities culminating in the decision in the earlier *Cornick v Cornick (No 2)* [1995] 2 FLR 490. But that line of authority governs the exercise of the judicial discretion in the determination of an application to vary any order that is capable of variation. I do not consider that it has any application to the orders defined in s 31(7B)(a) and (b), which are orders that the court has no power

to vary.

[26] Applying these considerations practically, if, as in the present case, the court determines at trial cross-applications for variation and capitalisation, the judge's first task is to determine the application for variation applying s 31(7) and the authorities culminating in *Cornick v Cornick (No 2)* [1995] 2 FLR 490. Having settled the past by fixing the commencement date for the variation, the judge must settle the future by fixing the date upon which periodical payments are to cease and the order for lump sum and/or property adjustment in lieu. The proper construction of s 31(7B) depends not so much

on the language of that subsection as its statutory context and the clear limitations on the power which s 24 confers upon the court.

[27] In para [114] Charles J sets out what he saw as the four contrary considerations. At paras (c) and (d) he recorded the considerations of context and background which for me are conclusive. In para (a) he referred to the Law Commission's report and recommendation. But the paragraphs he had cited at para [102] of his judgment were only 6.8 and 6.9, which simply explained the problem. For the due construction of s 31(7B) the crucial paragraph is 6.10, containing the Law Commission's recommendation:

> '6.10 It seems desirable to us that the court should have power to order a transfer of property or a lump sum where this would be appropriate in order to bring about a clean break instead of a continuing periodical payments order. Accordingly, we recommend that the courts should have power to make a property adjustment order or lump sum order when discharging or limiting the term of a periodical payments order. This power should in no way derogate from the principle that property adjustment and lump sum orders at, upon, or after, separation and divorce orders should be regarded as once and for all orders. The problem has been that the capital orders made at divorce take into account the continuing maintenance obligations; if that continued obligation is brought to an end, it may well be appropriate for a larger capital settlement to be made.'

That paragraph is clearly counter to the judge's construction. Finally in para (b) Charles J referred to the parliamentary material he had seen. That I cannot introduce into the debate since Mr Marks, who appeared as junior counsel in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240, has no recollection of what it might have been and neither he nor Miss Baron can now unearth any parliamentary material of relevance.

[28] I am in no doubt that the opinion expressed by Charles J between paras [109] and [118] of his judgment is obiter and erroneous. It was perhaps hazardous to dismiss the orthodox understanding of the meaning of s 31(7B) without argument especially when the case before him did not require it. After all full argument would almost inevitably have emphasised para 6.10 of the Law Commission's report and the observation of Pill LJ in *Harris v Harris* [2001] 1 FCR 68. Mr Cornick was hardly likely to appeal the judge's liberal construction of s 31(7B) given the fact that the judge had concluded his review of *Harris v Harris* with this paragraph:

> '[118] However I add that it seems to me that in many (and perhaps most) cases when the court concludes that an order for periodical payments should be discharged and that there should be a clean break and an order for a lump sum that a capitalisation of an existing or varied order for periodical payments using *Duxbury* as a tool and not a rule would provide the fair result and would in any event be a useful cross-check. Indeed as appears later this was the approach advanced by both sides in this case and is one that I have in general terms adopted.'

[29] As Mr Marks observed, the final sentence of that paragraph demonstrated that the judge had not erred from the path which counsel had agreed he must follow.

[30] When the present case came for trial the authority of *Cornick v Cornick (No 3)* [2001] 2 FLR

1240 was clearly influential. I turn to the judgment of Hedley J. Having set the scene he proceeded to consider the wife's reasonable needs. He said that he 'included the mortgage payments because as a matter of fact it is an ongoing cost, but I have removed the repayments based on a £9,000 capital debt'. Excluding holidays he approved £39,000 per annum of the £44,138 per annum claimed. Since the repayments on the £9,000 capital debt amounted to £2,240 per annum it follows that the sum of his other corrections or reductions amounted to about £2,898 per annum. Of the £20,000 claimed for holidays and weekends he allowed £8,000 per annum thus arriving at a total figure of £47,000 per annum, an increase of some £11,000 on the order that had been agreed in 1997. He continued:

> 'When one applies a *Duxbury* calculation to that, averaged as between the 3.75 and 4.25 figures, it produces a figure of about £635,000, I arrive, as it were, at my factual starting point.'

