



Neutral Citation Number: [2022] EWCA Civ 772

Case No: CA-2021-000559

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**MR JUSTICE MOSTYN**  
**FD20F00049**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10 June 2022

**Before :**  
**LORD JUSTICE MOYLAN**  
  
**LORD JUSTICE COULSON**  
and  
**LORD JUSTICE ARNOLD**

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**Between :**

**EMMA MARY JANE VILLIERS** **Appellant**  
- and -  
**CHARLES ALASTAIR HYDE VILLIERS** **Respondent**

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**Phillip Cayford QC and Simon Calhaem (instructed by Pennington Manches Cooper LLP)**  
for the **Appellant**

**Michael Horton QC and Alexander Laing (instructed by Dawson Cornwell) for the**  
**Respondent**

Hearing dates : 26 & 27 January 2022  
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**Approved Judgment**

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 10<sup>th</sup> June 2022.**

### **Lord Justice Moylan:**

1. The wife appeals from the order of Mostyn J (“the Judge”) dismissing her application under s.27 of the Matrimonial Causes Act 1973 (“the MCA 1973”) following a hearing from 1 to 4 March 2021. The Judge went on to indicate that, if he had not dismissed the application, he would have made a maintenance order at the rate of £10,000 p.a. from the date of his order until, at [143], “the date of the decree of divorce” in Scotland.
2. The wife made her application as long ago as 13 January 2015. The next five years, until the Supreme Court’s judgment of 1 July 2020, *Villiers v Villiers (Secretary of State for Justice intervening)* [2021] AC 838, were spent determining the husband’s application that the wife’s application should be stayed. The Supreme Court decided, at [41], that the wife had an “unfettered [entitlement] to choose to bring her claim in an English court on grounds of its convenience for her or because she believes that the law it will apply is more advantageous for her”; and, at [36], that there was “no scope whatever for the operation of a forum non conveniens discretion”.
3. Section 27 is a little used provision. This is not because it is complex but because of the availability of other routes by which the court has power to make a financial remedy order. These include a broad range of orders as can be seen from the definition of “financial remedy” in r.2.3 of the Family Proceedings Rules 2010 (“the FPR 2010”).
4. I set out the relevant parts of s.27 below but, in summary, a spouse can apply for an order “on the ground that the other party to the marriage ... (a) has failed to provide reasonable maintenance for the applicant; or (b) has failed to provide, or make a proper contribution towards, reasonable maintenance for any child of the family”. A gateway is required because an application under section 27 is not connected to, or made within, other proceedings. It is a freestanding application. The court is required, by s.27(3), to “have regard to all the circumstances of the case including the matters ... in section 25(2)” when deciding *both* (i) whether the respondent has failed to provide reasonable maintenance *and* (ii) what order, if any, to make. When an application is made in respect of a child, “first consideration shall be given to the welfare of the child while a minor”.
5. The determination of whether there has been a failure to provide reasonable maintenance and of what order to make are, in reality, two sides of the same coin. The determination of whether there has been such a failure requires the determination of what maintenance would be reasonable. The purpose of the section is also simple. It is about meeting the financial needs of a spouse and any child of the family and ensuring that the other spouse meets those needs when, and to the extent that, it is fair that they should be doing so.
6. In my view, this case could have been decided on a simple determination of the relevant facts at the date of the hearing. This is the required approach in respect of all other financial remedy applications and this was how it had been approached by the parties, including in their written submissions for the final hearing. This was, however, not what happened, as the Judge introduced a number of legal principles at that hearing, none of which had previously been raised by either of the parties or the court.

7. The Judge dismissed the wife's application because she had not established, what he described, at [54], as "a condition precedent", namely that "in the period *prior* to her application on 13 January 2015 the husband failed to provide her with reasonable maintenance" (my emphasis). He later, at [132], determined that the relevant period was "the two-year period immediately prior to" the application. That the wife was required to establish a failure to provide reasonable maintenance prior to the date of her application was one of the points raised by the Judge at the hearing. In the previous six years neither party nor any judge had raised this point. Until then, the case had been addressed on the conventional approach taken in other financial remedy applications namely, as referred to above, that the court would determine the issues referred to in paragraph 4 above ((i) whether there had been a failure and (ii) what order to make) by reference to the relevant s.25 factors as at the date of the final hearing. This can be seen from the parties' evidence and their written submissions for that hearing which focused on the position at the date of the hearing. The wife contended that there had been a continuing failure to maintain while the husband contended that the wife had failed to establish this because he "*has had* no income to make any meaningful contribution to W's need" (my emphasis).
8. The Judge raised a number of other issues which he considered significant to the manner in which the court should exercise its discretionary powers under s.27. The most prominent of these was his conclusion, at [41], that the common law duty of a husband to maintain his wife "should influence the exercise of the" court's discretionary powers under s.27 because it was "the foundation on which all of this legislation is built, and ... save where specifically abrogated, its incidents remain relevant". Again, this had not been raised by either party and, on this appeal, the husband did not seek to defend the Judge's view that this was a relevant consideration.
9. The significance the Judge attributed to the common law duty led to his conclusion, at [45], that, absent "exceptional circumstances", the duration of an order under s.27 should not extend beyond "a valid foreign divorce in a friendly state, or in another part of the British Islands". The Judge supported this conclusion by reference to other factors including, at [45], "principles of comity" as opposed to, what he described as, "the syndrome of chauvinism" and some other domestic statutory provisions such as sections 25A and 28(1A) of the MCA 1973. In the Judge's view, at [47], "it would amount to an exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances."
10. For the reasons set out below, I have reached the clear conclusion, first, that the Judge was wrong to dismiss the wife's application. In summary, this is because the Judge was wrong to determine the issue of whether the husband "has failed to provide reasonable maintenance" by reference solely to the period prior to the date of the application rather than up to the date of the hearing. In my view, this is what s.27 provides and, alternatively, it was procedurally unfair for the Judge to decide the case on this basis when it was raised for the first time, by him, at the final hearing.
11. Secondly, in the absence of the Judge having made any order, and in circumstances where neither party is, understandably, seeking a rehearing, it is for this court to determine what award is fair under s.27. In my view, the best we can do in the circumstances is, as sought by the wife, to make an order for periodical payments at the rate which the Judge said he would have ordered but for his dismissal of the

application. As for the duration of that order, again for the reasons set out below, I consider that the Judge's conclusions, as to the continuing influence and effect of a husband's common law duty to maintain and as to the other factors referred to by him, were wrong. The order should be until further order or the wife's earlier remarriage.

12. The wife also seeks the adjournment of her application for a lump sum. I have concluded, as set out below, that it would be fair to include such a provision.
13. All the lawyers are acting pro bono for the purposes of this appeal.

### Background

14. The judgment below is reported at [2021] EWFC 23, [2022] 1 FLR 513. In the published version of the judgment, the Judge omitted those parts of it which dealt with the parties' "personal financial details". He explained this decision as follows:

"[55] I therefore now turn to the facts. I will analyse the financial evidence, both historical and current, and will make my factual and computational findings. In the version of this judgment which I will make available for publication paragraphs 59 - 88, 108 -126(x), 132 -134 and 141 will be omitted. They contain personal financial details of both of the parties, extracted from them under compulsion, which are protected from public disclosure: *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261 at [72] per Dame Elizabeth Butler-Sloss P."

That approach reflects the fact that, pursuant to r.27.10 of the FPR 2010, financial remedy claims are invariably heard in private. The Court of Appeal takes a different approach to the disclosure of personal financial details because hearings are invariably in open court. Accordingly, when necessary, I refer to such details in this judgment without redaction.

15. The wife is now aged 63 and the husband is 59. They were in a relationship from 1992; married in 1994; and separated in 2012. There is one child of the marriage. They lived in Scotland from 1995 until the end of their relationship. The husband remained living in the former matrimonial home while the wife moved, with their daughter, to live in England.
16. The wife started divorce proceedings in England in 2013. The husband started divorce proceedings in Scotland in 2014. The wife's petition was subsequently stayed pursuant to the obligatory provisions in paragraph 8, Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 ("the DMPA 1973").
17. The wife's application under s.27 was supported by a statement dated 14 January 2015. This asserted that since the parties had separated in 2012 the husband "has refused to pay me any maintenance (including child maintenance)". She explained that she knew "little about" the husband's finances save that he was a beneficiary under a discretionary trust "holding very significant assets" and that he had "received an inheritance".

18. The husband filed a statement dated 23 March 2015 in which he gave little details of his financial circumstances. He said he had no “regular paid employment income”; no “heritable property or any meaningful assets”; and that he had been made bankrupt in 2013 and had been discharged in November 2014. He made no reference to any trust interests. Most of the statement was taken up with the husband’s evidence in support of his application to stay the s.27 application.
19. The parties subsequently each filed Forms E. The husband filed two, dated 24 April and 14 May 2015. In these he said that he had “no capital interest” in any trust and did not “currently receive” any income from any trust. In breach of his disclosure obligations, the husband did not disclose any details of his actual trust interests.
20. On 8 July 2016 Parker J dismissed the husband’s application for a stay. She also made an interim order under which the husband was required to pay the wife periodical payments of £2,500 per month and £3,000 per month as a costs’ allowance. This order was based on Parker J’s conclusion that:

“[109] The material relied on by W satisfies me that H has access through the Trustees to substantial funds from his late grandmother's and mother's estate, and outright to his mother's estate which appears to have liquidity. H relies on the fact that he has met his share of the joint debts. He is to be expected to approach the trustees to access these funds”.
21. The husband’s appeal from Parker J’s order was dismissed by the Court of Appeal on 17 May 2018: *Villiers v Villiers* [2019] Fam 138. In the course of her judgment King LJ said:

“[107] Mr Scott (counsel for the wife), for his part, drew the court's attention to the evidence which had been available to the court that is to say, the 'material relied upon by the wife' referred to by the judge at para [109] above. That material included the husband's Form E1, a singularly unimpressive document. In it the husband failed to provide the disclosure required in relation to the family trusts as, in response to the requirement to give details of any trust interests (including interests under a discretionary trust), he said only that he had "no capital interest in any trust nor do I currently receive any income from any existing trust of whatever nature". He therefore failed not only to provide details of the trust themselves but also omitted to make it clear that the trustees have a power to advance capital. Mr Scott showed this court his closing submissions on the trust issue. Mr Scott submitted that the evidence summarised in his closing document, together with some correspondence to which we were referred, entitled the judge, on the interim basis upon which she was proceeding, to reach the conclusion that she did.”

