Waggott v Waggott

[2018] EWCA Civ 727

COURT OF APPEAL

SIR JAMES MUNBY P, MOYAN LJ AND MACDONALD J

11 APRIL 2018

Financial remedies – Sharing principle – Needs principle – Post-separation income – Post-divorce income – Maintenance – Whether term or joint-lives appropriate.

The husband was 53 and the wife 47; they started living together in 1991 and married in 2000; their only child was born in 2004. When they met they were both working as accountants for a well-known firm; neither of them brought any significant financial resources into the relationship. In 2001, the husband accepted work in London, which led to the wife leaving her employment; thereafter, apart from a brief period in 2002/2003, she was not in paid employment. The couple separated in 2012.

In their financial remedy proceedings the husband and wife agreed that their current capital resource, including pensions, should be divided equally. They disagreed about the extent to which the wife should receive additional provision by way of maintenance.

The total current family assets, including pensions, were £16.4 million. The husband's net income for 2013/14 had been just under £3 million; a substantial proportion of his income was received by way of discretionary bonus, a performance share plan and a matching share plan, some part of which was deferred for three years. The wife was seeking 50 per cent of the deferred sums received to 2014 and 35 per cent of the net bonuses awarded for the years 2014 to 2019 (receivable up to 2022). In addition she argued for spousal maintenance at the rate of £190,000 pa. She was also making a compensation claim. The husband was arguing that the wife should receive a share of deferred remuneration received in 2014 and 2015 plus spousal maintenance for five years (£80,000 pa for the first three years and £50,000 pa for the last two years) with a clean break thereafter, on the basis that in three years' time the wife would be able to start earning and therefore contribute to her own needs. The husband did not ask for a s 28(1A) bar, arguing instead that there should be an 'option' of capitalising the wife's income claim during the term (the judge regarded this as 'akin' to seeking a s 28(1A) bar).

The judge issued a draft judgment, which he subsequently revised to take account of new information (the wife's decision to move to a different part of the country, which in the judge's view reduced her housing need) and new submissions concerning the proper rate of return on a capital sum

(the husband successfully argued for a *Duxbury* approach and the rate used by the judge increased to 2.25 per cent net). The final judgment identified a housing need for the wife of £2.75 million, to include a holiday home costing £750,000; and an income need for the wife of £175,000 pa plus £24,000 pa for the child. The judge considered that if she had continued with her career she might have been earning at the rate of £100,000 gross pa but would in fact have an earning capacity of about £30,000 in three years' time. He concluded that she had no compensation claim but was entitled to maintenance for joint lives, as she would not be able to adjust to termination of maintenance without undue hardship. The final court order provided that the wife should have £8.4 million of the available capital resources and the husband £7.8 million (the difference was in part to account for the wife's costs of purchasing alternative accommodation). In addition, the wife was to receive just under £1.4 million in respect of the husband's deferred remuneration received post-separation (25 per cent of the bonuses paid in 2014 and 12.5 per cent of those paid in 2015). The wife's total capital award was therefore £9.76 million, of which about £4.6 million was 'free capital' (not tied up in housing, pension or allocated to separation-related costs). In addition, the judge ordered the husband to pay the wife ongoing maintenance, for joint lives, set at the difference between the return the judge now considered she would receive from her 'free capital' (without amortisation) and her income need of £175,000 pa. The wife appealed and the husband responded with a cross-appeal.

The wife argued that she should have been awarded 35 per cent of the husband's net bonuses payable in respect of the years up to and including 2019 (payable until 2022) and maintenance at the rate of £190,000 pa for the parties' joint lives. In her view no part of her sharing award or the income derived from it should be treated as available to meet her needs. The husband argued that the judge should have awarded term maintenance, rather than maintenance for joint lives, proposing a five-year term from 2016, with a s 28(1A) bar to take effect in February 2021. The principal issues in dispute were: (i) whether an earning capacity was capable of being a matrimonial asset to which the sharing principle applied; and (ii) to what extent it was fair for the wife to be required to use her sharing award to meet her income needs, when the husband would meet his needs from earned income. The wife was also arguing that the compensation principle had not been properly addressed.

Held – (1) Sections 31(7A) and 31(7B) of the Matrimonial Causes Act 1973 gave the court the power on a variation application to make a further capital order, including a lump sum, combined with, in effect, a s 28(1A) direction. The best way to achieve a 'deferred clean break' was to seek a s 28(1A) direction; the judge had been right to regard the husband's case as 'akin to (seeking) a s 28(1A) bar' (see [36], below).

(2) An earning capacity was not capable of being a matrimonial asset to which the sharing principle applied, applying *Miller v Miller; McFarlane*

v McFarlane [2006] UKHL 24, *Jones v Jones* [2012] Fam 1 and *Scatliffe v Scatliffe* [2016] UKPC 36. The sharing principle applied to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (*Charman v Charman (no 4)* [2007] EWCA Civ 503). An earning capacity was not property and, in this context, resulted in the generation of property after (not during) the marriage. Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break and would not sit with the observation in *Miller* that ('(i)n general') 'it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation', or the observation as to the effect of '(t)oo strict an adherence to equal sharing'. Additionally, any such approach would inevitably require the court to assess the extent to which the earning capacity had accrued during the marriage, raising a range of difficult questions about the principles the court would have to apply; where would the court start and what factors would the court refer to in order to determine this issue? This lack of clarity meant that applying the sharing principle to an earning capacity would significantly undermine an 'important aspect of fairness', namely to achieve an 'acceptable degree of consistency of decision' (*Miller*) (see [3], [121]–[128], below).

(3) It was clear from *Miller* and *Charman* that the court applied the need principle when determining whether the sharing award was sufficient to meet that party's future needs, although not in an inflexible way. Applying *Jones*, an earning capacity could be 'relevant to a fair distribution of the assets pursuant to the sharing principle' and could be taken into account both when the court was deciding whether capital should be amortised in full, in part or not at all and when deciding what assumed rate of return to apply. When determining this issue, the court needed to have regard to all the relevant circumstances, to the clean break principle and, as appropriate, the issue of undue hardship. Given the range of options available, it was difficult to see how a definitive outcome could be mandated for all cases. In some it would clearly be fair for that part of the sharing award available to meet income needs to be fully amortised, for example, because neither party had any resources other than those being shared; in others, the court might take the view that the applicant should have a greater level of security than that provided by an amortised sum because of the respondent's earnings and apply only an assumed rate of return. In the context of this case, the husband's earning capacity was relevant to the question whether it was fair to require the wife to have to use her sharing award to meet her income needs. The more extreme argument that this wife's capital, apart from her housing need, should be preserved and not used in any way to meet her income needs would, again, conflict with the clean break principle to such a significant extent as to undermine the statutory 'steer' because, absent other resources, the applicant spouse would always have a claim for an additional award to meet his or her income needs (see [130]–[132], [134], [138], below).

(4) When identifying the appropriate rate of return to be applied, the relevant question was the gross rate of return, which was not necessarily confined to income but could include both income and capital returns. There were clearly advantages – both in terms of clarity and consistency – if the *Duxbury* model and the assumptions within it were to be used at least as a starting point. The manner by which the court assessed an award by application of the need principle and the manner by which it assessed whether a sharing award was sufficient to meet needs must be consistent. Given the consequential correlation between needs and sharing, using the same model would remove a potential element of inconsistency between the two. The court did not accept the wife's submission that the courts should determine what rate of return an applicant spouse could obtain 'now' and leave any adjustments as might be justified in the future to a subsequent application. Apart from this being a recipe for continued litigation, it ignored the fact that the court was taking a long-term perspective when assessing whether the sharing award met needs. If the needs were being assessed by reference to the applicant's life expectancy then the rate of return was to be assessed by reference to the same period (see [135]–[137], below).

(5) It was clear from *Miller* that compensation was for the 'disadvantage' sustained by the party who had given up a career, and was not to be applied where, instead, the respondent party had sustained a financial benefit. In practice compensation had very rarely been established and the court did not intend to encourage any more extensive or expensive exploration of the issue. However, as a necessary factual foundation for a compensation claim the court would have to determine, on a balance of probabilities, that the applicant's career would have resulted in them having resources greater than those which they would be awarded by application of either the need principle or the sharing principle. Further, the court would have to determine separately whether, and if so how, this factor should be reflected in the award so as to ensure that it was fair to both parties. On the basis of the finding in this case that the wife would have been earning less than £100,000 gross pa (£64,000 net pa), there was no basis for a compensation award, because the amount awarded to the wife exceeded what she might have been entitled to under this principle (see [139], [142], below).

(6) In relation to the judge's decision to revisit his initial determination of the wife's housing need and the rate of return to be applied to her free capital, a judge was entitled to reconsider the judgment prior to the order being made, applying *In re L and another (children) (preliminary findings: power to reverse)* [2013] UKSC 8, and this judge had been entitled to do so in this case (see [140], [143], below).

(7) When deciding whether to impose a term maintenance order, the judge had considered only whether the wife would be able to earn the shortfall between her income needs and the amount generated by her free capital. This was too narrow an approach; the judge should have addressed the issue

more broadly including by considering whether it would be fair for the wife to deploy part of her capital to meet her income needs. This broader approach would have enabled him properly to address the question of undue hardship and also to give proper weight to the clean break principle. The court needed to consider how an award would have to be deployed to enable income needs to be met; the degree of specificity required would vary according to the circumstances of the case but would not be more than was conventionally required when determining a claim by application of the need principle. In this case the question was: how would the wife be required to deploy her free capital in the absence of continuing periodical payments and, in the circumstances of this case, would it be fair for her to be required to use it in this way? Applying a return of 2.25 per cent net, the wife's free capital would provide just over £100,000 pa. From the age of 60 the wife would, in addition, be able to draw a gross pension of £76,000 pa, after which, very broadly, the two combined would produce £150,000 net pa. The wife would, in addition, in due course receive her state pension. If maintenance was awarded for a five-year term expiring in February 2021, the total shortfall between the wife's income from known sources (not factoring in her earning capacity) and her assessed needs would be about £950,000 (or less). If the wife had to expend £950,000 from her sharing award on her income needs, this would represent approximately 21 per cent of her 'free capital' of £4.6 million, or 10 per cent of her total award (acknowledging that part of the award was pension). On this basis, looking at s 25A(2), the wife would be able 'to adjust without undue hardship' to the termination of maintenance. To require her to use the above proportion of her award would not be unfair having regard to all the s 25 factors. She would still have free capital of £3.6 million and housing of £2.75 million. For the avoidance of doubt, the wife would still have no claim under the compensation principle because her retained award would still be greater than any award by reference to a lost net income of no more than about £64,000 net pa (see [146], [148]–[154], below).

Comment – In the context of financial remedy applications the court was giving guidance and judgments were not written in the expectation that they would be analysed as though they were statutes. This was not to suggest that precedents could not create binding authority; it was an issue as to how those precedents were interpreted and applied. In any event, even in the interpretation of statutes, the court was able to take a broad purposive approach (see [66], [67], below).