[31] Hedley J then turned to the law. In the course of his survey he said:

> 'It seems to me that I received limited submissions on the law for the entirely good reason that there was no serious dispute between the parties about the law, and accordingly all I propose to do is remind myself of the second part of the headnote in *Cornick* and one short paragraph within the judgment itself.'

[32] He then cited the headnote including this sentence:

> 'When substituting a lump sum on discharging a periodical payments order, the court was not limited to a mathematical calculation of the capital equivalent of the ongoing periodical payments, but was entitled to consider what lump sum would be fair in all the circumstances.'

Finally the short paragraph which he selected from the judgment of Charles J was para [118] (which I have cited at para [28] above).

[33] Hedley J then surveyed a number of factors to which he attached relevance summarised in the following crucial paragraph:

> 'The consequences of that, in my view, are that a *Duxbury* calculation, based as it is here on reasonable requirements by itself is not enough and will require to be supplemented I think in the following aspects. First, there will have to be some compensation for the loss of the holiday home. Secondly, that the wife should be relieved of debt, if in fact that can be done without causing undue hardship to the husband. Next, there should be an element of sharing in the much greater prosperity than expected in 1997 with a view to achieving fairness, and next it seems to me that there should be some acknowledgement of backdating.'

[34] In the next paragraph Hedley J explained his reasons for requiring a payment of £25,000 for the release from the second undertaking in the consent order providing for the wife's use of the holiday home. He concluded his judgment thus:

> 'So I come to address the final figure and the extent to which it should exceed the *Duxbury* figure and the £25,000 figure.
>
> I remind myself, without repeating it, of the factors that I have indicated in this judgment I have taken into consideration. I have reminded myself of the *Duxbury* and (holiday home) figures. I have reminded myself of the fortunes, present and prospective, of both of the parties, and I have reminded myself of the need for fairness in the wide discretion that the court is called upon to exercise under s 31(7) bearing in mind that capitalisation means finality. I have concluded that if capitalisation is right, then the proper figure is one of £740,000.'

[35] Those passages make plain the fact that the judge added a substantial sum, about £70,000, in

reliance on the liberty which he took from the decision of Charles J in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240. Why did Mr Marshall, who appeared for the husband at the trial, not seek to protect his client against that development? For the simple reason that Mr Atkins, for the wife, had not sought anything other than an increase of the current periodical payments order to the sum of £60,000 per annum and thereafter its conventional capitalisation according to the *Duxbury* tables. Mr Marshall might have raised the point in seeking permission to appeal but did not do so and, without that foundation, his application was understandably refused by Hedley J. However, all Mr Marks' arguments were marshalled in his draft grounds of appeal and in his skeleton argument supporting his application for permission.

[36] These then are my conclusions on the rival submissions. First, Hedley J should have restricted himself to capitalisation of the increased periodical payments order and abstained from the addition of a substantial uplift. Secondly, he should not have allowed the wife to discharge her mortgage at the husband's expense. Such an indemnity violates the principle that capital claims compromised in 1997 could not be revisited in 2003. There is simply no power or discretion to embark on further adjustment of capital to reflect the outcome of unwise or unfortunate investment on one side or prudent or lucky investment on the other. In the aftermath of the Irish venture the wife might have returned to Chelsea and taken a much greater mortgage. She might have found a home outside London without the need to borrow. These options could not be surveyed in the hope or understanding that she could look to the husband for contribution or indemnity.

[37] Thirdly, the elimination of debt and the issue of backdating were obviously closely inter-related. That needed to be recognised to avoid duplication. However, relief from debt and backdating needed to be tackled at an earlier stage. Both as a matter of principle and as a matter of good practice, in my opinion the judge had to decide three questions in the following sequence. First he had to decide what variation to make in the order for periodical payments agreed in 1997. An increase was inevitable given inflation and the husband's overall increased prosperity despite the decline in his income. The judge's second task was to fix the date from which the

increased order was to commence. That would dispose of the past and present account between the parties. Then, and only then, should he have moved to the future, substituting a capital payment calculated in accordance with the *Duxbury* tables for the income stream that he was terminating.