The husband was given permission to appeal to the Supreme Court in respect only of the dismissal of his application for a stay. As referred to above, his appeal was dismissed on 1 July 2020.

22. Following the dismissal of the husband's appeal by the Supreme Court, the wife sought to enforce Parker J's order. The husband applied for that order to be set aside and filed a statement dated 27 January 2021. In this, the husband gave details of the income he had received, up to and including the year 2019/2020, from his share of what he called "the grandchildren's fund".
23. Over the course of the proceedings the court made a number of orders dealing, among other matters, with replies to questionnaires, the provision of statements from the parties and further disclosure. The purpose included, as set out in the order made on 1 February 2021 by Deborah Eaton QC, sitting as a deputy High Court Judge, "updating" each party's financial position. Pursuant to that order, the parties each filed statements dealing with the s.25 factors on 24 February 2021.
24. The final hearing took place from 1 to 4 March 2021.

Hearing and Judgment below

25. The parties filed their respective written submissions for the final hearing below. The wife sought a total award of £3.15 million together with payment of her costs and an indemnity in respect of marital debts. The husband proposed that there should be no award and that the order made by Parker J should be set aside.
26. The wife's document dealt at length with her case as to the husband's financial resources and most significantly as to his trust interests. The principal focus was on his resources as at the date of the hearing. It set out a summary of her understanding of the husband's trust interests. This identified that he had interests under trusts established by his grandmother's will and by his father's will. It was said that the wife had only "recently learned" about the latter and that there was "virtually no disclosure about this trust". Through "publicly available information", the wife believed that the father's will trust owned or had a substantial interest in a property in London which was understood to have been sold for £9.7 million. Mr Cayford told us at the hearing that the property had in fact sold for £8.9 million.
27. The husband's document likewise dealt with the parties' "current position" in respect of their financial resources, as summarised in a schedule of assets. The only reference to the past financial history was for the purposes of the husband's application to set aside the order made by Parker J. There was no reference to any requirement to establish a failure to maintain prior to the date of the application. It was submitted that Parker J's order should be set aside on the basis that her conclusion that the husband "had outright ownership of or access to liquid funds from his mother's estate had been shown to be incorrect". In respect of the wife's substantive application it was submitted:

"W must establish that H has failed to provide reasonable maintenance for her: s.27(1)(a) and (6). When H has had no income to make any meaningful contribution to W's income needs and where his creation of the sub-fund for C benefited both C and W ..., W has failed to do so."

28. The parties' respective cases as to the s.27 application were, therefore, advanced by reference to their respective contentions as to their, and in particular, the husband's

resources as at the date of the hearing. Neither party raised any broader legal issues. In particular, as referred to above, neither party contended that the wife had to establish, as a “condition precedent”, a failure to provide reasonable maintenance *prior* to the date of her application let alone, that if she did not, the court would have no power to make an order. The husband’s case was simply that he “*has had* no income to make any meaningful contribution”; i.e. up to the date of the hearing.

29. On the first day of the final hearing, 1 March 2021, the Judge provided the parties with a short Note in which he identified a number of legal issues on which he requested submissions. He referred to some authorities which he considered relevant, the most recent of which had been reported in 1978, and which subsequently featured in his judgment. As referred to above, among the issues raised by the Judge were the relevance of the common law duty of a husband to maintain his wife and whether “modern considerations of comity require more weight being given” to that fact that “the Scottish divorce will bring to an end the common law duty to maintain and that ‘convenience of forum’ would appear to favour Scotland”. These issues subsequently underpinned his conclusions about how the court should exercise its discretion under s.27.
30. Much of what the Judge said on these issues could be said to be obiter, because he dismissed the wife’s application, at [135], on the basis “that the condition precedent is not satisfied in this case”. However, because this court is determining what order to make on the wife’s application and because, in that exercise, I do not agree with the Judge’s conclusions, I consider it necessary to address those conclusions in more detail than might otherwise be required.
31. At the outset of his judgment, the Judge dealt with the Supreme Court’s decision in this case on the issue of jurisdiction. He noted, at [4], that “the majority decision” had been that there “was no scope for the operation of a forum non conveniens discretion” in this case. However, for the purposes of his later analysis, the Judge went on to refer, at [10]-[12], to what Lord Wilson had said in his minority judgment about the adoption in English law of the principle of forum conveniens. The Judge quoted what Lord Wilson said, at [107(c)], about the previous “narrowness of the English ground” on which a stay would be granted and his observation that this “betrayed a degree of arrogance that proceedings in England were intrinsically better than proceedings elsewhere”. The Judge considered, at [12], that it was “important to bear in mind this chauvinism when I come to analyse the cases, all of which are of some age, concerning the appropriateness of making orders under s.27 ... which are expressed to take effect after a foreign decree of divorce”.
32. The “condition precedent” as formulated by the Judge, at [54], was as follows:

“In order to exercise my powers the wife has to satisfy me as a condition precedent that in the period prior to her application on 13 January 2015 the husband failed to provide her with reasonable maintenance”.

This Judge, at [128], first observed that s.27(1)(a) must be “interpreted purposively and not literally”, before going on to conclude that it “must mean ... in the period immediately prior to the application”. In his view, at [129], the “use of the present tense shows clearly that the court must be looking at the here and now” which he

considered meant “the period immediately preceding the application”. He then, at [132], decided that, in the present case, this meant “the two-year period immediately prior to her application namely 2013 and 2014”.

33. A significant part of the judgment dealt with the common law duty to maintain. The Judge’s conclusion, at [41], was that this ancient duty “should influence the exercise of the discretion” to make “a non-divorce-based maintenance order, whether under s.27, ss 1-7 of the (Domestic Proceedings and Magistrates’ Courts Act 1978) or Schedule 5 (paras 39 to 45) to the Civil Partnership Act 2004”. This was because: “The common law is the foundation on which all of this legislation is built, and in my judgment, save where specifically abrogated, its incidents remain relevant”.
34. The Judge set out the legislative history of the court’s power to award maintenance, other than in the context of divorce, starting with the Summary Jurisdiction (Married Women) Act 1895 (“the 1895 Act”). He saw an unbroken line between the 1895 Act and s.27 and concluded, at [28], that the history of the legislation demonstrated that:
- “the legislature intended the original power of the [court] to award maintenance to be a facilitation of the common law duty imposed on a husband to maintain his wife. The statutes of 1895 and 1949, and their successors, provided an accessible remedy from the court for breach of that duty, and extended the duty so that it operated mutually. But that duty did not apply if the wife was at fault.”
35. The Judge supported his conclusion, as to the continuing relevance of the common law duty, by reference to a number of authorities, all of which predated 1978. He placed particular weight on *Gray v Gray* [1976] Fam 324 because, at [18], Purchas J (as he then was) had “demonstrated that the meaning of the phrase ‘wilfully neglected to provide reasonable maintenance’ (which is what s.27(1)(a) of the 1973 Act *originally* stated) had to be interpreted by reference to the common law” (my emphasis). As the Judge noted, an aspect of the common law principle, namely “that a wife guilty of a ‘grave fault’ (i.e. adultery (but not condoned, connived at, or condoned to), cruelty, or desertion) forfeited her entitlement to maintenance”, was considered to have been imported into the application of s.27. Purchas J observed, at p.335 C, that the continuing application of this aspect of the common law rule was “confirmed ... by the apparent necessity for the draftsman to include section 27(8)” in the MCA 1973. This provided that: “For the purpose of proceedings on an application under this section adultery which has been condoned shall not be capable of being revived”. The Judge also considered, at [22], that the “only possible explanation for the insertion of s.27(8) into the 1973 Act is that it was intended by the legislature that the common law principles, and specifically the fault rule, should strongly influence the operation of s.27”.
36. The Judge noted that s.27(8) (and its equivalent in the Matrimonial Proceedings (Magistrates’ Courts) Act 1960 (“the 1960 Act”)) had been repealed but considered, at [29], that “otherwise the common law duty lives on”. He relied on the following in support of this conclusion:

“[30] The common law duty to maintain has been abolished by s.198 of the Equality Act 2010, but a decade after this landmark



statute was passed, this provision has not been brought into force. The failure to do so clearly confirms that the common law duty remains alive ...”

37. The Judge next turned to consider the duration of the common law duty to maintain and the court’s historic approach to the making of orders for maintenance which survived divorce, whether domestic or foreign. The Judge’s ultimate conclusions were as follows. He stated, at [45], that, absent “exceptional circumstances”, the “normal way for the discretion to be exercised” would be by limiting any maintenance order so that it did not “endure, or take effect, after the foreign divorce”. This was because, at [46]:

“... the influence of the common law rule that the duty to maintain subsists only while the marriage subsists is given effect by a normal exercise of the discretion (under s.27) in this way.”

And, at [47]:

“... it would amount to an exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances.”

38. The Judge’s analysis, which led to the above conclusions, started at [31]. In his view a “critically important feature of the common law duty to maintain is that it endures only for as long as the marriage subsists” (the Judge’s emphasis). This led the Judge to comment, at [33], that: “One might have thought ... (that) this principle would be carried across to applications for maintenance ... in exactly the same way that the common law fault rule had been carried across”. However, he noted at [34], that “most surprisingly”, this had not happened and that the legislation “permitted a maintenance order to continue after the dissolution of the marriage during joint lives”. He also noted that there were “old cases which say that the court retains a discretion to allow an order for maintenance to continue after the dissolution of the marriage, whether by a domestic decree or a foreign decree”. In this respect also, however, he went on to say that this was “wholly anomalous” and “contrary to common sense”. The Judge regarded this as “a manifestation of the syndrome of chauvinism”, as referred to above (paragraph 31).
39. The Judge acknowledged, at [35], that the “old cases” comprised “weighty authority which permitted ... maintenance orders to be made which survived a later divorce”, including *Bragg v Bragg* [1925] P 20. He also considered that the later statutory “provisions were no doubt enacted to reflect (this) weighty authority”. However, to insert the words I have omitted from the sentence I have quoted, in the Judge’s view the making of such orders was “permitted, quite illogically”.
40. I would observe in passing that it is only illogical because of the Judge’s, effectively prior, conclusion as to the appropriate duration of maintenance orders. I would also note that the Judge adopted the expression, “contrary to common sense”, from Sir Henry Duke P’s judgment in *Bragg v Bragg*, even though Sir Henry Duke had used it in the context of saying that the fact that the outcome might be contrary to common sense did not mean that this was “not ... the result of the statutory provision”. Indeed,

he went on to say, at p.24, that there “are grounds of common sense why an order which dealt with maintenance and not with the general obligations of married life should continue to subsist”.