Statutory provisions referred to

Matrimonial and Family Proceedings Act 1984.

Matrimonial Causes Act 1973, s 25(2)(a), s 25A, s 25A(1), s 25A(2), s 28(1A), s 31, s 31(7), ss 31(7A) and 31(7B).

Cases referred to

AR v AR (inherited wealth) [2011] EWHC 2717 (Fam), [2012] 2 FLR 1, [2012] WTLR 373.

B v B (ancillary relief: post-separation income) [2010] EWHC 193 (Fam), [2010] 2 FLR 1214.
B v S (financial remedy: marital property regime) [2012] EWHC 265 (Fam), [2012] 2 FCR 335, [2012] 2 FLR 502.
BD v FD (financial remedies: needs) [2016] EWHC 594 (Fam), [2017] 1 FLR 1420.
Charman v Charman (no 4) [2007] EWCA Civ 503, [2007] 2 FCR 217, [2007] 1 FLR 1246, [2007] WTLR 1151, (2006-07) 9 ITELR 913.
CR v CR [2007] EWHC 3334 (Fam), [2008] 1 FCR 642, [2008] 1 FLR 323.
Duxbury v Duxbury [1992] Fam 62, [1991] 3 WLR 639, [1990] 2 All ER 77, [1987] 1 FLR 7.
GW v RW (financial provision: departure from equality) [2003] EWHC 611 (Fam), [2003] 2 FCR 289, [2003] 2 FLR 108.
H v H [2007] EWHC 459 (Fam), [2008] 2 FCR 714, [2007] 2 FLR 548.
H v H (financial remedies) [2014] EWCA Civ 1523, [2015] 2 FLR 447.
Hvorostovsky v Hvorostovsky [2009] EWCA Civ 791, [2009] 3 FCR 650, [2009] 2 FLR 1574.
JL v SL (no 2) (appeal: non-matrimonial property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202.
Jones v Jones [2011] EWCA Civ 41, [2011] 1 FCR 242, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723.
K v L [2011] EWCA Civ 550, [2011] 2 FCR 597, [2012] 1 WLR 306, [2011] 3 All ER 733, [2011] 2 FLR 980, [2012] WTLR 153.
L and another (children) (preliminary findings: power to reverse), Re [2013] UKSC 8, [2013] 1 WLR 634, [2013] 2 All ER 294, [2013] 2 FLR 859 (see also *L-B (children) (care proceedings: power to revise judgment), Re*).
L-B (children) (care proceedings: power to revise judgment), Re [2013] UKSC 8, [2013] 2 FCR 19 (see also *L and another (children) (preliminary findings: power to reverse), Re*).
Lambert v Lambert [2002] EWCA Civ 1685, [2002] 3 FCR 673, [2003] Fam 103, [2003] 2 WLR 631, [2003] 4 All ER 342, [2003] 1 FLR 139.
Lauder v Lauder [2007] EWHC 1227 (Fam), [2008] 3 FCR 468, [2007] 2 FLR 802.
McFarlane v McFarlane, Parlour v Parlour [2004] EWCA Civ 872, [2004] 2 FCR 657, [2005] Fam 171, [2004] 3 WLR 1480, [2004] 3 All ER 921, [2004] 2 FLR 893.
McFarlane v McFarlane [2009] EWHC 891 (Fam), [2009] 2 FLR 1322.
Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, [2006] 2 FCR 213, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 3 All ER 1, [2006] 1 FLR 1186.
Minton v Minton [1979] AC 593, [1979] 2 WLR 31, [1979] 1 All ER 79.
Robson v Robson [2010] EWCA Civ 1171, [2011] 3 FCR 625, [2011] 1 FLR 751.
Rossi v Rossi [2006] EWHC 1482 (Fam), [2006] 3 FCR 271, [2007] 1 FLR 790.
Scatliffe v Scatliffe [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106, [2017] 2 FLR 933.
Simon v Helmot [2012] UKPC 5, [2012] Med LR 394, (2012) 126 BMLR 73.

Vaughan v Vaughan [2010] EWCA Civ 349, [2010] 2 FCR 509, [2011] Fam 46, [2010] 3 WLR 1209, [2010] 2 FLR 242.
White v White [2001] 1 AC 596, [2000] 3 FCR 555, [2000] 3 WLR 1571, [2001] 1 All ER 1, [2000] 2 FLR 981, HL.
VB v JP [2008] EWHC 112 (Fam), [2008] 2 FCR 682, [2008] 1 FLR 742.
Z v A (financial remedy) [2012] EWHC 1434 (Fam), [2014] 2 FLR 109.

Appeal

The wife appealed from a financial remedy order made by Recorder Tidbury sitting in the Central Family Court on 16 September 2016, awarding her £9.76 million and ordering the husband to pay the wife ongoing maintenance for joint lives at the rate required to meet her income needs, which he assessed to be £175,000 per year. Permission for the wife to appeal was refused by the judge but was granted by Gloster LJ. The husband responded by filing a Respondent's Notice. Permission for the husband to cross-appeal was given by Moylan LJ. The facts are set out in the judgment.

James Turner QC and *Thomas Dance* (instructed by *BP Collins LLP*) for the appellant.
Nigel Dyer QC and *Lily Mottahedan* (instructed by *Penningtons Manches LLP*) for the respondent.

11 April 2018. The following judgment was delivered.

MOYLAN LJ.

INTRODUCTION

[1] This case raises issues about the application of, and the relationship between, the principles of need, sharing and compensation in the determination of financial claims under the Matrimonial Causes Act 1973 (the 1973 Act). The specific issues can be phrased in a variety of ways but I propose to express, what I regard as, the principal issues as follows:

(i) Is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has a continuing entitlement to share?

(ii) How should the court assess whether an award determined by application of the sharing principle meets the party's needs? More specifically to the arguments advanced in this case, to what extent is it fair for the wife to be required to use her sharing award to meet her income needs when the husband will meet his needs from earned income?

Additionally, although as a subsidiary issue, the wife submits that the compensation principle has not been properly understood and applied because it is applicable, not only when the applicant spouse has sustained

a financial disadvantage, but also, separately, when the respondent has sustained a financial advantage during the marriage.

[2] It has been said in many previous decisions that there are few cases in which the available resources exceed those required to meet the family's future financial needs. On one view, having regard to the substantial amount of the resources available in this case, the issues raised might, therefore, be considered to have limited application. However, as explained below, this is not necessarily the position and it is important that, when determining the arguments raised in this case, I should at least consider how those arguments and their determination might impact on a broader range of cases.

[3] This is important because of the obligation on the courts to achieve, what Lord Nicholls in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 FCR 213, [2006] 2 AC 618 (*Miller*) (para [6]) referred to as, 'an acceptable degree of consistency of decision from one case to the next'. I would also note in passing that the statistics published by the Ministry of Justice for the years 2006 to 2016, whilst accepted not to be entirely accurate (and thought to underestimate the overall number of applications), show that a very significant percentage of cases started (which have numbered, very broadly, between 38,000 and 65,000 per year) are either uncontested or become uncontested because they are resolved by agreement between the parties. It is only a very small percentage, in many years well under 10 per cent (between about 3,000 and 3,800 cases), that are determined after a contested hearing. This is not to diminish the impact on the families involved in those contested cases but to remind me of the importance of adhering to Lord Nicholls' observation and, as he went on to say, that the articulation by the courts of the applicable principles have the objective, as an 'important aspect of fairness', of providing an appropriate degree of clarity and predictability in the manner of their application.

[4] The final financial remedy order which is the subject of this appeal was made by Recorder Tidbury sitting in the Central Family Court on 16 September 2016. The parties had agreed that their capital resources, including pensions, should be divided equally. Centred on the issues of principle referred to above, they disagreed about the extent to which the wife should receive additional provision by way of maintenance.

[5] In simplified terms, the effect of the court's order has been as follows. The wife's share of the parties' capital resources totalled £8.4 million and the husband's £7.8 million. The difference reflected specific adjustments made by the judge to ensure that the resources were shared equally (for example, because the wife had not yet incurred the cost of purchasing alternative accommodation). The wife received an additional sum of just under £1.4 million comprising differing percentages of deferred remuneration received by the husband after the parties had separated. The award, therefore, totalled £9.76 million. In addition, the judge ordered the husband to pay the wife ongoing maintenance for joint lives at the rate required to meet her income needs which he assessed to be £175,000 per year.

[6] The wife made it clear from receipt of the judge's first draft judgment that she intended to seek permission to appeal. Permission was refused by

the judge but was granted by Gloster LJ. The husband responded by filing a Respondent's Notice. I gave him permission to cross-appeal.

[7] In summary the parties' respective cases are as follows.

[8] As to the issue set out under (i) above, Mr Turner QC on behalf of the wife (as I will call her) submits that the judge failed to award her a fair share of the husband's post-separation earned income. He submits that the husband's earning capacity is a matrimonial asset in which the wife is entitled to share as with any other such asset. It was built up during the marriage and is, therefore, the product of marital endeavour. Accordingly, post-separation income received by the husband from the deployment of this earning capacity should be shared as being referable to or the product of marital endeavour.

[9] As to the issue under (ii), Mr Turner submits that the wife should not have to make any use of her capital share, including by the attribution of a notional investment return, to meet her income needs.

[10] Mr Turner further submits that she is entitled to a share of the husband's earned income by application of the compensation principle. This principle, 'properly understood', applies not only when an applicant has sustained a financial detriment but also when a financial benefit or advantage has accrued to a respondent by reason of the relationship and which has produced a surplus of resources over needs.

[11] In summary, the wife submits that she should have been awarded 35 per cent of the husband's net bonuses payable in respect of the years up to and including 2019 (payable until 2022) and maintenance at the rate of £190,000 per year for the parties' joint lives.

[12] Mr Dyer QC on behalf of the husband (as I will call him) submits that an earning capacity is not an asset to which the sharing principle applies. However, although this was, what might be called, his headline submission, he conceded that, as a matter of practice, an award of a share of post-separation bonuses sometimes occurs even though they were not earned during the marriage.

[13] As to (ii), Mr Dyer's simple submission is that the court only has to look at the amount received by the wife, namely £9.7 million, to be able to conclude that she will have sufficient resources to justify effecting a clean break. During the hearing Mr Dyer, albeit with some apparent reluctance, appeared to be willing to extend this submission to include some consideration of how the wife's resources might be deployed to enable her to meet her needs.

[14] As to the issue of compensation, Mr Dyer submits that this was correctly rejected by the judge who found that the wife had not sustained a financial disadvantage greater than the sum awarded to her by application of the sharing principle. Absent such a finding there is, he submits, no basis for an award to be made by reference to this principle.

[15] In summary, Mr Dyer submits that the judge should have ordered maintenance for a term only. He proposes a five-year term from 2016, namely to February 2021, with a s 28(1A) bar to take effect at the end of a five-year term from 2016, namely February 2021.