[38] Of course I do not seek to put the trial judge in a straightjacket. He exercises a broad discretion at the first stage. Equally at the third stage he exercises a discretion, albeit a narrower one, in departing from the mathematics of the *Duxbury* tables to reflect special factors which individual cases will regularly generate.

[39] I believe that this discipline is necessary as a safeguard against the temptation to further adjust the capital division between the parties to reflect the factors which were not foreseen or which did not pertain at the date of the original division. This abstinence is required not only by authority but also as a matter of policy. Families with not inconsiderable assets are obliged to achieve division, by one means or another, once the marriage has foundered. They are entitled to know that that obligation once completed does not revive. In cases where a complete clean break cannot be achieved at the date of redistribution of the family assets it is important that the parties should be encouraged to take advantage of any subsequent developments that permit the dismissal of the outstanding periodical payments order. The court has its duty under s 31(7)(a). Therefore a relatively simple, certain and predictable method for the calculation of the capital sum that can fairly be substituted for the periodical payments order is of great importance. It enables parties to see where they stand and to weigh the relative advantages and disadvantages of finality. It contributes to the compromise of the issue and thus to a reduction in contested cases.

[40] Returning to the present appeal, Miss Baron in her spirited response to Mr Marks' submissions succinctly submits that the judge's only error was to exercise his discretion at the wrong stage. The reflection of the wife's entitlement to share in the husband's continuing prosperity should have appeared in his assessment of her reasonable needs. At that stage the judge had described his figure of £39,000 per annum excluding holidays as 'a modest, but I think realistic assessment of reasonable requirements but no more than that'. Miss Baron submits that the judge was consciously reserving the search for fairness to a later stage, as the decision in *Cornick v Cornick (No 3)* [2001] 2 FLR

1240 permitted. Equally Miss Baron says that the judge deferred relief from debt and backdating to his ultimate assessment of a fair outcome.

[41] In reply Mr Marks accepted the force of Miss Baron's submissions on relief of debt and backdating. Ultimately he accepted that the judge might reasonably have backdated the increase to the date of the husband's application for capitalisation. Mr Marks offered a computation of the resultant arrears in a round sum of £10,000 which would enable the wife to discharge her capital debt of £9,333.

[42] However, Mr Marks did not accept that there was anything meagre in the judge's assessment of the wife's application for upward variation of her periodical payments order. He emphasised that the judge had allowed the vast majority of her itemised budget without deduction.

[43] In exercising the discretion afresh I would propose a middle course. Clearly the judge intended to be generous to the wife and I am convinced that had the husband's case been presented to him as it has been presented to us he

would have been ready to express his generosity in a greater upward variation of the periodical payments order. Accordingly I would allow the wife's budget as sought deducting only the annual cost of servicing the mortgage and the capital debt. I would add to the resulting figure of £41,698 the sum of £4,000, being the uplift approved by the judge for holidays and weekends. That produces a current periodical payments order of £45,698. I would capitalise that at £620,000, a slight but permissible increase on what the *Duxbury* tables suggest. I would add to that the £25,000 compensation for loss of use of the holiday home and the sum of £10,000 in respect of arrears.

[44] I would accordingly allow this appeal and substitute for the judge's figure of £740,000 the lesser sum of £655,000.

[45] There are advantages and possible dangers in attempting in a paragraph to summarise the message of this judgment. What follows is, therefore, not intended to be a substitute for a full reading where necessary. But my essential general conclusions are:

(i) On dismissing an entitlement to future periodical payments the court's function is not to reopen capital claims but to substitute for the periodical payments order such other order or orders as will both fairly compensate the payee and at the same time complete the clean break.

(ii) In surveying what substitute order or orders should be made first consideration should be given to the option of carving out of the payor's pension funds a pension for the payee equivalent to the discharged periodical payments order.

MANTELL LJ:

[46] I agree.

DAME ELIZABETH BUTLER-SLOSS P:

[47] I also agree.

Order accordingly.

Solicitors: *Withers LLP* for the petitioner
Levison Meltzer Pigott for the respondent

PHILIPPA JOHNSON
Law Reporter