41. The Judge’s approach is also reflected in his further observation, at [41], that *Bragg v Bragg* and other authorities, particularly *Wood v Wood* [1957] P 254, a Court of Appeal decision in which the leading judgment was given by Lord Evershed MR, “failed to grapple with (or even mention) the *key point* that the scope of the duty to maintain (which was given effect by the existing order in that case) was governed by the common law, and the common law terminated that duty on a dissolution of the marriage” (my emphasis).
42. The Judge further extrapolated, at [42], that the “*unspoken* message of these old cases is that extension of an English maintenance order after a foreign divorce would be a good thing because of fears that the foreign court would not deal with the claim justly by English standards, which then were dominated by considerations of conduct” (my emphasis). I have emphasised the Judge’s use of the word “unspoken” because he is right that these cases do not say what the Judge imputes to them. I also consider it unlikely that, if it was the “key point” as suggested by the Judge, the relevance of the common law duty to maintain would have been overlooked by all the judges involved in *Wood v Wood*, namely Lord Merriman P. and Collingwood J in the Divisional Court and Lord Evershed MR, Hodson and Ormerod LJ in the Court of Appeal. Further, in *Wood v Wood*, the Court of Appeal allowed an appeal from the Divisional Court and restored the order made by the Magistrate increasing an award of maintenance under the 1895 Act after the husband had subsequently obtained a divorce in Nevada. The Court of Appeal decided that the Magistrate had made no error of law in the exercise of his discretion.
43. The next element relied on by the Judge to support his conclusions was that, at [45], “principles of comity have come to the fore in the judicial application of private international law and there has been a marked retreat from the syndrome of chauvinism to which Lord Wilson referred”. He combined “these developments” with “the influence of the common law rule as to duration” in support of his conclusion as to how, absent “exceptional circumstances”, the court’s discretion under s.27 should “normally” be exercised so that a maintenance order did not “endure, or take effect, after the foreign divorce”.
44. The Judge further considered, at [46], that his proposed approach reflected three additional factors. These were:
  - (i) that sections 25A and 28(1A) of the MCA 1973 do not apply to an application under section 27 with the result that “there is no duty on the court to consider whether it would be appropriate to exercise its powers” to effect a clean break, either immediate or deferred. The court “should not in earlier proceedings under s.27 tie the hands of that court in later proceedings post-divorce”;
  - (ii) that, if a marriage is dissolved abroad, the parties will “have their rights to financial provision in accordance with the law of that jurisdiction”. Additionally, a party may have rights under Part III of the Matrimonial and Family Proceedings Act 1984. The Judge considered that this dealt with the “fear of Lord Evershed MR that a

wife, habitually resident here, may be left unprovided for following a foreign divorce”;

(iii) that, if “the marriage is to be dissolved by a court in another part of the British Islands ... That post-divorce maintenance should be dealt with in the divorce jurisdiction is implicit in para 11 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973” (“the DMPA 1973”). The Judge based this on the fact that, when divorce proceedings in England and Wales are stayed under Schedule 1 because of the existence of divorce proceedings in Scotland, paragraph 11 provides that certain orders made in the proceedings in England (such as for maintenance pending suit) “will generally come to an end three months after the stay takes effect”. The Judge agreed with Mr Horton “that it would be highly anomalous, in circumstances where the wife's English petition has been first stayed and then dismissed under the provisions of para 8, that she could obtain an order of longer duration under s.27 than she could have done within the stayed, and then dismissed, divorce proceedings”.

45. The Judge repeated, at [47], that, when deciding how “to exercise the substantive discretion”, the court should take into account “the convenience and appropriateness of matters being dealt with in the foreign court”. As referred to above, he decided that “it would amount to an exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances.”.
46. Finally, the Judge sought to distinguish *Newmarch v Newmarch* [1978] Fam 79 (decided on 21 February 1977), in which Rees J had made a substantive order under s.27 following an Australian divorce, on the basis, at [53], that “insufficient attention was paid in that case to considerations of comity, or to the underpinning common law rule concerning the duration of the duty to maintain”.
47. The Judge then turned to consider the facts of this case.
48. In the course of his analysis, the Judge was critical of both parties. He noted, at [57], that “the wife, with some justification, has accused the husband of being dishonest, manipulative, vindictive and bullying”; while the wife “is not beyond criticism herself”. He described the husband, at [102], as having blatantly refused “to provide basic disclosure in the form of his bank statements”, contrary to an order made by the court. He considered, at [100], the husband’s explanation for his non-compliance as “absurd”. The husband had “claimed that he was acting in the public benefit in the context of the pandemic by not going to his bank in person”. The Judge went on to say, at [101], that this was “illustrative of a general syndrome on the part of the husband of defiance, offensiveness, non-cooperation and truculence”.
49. The Judge summarised the evidence as to the husband’s financial resources. The Judge briefly referred to the husband’s interest in the trust established under his father’s will. His focus was principally on the husband’s interests in the trusts created under the will of his maternal grandmother who died in 2009. The residuary estate had been divided between four funds, the husband having an interest in three of them called the Lady Elizabeth Fund, the Mount Stewart Discretionary Fund and the Grandchildren’s Fund. The Judge described the central factual issue, at [70], as follows:

“The central issue ... is whether the £1.3 million, being the husband’s share in the Grandchildren’s Fund and the Lady Elizabeth Fund, can be treated as a resource available to him for the purposes of computing a maintenance award in favour of the wife.”

It can be seen that in his description of the central factual issue the Judge did not refer to the husband’s interest in his father’s will trust.

50. Following the death of the husband’s stepmother in 2019, the husband’s contingent interest under the trust established by his father’s will had vested. Despite this, and despite being asked about it in a questionnaire served by the wife, the husband gave almost no disclosure about this trust.
51. The Judge dealt with this trust at, and only at, [60] and [61]. He noted that the husband, the wife and their daughter are all within the class of “eight living beneficiaries”. He added that: “It is not known what the estate currently comprises although it is believed to be of some substance as it includes a valuable house in west London”. He also referred to “a letter written to the court on 2 March 2021 by the executors”. As can be seen, this letter was received during the course of the hearing below. It was, it appears, in response to a letter from, or on behalf of, the wife. It was certainly not in response to any enquiry from, or on behalf of, the husband.
52. The letter stated that “no final decisions” had been made by the trustees in part because, although the trust’s main asset (a property held by a company) had been sold, “it will not be clear to the executors as to how much value will be available for distribution until all relevant taxes and liabilities of the estate have been settled”. They did not say what it had been sold for but, as referred to above, it appears that it sold for about £9 million. They did say, however, that “at this stage” the “possibility of either (the wife or the husband) receiving some form of financial benefit from the estate ... (was) extremely unlikely”. The Judge decided, at [62]: “In the light of the contents of that letter it is plain that the husband has no realistic prospect of benefit from his father’s estate in the foreseeable future”.
53. The Judge also excluded the Mount Stewart Discretionary Fund because he accepted, at [68(iii)], that this fund had been “specifically earmarked ... to meet the running costs of the Mount Stewart estate incurred by the family tenant”, the husband’s aunt aged 77 (at the date of the judgment below). The Judge concluded that this meant that the husband had “no expectation of any benefit from this trust in the foreseeable future”.
54. In the course of his analysis, the Judge referred, at [66], to “a memorandum prepared by the husband in December 2010 in order to try and persuade the wife’s brother to lend them £100,000”. In this, the husband had painted a positive picture of the resources likely to be available to him based on his grandmother’s residuary estate totalling a minimum of £14 million. The Judge noted, at [67], that “these predictions proved to be optimistic” but, as submitted by Mr Cayford at the hearing of this appeal, this information had been available to the wife and had given her reason to believe that the husband had significant resources potentially available to him.

55. The Judge's ultimate conclusion, at [104], was that aside from his interests in the Grandchildren's Fund and the Lady Elizabeth Fund and his interest in his SIPP, "there is nothing else to know about the husband's financial circumstances". The SIPP's only asset, at [63], was a field which had been, but was no longer, included "as a housing opportunity site in the Local Plans". It was said to be worth £7,000. The Judge dealt with the evidence as to the sums received by the husband from the Grandchildren's Fund and the Lady Elizabeth Fund. This included income and other small distributions as well as loans.
56. The Judge next asked himself, from [105], what he described as the "Charman question". I would note, in passing, that although the Judge said this came from *Charman v Charman (No 4)* [2007] 1 FLR 1246, at [48], I think it more accurately comes from Wilson LJ's (as he then was) judgment in an earlier decision in that case, *Charman v Charman* [2006] 2 FLR 422, at [12]. The question, as phrased by Wilson LJ was "whether, if the husband were to request (the trustee) to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so".
57. At [105], the Judge phrased the question more narrowly in that he confined it to whether the trustees "would respond positively to a request by the respondent to make funds available to him to make provision for the applicant". In my view, the question is better phrased more generally, as the Judge did, at [107], when he referred to "the likelihood of (a) whether, if asked, the trustees would have made further assistance available in the period prior to the wife's s.27 application; and (b) whether the trustees would now and in the future make available assistance over and above the income they are already providing". In respect of *both* issues, however, the Judge only considered the Grandchildren's Fund and the Lady Elizabeth Fund. The Judge's conclusion, at [126(xi)], was "that both in the period preceding the wife's application, and at the present time, the answer to the Charman question is no".
58. This led to the Judge's ultimate conclusion, at [135], that the "condition precedent is not satisfied in this case" and that the wife's application "must therefore be dismissed".
59. The Judge went on to consider what order he would have made but for his conclusion that the wife had not satisfied the condition precedent. The Judge again answered that question only by reference to the Grandchildren's Fund and the Lady Elizabeth Fund and by reverting to the narrower question, referred to in paragraph 57 above. His conclusion, at [141], was that "I am not satisfied, on the balance of probability, that the trustees would appoint capital to the husband for him to maintain the wife. Indeed I am sure that they would not".
60. However, because the husband, at [142], "is now receiving about £28,000 a year in net income from the two funds" the Judge concluded that the husband "should be maintaining the wife" at the rate of £10,000 p.a. That finding appears to be based on the husband's tax return for 2019/2020 which showed that he had received this net sum. Although not expressed in this way in the judgment, this conclusion clearly comprised both a determination that the husband "has failed to provide reasonable maintenance" as at the date of the hearing below and a determination that this would be a fair award under s.27.
61. Finally, the Judge decided, at [143], that:

“In accordance with the principles I have formulated above, my primary conclusion is that once the parties are divorced, the Sheriff's Court at Dumbarton should deal with all financial questions between the husband and wife. This would include exercising powers not available to me, such as pension sharing. Therefore, the duration of the maintenance order, were I to make it, would be until the date of the decree of divorce in the Sheriff's Court at Dumbarton.”