BACKGROUND AND JUDGMENT

[16] At the date of the order the husband was aged 53 and the wife 47. They started living together in 1991, married in 2000 and separated in 2012. They have one child who was born in 2004.

[17] When the parties started living together they were both working as accountants for the same well-known firm, Coopers & Lybrand. They had no significant capital resources. In 2001 the husband accepted employment which required the family to move from Manchester to live near London. This move led to the wife leaving her then employment and, apart from a short period in 2002/2003, she has not worked in paid employment again.

[18] The final hearing did not take place until September 2014. A draft judgment was sent to the parties in November 2014. This was followed by a number of further hearings to deal with additional points raised by the parties. These were in part because further evidence was required to deal with pension issues which, for reasons which are not clear, had not been sufficiently clarified by the date of the final hearing and also because of subsequent developments. The subsequent developments led the judge to change his draft judgment in two respects. One was to reduce the amount he had determined it would be reasonable for the wife to spend on purchasing alternative accommodation. The other was to alter the rate of interest applied to the wife's capital for the purposes of calculating her income needs. I will deal with these developments further below.

[19] The parties had agreed that there should be an equal division of their capital assets including pensions. The judge assessed their total value in his first substantive judgment as being £14.4 million. For reasons which it is not necessary to set out, their value subsequently increased to £16.4 million.

[20] The husband's net income for the tax year 2013/2014 had been just under £3 million. His total estimated net income for the calendar year 2014 was £3.7 million. The judge accepted that there were reasons for being cautious about whether the husband's income in the future would continue at these levels. A substantial proportion of the husband's income was received by way of a discretionary bonus, a performance share plan and a matching share plan, payment of which (either in whole or in part) was deferred for three years with the ultimate amount paid being dependent on performance over that period.

[21] The wife sought a share of the husband's bonuses. She sought 50 per cent of the deferred (net) sums received in the years to 2014 and 35 per cent of the (net) bonuses awarded for the years 2014 to 2019 (receivable up to 2022). In addition, she sought continuing spousal maintenance at the rate of £190,000 per year.

[22] The husband proposed that the wife should only be awarded a share of his deferred remuneration received in 2014 and 2015 and spousal maintenance for five years (£80,000 for three years and £50,000 for two years) with a clean break. The husband argued that, at the end of that term, the wife would be able to meet her own needs in part with an assumed earned income starting at £30,000 after three years (hence the reduction in the proposed rate of periodical payments).

[23] The judge's decision in his draft judgment was, in summary, as follows. He decided that the wife's housing need totalled £3.25 million, consisting of a main home costing £2.5 million and a holiday home costing £750,000. She had an income need for herself of £175,000 per year plus £24,000 per year for the parties' child. He decided that the wife should receive 25 per cent of the bonuses paid in 2014 and 12.5 per cent of those paid in 2015. This would provide the wife with total net capital of approximately £8.3 million (on the figures then available).

[24] After deducting housing (£3.25 million) and pension funds (£1.27 million), the wife would have liquid capital totalling approximately £3.5 million (I will call this the wife's 'free capital' to differentiate it from the former assets). The judge ascribed a net income of £60,000 to the wife's free capital, being an assumed net return of 1.75 per cent. Although the figures in the judgment are more complicated, because of the way in which the wife would, in fact, receive her capital, the judge's ultimate order awarded the wife continuing maintenance of the amount required to bridge the shortfall between her assumed net income (£60,000) and £175,000. The judge did not make any reduction for assumed future earnings because, although he expected the wife to have obtained paid employment after 4/5 years, he did not consider it fair to do so, largely because of the level of the husband's income but also because of uncertainty as to whether and what she might be earning.

[25] The judge did not consider that the wife could adjust without undue hardship to the termination of maintenance. His evaluation was confined to considering 'whether she could adjust without undue hardship on the … income that I have attributed to her capital plus whatever she earned'. He decided that the consequent differential between the parties' respective lifestyles, because of the income available to the husband, would be such that she could not.

[26] I now turn to consider in a little more detail the judgment and the parties' cases below and also the way in which the case developed after the first draft of the judgment had been provided to the parties.

[27] The judge described the two main areas of dispute as being:

(a) whether the wife should be entitled to share in the husband's post-separation bonuses, and

(b) whether the wife should be awarded open-ended maintenance or whether, as argued by the husband, she would be able to adjust without undue hardship to the dismissal of her claims at the end of the proposed five-year term.

Underlying the latter issue was the question of how the wife's income needs would be met and the extent to which her share of the capital assets should be deployed to meet those needs.

[28] As to (a), the wife contended, as on this appeal, that the husband's post-separation earnings were marital property which should be shared. They were the product of an earning capacity which had been built up during the marriage. As part of this submission, it was accepted before the judge that

the entitlement to share only applied to earnings from 'the same job of the same character'.

[29] The wife also contended that she was entitled to a share of the husband's income, by application of the principle of compensation, because the husband's earned income represented an advantage which had accrued to him during the marriage. Any other outcome would not achieve a fair result.

[30] The husband submitted that any entitlement to sharing ceased with the end of the marriage, save only to the extent that any deferred emoluments had been 'earned' prior to the separation. He also submitted that, factually, the wife could not establish a claim to compensation.

[31] The judge decided that the sharing principle did not apply to the husband's post-separation earnings. Sharing stopped 'at or within a short time of the end of the relationship'. The wife could only establish a claim to a continuing share of those earnings if 'necessary to meet her reasonable needs'. Further, the bonuses actually received by the husband were 'entirely dependant on the husband's post-separation performance'. It was only the maximum amount of the potential award, deferred for three years, which had been determined by his performance during the marriage. However, because, it appears, of this latter factor and because 'it is not unusual for assets to be assessed at the date of the hearing', the judge decided that the wife should receive a percentage of the amounts received by the husband in 2014 and 2015 (25 per cent and 12.5 per cent respectively, as referred to above).

[32] As to the claim based on compensation, this regrettably led to an exploration of the reasons for the wife not returning to paid employment after the family moved in 2001. Because this claim is based on 'advantage' and 'disadvantage', it is perhaps not surprising that parties can be led into arguing that what is now asserted to have advantaged one party was not an advantage achieved due to the actions of the other party, or that what is now said to have been a disadvantage was a choice freely and willingly adopted by that party during the marriage and contrary to the wishes of the other party or vice-versa. I consider the issue of compensation further below but, at this stage, I confine myself to saying that, in my view, it was unnecessary and inappropriate for the parties to engage in this factual debate. I would suggest that, absent reliance on conduct (which will only exceptionally have any relevance), the court is looking at the financial consequences of what happened during the marriage and those alone.

[33] The judge rejected the wife's case as to compensation. The wife had suggested that, if she had continued with her career, she might have been earning at the rate of £100,000 gross per year. The judge found that even this would have required the wife to have been more determined to pursue her career than she was and, further, that his proposed award in any event exceeded any financial loss she might have sustained.

[34] As to the latter dispute, under (b) above, the wife's case was that her income needs should be met by the husband through continuing periodical payments of £190,000 per year.

[35] The husband proposed, as referred to above, that the wife should receive maintenance for a defined term of five years. Although he also sought a clean break, he did not seek a s 28(1A) bar. Rather, he sought the 'option' of capitalising the wife's income claim during that term. During the hearing of this appeal, Mr Dyer sought to explain these submissions. It may be a matter of perspective, but even after further reflection, I remain puzzled by this aspect of the husband's case.

[36] The statutory framework, by ss 31(7A) and 31(7B) of the 1973 Act, gives the court the power on a variation application to make a further capital order, including a lump sum, combined with, in effect, a s 28(1A) direction. These are powers which exist and no order is required to enable a party to apply to the court to exercise those powers. If the husband was seeking a deferred clean break, which he said he was, the way to achieve this was by seeking a s 28(1A) direction. In my view, therefore, the judge was right to regard the husband's case as 'akin to (seeking) a s 28(1A) bar'.

[37] Dealing with the wife's needs, as referred to above, the judge assessed her income needs for herself at £175,000 per year and her housing needs at £3.25 million (£2.5 million for her main home and £750,000 for a holiday home). The amount taken by the judge for the wife's main home was based on her evidence that she intended to remain living in the same area as the former matrimonial home. During the hearing, she was asked specifically whether she intended to move to North Wales, because there was some evidence which suggested that she was, and she said she had no such intention. The judge's figure of £2.5 million was based on the amount of the available resources, the quality of the former matrimonial home and its value (nearly £5 million) and the quality of the property purchased by the husband (at an initial cost of c £2 million).

[38] The judge did not consider that the evidence enabled him to make any clear findings as to the wife's employment prospects. In broad terms, he concluded that the wife could be expected to start working part-time from about 2020 (when the parties' child would be 16) and, at some point thereafter, would be able to work full-time. He did not expect her to be earning substantial sums for at least three and probably four or five years. In those circumstances the judge decided, as referred to above (paragraph [25]), that the wife could not adjust without undue hardship to the termination of maintenance.

[39] Following a further hearing in February 2015 (fixed primarily to deal with pension issues, which included the impact of the parties' respective lifetime allowances) the judge returned to the issue of what he described as the 'rate of return' on the wife's 'invested capital'. This arose because Mr Dyer had referred the judge to the Court of Appeal's decision of *H v H (financial remedies)* [2014] EWCA Civ 1523, [2015] 2 FLR 447, which post-dated the first draft judgment in the present case, and had submitted that this impacted on the judge's assumed rate of return of 1.75 per cent.

[40] In his initial submissions for the final hearing the husband had contended for an assumed rate of return of 2.5 per cent. At the hearing in February 2015, having previously accepted the judge's rate of 1.75 per cent,

Mr Dyer argued for a net rate of between 2.5 and 3 per cent based, it seems, significantly on *H v H*.

[41] Contrary to the wife's submissions, the judge decided that it was appropriate for him to revisit this figure. In his view, although there was 'no benchmark rate for attributed income on capital', the '*Duxbury* rate … is as close to a benchmark as can be determined'. Specific justification would be required to depart from that rate. The judge took a lower rate for an initial period, because the wife would have less financial flexibility, but, thereafter, he applied what he regarded as 'the *H v H* rate of return', being 3.75 per cent gross. He deducted tax at an assumed rate of 40 per cent giving 2.25 per cent net. The judge considered, further, that it was appropriate to take this rate because the capital fund was not being amortised and the wife would also be receiving periodical payments.

[42] A report on pensions was provided by a jointly instructed expert in May 2015. This put forward options each of which was based on seeking to achieve an equal division of the pension funds allowing for the fact that the parties had different lifetime tax allowances. The expert assumed that the wife would start drawing a pension at the age of 60 and, on the option selected by the judge, that this would provide her with a gross pension of £76,000 (in real terms). This was based on a number of assumptions including an investment return prior to retirement of 5 per cent, being broadly midway between the Financial Ombudsman Service's then assumptions of bond returns of 3.25 per cent and equity returns of 8 per cent.