62. The Judge also discharged the order made by Parker J for interim maintenance and legal costs and remitted all the arrears. There is no appeal from this part of the Judge's order.

### Legislation

63. It is important to note that the jurisdictional structure applicable in this case no longer applies to new applications as a result of the United Kingdom's withdrawal from the European Union. The Supreme Court's decision on jurisdiction was based on the provisions of Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011. These provisions have now been revoked, as set out in the judgment below, at [8]. However, what the Supreme Court said about the issue of jurisdiction in *this* case, as referred to below, is clearly of relevance to this appeal.
64. Section 27 of the MCA 1973 has been substantively amended since it was first enacted. In its *original* form s.27(1) provided:

“Financial provision orders, etc., in case of neglect by party to marriage to maintain other party or child of the family

(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent) -”

(a) being the husband, has *wilfully neglected* -

(i) to provide reasonable maintenance for the applicant, or

(ii) to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family to whom this section applies;

(b) being the wife, has *wilfully neglected* to provide, or to make a proper contribution towards, reasonable maintenance -

(i) for the applicant in a case where, by reason of the impairment of the applicant's earning capacity through age, illness or disability of mind or body, and having regard to any resources of the applicant and the respondent respectively which are, or should properly be made, available for the purpose, it is reasonable in all the circumstances to expect the respondent so to provide or contribute, or

(ii) for any child of the family to whom this section applies.”  
(emphasis added)

It was also provided by s.27(8):

“For the purpose of proceedings on an application under this section adultery which has been condoned shall not be capable of being revived, and any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent.”

I do not propose to set out the rest of s.27 but it is relevant to note that there was no provision stipulating the matters to which the court was to have regard when determining an application under this section.

65. Similar wording to the above appeared in s.1 of the 1960 Act, which gave Magistrates’ Courts jurisdiction to make orders in what were called “matrimonial proceedings”.
66. I have highlighted the expression “wilfully neglected” because these words date back to s.4 of the 1895 Act. That section gave a wife the right to apply for an order against her husband on a number of grounds including if her “husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain”.
67. The Domestic Proceedings and Magistrates’ Courts Act 1978 (“the DPMCA 1978”) made a number of significant amendments to s.27 of the MCA 1973 and revoked the 1960 Act. The amendments to s.27 included changing the “ground” from “has wilfully neglected” to “has failed to provide reasonable maintenance”, adding new subsections (3) and (3A) and revoking s.27(8). The same changes were effected by the DPMCA 1978 in respect of Magistrates, which replaced the previous provisions in the 1960 Act.
68. The Law Commission, in its 1976 Report, *Matrimonial Proceedings in Magistrates Courts* (Law Com. No. 77) (“the 1976 Report”), made clear that it was proposing fundamental reforms, following on from the reforms effected by the Matrimonial Proceedings and Property Act 1970 (and the MCA 1973). For example, at [1.16], it was said:

“The recommendations in our report include recommendations:-

(a) For changing the principles on which matrimonial relief is available to husbands and wives in magistrates’ courts (Part II) and for making consequential changes in the law relating to wilful failure to maintain administered in the High Court and divorce county courts (Part IX).”

Another example is when, at [2.12], the 1976 Report refers to what was being proposed as “reformulated law”.

69. That this was the effect of the Law Commission's proposals reflected its view, as set out in its 1973 Working Paper No 53, *Matrimonial Proceedings in Magistrates' Courts*, ("the 1973 Working Paper") at [36], that:

"Any new legislation affecting the obligations of parties during marriage will have to be expressly drafted to override the common law by making the obligations reciprocal; and to amend section 6 of the 1970 Act by introducing full reciprocity and removing the requirement to establish that the failure to maintain was wilful."

70. The 1976 Report set out what the Law Commission considered should be the principles underlying a spouse's obligation to support the other spouse and their children:

"[2.5] ... the Working Party set out to determine what should be the policy underlying the law relating to the support of spouses and their children. They concluded that three principles could be stated: first, that both parties to a marriage should have an absolute obligation to maintain their dependent children, which should survive irrespective of the way in which they have behaved towards each other; secondly, that the obligation of each spouse to maintain the other should be fully reciprocal; and thirdly, that it should be left to the court to determine in particular cases whether an order should be made and for how much in the light of whatever guidelines might be embodied in the law."

These principles, which it can be seen did not mention and were not based on the common law duty of a husband to maintain his wife, were carried forward into the recommendations:

"2.14 We further recommend that:-

- (a) the magistrates' matrimonial law should embody the general principle that it is the duty of each spouse to support the other on a basis of equality;
- (b) the grounds of application and the guidelines for the court should be the same whichever spouse applies for maintenance;
- (c) the court should then determine the application in the light of the particular circumstances of the case."

The old concept of the need to establish a "matrimonial offence", which was part of the previous legislation, was abolished. The Law Commission referred, at [1.7] to the criticism in its report by the Finer Committee (the Committee on One-Parent Families chaired by Finer J) "of the survival (in the matrimonial law administered in matrimonial magistrates' courts) of the concept of the matrimonial offence, both as a ground on which relief may be granted and as a ground on which it must be refused."



71. The Law Commission also proposed that the provisions of s.27 of the MCA 1973 be reformed in line with the proposals made in respect of Magistrates' Courts. The specific recommendations included the following:

“9.24 We accordingly recommend as follows:-

(a) Section 27 of the Matrimonial Causes Act 1973 should be amended by removing the requirement to establish that the failure to maintain was wilful.

(b) The section should embody the principle that it is the duty of each spouse to support the other and that the nature of the duty is the same in the case of each spouse.

...

(d) In determining whether and, if so, how, to exercise its powers under the section in favour of a spouse, the court should be required to have regard to all the circumstances of the case, and the matters set out in (a) to (g) of paragraph 2.29 above.”

72. The relevant parts of s. 27, as amended, are as follows:

“27 Financial provision orders etc in case of neglect by party to marriage to maintain other party or child of the family

(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent) –

(a) has failed to provide reasonable maintenance for the applicant, or

(b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.

...

(3) Where an application under this section is made on the ground mentioned in subsection (1)(a) above, then, in deciding –

(a) whether the respondent has failed to provide reasonable maintenance for the applicant, and

(b) what order, if any, to make under this section in favour of the applicant,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(2) above, and where an application is also made under this section in respect of a child of the family who has not attained the age of

eighteen, first consideration shall be given to the welfare of the child while a minor.

(3A) Where an application under this section is made on the ground mentioned in subsection (1)(b) above then, in deciding

–

(a) whether the respondent has failed to provide, or to make a proper contribution towards, reasonable maintenance for the child of the family to whom the application relates, and

(b) what order, if any, to make under this section in favour of the child,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(3)(a) to (e) above, and where the child of the family to whom the application relates is not the child of the respondent, including also the matters mentioned in section 25(4) above.

(3B) In relation to an application under this section on the ground mentioned in subsection (1)(a) above, section 25(2)(c) above shall have effect as if for the reference therein to the breakdown of the marriage there were substituted a reference to the failure to provide reasonable maintenance for the applicant, and in relation to an application under this section on the ground mentioned in subsection (1)(b) above, section 25(2)(c) above (as it applies by virtue of section 25(3)(e) above) shall have effect as if for the reference therein to the breakdown of the marriage there were substituted a reference to the failure to provide, or to make a proper contribution towards, reasonable maintenance for the child of the family to whom the application relates.

...

(5) Where on an application under this section it appears to the court that the applicant or any child of the family to whom the application relates is in immediate need of financial assistance, but it is not yet possible to determine what order, if any, should be made on the application, the court may make an interim order for maintenance, that is to say, an order requiring the respondent to make to the applicant until the determination of the application such periodical payments as the court thinks reasonable.

(6) Where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above, the court may make any one or more of the following orders, that is to say –

(a) an order that the respondent shall make to the applicant such periodical payments, for such term, as may be specified in the order;

(b) an order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

(c) an order that the respondent shall pay to the applicant such lump sum as may be so specified;

(d) an order that the respondent shall make to such person as may be specified in the order for the benefit of the child to whom the application relates, or to that child, such periodical payments, for such term, as may be so specified;

(e) an order that the respondent shall secure to such person as may be so specified for the benefit of that child, or to that child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

(f) an order that the respondent shall pay to such person as may be so specified for the benefit of that child, or to that child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) above, to the restrictions imposed by section 29(1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen.”

The heading of s.27 did not change but otherwise the section was substantively and significantly reformulated. As referred to above, as well as the ground changing, ss.27(3), (3A) and (3B) were all new provisions introduced by the DPMCA 1978.

73. I would also note that Schedules 5 and 6 to the Civil Partnership Act 2004 replicate the relevant provisions of the MCA 1973 and the DPMCA 1978.
74. It is also relevant to note the definition of “financial provision orders” in the MCA 1973. They are defined by s.21 as comprising orders made under s.23 (on divorce, nullity or judicial separation) for periodical payments, secured periodical payments and for the provision of a lump sum *and* like orders made under s.27. The integration of s.27 within the overall structure of the financial remedy provisions in the MCA 1973 is also demonstrated by the fact that, as mentioned above, an application under s.27 is included within the definition of “financial remedy” (r.2.3) so that the same provisions of the FPR 2010, Part 9, apply to applications under s.27 as they apply to other applications for a financial remedy order.
75. Section 28 of the MCA 1973 deals with the duration of financial provision orders. I set out the section in full because it expressly makes clear that the term of an order made under s.27 is *not* confined to the duration of the marriage: see s.28(1)(a) and s.28(2). Section 28(2) deals specifically with an order which has been made under

s.27 and which “continues in force” after the marriage “is subsequently dissolved or annulled”. It provides only that such an order “shall, notwithstanding anything in it, cease to have effect on the remarriage of, or formation of a civil partnership by, that party”.

“28 Duration of continuing financial provision orders in favour of party to marriage, and effect of remarriage or formation of civil partnership

(1) Subject in the case of an order made on or after the grant of a decree of a divorce or nullity of marriage to the provisions of sections 25A(2) above and 31(7) below, the term to be specified in a periodical payments or secured periodical payments order in favour of a party to a marriage shall be such term as the court thinks fit, except that the term shall not begin before or extend beyond the following limits, that is to say –

(a) in the case of a periodical payments order, the term shall begin not earlier than the date of the making of an application for the order, and shall be so defined as not to extend beyond the death of either of the parties to the marriage or, where the order is made on or after the grant of a decree of divorce or nullity of marriage, the remarriage of, or formation of a civil partnership by, of the party in whose favour the order is made; and

(b) in the case of a secured periodical payments order, the term shall begin not earlier than the date of the making of an application for the order, and shall be so defined as not to extend beyond the death or, where the order is made on or after the grant of such a decree, the remarriage of, or formation of a civil partnership by, of the party in whose favour the order is made.

(1A) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce or nullity of marriage, the court may direct that that party shall not be entitled to apply under section 31 below for the extension of the term specified in the order.

(2) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made otherwise than on or after the grant of a decree of divorce or nullity of marriage, and the marriage in question is subsequently dissolved or annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of, or formation of a civil partnership by, that party, except in relation to any arrears due under it on the date of the remarriage or formation of the civil partnership.

(3) If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries whether at any time before or after the commencement of this Act or forms a civil partnership, that party shall not be entitled to apply, by reference to the grant of that decree, for a financial provision order in his or her favour, or for a property adjustment order, against the other party to that marriage.

As Arnold LJ pointed out during the course of the hearing, the statute does not distinguish between where the divorce takes place.

76. Section 31 of the MCA 1973 gives the court power to vary or discharge orders for periodical payments made under s.27 (as well as under s.23). Subsections (7A) and (7B) give the court a wide power to make other, capital, orders when, “*after* the dissolution of a marriage” (my emphasis), the court discharges a periodical or secured periodical payments order or varies such an order “so that payments under the order are required to be made or secured only for such further period as is determined by the court”. The purpose of these provisions is clear in that they enable the court to impose an immediate or a deferred clean break once the marriage has been dissolved.
77. The section does not expressly confine the power to make capital orders to when the court is varying or discharging an order made under s.23. Any such limitation would have to be implied. The section as a whole clearly applies to orders made under s.27 so it is not easy to see why this power should be excluded when the court is varying or discharging a periodical payments order made under s.27. However, the parties were not agreed as to whether this gave the court power to order, say, a lump sum when varying or discharging a periodical payments order made under s.27. Mr Cayford submitted that it did. Mr Horton submitted that it is not clear.
78. This is not the occasion to determine the precise scope of the power under ss. 31(7A) and (7B). All I would say is that including orders made under s.27 within the scope of the power would be consistent with the long-established duty of the court to effect a clean break when that can be achieved fairly. This principle predates the substantive legislative changes effected by the Matrimonial and Family Proceedings Act 1984: *Minton v Minton* [1979] AC 593. In that case, Lord Scarman identified, at p.608 F/G, “the principle of ‘the clean break’” as being one of the principles which informs “the modern legislation”, an observation specifically endorsed by Viscount Dilhorne and Lord Fraser.
79. Returning to s.27, as referred to above, the purpose of the legislation is clear. It is to ensure that a spouse is able to obtain financial provision when the other spouse should be, but is not, providing them with proper financial support. It is to meet a financial need which should be, but is not, being met. It is a provision which fits within, and is part of, the general scheme of the MCA 1973. The court is required to have regard to the same factors both when determining whether there has been a failure to provide reasonable maintenance *and* when deciding what order to make. They are, in effect, all part of the same exercise. The focus, as with all other applications for a financial remedy, is on *all* the circumstances of the case with first consideration being given to the welfare of any minor child.

## Submissions

80. Mr Cayford challenged the Judge's whole approach to the wife's application which in part, he submitted, reflected the Judge's view that the minority, rather than the majority, in the Supreme Court in this case had been correct. In his submission, the Judge misdirected himself as to the meaning and effect of both s.27 and s.28 of the MCA 1973 in respect of, what the Judge called, the "condition precedent" and in respect of the appropriate duration of a periodical payments order. The Judge was wrong to conclude, at [41], that the "incidents" of a husband's duty under the common law to maintain his wife "remain relevant" to the manner in which the court exercises its powers under s.27. He submitted that the dismissal of the wife's application on the basis that the "condition precedent" had not been satisfied was legally wrong and that, in addition or alternatively, its introduction into the case by the Judge *at* the final hearing was procedurally unfair.
81. As to the "condition precedent", Mr Cayford submitted that the court does not lack the power to make an order if the failure to pay reasonable maintenance has only occurred between the date of the application and the date of the hearing. He submitted that the Judge's approach would undermine the purpose of the legislation which is to make financial provision for a spouse in need. The "imposition of an historic gateway", before the court could make an order, would be contrary to the purpose and ambit of the relief afforded by s.27. It would also be inconsistent with the approach that a judge must take when deciding what award to make, in which past conduct has little relevance.
82. In this respect, Mr Cayford relied on the provisions of section 27(3)(a) which require the court to have regard to all the circumstances of the case, *including* the matters set out in s.25(2), *both* when deciding whether the respondent has failed to provide reasonable maintenance and when deciding what award to make. As set out in s.25(2) (a) and (b) of the MCA 1973, the focus is on the financial resources and the needs which each party "*has* or is likely to have in the foreseeable future" (emphasis added). This, he submitted, as with all applications for maintenance/financial provision under the MCA 1973, principally requires an assessment of the circumstances at the date of the hearing with a historic review only being relevant to calculating a figure for backdated arrears. In contrast, the test adopted by the Judge would require a bifurcated approach with one part of the exercise being focused exclusively on analysing some period predating the application and the second part requiring analysis principally of the relevant factors at the date of the hearing, in circumstances where a maintenance order cannot begin earlier than the date of the application.
83. In summary, Mr Cayford submitted that the structure of s.27, and the approach taken to all other applications for financial provision, point firmly to the question, of whether the respondent has failed to provide reasonable maintenance, being determined at the date of the hearing and not at a date prior to the application. Mr Cayford relied on *H v H* [2015] EWHC B24 Fam, in which HHJ Booth, sitting as a deputy High Court Judge, had identified the relevant issue, at [7], as being whether "the provision that is currently made is reasonable".
84. Mr Cayford suggested that, if the Judge was right, in every case an applicant would be well advised to issue a fresh application immediately before the final hearing. This would apply particularly when a respondent had refused or failed to give proper disclosure, because there would be some consequent uncertainty as to when the court might determine that there had been a failure by the respondent to provide reasonable

maintenance. He submitted that this further demonstrated that the judge's approach was inconsistent with the achievement of proportionate and fair justice in the application of s.27.

85. Further, Mr Cayford submitted that it was procedurally unfair for the Judge himself to have raised this point at the final hearing when it had not been raised previously either by the husband or the court. This meant that the wife had no advance notice that she was required, substantively, to address the husband's financial circumstances in 2013 and 2014 and that her application would fail if she did not establish a failure to maintain in that period. She was unprepared to address that issue and had not sought disclosure on that basis.
86. In respect of the duration of orders, Mr Cayford submitted that the Judge had introduced an impermissible gloss on the provisions of s.27 and s. 28(2), namely that, at [47], it would be "an exorbitant extraterritorial exercise of jurisdiction" to make an order which would continue after a foreign divorce "save in exceptional circumstances". This was, Mr Cayford submitted, based on the Judge wrongly concluding that the common law duty to maintain has continuing relevance to the exercise of the court's powers under s.27. He had also wrongly, and contrary to the Supreme Court's decision in this case, imported principles relating to forum conveniens to support his conclusions; for example, at [47], when the Judge referred to "convenience and appropriateness". Mr Cayford submitted that forum conveniens has "no role to play" in the exercise of the court's powers under s.27 and that, although the Judge said that he was not, the effect of his decision was, "precisely and impermissibly", to introduce the features of this principle into the operation of s.27.
87. Mr Cayford relied on the manner in which the law has developed since 1970 and, in particular, on the amendments made to s.27 in 1978 (as referred to above). He pointed to the observations of Thorpe LJ in *McFarlane v McFarlane; Parlour v Parlour* [2005] Fam 171 ("*McFarlane*") including his endorsement of what Charles J had said in *G v G (Maintenance Pending Suit: Costs)* [2003] 2 FLR 71 ("*G v G*"), namely that the term "maintenance" in ss.22 and 27 of the MCA 1973 "was not used by Parliament to refer to the old common law duty of a husband to maintain his wife".
88. Mr Cayford also challenged the Judge's approach to the evidence and his conclusions as to the resources available to the husband. He pointed, for example, to the fact that the husband had refused to make any request to his trustees for any financial assistance save in respect of the funds required to enable his appeal to the Supreme Court to proceed, which the trustees then provided: £30,000 as security for the wife's costs and £19,000 for other costs. He submitted that the Judge's conclusion, at [104], as to the resources available to the husband was flawed and challenged the Judge's comments in the previous paragraph as not being an accurate reflection of his submissions. The Judge said, at [103]:

"Mr Cayford QC did not in his final submission seek to argue that the dishonest withholding of bank statements by the husband should lead me to infer that they would have revealed the existence of funds, or sources of funds, about which we do not already know. I sensed that he accepted that the husband's motive for this deplorable conduct was simply in order to needle his wife and those advising her. That is my conclusion."

Mr Cayford made clear that he did *not* accept that this was the husband's motive nor had he accepted before the Judge that the husband did not have, and had not had, other undisclosed resources. Further, the husband's failure to make proper disclosure went much further than the failure to provide his bank statements.