[43] In addition, prior to the next hearing in August 2015, the wife had decided that she would move to live in Cheshire and, quite rightly, her solicitors informed the husband's solicitors of this development. The husband responded by requesting the judge, relying on *Robson v Robson* [2010] EWCA Civ 1171, [2011] 3 FCR 625, [2011] 1 FLR 751, to revisit the sum he had determined as being required to meet the wife's future housing need in part because of its consequent impact on her free capital. As with the rate of return issue, Mr Turner submitted that there was no justification for the judge revisiting his determination in what, at that stage, was still a draft judgment. The judge decided to reconsider the issue of housing and heard further evidence. He then determined that the sum of £2 million, rather than the previous figure of £2.5 million, should be taken as being the cost of the wife's main home. The judge rejected the husband's further argument that he should revisit the wife's income needs on the basis that living in Cheshire would be less expensive than living in Buckinghamshire.

[44] There was a further hearing in January 2016 which dealt with the sale of the former matrimonial home (which was being compulsorily purchased because of HS2) and a number of other minor issues. The judge was required to deal with yet further issues in April and August 2016 leading to the September 2016 order.

[45] At the request of the court, after the conclusion of the hearing, we were provided with further clarification about the expert evidence as to the wife's prospective pension. The figure given by the expert for the wife's projected

pension income at the age of 60 is £76,000 per year in real terms (ie the expert has allowed for inflation between now and then) and is the figure before income tax.

SUBMISSIONS

[46] The parties' respective cases on this appeal can be summarised as follows.

[47] Mr Turner advances three grounds of appeal:

(a) The judge was wrong not to award the wife a share (or greater share) of the husband's post-separation income by application of the sharing principle,

(b) The judge, having concluded that the wife had not sustained a relationship-generated financial disadvantage, failed properly to apply the compensation principle by failing to take into account that the husband had obtained an ongoing relationship-generated advantage (in terms of his earned income),

(c) The judge was wrong to attribute any income to the wife's capital resources, allocated to her by application of the sharing principle, when determining how she could meet her income needs because the husband would not have to make use of his capital to meet his income needs.

In general terms Mr Turner submits that the judge's approach and award were both unfair and discriminatory. Mr Turner also referred to a number of authorities some of which I address later in this judgment.

[48] (a) At the core of Mr Turner's submissions on this ground is his argument that an earning capacity is a matrimonial asset. It is, he submits, an asset referable to or the product of marital endeavour and should, therefore, be divided between the parties by application of the sharing principle as with other marital assets. In his submission, in every case where the parties' resources (as I understand it, capital and/or income) exceed their needs, the applicant spouse potentially has an entitlement to share in future income. Any other outcome would not be fair because it would be discriminatory in the same way that cases determined before the decision of *White v White* [2001] 1 AC 596, [2000] 3 FCR 555, [2000] 3 WLR 1571 were identified in that case as having been decided on discriminatory grounds.

[49] Apart from the general submission that any other approach would be unfair and discriminatory and would not represent the proper application of the sharing principle, this aspect of the wife's case is constructed significantly on one sentence in Lady Hale's speech in *Miller*. In paragraph [154] she said:

> 'She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation …'.

It is clear that this is a reference to surplus *income* and is relied on by Mr Turner for this reason. This is, he submits, awarding the wife no more

than a share of her earned entitlement, namely a share of what she has helped create or develop during the course of the marriage.

[50] Indeed, Mr Turner submitted that in the present case the whole of the husband's 'relevant earning capacity' had been 'earned' during the marriage. The husband's post-separation earnings are the fruits, perhaps even the 'best fruits', of this earning capacity and, as such, are the product of the parties' respective contributions during the marriage in the same way as other assets. Is this not, he asks, the rationale which underpins the sharing principle and, if it is, why should the wife not be entitled to a share as with all other marital assets?

[51] Mr Turner frankly acknowledged that there would be significant difficulties in individual cases in quantifying the share which the applicant spouse should receive of the other party's earned income. In the course of the hearing he was, frankly, unable to identify the factors which would determine what percentage share the applicant should receive and for what period. The court could, he said, make 'robust assumptions' and, 'ultimately, stand back and take a view'. He conceded that the wife's claim to 35 per cent in respect of the husband's bonuses to the end of 2019 contained 'an element of arbitrariness' both in respect of the percentage and the duration sought. However, he submits, difficulties of quantification should not defeat the principle.

[52] Mr Turner touched on some other, subsidiary, aspects of this submission. For example, he submitted that, if a respondent chose to move to lower paid employment or not to work at all, the applicant's share should be determined by reference to earning potential, unless it was reasonable for the respondent to have acted as he/she had, because the respondent had a 'post-matrimonial obligation to work'. He accepted that a strictly principled approach would include all income and not just a share of bonuses (or additional awards) as sought by the wife in this case. He also did not shy away from the logical outcome of this submission, namely that in all cases where resources exceed needs the applicant spouse has a potentially open-ended claim to a share of income until the respondent's retirement or death. When asked how this would impact on the court's ability to effect a clean break, Mr Turner responded by submitting that it would be no more difficult than in cases based on needs.

[53] (b) On the issue of compensation, Mr Turner submits that this principle has been misunderstood. In his submission, it applies not only when the applicant has suffered a financial disadvantage through the relationship but also, separately, when a financial advantage (namely, 'enhanced earnings' per Lord Nicholls in *Miller*, para [32]) has accrued to the other party. It is confined to cases in which the benefit which has accrued produces a surplus over needs but, otherwise, it applies in all such cases.

[54] As to (c), Mr Turner asks why the wife should be required to use her capital share in this way, when the husband does not because of his earnings. The wife's income needs should, instead, have been met purely by an award of periodical payments. Again, Mr Turner did not shrink from acknowledging the logical effect of this submission, namely that, following the division of

the parties' capital resources by application of the sharing principle, in all cases in which one party earns more than the other then, *regardless* of needs, the latter will have an entitlement to receive an additional award from the former to reflect that income differential. Any other outcome would be unfair in part because the parties would have an entirely different start to their post-marriage lives. Further, to require the wife to use her resources in this way, when the husband would not, would lead to an increased financial disparity between the parties from the outset. It would also be discriminatory because it results from the husband having been the breadwinner and the wife the homemaker during the marriage. In some respects, these arguments replicate Mr Turner's submissions as to the application of the sharing principle to earned income.

[55] The wife also challenges the judge's decision to revisit the amount allocated for the wife's housing needs and the rate of return applied to the wife's free capital. Mr Turner submits that *H v H* was a case concerning capitalisation of an income claim and not the use of a spouse's capital share which is a 'very different' exercise. The former is averaging over time while the latter should, at most, be considering what the wife's capital is, *at present*, able to produce.

[56] In response to the husband's cross-appeal, Mr Turner submits that the judge's decision not to impose a maintenance term cannot be described as wrong because it did not involve any error of principle. This was not a 'meal ticket for life' because it will be brought to an end by, for example, the wife's remarriage. The court can also determine at a later date that the wife's right to claim maintenance should be brought to an end. Further, to require the wife to use even part of her capital to meet her income needs would be unfair because the husband will not have to use his capital in this way.

[57] Mr Dyer commenced his oral submissions by observing, with broad simplicity, that surely with £9.7 million the wife must have sufficient resources for the court to be able fairly to effect a clean break. With some encouragement from the court he seemed prepared to countenance a more detailed consideration of the issue of needs and, in particular, how the wife's resources might be fairly deployed to meet those needs. This did not extend to the husband seeking the amortisation of all the wife's free capital because, so Mr Dyer submitted, this is 'not done'.

[58] Mr Dyer advanced a number of general points based in part on aspects of the speeches in Miller. The 1973 Act contains a 'statutory steer' towards a clean break when this can be fairly achieved. There is an 'assumption' that the marital partnership does not stay alive for the purposes of sharing future resources unless justified by either need and/or by application of the compensation principle. The objective is 'independent finances and self-sufficiency' and an 'equal start on the road to independent living' not continuing economic parity or equivalence. At the end of the marriage, a spouse has no continuing entitlement to share in the other spouse's resources because the partnership, on which the sharing entitlement is based, has come to an end.

[59] Mr Dyer's core response to the first ground of appeal is that earning capacity and post-separation earnings are not marital property to which the sharing principle applies. He relies on passages from *Miller* as demonstrating that the sharing principle is confined to capital assets. He submits that, if the principle was intended to apply to an earning capacity, this would have been more clearly expounded given the likely importance and effect of this on the determination of financial claims.

[60] The extension of the sharing principle as sought by the wife would, he submits, contravene the clean break principle in a fundamental manner. It would also introduce complexity and confusion into the determination of financial claims contrary to the clarity which is required properly to assist both the courts and parties. He described the wife's claim as arbitrary and scatter-gun in its approach and pointed to the difficulties Mr Turner had in explaining the basis of her case for 35 per cent of bonuses received up to 2022.

[61] Mr Dyer also took the court through a number of authorities. He initially submitted that in no reported case had the sharing principle been applied to post-separation earnings. However, as was pointed out during the hearing by MacDonald J, this submission appeared to overlook cases in which a spouse had been awarded a share of post-separation earnings other than by reference to needs or compensation: as in *H v H* [2007] EWHC 459 (Fam), [2008] 2 FCR 714, [2007] 2 FLR 548. Further, in the present case the husband had proposed that the wife should receive a share of post-separation bonuses. However, Mr Dyer described this as a 'run-off' which was often offered on a pragmatic basis in order to achieve an agreed settlement rather than on any principled basis.

[62] As to the issue of compensation, Mr Dyer submits that the judge's finding, that the wife would have been earning less than £100,000 gross per year even if she had continued with her career, is not one which can be disturbed by this court. As a consequence of this finding he submits that the judge was also right to conclude that she had not sustained a financial disadvantage in respect of her career greater than the amount she would receive by application of the sharing claim. Mr Dyer also submits that the principle only applies if the applicant spouse has sustained a financial disadvantage. This is the essential evidential issue, not whether the husband has obtained an advantage.

[63] As to ground (c), Mr Dyer submits that the judge was entitled to decide that 2.25 per cent net return was a fair rate of return to apply to the wife's free capital, in particular following *H v H*. This decision also justified the judge revisiting the rate applied in his draft judgment. Similarly, the judge was justified, indeed required, to determine the wife's application on the true facts, namely that the cost of an alternative home in England would be £2 million rather than the judge's previously estimated sum of £2.5 million.

[64] On the husband's cross-appeal, Mr Dyer submits that the judge failed to give sufficient weight to the clean break principle. He was clearly wrong to make a joint lives maintenance order and was also wrong not to determine

that the wife could adjust without undue hardship to the termination of maintenance.