89. Despite the above submissions as to the deficiencies in the judgment, Mr Cayford recognised, reluctantly, that a rehearing would not be proportionate. Rather, as set out in his Skeleton Argument dated 26 April 2021 and repeated in his oral submissions, he sought, first, a joint lives maintenance order of £10,000 p.a., this being the amount that the Judge would have ordered but for his decision on the "condition precedent".
90. Secondly, he sought an adjournment of the wife's application for a lump sum. He submitted that the husband's failure to comply with his disclosure obligations meant that the court was not currently able, properly and fairly, to determine the wife's claims. Mr Cayford relied on, what Arnold LJ described during the hearing as, the husband's "egregious non-disclosure". He also pointed to the absence of any proper inquiry into the husband's interest under his father's will trust. In these circumstances, he submitted that the court should retain the power to order a lump sum. This was also to ensure that, if disputed, the court retained the power to make a lump sum order when varying or discharging the maintenance order in the future. This would ensure that this power was available to the court, if required, to achieve a fair outcome.
91. I can deal with Mr Horton's submissions more shortly because, although he does not seek to support all of the Judge's reasoning, he submitted that the Judge was right in respect of the "condition precedent" and right as to the approach to be taken to the duration of orders under s.27.
92. As referred to above, Mr Horton did not seek to support the Judge's conclusion as to the continuing relevance of a husband's common law duty to maintain his wife. He did, however, support the Judge's conclusion that, if an applicant fails to establish a failure to provide reasonable maintenance prior to the date of the application, the application must be dismissed. Mr Horton briefly sought to suggest that this argument had been advanced at the hearing below. With all due respect, that was a hopeless submission. It had been submitted only that the wife "must establish that H *has* failed to provide reasonable maintenance for her" and that she "*has* failed to do so" (emphasis added). This was clearly as at the date of the hearing and no mention was made of this having to be established prior to the application. It was clearly the husband's contention that the court had to consider all the circumstances up to the date of the hearing for the purposes of determining that question.
93. Mr Horton further submitted that it was open to the wife to avoid the effect of the Judge's decision by bringing a fresh s.27 application although, at the same time, he made clear that, if she had, the husband would have applied to stay such a claim under the new legislative structure.
94. Mr Horton relied on *Morton v Morton (No. 2)* [1954] 1 WLR 737, a case under s.23 of the Matrimonial Causes Act 1950. That provision followed the previous legislation in that it still required a husband to be "guilty of wilful neglect to provide reasonable maintenance". The Court of Appeal's decision focused principally on the requirement for there to be "some element of matrimonial misconduct", at p.743, and on the effect of a separation agreement which provided for the payment of maintenance, at pp.



745/746. In addition, Singleton LJ referred to the decision of *Tulip v Tulip* [1951] P 378 in which the Court of Appeal had said, at p.388, in respect of an application under s.5 of the Law Reform (Miscellaneous Provisions) Act 1949 (which was in the same terms as s.23 of the 1950 Act) that “the real question ... was ... whether at the time the application was made ... the husband had wilfully neglected to provide reasonable maintenance”.

95. Mr Horton also relied on s. 31 of the Children Act 1989 which deals with when a court can make a care or supervision order. Under that section, the court can only make an order “if it is satisfied ... that the child concerned is suffering or is likely to suffer significant harm”. In *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 AC 424 (“*Re M*”), the House of Lords addressed the relevant date at which this had to be determined. The Court of Appeal had decided that the relevant date was the date of the hearing because of the use of the present tense in s. 31.
96. The problem facing the court was how the provision was to be applied when the local authority had taken protective measures before applying for a care order. The House of Lords decided that, based on the wording of s.31, the relevant date for determining whether the threshold criteria were established was the date of the application *or*, as explained by Hale LJ (as she then was) in *Re G (Care Proceedings: Threshold Conditions)* [2001] 2 FLR 1111, at [10], “if child protection measures (police protection or an emergency protection order) have been continuously in place since before then, the date when those began”. Lord Templeman considered, at p.438, that the appeal was “an illustration of the tyranny of language and the importance of ascertaining and giving effect to the intentions of Parliament by construing a statute in accordance with the spirit rather than the letter of the Act”.
97. On the first day of the hearing of the appeal, Mr Horton produced the case of *West v West* [1954] P 444. This was a decision in respect of an originating summons issued under s.23 of the Matrimonial Causes Act 1950. The issue in the case was whether the husband was under no duty to maintain his wife because he reasonably believed that she had committed adultery. Mr Horton relied on this case because the Court of Appeal decided that the relevant date for the determination of that issue was the date of the originating summons.
98. In response to the order sought by the wife in her Notice of Appeal, Mr Horton submitted that the Judge had not been asked to adjourn the application for a lump sum and that, in any event, it would be wrong to do so in this case.
99. Mr Horton also submitted that the Judge was right to have decided, at [143], that, if he had made an order for maintenance, its duration “would be until the date of the decree of divorce” in the proceedings in Scotland. He relied on the reasons advanced by the Judge, at [46], as supporting the need for “exceptional circumstances” to justify a longer order, and made a number of additional submissions including that “the issue of post-divorce maintenance ... is predominantly the responsibility of the court dealing with divorce” and that the wife was seeking to circumvent the effect of paragraph 11 of Schedule 1 to the DMPA 1973 (referred to by the Judge).

### Determination

100. It might seem more logical to deal with the “condition precedent” issue first. I do not do so because, in my view, the other issues which I address first set the context for my consideration of that issue.

*Duration of Maintenance and common law duty to maintain*

101. I propose, therefore, first to deal with the Judge’s conclusions: (a) at [41], that the common law duty of a husband to maintain his wife “should influence the exercise of the” court’s discretionary powers under s.27 because “the common law is the foundation on which all of this legislation is built, and ... save where specifically abrogated, its incidents remain relevant”; and (b) at [45]-[46], that, absent “exceptional circumstances”, the court’s discretion under s.27 should be exercised so that any order for maintenance should not “endure, or take effect, after the foreign divorce”.
102. Before considering this in detail, I would first note that a husband’s common law duty derived from the fact that a wife was not entitled to own property nor entitled to enter into contracts and that, effectively, her property became her husband’s on marriage. It might, therefore, seem surprising that a common law duty arising out of the historic subjugation of, and denial of rights to, women should be relevant in the 21<sup>st</sup> century to the exercise of the court’s powers under s.27.
103. Secondly, it is clearly significant that s.28(1) expressly limits the duration of a periodical payments or a secured periodical payments order made under s.27 (and an order made under s.23 on or after the grant of a decree of judicial separation) *only* to the death of either of the parties; and that s.28(2) expressly provides that an order made otherwise than on or after a decree of divorce/nullity (i.e. an order made under s.23 on or after the grant of a decree of judicial separation or an order under s.27) and which “continues in force” after “the marriage in question is *subsequently* dissolved or annulled” (emphasis added) shall automatically cease to have effect *only* on the remarriage/formation of a civil partnership of the payee. These provisions do not suggest that Parliament intended the duration of orders necessarily, or absent exceptional circumstances, to be limited to a subsequent divorce.
104. Does the Judge’s historical analysis support his conclusion that the manner in which the court exercises its discretionary powers under s.27 depends on or should be influenced by the nature and extent of a husband’s common law duty to maintain his wife?
105. My short answer is, that it does not. Any continuing connections that there might have been between the provisions of s.27 and the old common law duty came to an end with the significant statutory amendments effected by the DPMCA 1978. In my view, this is evident from the nature and the extent of the changes made to s.27. As set out above, these introduced a differently formulated statutory provision which, among other things, no longer used the old language of wilful neglect and repealed s.27(8). If there was any doubt about this, I consider that it is confirmed by what was said, as set out above, in the 1973 Working Paper that “Any new legislation affecting the obligations of parties during marriage will have to be expressly drafted to override the common law”; and in the 1976 Report about the principles underlying a spouse’s obligation to support the other spouse and their children, which were new principles distinct from the common law duty of a husband to maintain his wife.

106. Further, the amended s.27 has to be interpreted in the context of, and as part of, the new legislative framework governing financial claims. That this is the right approach can additionally be seen from what led to the 1976 Report and, subsequently, the DPMCA 1978. The 1976 Report, at [1.1], sets out that:

“In December 1970, the Home Secretary, the Right Honourable Reginald Maudling, M.P., invited us in the course of our work under Item XIX of our Second Programme (the reform and codification of family law) to consider:-

(a) what changes in the matrimonial law administered by the magistrates’ courts may be desirable as a result of the coming into operation of the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970, and

(b) any other changes that may appear to be called for in related legislation in order to avoid the creation of anomalies.”

The subsequent review was, therefore, expressly directed towards ensuring a cohesive legislative framework across all courts in the light of the changes effected by the new legislation. This is also supported by what was decided in *McFarlane*, which I deal with below.

107. As a result, after 1978 and contrary to the Judge’s view, it is clear to me that the common law duty is no longer “the foundation on which all of this legislation is built” and that it no longer has any relevance to the manner in which the court should exercise its jurisdiction under s.27.
108. I would just observe, briefly, in respect of *Gray v Gray*, which the Judge considered of particular significance, that Purchas J based his conclusions on his acceptance of the submission made by Mr Alan Ward (as he then was) on behalf of the husband, at p.327 B/C:

“Mr. Ward, for the husband, relies on well-established authority that the common law definition of wilful neglect to provide reasonable maintenance governs this statute as it has governed all other statutes containing those words.”

At p.329 B, Purchas J rejected the argument advanced on behalf of the wife that the 1895 Act “created a new duty and a right arising therefrom in favour of the wife and was independent of the common law”. This was because, at p.329 D/E:

“Wilful neglect to provide reasonable maintenance imports an existing duty to provide such maintenance. Under the common law the duty to provide maintenance only arose in respect of a wife who was not herself in default. Moreover it did not import a right in the wife to sue for money. This right was created by statute.”

His ultimate conclusion, at p.334 G/H to p.335 A/B, was as follows:

“The approach both historically and logically adopted by the courts demands that the meaning of the phrase "wilful neglect to provide reasonable maintenance" must be equivalent whether it is considered in the magistrates' courts or in the High Court. The powers granted to the High Court under section 27 of the Matrimonial Causes Act 1973 find their genesis in section 5 of the Law Reform (Miscellaneous Provisions) Act 1949. There is clear authority for the proposition that the latter Act merely extended to the High Court jurisdiction which had for many years been exercised by the magistrates' courts. In extending this jurisdiction to the High Court the common law rule that a wife in default was owed no duty of maintenance was imported into the High Court jurisdiction.”