[65] In support of this aspect of his case, Mr Dyer relies on the fact that the wife is receiving assets worth a total of £9.7 million rather than the sum of £8.3 million as estimated by the judge in his draft judgment. Mr Dyer submits that the receipt by the wife of an additional £1.4 million should, by itself, have led the judge to impose a defined, non-extendable term. The wife will have free capital of £4.6 million which, at 2.25 per cent net, will produce £103,500 and, at 3.75 per cent gross, would produce between £110,000 and £124,000 net (depending on variable tax rates). In addition, Mr Dyer points to the wife's pension from the age 60 (in 2028) of £76,000 gross and any sum she might additionally earn. In those circumstances he submits that she can adjust without undue hardship with effect from February 2021.

THE LEGAL CONTEXT

[66] During the course, in particular, of Mr Turner's submissions, it sometimes seemed as though the court was being invited to undertake a detailed textual analysis of what has been said in some of the cases, notably *Miller*, in a manner similar to that which might be applied when the court is required to interpret a statute. I would question whether such a detailed scrutiny is apt and properly reflects the differences between the drafting process for a judgment and that for a statute and their different roles in the administration of justice. I would also mention that, even in the interpretation of statutes, the court can take a broad purposive approach.

[67] Further, in the context of financial remedy applications, the court is giving guidance. Guidance can, of course, be given with a degree of specificity but, it is perhaps obvious to say that, one cannot expect judgments to be written in the expectation that they will be analysed as though they were statutes. This is not to suggest that precedents cannot create binding authority. The issue I am addressing is how those precedents are interpreted and applied.

[68] The present case engages with a number of principles which underpin the exercise by the court of its discretionary powers under the 1973 Act. I propose to address the following principles – non-discrimination, sharing, compensation, need, and clean break – by reference principally to the way in which they have been considered in previous authorities. In referring only to these principles, I do not, of course, overlook that the court's objective is to achieve a fair outcome having taken into account all the relevant circumstances of the case.

[69] The first, over-arching, principle is that the court must exercise its discretionary powers in manner which is not discriminatory. As Lord Nicholls said in *White v White* [2001] 1 AC 596, 605B/C:

> 'In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles.'

This was repeated with added emphasis in *Miller* in which Lord Nicholls described discrimination as 'the antithesis of fairness' (para [1]).

[70] However, because it appeared at times that Mr Turner was submitting, simply, that any future financial differences between the parties could or would constitute discrimination, it is relevant to repeat what Wilson LJ (as he then was) said in *K v L* [2011] EWCA Civ 550, [2011] 2 FCR 597, [2012] 1 WLR 306, 313C/D:

> 'the law does not abjure all discrimination. On the contrary it is of the essence of the judicial function to discriminate between different sets of facts and thus between different claims. What is outlawed is discrimination on the ground of superficial differences which, on analysis do not reflect substantive differences …'.

[71] The next three principles are, of course, those identified in *Miller* as guiding the manner in which the court determines its award. I will deal with them together by citing some passages from the authorities to which we have been referred.

[72] I start by referring briefly to *White v White* in which the 'yardstick of equality' was developed as a 'general guide'. In particular, it is relevant to note that the yardstick was to be applied to the division of the parties' 'available assets': Lord Nicholls p 605F/G.

[73] In *McFarlane v McFarlane, Parlour v Parlour* [2004] EWCA Civ 872, [2004] 2 FCR 657, [2005] Fam 171, Thorpe LJ (para [4]) referred to the 'novel point of principle' raised in those cases as being whether the yardstick of equality, introduced by *White v White* 'for measuring the fair division of capital', should also be 'applied as the measure for the division of income'. He rejected this because he did not consider that the cross-check of equality was appropriate in respect of the division of income 'for a number of reasons' (para [106]). These included that Lord Nicholls had 'suggested the use of the cross-check in dividing the accumulated fruits of past shared endeavours'.

[74] However, in those cases where an immediate clean break could not be achieved, Thorpe LJ recognised that the 'surplus of future income over future needs' could be divided between the parties. In his view it was wrong in principle for 'the earner to have sole control of the surplus' (para [66]). This was to give *both* parties 'the opportunity and the responsibility to invest' with the objective of financial independence being achieved 'within a relatively short span'.

[75] I recognise, as highlighted by Mr Turner, that the award of periodical payments made by the District Judge in *McFarlane* was restored by the House of Lords. However, as Sir James Munby P observed during the hearing, although the specific amount was restored, this was based on the principles referred to by the House of Lords which were, inevitably, not those on which the District Judge had based her decision.

[76] The case to which the parties have given the most attention during this appeal is *Miller*. This case covers a number of matters which require consideration.

[77] Matrimonial property is defined by Lord Nicholls as being 'property acquired during the marriage otherwise than by inheritance or gift',

such property being 'the financial product of the parties' common endeavour' (para [22]). This definition is picked up in *Charman v Charman (no 4)* [2007] EWCA Civ 503, [2007] 2 FCR 217, [2007] 1 FLR 1246 in which matrimonial property was defined as 'the property of the parties generated during the marriage otherwise than by external donation' (para [66]).

[78] As to sharing, which Lord Nicholls called the 'equal sharing' principle, in his view: 'When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary' (para [16]). Lady Hale put it in terms of 'the sharing of the fruits of the marital partnership' (para [141]) and also 'roughly equal sharing of partnership assets' (para [143]).

[79] As referred to above, Mr Turner relies heavily on what Lady Hale said when dealing with the *McFarlane* case. To repeat, she said that the wife 'is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation …' (para [154]).

[80] However, I note that earlier in her speech, when dealing with general principles, she said (para [143]):

> 'But there are many cases in which the approach of roughly equal sharing of the partnership assets with no continuing claim one against the other is nowadays entirely feasible and fair.'

After referring to two cases, in which both parties 'could earn their own living', Lady Hale added that:

> 'Although one party might have better prospects than the other in future, once the marriage was at an end there was no reason for one to make further claims upon the other.'

Importantly she also said (para [144]):

> 'In general, it can be assumed that the marital partnership does not stay alive for the purposes of sharing future resources unless this is justified by need or compensation.'

I appreciate that in the preceding sentence Lady Hale had said, 'Much will depend upon how far future income is to be shared as well as current assets'. However, this comment is dealing with the question of whether the court starts the exercise with equal sharing and then goes on to consider need and compensation or vice-versa.

[81] It is also relevant to note that it is the 'assets' of the partnership or its 'property' which is being shared. Does an earning capacity fit easily within these terms? It may be that I am at risk of adopting the textual approach which I have questioned above. However, when Lady Hale addressed the issue of earning capacity she did so by noting that (para [142]):

> 'Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a

> rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution.'

If an earning capacity was within the sharing principle, this would not be the effect of too 'strict an adherence' to it. This conclusion is further supported by the fact that this observation is immediately followed by the first sentence of paragraph [143] (quoted above) which referred to 'roughly equal sharing of partnership assets with *no* continuing claims' (my emphasis). Again, if an earning capacity was a partnership asset, a roughly equal sharing would be likely to include continuing claims especially, on Mr Turner's argument, when one party has 'better prospects'. Such prospects are, however, specifically stated by Lady Hale as not being a reason 'for one to make further claims upon the other' (para [143]).

[82] *Charman (no 4)* directly addressed the question of the property to which the sharing principle applies. What is of most relevance to the present case is the specific reference to where an earning capacity sits in the application of this principle. The court observed that 'future income must always be appraised', because of its potential relevance to the fairness of the overall outcome, but left open the effect of Lady Hale's remarks in *Miller* (para [154]):

> 'We appreciate that [these remarks] are also said to permit argument that a party's earning capacity is itself an asset to which the other party has contributed and which might to some extent be subject to the sharing principle, this seems to us an area of complexity and potential confusion which in this case it is unnecessary for us to visit' (para [67]).

[83] In *VB v JP* [2008] EWHC 112 (Fam), [2008] 2 FCR 682, [2008] 1 FLR 742 (para [59]) Sir Mark Potter P addressed the effect of the end of the partnership in terms which were endorsed by Thorpe LJ in *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 3 FCR 650, [2009] 2 FLR 1574 (para [37]) and by Ryder LJ in *H v H* (para [40]). Quoting from *VB v JP*:

> 'on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible.'

The fact that this observation has been approved twice by the Court of Appeal is clearly significant to the outcome of the present case.

[84] In *Scatliffe v Scatliffe* [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106 (para [25]) Lord Wilson JSC concluded that:

> 'in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then ask whether, in the light of all the matters specified [in the statute], the result of so doing represents

an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Baroness Hale in the *McFarlane* case [2006] 2 AC, paras [137]–[144], require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other'.

[85] Wilson LJ had further considered the question of the relevance of an earning capacity in *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FCR 242, [2012] Fam 1. I propose only to quote part of what comprises (paras [21] to [28]) a detailed consideration of its potential relevance.

[86] As part of this consideration, Wilson LJ addressed whether (para [23]):

> 'for the purposes of the sharing principle it might be appropriate to capitalise the earning capacity brought by one spouse into the marriage … an approach first favoured by Mr Nicholas Mostyn QC … in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108.'

He went on immediately to question this approach:

> 'I am unclear how the earnings *were* thus to be capitalised, still less how such allowance *was* thus to be made, and in particular whether, if at the date when the financial proceedings were heard, the spouse still enjoyed an established earning capacity, such also fell to be capitalised and also in some way to be taken into account.'

[87] Wilson LJ agreed with Lord Mance's objections, as set out in *Miller* (para [172]), 'to the capitalisation of a spouse's earning capacity at the date of the marriage' (para [25]). An earning capacity was 'not easily measurable in capital terms'. This had been demonstrated by the first instance judgment in *Jones* being 'replete with objections to the adoption of arbitrary percentages in the application of the sharing principle'. Wilson LJ also pointed to the difficulty of evaluating what contributed to the husband's capacity 'to generate earnings':

> 'The proper depth of any inquiry into a spouse's expertise and acumen is unclear. What contributed to the substantial capacity of this husband to generate earnings (or profits) in his chosen field? The judge rightly laid stress on the knowledge which he had gained during employment in the field from 1967 to 1986. But, without his having other qualities, whether inherited or acquired as a child at home or at school or otherwise, he would not have been able to put his knowledge to profitable use. In truth the judge was placing a substantial capital value on the husband as a person, I am convinced that such is no function of the divorce court.'

[88] Wilson LJ expressly decided that a spouse's established earning capacity at the date of the marriage did not fall 'to be capitalised, or otherwise brought into account, for the purpose of the sharing principle' (para [26]), thereby overruling *GW v RW (financial provision: departure from equality)*.

[89] Additionally, and importantly for the present case, Wilson LJ returned to the question he had asked (in para [23]) as to whether an earning capacity should be capitalised for the purposes of determining a financial claim and went on to consider the issue of earning capacity more generally.

> '[27] In para [23] above I questioned whether Mr Mostyn's approach also required capitalisation of any such established earning capacity as still subsisted at the date when the financial proceedings were heard. Were we to overrule his decision, my question would not need to be answered. There is, however, a separate, wider question whether it is ever necessary or appropriate for the court to attempt to capitalise the earning capacity which a party has at the date of the hearing. There is no denying the extreme importance of an inquiry into the earning capacity of each party at that date: indeed s 25(2)(a) of the Matrimonial Causes Act 1973 makes it mandatory. A spouse's earning capacity will usually be a central foundation of an order for periodical payments, and thus of any order by way of capitalisation thereof, pursuant to the principles of *need* and/or of *compensation*. Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the *sharing* principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it. Today I have as little appetite for such costly artificiality as when, in 2007, I subscribed to the judgment of this court in *Charman v Charman (no 4)* [2007] 1 FLR 1246, para [67] and thus to the reservations in this respect which the court expressed at the foot of that paragraph.'

Whether or not strictly obiter, the above passage would seem to provide a clear answer to one aspect of Mr Turner's case, namely his submission that an earning capacity is to be treated as an asset to which the sharing principle applies. It can make no difference whether the court is proposing to ascribe a capital value to such a capacity or proposing to make an order for periodical payments so that its product is shared between the parties.

[90] In *B v S (financial remedy: marital property regime)* [2012] EWHC 265 (Fam), [2012] 2 FCR 335, [2012] 2 FLR 502, Mostyn J questioned the application of the sharing principle to post-separation earnings in these terms:

> 'to allow consideration of the concept of sharing to intrude in the assessment of a periodical payments award seems to me to be based on a doubtful principle, and is replete with problems of quantification to any sure standard … if the concept of sharing is going to uplift above the assessment of need a periodical payments award which will be paid from post-separation earnings, how does a judge set about doing it? Is it a third? Or 40%? Or 20%? There are not even any signposts along the road to a fair award.'

[91] Finally, in respect of this principle, I refer again to the question asked by MacDonald J during the hearing about the small number of reported

cases in which the applicant received a share of bonuses the accrual of which post-dated the parties' separation. Mr Dyer suggested that this was an example of pragmatism, namely the goal of achieving an agreed resolution. I agree that this goal should be a powerful incentive and an inducement to be pragmatic. But, the relevant question for the purposes of this appeal is that those cases could be said to support the proposition that the sharing principle applies to post-separation earnings.

[92] In *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2006] 3 FCR 271, [2007] 1 FLR 790 (para [24](4)) Mr Mostyn QC (as he then was), whilst acknowledging 'an element of arbitrariness', proposed that he 'would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation'. This was because this period was 'too close to the marriage to justify categorisation as non-matrimonial'. Charles J in *H v H* [2007] EWHC 459 (Fam), [2008] 2 FCR 714, [2007] 2 FLR 548, did not agree with this approach, and, as set out in the headnote, awarded the wife 'declining percentages' of the husband's bonuses for the three years after the year of separation. The rationale for this 'could be classified as either compensation or sharing' (para [111]). In addition, in *CR v CR* [2007] EWHC 3334 (Fam), [2008] 1 FCR 642, [2008] 1 FLR 323, Bodey J gave 'primary recognition to the wife's reasonable requirements' but also took into account, as a 'subsidiary factor' to needs, that 'the husband was assisted towards his high likely future earnings by (the wife's) past contributions …' (para [103]). Accordingly, 'in the pursuit of overall fairness' an additional capital sum could be awarded to 'reflect large imbalances of future earnings'.

[93] I now turn to the compensation principle. Lord Nicholls referred to this in *Miller* as being (para [13]),

> 'aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Thus the wife suffers a double loss, a diminution in her earning capacity and the loss of a share in her husband's enhanced income.'

Later (para [28]) he described the principle as applying 'when one party's earning capacity has been advantaged at the expense of the other' (para [28]). When specifically addressing periodical payments, Lord Nicholls stated that they could be ordered 'for the purpose of affording compensation' (para [32]).

> 'It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation

to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.'

We were also taken to paragraphs at the end of Lord Nicholls' speech where he applied the principles to the case of *McFarlane*. He said, for example, that the wife was entitled to 'an award of compensation in respect of the significant future economic disparity' (para [93]). Further, this element of her claim was 'not directly affected by the use she makes of her resources' (para [99]).

[94] Lady Hale referred to the compensation principle in terms of the 'economic disadvantage generated by the relationship' (para [140]). This arose because, when one of the spouses gave up a career, the other spouse, if a 'high earner', had been 'the beneficiary of the choices made during the marriage' (para [140]). When dealing specifically with the case of *McFarlane* Lady Hale referred again to '*disadvantages* for which compensation is warranted' (para [153]: my emphasis) and described compensation as being 'for the comparable position which she might have been in had she not compromised her own career for the sake of them all' (para [154]).

[95] I interpolate that these passages led to some debate during the hearing as to how they might provide support for Mr Turner's submission that the principle of compensation applies even if the disadvantaged party's financial needs are being met at a level higher than the 'loss' sustained by them (as referred to by Lord Nicholls in para [13]). One aspect of the debate was what is meant by 'enhanced earnings' and what advantage or disadvantage is being measured. Just to repeat, it is Mr Turner's case that this principle has been misunderstood and it also applies when *and* to the extent that the husband's earning capacity has benefited by reason of the relationship.

[96] It is not altogether easy to understand how the extent of the enhancement or benefit/advantage would be established if Mr Turner was right. As Sir James Munby P postulated during the hearing, was it being proposed that the court would have to seek to determine what each of the parties would have been earning if there had been no marriage and then calculate the quantum of, respectively, the advantage and the disadvantage? Otherwise, how was the advantage and/or the disadvantage to be determined? The submissions provided no clear answer, perhaps understandably because of the evidential difficulties. Whilst the evidence might provide some route to determining how an abandoned or diminished career would have been likely to develop, I find it hard to envisage what evidence would enable a court to conclude how a spouse's career would have developed absent the marriage or to what extent it was, in fact, enhanced by the marriage.

[97] I mention, in passing, that Charles J referred to some of these difficulties when determining Mrs McFarlane's application for a variation of the periodical payments order: *McFarlane v McFarlane* [2009] EWHC 891 (Fam), [2009] 2 FLR 1322.

[98] Similar problems would arise if the court had to determine the extent to which an earning capacity was the product of marital endeavour. I have already referred to the difficulties mentioned by Wilson LJ in *Jones v Jones*

when he rejected the whole notion of the court seeking to determine, let alone evaluate, what had contributed to a spouse's earning capacity at the end of the marriage. Further, despite what I have said above (para [32]), would this require the court, in fairness, to embark on considering whether, as can sometimes be asserted, any alleged continuing economic advantage was obtained or developed despite rather than because of the marriage? There would clearly be significant conceptual and evidential difficulties if Mr Turner was right and the court had to determine whether and, if so, the extent to which a spouse's earning capacity was the product of marital endeavour.

[99] The principle of need does not require elaboration. The court has to determine both the level at which and the manner in which the applicant spouse's needs should be met.

[100] The final principle is the clean break. This was referred to by both Lord Nicholls and Lady Hale in *Miller*. It pre-dates the changes made to the 1973 Act by the Matrimonial and Family Proceedings Act 1984. As referred to by Lord Nicholls, it was one of the principles identified as informing the legislation by Lord Scarman in *Minton v Minton* [1979] AC 593, p 608F/G when he said:

> 'An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.'

Lord Nicholls agreed that, following the 1984 Act, this was 'an important principle now embodied in the statute' (para [30]).

[101] During the course of his speech, Lord Nicholls distinguishes between those cases in which there is sufficient capital to effect an immediate clean break and those in which there is not. He gives the case of *White* as one in which 'the capital assets were more than sufficient to meet the parties' financial needs' and *McFarlane* as a case in which the 'parties' capital was insufficient to enable an immediate clean break' (para [2]). The only circumstances in which he suggests that a clean break cannot be effected are either because of a party's continuing financial needs or because of the impact of the principle of compensation (para [28]). Further, he says that periodical payments 'may be made for the purposes of affording compensation … as well as meeting financial needs' (para [32]).

[102] Lady Hale noted that: 'several provisions were inserted in 1984 *to encourage and enable a clean break settlement*, in which the parties could go their separate ways without making further financial claims upon the other' (para [130]). Section 25A(1) provides a 'clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments. But it does not tell us much about what an appropriate result would be' (para [130]). 'Independent finances and self-sufficiency are the aims' (para [133]) with the 'ultimate objective (being) to give each party an equal start on the road to independent living' (para [144]). For the avoidance of doubt, it is important also to note that, as Lady Hale reminds us, 'a clean break is not to be achieved at the expense of a fair result' (para [134]).

[103] The 'steer' provided by s 25A is clear because of the *duty* it imposes on the court under s 25A(1), when making an order of the type(s) specified, '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'. Section 25A(2) provides:

> '(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.'

[104] Further, on any application under s 31, subsection (7) requires the court to consider the termination of periodical payments, in the same terms as under s 25A(2). This is combined with the power under section 31(7B) to make a lump sum, property adjustment or pension sharing order and to prohibit the making of any further application. Therefore, if a clean break could not be effected fairly at the time of the first order, it can be implemented on a subsequent application.

[105] It is relevant to note that, as referred to above, in *Miller* Lord Nicholls expressly stated that, in respect of the *McFarlane* case, there was 'insufficient capital to enable an immediate clean break' (para [2] and para [90]). Lady Hale clearly also took the same approach. This approach ties in with other aspects of their respective speeches which indicate that the sharing principle applies to the *available* capital assets and that the court will determine whether the division effected by application of this principle is sufficient by reference to the claims based on needs and compensation.

[106] This then brings me to the question of the interrelationship between the principles of sharing, compensation and need when the court is determining whether or not a clean break can fairly be achieved. This question is directly relevant to the issue in the present case of the approach the court should take to the manner in which the wife's share of the marital wealth should be deployed to meet her financial needs.

[107] Consistent with the authorities, it is appropriate to separate sharing and compensation from need. Neither of the former are based or depend on a financial need being established. So, for example, in *Miller*, Lord Nicholls said that compensation is 'not needs-related, it is loss-related' (para [98]). Lady Hale made a similar point (paras [140] and [155]).

[108] Additionally, and of particular importance to the question I am addressing, Lady Hale commented that there was no 'hard and fast rule about whether one starts with equal sharing and departs if need and compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance' (para [144]). Lord Nicholls made

similar comments (paras [28] and [29]). These observations were taken up in *Charman (no 4)* (para [73]):

> 'It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail … It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail …'.

These comments would require, and in my view practical justice would dictate, that there must be a means of determining whether, and if so how, the sharing award does or does not meet the applicant's needs. This inevitably also requires the court to determine in the individual case how the sharing award is to be deployed to meet needs. Absent the court considering this latter issue, there would be no way of assessing whether the sharing award met needs.