In essence, the statutory provision merely gave a wife the right to enforce her husband's common law duty. If under the common law the husband had no obligation to maintain his wife because, for example, she was “in desertion”, then the statutory provision did not give the wife the right “to sue for money”. This analysis is no longer relevant following the reformulation of the statutory provisions which removed any continuing link between s.27 and a husband's duty at common law to maintain his wife.

109. The impact of the legislative developments in the 1970s is also made clear by the decision in *McFarlane*. The Judge was not referred to this case in which Thorpe LJ dealt, from [87], with “*The evolution of the statutory powers and the definition of periodical payments*”. This was for the purposes of addressing the submission, challenged by Mr Mostyn QC (as he then was) on behalf of Mrs Parlour, that the court's power to award maintenance was limited to payments required to meet a party's *needs*. Thorpe LJ first noted, at [87], that:

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

He concluded, at [89], that up to 1970, “There is no doubt, in my judgment, that to that date the court's power did not extend beyond ordering maintenance payments to meet the wife's needs”.

110. This changed from 1970 with, at [90], the “major reforming statute”, namely the Matrimonial Proceedings and Property Act 1970. Thorpe LJ, at [92], also made the following observation about the language of s.23 of the MCA 1973:

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

111. Thorpe LJ then expressly addressed the meaning of the word “maintenance”, first noting, at [94]:

“The term ‘maintenance’ survives only in section 22 and section 27. In those contexts the term might be thought to have the traditional meaning. However the judges have rejected that approach.”

He quoted, with approval, what Charles J had said in *G v G*, at [48], when addressing the argument that “the court’s power under s.22 to order maintenance pending suit was confined to sums necessary for the recipient’s daily support”:

“I do not accept that argument for the following reasons. (1) The purpose of the 1970 Act was to change statutory provisions that were outdated and inadequate and *to make a new start*. (2) Although the word 'maintenance' was used in both sections 1 and 6 of 1970 Act (now sections 22 and 27 of the Matrimonial Causes Act 1973) there are changes between section 6 of the 1970 Act (section 27 of the 1973 Act) and its predecessors and the word 'maintenance' is not used in the predecessors to section 1 of the 1970 Act (section 22 of the 1973 Act). (3) *The subsequent amendments to section 27 of the 1973 Act confirm or clarify that 'maintenance' was not used by Parliament to refer to the old common law duty of a husband to maintain his wife*. (4) The report (read alone and together with the working paper) supports the conclusion that 'maintenance' was not used by Parliament to refer to the old common law duty of a husband to maintain his wife.” (my emphasis)

Although Charles J was dealing with an application under s. 22 of the MCA 1973 for maintenance pending suit, his analysis clearly applies to both s.22 and to s.27 as does his conclusion that the term “maintenance” was *not* “used by Parliament to refer to the old common law duty of a husband to maintain his wife”. This had been a specific factor relied on by the husband in that case. As I have said, the whole of this analysis was endorsed by Thorpe LJ.

112. I would add to this what Charles J went on to say, at [54]-[55], when explaining his conclusions, as summarised at [48]:

“[54] Further and in any event, in my judgment, the changes made in s 6 of the 1970 Act and s.27 of the MCA 1973 (as originally enacted) point to a conclusion that Parliament was not intending to carry forward the earlier provisions as interpreted by the courts.

[55] In my judgment, this conclusion is confirmed by point (3). The amendments to s.27 of the MCA 1973 referred to therein introduce s.25 of the MCA 1973 into s.27 of the MCA 1973 both for the purposes of deciding whether the power conferred by s.27 of the MCA 1973 is triggered and the amount of any award. In my judgment, those amendments are not directed

only to what is reasonable and/or to the quantum of the award but also apply to the determination of the purposes of the payments and thus of maintenance.”

113. The Judge also relied on the fact that s.198 of the Equality Act 2010, which formally abolishes the common law duty of a husband to maintain his wife, has not yet been brought into force. I do not consider that this is relevant to the issue in this case. The fact that it may not yet have been formally abolished by statute does not mean that it informs the exercise of the court’s powers under s.27. I consider that this is self-evident but it is also interesting to note what the Explanatory Note dealing with s.198 states:

“Background

The husband’s common law duty to provide his wife with the necessities of life was a consequence of now obsolete rules of law which prevented the wife from having capacity to hold property and to enter into contracts. There is no equivalent common law duty for a wife to maintain her husband. There are, however, now adequate statutory provisions requiring both spouses to maintain each other. The common law duty to maintain has little if any practical application.

Example

Either party to a marriage can apply to the court for a financial provision order against the other party under the Domestic Proceedings and Magistrates’ Courts Act 1978 or the Matrimonial Causes Act 1973 on the grounds that his or her spouse has failed to provide reasonable maintenance for them or for any child of the family. There will no longer be any additional common law requirement for a husband to maintain his wife.”

114. Not only *Gray v Gray* but all the other cases referred to by the Judge, when dealing with the continuing relevance of the common law duty and the duration of orders under s.27, predate the amendments made to the MCA 1973 by, and the enactment of, the DPMCA 1978. As a result, I do not consider that these decisions are relevant to the manner in which the court exercises its powers under the reformulated s.27. I do not, therefore, propose to make this already long judgment even longer by dealing with them. I would just comment that I do not agree with many of the Judge’s observations as to their effect nor his attempts, when they did not support his analysis, to dismiss them or deflect their effect. As the Judge noted, even under the previous legislation, maintenance orders were made which endured after a subsequent divorce. I do not consider that this was because, as suggested by the Judge, these decisions either “failed to grapple with” or paid “insufficient attention” to the scope of the common law duty to maintain. They reflected the fact that the court had been given a discretion to make an order which continued in force after the parties were divorced.

*Exercise of Discretion as to Duration*

115. I do, however, consider it necessary to deal with some of the other matters relied on by the Judge as supporting his conclusion as to the manner in which the court should exercise its discretion in respect of the duration of a maintenance order under s.27. These include, in particular, his comment that it would be an “exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances”.
116. Again, my short answer is, that it would not be an exorbitant exercise of the court’s jurisdiction to make, nor would it require exceptional circumstances to justify making, such an order. This is particularly so in the present case, as explained below, but this also applies in other cases. The Judge’s approach would amount to an unreasonable fetter on the court’s discretionary powers.
117. In respect of the present case, the Supreme Court determined the following question, as phrased at [7(2)] in Lord Sales’ judgment:

“... does the English court have a discretion which has survived the promulgation of Schedule 6, to stay maintenance proceedings before it on the general ground of forum non conveniens (and if so, should it exercise that discretion so as to give priority to the Scottish courts to deal with financial issues between the parties)?”

The conclusion, as referred to above, was that, at [36], there was “no scope whatever for the operation of a forum non conveniens discretion”; and at [41], that the wife had an “unfettered [entitlement] to choose to bring her claim in an English court on grounds of its convenience for her or because she believes that the law it will apply is more advantageous for her”. In my view, the consequential effect of these conclusions was that, as a matter of jurisdiction, there was no discretion to give priority to the Scottish courts to deal with financial issues between the parties. The reason was, at [36], that “Schedule 6 is intended to be a comprehensive code to govern questions of jurisdiction in relation to maintenance claims with a cross-jurisdictional dimension within the United Kingdom”.

118. Lord Sales also considered the principles which underpin the special jurisdictional rules governing maintenance claims contained in the Maintenance Regulation (Council Regulation (EC) No 4/2009) and its predecessors. One key principle is that the maintenance creditor is able to choose where to sue. As Lord Sales noted, at [9]: “This was specifically designed to make it easier for a maintenance creditor to enforce his or her rights, by giving them the right to choose where to sue the maintenance debtor”. This was because, at [14], “the maintenance creditor, who is regarded as the weaker party, should have options regarding where to sue, so that he or she could proceed in the place most convenient or advantageous for him or her”. This meant, at [15], that “the maintenance creditor was also afforded a choice regarding the substantive law to be applied”.
119. It is worth recording that the Maintenance Regulation contains four grounds of jurisdiction, in simplified terms: the habitual residence of the respondent; the habitual residence of the creditor; the court having divorce jurisdiction, when maintenance is ancillary to those proceedings; and the court having parental responsibility jurisdiction, when maintenance is ancillary to those proceedings. A similar structure

is reflected in the provisions of the 2007 Hague Maintenance Convention. This Convention does not contain jurisdictional provisions as such, but it sets out when orders will be recognised and enforced. I mention the provisions in both of these instruments because maintenance ancillary to divorce proceedings is only of the grounds of jurisdiction in the former and, likewise, is only one of the bases on which orders will be recognised and enforced in the latter.

120. This makes clear that a spouse is not to be criticised merely because they choose to bring their claim in one jurisdiction rather than another. It is forum shopping in one sense but, as made clear by Lord Sales, the legislation has been designed expressly to give the maintenance creditor the right to choose the forum which they consider to be the “most convenient or advantageous for him or her”.
121. That is why, in my view, the Judge’s references to “chauvinism”; his conclusion that all financial questions, including maintenance, should be dealt with by the court dealing with the parties’ divorce; and his conclusion that “it would amount to an exorbitant extraterritorial exercise of *jurisdiction* to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances” (my emphasis) are all inapt. They do not apply in this case because, as explained by the Supreme Court, the wife has the right to bring her maintenance claim here and there is no power to stay her claim on the basis that Scotland is the more appropriate forum. Despite his suggestion, at [47], that he was not, in effect, introducing “a stay on the grounds of forum conveniens by the back door”, in my view, this is what the Judge was doing because his approach to the question of the duration of any maintenance order can be seen to have been heavily influenced by his views on whether England was the appropriate forum in this case in respect of maintenance. This went behind the Supreme Court’s clear decision on the issue of jurisdiction.
122. More generally, as referred to above, the court is expressly given the power to make an order for periodical payments or secured periodical payments under s.27 which continues after a subsequent domestic or foreign divorce. This is expressly provided under s.28(1) and s.28(2). As with the general power to make an order, the court has a broad discretion to make an order for such duration as it considers fair having regard to the relevant s.25 factors. This is a discretion which is to be exercised in line with the many authorities on the court’s power to make an equivalent order under s.23 subject, of course, to the fact that the order is not being made on or after the grant of a decree of divorce or nullity of marriage.
123. The jurisdiction to make maintenance orders is not necessarily connected to divorce proceedings nor does maintenance necessarily have to be determined by the courts dealing with the divorce. This case does not concern the application of the principle of forum conveniens but the exercise by the court of its jurisdiction to make an order. In this context, Mr Horton’s submission that “the issue of post-divorce maintenance ... is predominantly the responsibility of the court dealing with divorce”, even if it was assumed to be correct, is misplaced. As was noted by Lord Sales, at [17]:

“Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of and enforcement of judgments in matrimonial matters and matters of parental responsibility (“the Matrimonial Regulation” ...) excluded maintenance obligations from its scope. In due course,



maintenance obligations were covered by their own jurisdictional regime as set out in the Maintenance Regulation. Accordingly, EU legislation has continued the original scheme of the Brussels Convention, by treating maintenance obligations and questions of marital status, including divorce, as separate matters for the purposes of jurisdiction.”