[109] I propose, first, to consider *Vaughan v Vaughan* [2010] EWCA Civ 349, [2010] 2 FCR 509, [2011] Fam 46, in which Wilson LJ said the following:

> '[42] More widely, we have received interesting arguments about the circumstances in which the law expects a spouse to apply not only income but capital to the meeting of maintenance needs or obligations. There is no doubt that the case in which (let us say) a wife is most clearly expected to apply capital to the meeting of her maintenance needs is when, at arm's length following divorce, the husband agrees, or is ordered, to pay her a needs-based capital sum: such will still have been calculated by reference to the *Duxbury* formula, inherent in which is the principle of amortisation. There is, by contrast, no doubt that the court will not generally expect her to apply inherited capital (as opposed to the income generated therefrom) to the meeting of her maintenance needs: *Lauder v Lauder* [2007] EWHC 1227 (Fam), [2008] 3 FCR 468, [2007] 2 FLR 802, para [64], per Baron J. But I am clear that it is impossible to be categorical about what the law expects in this area. No doubt there are circumstances in which it is reasonable to order a husband to make periodical payments even though his income is insufficient to support them and he will therefore have to make them wholly or partly out of his capital, and, correspondingly, no doubt there are circumstances (see, for example, my conclusion in this very case at para [44] below) in which it is reasonable to expect a wife to apply capital to the meeting of at any rate some of her maintenance needs even if it has come into her hands by inheritance or, more generally, otherwise than as a needs-based capital payment by the husband. Perhaps particularly when they reach or approach retirement and have reasonably significant capital assets (often the product of savings out of income), many people treat the distinction between income and capital as fluid, the court will recognise this reality.'

Wilson LJ also considered that the wife had made a 'realistic concession' that the net value of a desk, which she had received as part of the settlement when the parties separated and which had become extremely valuable, should be amortised 'for the purposes of assessing her ability to contribute to her maintenance requirements' (para [18]).

[110] Wilson LJ went on to determine that the judge had been 'wrong to conclude that the wife could adjust without undue hardship to the determination of the husband's periodical payments on the basis that she could amortise her entire liquid capital' (para [43]). She was entitled to a further capitalised award which would enable her to meet her needs when combined with 'the modest application of her existing liquid capital or by sale of her home in due course' (para [44]).

[111] Apart from the observations in *Vaughan v Vaughan*, there appears to have been little debate, in the post-*Miller* authorities to which we were referred, about how the court should determine whether the capital allocated to a spouse pursuant to the sharing principle is sufficient to meet their needs. Clearly, part will be used to meet capital needs, particularly housing. But how are income needs to be assessed?

[112] In a pre-*Miller* case, *Lambert v Lambert* [2002] EWCA Civ 1685, [2002] 3 FCR 673, [2003] Fam 103, Thorpe LJ (para [60]) could see 'no possible reason why the wife alone should be required to amortise' her share of the marital wealth to meet her needs. Likewise, Bodey J (para [75]) considered that for the wife 'to have to amortise capital when the husband himself would not have to do likewise' would not 'meet the aim of achieving fairness'.

[113] There is one post-*Miller* case, to which we were not referred, in which Lady Hale makes a brief observation about this issue. In *Simon v Helmot* [2012] UKPC 5, [2012] Med LR 394, (2012) 126 BMLR 73, a case dealing with predicting the future for the purposes of the quantification of damages for personal injuries, Lady Hale referred to *Duxbury* and said (para [70]):

> 'The *Duxbury* calculation was first devised when it was thought that the purpose of financial awards in matrimonial cases was to cater for the "reasonable requirements" of the dependent party. Now that the "sharing principle" has been adopted, the calculation is mainly used as a guide to capitalising an existing periodical payments order or to check whether the sum produced by the sharing principle will be enough to meet the applicant's needs.'

This observation appears to have been derived from *At A Glance* and, although obiter, clearly provides support for the use of *Duxbury* in this context.

[114] In *JL v SL (no 2) (appeal: non-matrimonial property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J determined what sum the wife would receive by application of the sharing principle, namely £2.9 million, and observed that (para [55]):

> 'It might be thought that it is a truism that just under £3 million is sufficient to meet the lifetime needs of a 50 year old woman living in Buckinghamshire.'

However, he went on to determine what capital the wife would require to meet her needs. He assessed the sum required in part (for the first 10 years) by taking a non-amortising sum and in part (for the remaining years) by taking an amortising sum (paras [58]–[68]). He applied the *Duxbury* assumptions to both aspects of the calculation. The result was that the total sum required by the wife to meet her needs (including housing) was just over £3 million. This was the amount of the award rather than the sum arrived at by application of the sharing principle.

[115] Other cases demonstrate that the courts have adopted a degree of flexibility when determining needs-based awards. This flexibility has included as to the deployment of the applicant's own capital and in respect of amortisation and rates of return.

- *CR v CR* (para [101]): Bodey J applied a 5 per cent annual gross return, when calculating the sum required to meet the wife's income needs (rather than a conventional *Duxbury*). He also acknowledged that this might require the wife 'to spend through some of her' capital award in order to meet her needs,
- *B v B (ancillary relief: post-separation income)* [2010] EWHC 193 (Fam), [2010] 2 FLR 1214: I calculated the sum required to meet the wife's income needs by reference to an assumed 2 per cent net rate of return,
- *Z v A (financial remedy)* [2012] EWHC 1434 (Fam), [2014] 2 FLR 109 (para [43]): Coleridge J did not consider '(c)omplete amortisation' of the wife's own assets fair when determining the award required to meet the wife's needs. He applied a 3 per cent net return to the wife's assets. The balance required to meet the wife's income needs was not calculated solely by reference to *Duxbury* but in part by reference to a fixed term of 10 years (para [44]),
- *AR v AR (inherited wealth)* [2011] EWHC 2717 (Fam), [2012] 2 FLR 1, [2012] WTLR 373 (para [100]): I awarded the wife a sum (£3.2 million) which was greater than the 'simple *Duxbury* sum' (£2.5 million) required to meet her income needs in part to provide her with 'an additional measure of financial security',
- Another example of a non-amortised calculation and award is *B v S (financial remedy: marital property regime)* [2012] EWHC 265 (Fam), [2012] 2 FCR 335, [2012] 2 FLR 502 (para [87]).

There are, of course, a number of other cases in which a conventional *Duxbury* lump sum has been awarded, such as *BD v FD (financial remedies: needs)* [2016] EWHC 594 (Fam), [2017] 1 FLR 1420.

[116] Rates of return were considered by the Court of Appeal in *H v H (financial remedies)* which concerned a variation application. The judge's award was set aside because, when calculating the lump sum required to enable the wife to meet her income need, he had applied a 3.75 per cent net rate of return to the capital the wife had received under the original financial order. This had not been a rate proposed by either of the parties and the judge used this rate 'without addressing the question to the advocates for them to

make submissions' (para [28]). Ryder LJ went on to say that if the judge had arrived at this rate having heard submissions then, 'absent an irrational decision, his exercise of discretion would have been incapable of challenge' (para [28]).

[117] At first instance the wife had proposed a rate of return of 3.75 per cent gross which was said to be 'a standard Family Division' rate. The husband had not proposed any particular rate. Ryder LJ rejected the notion that there was an 'industry standard' for these purposes. However, he also considered that a judge could adopt the *Duxbury* assumptions if 'valid on the facts of the case' (para [31]).

CONCLUSIONS

[118] Having spent some considerable time analysing the authorities, I consider that I can set out my conclusions relatively succinctly.

[119] The overarching question, as Mr Turner rightly identified, is whether the award made by the judge was fair. However, to provide an answer to this question requires more than the simple, almost pantomime, response of, 'Yes, it is' or 'No, it isn't'. The answer needs to have a principled basis of sufficient substance to explain why any specific award is to be regarded as fair or unfair. That is why I have spent some time in this judgment addressing the applicable principles. This is not, of course, the same as saying that the application of those principles will lead to one answer. Discretion and evaluation remain important elements which will inform the judge's determination. However, as referred to at the outset of this judgment, as with all judicial powers which have these elements, it is incumbent on the courts to seek to provide sufficient clarity as to the relevant legal principles and the manner in which they should be applied so that the outcome in any specific case can be identified as being within a reasonably circumscribed range of potential awards.

[120] I propose to address each of the issues set out in paragraph [1] above.

[121] First: (i) is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?

[122] In my view, there are a number of reasons why the clear answer is that it is not.

[123] Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.

[124] Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Lady Hale's

observation in *Miller* that, even confined to '(i)n general', 'it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation' (para [144]) or her observation as to the effect of '(t)oo strict an adherence to equal sharing' (para [142]).

[125] Additionally, it would inevitably require the court to assess the extent to which the earning capacity had accrued *during* the marriage. This would require the court to undertake the exercise to which there are the powerful objections referred to by Wilson LJ in *Jones v Jones*. Where would the court start and by reference to what factors would the court determine this issue?

[126] Mr Turner had no answer as to what factors would determine either the percentage of any award or its duration. He made general submissions (as summarised in paras [51] and [52] above) but was unable to articulate any principles by which, for example, the court: (i) should determine the percentage division of the income which is, of course, only generated by actual work (the 'unforgiving minute' referred to by Mostyn J in *B v S*, para [76]); (ii) should determine how long the relevant earned income should be deemed to continue (would it be based on some notional 'retirement' date considered to be 'fair' or would it require a factual determination?); or (iii) should determine whether any changes in employment were reasonable (if resulting in a lower income) or were, or were not, sufficient to make the new job of a different 'character' to the earning capacity claimed as having been developed during the marriage (see para [28] above). This lack of clarity supports the conclusion that to apply the sharing principle in this way would significantly undermine the 'important aspect of fairness' referred to by Lord Nicholls (para [3] above), namely to achieve an 'acceptable degree of consistency of decision'. This is in part because this branch of the road to achieving a clean break would be devoid of clear signposts.

[127] I also consider that the passage, relied on by Mr Turner from Lady Hale's speech in Miller (para [154]), cannot bear the weight he seeks to put on it, not least because Lady Hale began that paragraph by saying:

> 'There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision'.

These words, and the other passages referred to above, are inconsistent with Mr Turner's submission.

[128] In my view Miller and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe*, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (*Charman v Charman (no 4)*, para [66]). An earning capacity is not property and, in the context advanced by Mr Turner, it results in the generation of property *after* the marriage.

[129] Secondly, (ii) How should the court assess whether an award determined by application of the sharing principle meets the party's needs? More specifically to the arguments advanced in this case, to what extent is it fair for the wife to be required to use her sharing award to meet her income needs when the husband will meet his needs from earned income?

[130] I reject Mr Turner's more extreme argument that the wife's capital, apart from her housing need, should be preserved and should not be used in any way to meet her income needs. This again would conflict with the clean break principle to such a significant extent as to undermine the statutory 'steer' because, absent other resources, the applicant spouse would always have a claim for an additional award to meet his or her income needs.

[131] In my view it is clear from *Miller* and *Charman* alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs. To repeat what I have said above (para [108]), there must be a means of determining whether, and if so how, the sharing award does or does not meet the applicant's needs. There is no suggestion that the question of needs for these purposes is to be determined by reference to a different need *principle*, or more broadly, by means of a different approach. Indeed, any other approach would be inconsistent with the observations made by both Lord Nicholls and Lady Hale, that there is no rule about where the court starts the exercise, and inconsistent with *Charman* (para [73]) in which the sufficiency of the award by reference to the sharing principle is directly assessed by the award 'suggested by the needs principle'.

[132] This does not mean that the manner in which the need principle is applied to the sharing award is inflexible, no more that the application of the need principle is itself inflexible. The cases referred to above (para [115]) demonstrate the latter point. Further, as Wilson LJ observed in Jones (para [27]), an earning capacity can be 'relevant to a fair distribution of the assets pursuant to the *sharing* principle'. It can be taken into account when the court is deciding whether the capital should be amortised in full, in part or not at all and when deciding what assumed rate of return to apply. However, to repeat what Wilson LJ said in *Jones*:

> 'Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the *sharing* principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it.'

[133] Further, even if in *Vaughan* Wilson LJ was not including a sharing award within the scope of capital received by a wife 'otherwise than as a needs-based capital payment' (para [42]), if, in some circumstances, a wife can be expected to meet her income needs out of inherited capital, it is difficult to see why the same should not apply to a wife's share of marital wealth.

[134] I would also agree with his observation that it is 'impossible to be categorical about what the law expects in this area'. Given the range of options from full amortisation to an assumed rate of return and the range

of potential circumstances (including all the s 25 factors) it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases. In some cases it will clearly be fair for that part of the sharing award available to meet income needs to be fully amortised, for example, because neither party has any resources other than those being shared. In other cases, the court might take the view that the applicant should have a greater level of security than that provided by an amortised sum because of the respondent's earnings and apply only an assumed rate of return. To repeat, when determining this issue, the court will need to have regard to all the relevant circumstances, to the clean break principle and, as appropriate, the issue of undue hardship.

[135] I have used the expression '*assumed* rate of return' because, again, of the scope for different rates of return sometimes to be applied as reflected in the cases referred to above (para [115]). I also use the expression 'rate of return' because, in my view, the relevant question is the gross rate of return which is not necessarily confined to income but can include both income and capital returns.

[136] There are, however, clearly advantages – both in terms of providing clarity and of consistency – if the *Duxbury* model and the assumptions within it were to be used at least as a starting point. I note that in *H v H* there was 'an assumption in the parties' calculations that 3.75 per cent was an appropriate rate of return for the judge to apply' (para [25]). As I have concluded as set out above, the manner by which the court assesses an award by application of the need principle and the manner by which it assesses whether a sharing award is sufficient to meet needs must be consistent. Given the consequential correlation between needs and sharing, using the same model would remove a potential element of inconsistency between the two which might result in different outcomes depending on whether the court started with a needs-based award or vice-versa.

[137] I would also add that I do not accept Mr Turner's submission that the court should determine what rate of return the wife can obtain 'now' and leave any adjustments as may be justified in the future to a subsequent application. Apart from this being a recipe for continued litigation, it ignores the fact that the court is taking a long-term perspective when assessing whether the sharing award meets needs. If the needs are being assessed by reference to the applicant's life expectancy then the rate of return is being assessed by reference to the same period.

[138] As to the specific issue raised in this case, namely whether it is fair for an applicant spouse to be required to use their sharing award to meet their income needs when the other spouse will meet their needs from earned income, the answer is that the latter factor will be relevant to the court's determination of the former issue.

[139] I next deal with the compensation principle. I do not accept Mr Turner's submission that the compensation principle is to be applied not only when the applicant has sustained a financial disadvantage in his or her prospective career but also when the respondent has sustained a financial benefit. In my view it is clear from *Miller* that compensation is for the

'disadvantage' sustained by the party who has given up a career. I appreciate that it is based in part on the other party's career having benefited but I regard that as an assumption rather than an evidential issue which has to be determined, in part because of the difficulty of undertaking any such exercise. In practice it is a claim which appears very rarely to have been established and I do not intend to encourage any more extensive or expensive exploration of the issue. However, as a necessary factual foundation the court would have to determine, on a balance of probabilities, that the applicant's career would have resulted in them having resources greater than those which they will be awarded by application of either the need principle or the sharing principle. Further, the court must separately determine whether, and if so how, this factor should be reflected in the award so as to ensure that it is fair to both parties.

[140] The other matters raised by Mr Turner relate to the judge's decision to revisit his initial determination of the wife's housing need and the rate of return to be applied to her free capital. In my view, these points do not raise any issues of principle. A judge is entitled to reconsider their judgment prior to the order being made: *In re L and another (children) (preliminary findings: power to reverse)* [2013] UKSC 8, [2013] 1 WLR 634, [2013] 2 All ER 294[a]. The question in the present case is whether the judge was wrong to exercise this power in the manner in which he did.

DETERMINATION

[141] It will be clear from what I have said above that the wife's appeal from the judge's decision not to award the wife more of the husband's post-separation income by application of the sharing principle fails.

[142] I am also satisfied that the judge was right to reject the wife's claim to an award by application of the compensation principle. The judge's finding that the wife would have been earning less than £100,000 gross per year (£64,000 net) is a finding which cannot be, and has not been, challenged. There was, therefore, no basis for any such award because the amount awarded to the wife exceeded what she might have been entitled to under this principle. In reaching this conclusion, I have, of course, rejected Mr Turner's submission as to the manner in which this principle is applied and have decided that it requires the applicant spouse to have sustained a financial disadvantage greater than the amount of the proposed award calculated by reference to the other principles.

[143] I am not persuaded that the judge was wrong to revisit his initial decision both as to the amount the wife would be spending on housing and as to the rate of return. The judge had to determine the former for the purposes of determining what free capital the wife would have to meet her income needs. He could have taken a broad approach but he decided, and was entitled to decide, to reconsider this issue having regard to the change in the wife's position. He was equally entitled to reconsider the rate of return.

a Reported as *Re L-B (children) (care proceedings: power to revise judgment)* [2013] UKSC 8, [2013] 2 FCR 19.

Even if he had not undertaken this exercise then, it would have been open to the court to reconsider these issues at a subsequent hearing if an application had been made by the husband.

[144] Accordingly, I propose that the wife's appeal should be dismissed.

[145] Turning now to the husband's cross-appeal.

[146] The judge determined whether to impose a term maintenance order by reference *only* to whether the wife would be able to earn the shortfall between her income needs and the amount generated by her free capital (para [25] above). He decided that, by this measure, she could not adjust without undue hardship. For the reasons set out above this was too narrow an approach. The judge should have addressed the issue more broadly including by considering whether it would be fair for the wife to deploy part of her capital to meet her income needs. This broader consideration was required both so as properly to address the question of undue hardship and also so as to give proper weight to the clean break principle.

[147] As the judge took too narrow an approach the options are either to remit this issue to be reheard or for this court to undertake this task. In my view, having regard to the length and expense of the litigation to date and to the fact that we have sufficient financial details fairly to undertake the task, I propose that this court should do so.

[148] I have probably already made clear that I do not consider it appropriate simply to look at the amount of the wife's award without any consideration of how it would have to be deployed to enable her to meet her income needs of £175,000 per year as found by the judge. The court needs to undertake that exercise to some level of specificity. The degree of specificity required will vary according to the circumstances of the case and will be for the trial judge to determine. However, it does not have to be more than would be conventionally required when the court is determining a claim by application of the need principle.

[149] In this case, although not, I think, expressly articulated in the judgment, it is clear that the judge considered that the wife's income need would continue at this level for life. In any event, I do not consider that it would be appropriate for this court to determine this issue by reference to any lesser amount. The question, therefore, is how would the wife be required to deploy her free capital in the absence of continuing periodical payments and, in the circumstances of this case, would it be fair for her to have to use it in this way.

[150] Mr Dyer has produced a schedule which shows that, applying 2.25 per cent net, the wife's free capital would provide just over £100,000 per year. From the age of 60 (in 2028) the wife will, in addition, be able to draw a gross pension of £76,000 per year. Very broadly, the two combined would produce £150,000 net per year. The wife would, in addition, in due course receive her state pension. The *Duxbury* sum required to produce an annual income of £25,000 net from the age 60 would be £360,000.

[151] The husband seeks a term expiring in February 2021 when the wife will be aged 52. There would, therefore, be a shortfall between the wife's income

needs and the net sum produced by her capital of approximately £75,000 per year between 2021 and 2028. Taking a simple arithmetical approach, this would lead to a shortfall totalling just under £600,000.

[152] The total shortfall, applying the above very broad analysis, would be just in the region of £950,000. It is likely that the actual amount would be less but I propose to address this issue on the basis that the wife would have to expend this proportion of her sharing award on her income needs. This would represent approximately 21 per cent of the wife's free capital of £4.6 million or 10 per cent of her total award (acknowledging that part of that is pension).

[153] I appreciate that the husband may well have continued to generate a very substantial income and that his financial position will have been enhanced as a result. But, first looking specifically at s 25A(2), it is plain to me that the wife would be able 'to adjust without undue hardship' to the termination of maintenance. To require her to use the above proportion of her award would not be unfair having regard to all the s 25 factors. She would still have free capital of £3.6 million and housing of £2.75 million. For these purposes, I have not specifically factored in the judge's finding that the wife would be able to obtain employment from late 2019.

[154] For the avoidance of doubt, the wife would still have no claim under the compensation principle because by any measure her retained award would be greater than any award by reference to a lost net income of no more than about £64,000 per year.

[155] Accordingly, I would allow the husband's appeal and impose a term order expiring on 1st March 2021 with a s 28(1A) bar.

[156] Before concluding my judgment, I propose to make one additional observation. During the course of the hearing, Mr Turner was evidently concerned that recent public debate about how the courts determine a spouse's claim for maintenance might somehow intrude into the determination of this case. His particular focus was what he described as the unfair use of the expression 'meal ticket for life' which, he suggested, was often deployed without regard to a spouse's fair entitlement which might properly include long-term maintenance. I do not comment on his remarks, save to say that I, of course, acknowledge that long-term maintenance can be required as part of a fair outcome and also that I understand why he suggests that the expression 'meal ticket for life' can be used as an unfair trope. However, I would make clear that my determination of this appeal has been based solely on my view of the proper application of the 1973 Act and the principles identified above to the facts of this case.

MacDONALD J.

[157] I agree.

SIR JAMES MUNBY P.

[158] I also agree.

Dismissing the wife's appeal and allowing the husband's cross-appeal, imposing a term order expiring on 1 March 2021, with a s 28(1A) bar.