They are separate matters and are to be determined separately.

124. I also, therefore, do not agree with the Judge when, at [46(iii)], he accepted Mr Horton’s submission that “it would be highly anomalous, in circumstances where the wife’s English petition has been first stayed and then dismissed under the provisions of para 8 (of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973), that she could obtain an order of longer duration under s.27 than she could have done within the stayed, and then dismissed, divorce proceedings”. The statutory provisions are different and, inevitably, provide scope for different outcomes. Schedule 1 is dealing with “matrimonial proceedings” (e.g. divorce proceedings) which are stayed, either under the obligatory provisions of paragraph 8 or the discretionary provisions of paragraph 9. Paragraph 11 deals expressly with the consequences of a stay, including as to orders made “*in connection with* the stayed proceeding” (my emphasis). It is not surprising that a maintenance order made in connection with stayed proceedings might “cease to have effect”. The provisions of s.27 are dealing with a very different situation which is unrelated to, and not analogous with, the circumstances addressed in Schedule 1 to the DMPA 1973.
125. Accordingly, I agree with Mr Cayford’s submission that s.27 provides the court with an “open discretion”. As I have said, when exercising this discretion, the duration of an order under section 27 will depend on the court’s determination as to what is the fair outcome having regard to all the circumstances of the case. These circumstances will, of course, include the fact that there are divorce proceedings in another jurisdiction but that fact certainly does not mandate the approach proposed by the Judge. In the individual case, the court will give it such weight as it requires, having regard to all the other circumstances.
126. Finally, in respect of the Judge’s observations about the duration of a maintenance order under s.27, I propose to address what he said, at [46(i)]: “In a s.27 case there is no duty on the court to consider whether it would be appropriate to exercise its powers such that the financial obligations of each party towards the other will be terminated as soon as the court considers just and reasonable”. The Judge based this conclusion on the fact that ss.25A and 28(1A) of the MCA 1973 do not apply to an application under s.27.
127. It is obvious why a court making an order under s.27 does not have the same statutory obligations as a court making an order on or after the grant of a decree of divorce or nullity. However, in general terms, and more specifically when the court is dealing with an application to vary or discharge an order under s.31, I have no doubt that the general clean break principle is applicable. As referred to above, this principle predates the substantive legislative changes effected by the Matrimonial and Family Proceedings Act 1984 and, as can be seen from *Minton v Minton*, is one which informs the modern legislation.

*Condition Precedent*

128. I repeat that at no time prior to the final hearing below had the argument been raised that the wife would have to establish that the husband had failed to provide reasonable maintenance for her prior to the date of her application and that a failure to provide reasonable maintenance after that date would be irrelevant to her application.
129. I agree with the Judge that s.27(1) must be interpreted purposively. I also agree that it could be said to be referring to “the here and now”. However, I disagree with his conclusion that the here and now means the period preceding the date of the application and not the date of the hearing. It is clear to me that the court has to determine whether the respondent “*has* failed to provide reasonable maintenance” (my emphasis) at the date of the hearing. The wording of s.27 does not support the conclusion that this has to have occurred prior to the date of the application. Rather, the structure and purpose of s.27, and its place in the overall framework of the MCA 1973, support the date of the hearing as being the relevant date.
130. Section 27 does not expressly require that the failure to provide reasonable maintenance has to be established or determined as at the date of the application. I agree with Mr Cayford’s submission that, if Parliament had intended that the court should consider only the historic circumstances of the case prior to the date of the application when determining whether the respondent has failed to provide reasonable maintenance, it could be expected to have said so. On the contrary, s.27(3) expressly provides that when the court is deciding whether there has been such a failure under 1(a) and/or 1(b), the court *must* have regard to all the circumstances including the matters set out in s.25(2). Further, “first consideration shall be given to the welfare of the child while a minor”.
131. The matters in s.25(2) include, under (a), the “financial resources which each of the parties to the marriage *has* or is likely to have in the foreseeable future” and, under (b), the “financial needs ... which each of the parties to the marriage *has* or is likely to have in the foreseeable future” (my emphasis). There are other provisions which equally make it clear that the court is considering the circumstances at the date of the hearing for the purposes of determining whether there has been a failure to provide reasonable maintenance.
132. Further, the fact that s.27(3) expressly requires the court to have regard to the same matters, both when deciding this question and when deciding what order to make, is inconsistent with the determination of the former question being limited to a consideration of the circumstances of the case up to the date of the application. The section does not differentiate between these two elements of section 27 and does not support such a bifurcated approach as submitted by Mr Cayford. I would add that I find it difficult to see how restricting the court’s consideration to the period prior to the date of the application, when determining the former element, would be consistent with the court’s obligation to give first consideration to the welfare of any minor child.
133. It would also, in my view, be contrary to the purpose of the legislation for it to be interpreted as meaning that the court could not make an order against a respondent who, the court determined, had only failed to provide reasonable maintenance after an application was made. It would significantly undermine its purpose, which is to

enable the financially weaker spouse to obtain financial provision to meet current and future needs, if the success of the application depended on establishing an historic failure to provide reasonable maintenance even when, as in the present case, there had been a failure between the date of the application and the hearing. This would impede the effective operation of this provision and, in my view, would require clear words. Instead, I repeat, section 27(3) requires the court to have regard to “all the circumstances of the case” up to and as at the date of the hearing both when deciding *this* issue and when deciding what order, if any to make. The s.25 factors are, of course, the same as for all other financial provision orders under s.23.

134. I do not consider that the old authorities, including *West v West*, provide any assistance on this question. They were dealing with a very different statutory provision and in an overall legislative framework which was also very different because it preceded that “major reforming” legislation, as referred to by Thorpe LJ in *McFarlane*, which includes the provisions of the DPMCA 1978. Likewise, I do not consider that *Re M* provides any assistance. That was also dealing with a very different legislative provision in a very different context.
135. Finally, on this issue, if I was wrong about the relevant date for the determination of whether there has been a failure to maintain, I consider that it was procedurally unfair for the wife’s application to be dismissed on this basis when this was raised for the first time, by the Judge, at the final hearing. It was too late for this technical issue to be raised given the history of the proceedings.

#### *Exercise of Discretion in this case*

136. Given my conclusion that the Judge was wrong to dismiss the wife’s application on procedural grounds, either this court has to determine what award to make or the matter would have to be remitted for a rehearing. Neither party sought the latter. As referred to above, Mr Cayford has adopted the pragmatic approach of seeking an order for periodical payments in the amount which the Judge indicated he would have ordered but for his dismissal of the application. This cannot, realistically, be contested by the husband.
137. The next issue is the duration of this order. For the reasons set out above, it is clear that the Judge’s approach to the duration of orders under s.27 was flawed. The court has a wide power which must be exercised having regard to all the circumstances of the case. I can see no justification in limiting the duration of the order to the date of the parties’ prospective divorce in Scotland. A divorce by itself does not bring the obligation to pay reasonable maintenance under s.27 to an end. As referred to above, as explained by the Supreme Court in this case, the wife had the *right* to make an application in England and Wales pursuant to the provisions of Schedule 6 to the 2011 Regulations. It would be inconsistent with that right if the court were to decide that, as the Judge determined at [143], it should effectively cede jurisdiction to the Scottish court to decide “all financial questions”. The court in England can, of course, take into account any order made by the court in Scotland when dealing with any future application under s.31.

138. The whole point of the various grounds of jurisdiction, as set out in the Maintenance Regulation, is that maintenance does not necessarily have to be determined by the courts dealing with divorce and that the choice of *where* to bring proceedings is a choice deliberately given to the maintenance creditor. As referred to above, the first two grounds are the habitual residence of the respondent and the habitual residence of the creditor. Indeed, article 3(c) of that Regulation, whilst generally providing that a court will have maintenance jurisdiction when it “has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings”, provides that this does *not* apply if “that jurisdiction is based solely on the nationality of one of the parties”. This Regulation and the 2007 Maintenance Convention clearly demonstrate that there is widespread recognition that jurisdiction in respect of maintenance is not necessarily linked to jurisdiction in respect of divorce.
139. Accordingly, the Judge’s conclusion, at [47], about, I repeat, the “exorbitant extraterritorial exercise of jurisdiction”, was wrong. This conclusion was in part based on his flawed approach to the continuing relevance of a husband’s duty under common law to maintain his wife, which I have dealt with above. It was also based on other factors, in particular, that he considered there was no place for, what he described at [42] as, outdated “chauvinistic concern” about whether a foreign court would deal with a maintenance “claim justly by English standards”; and that it was his view, at [47], that the court’s discretion should take “into account the convenience and appropriateness of matters being dealt with in the foreign court”.
140. In my view, as referred to above, the Judge was also wrong to consider that these latter factors supported his conclusion. First, I do not consider that, even if the Judge was right about there having been, at [45], a “syndrome of chauvinism” in the past that this has any relevance to the manner in which the court exercises its powers under s.27. It is not chauvinistic to exercise those powers to make a maintenance order which continues after the parties have been divorced by a foreign court. That is simply what the statute permits the court to order. Equally, issues of “comity” or “the convenience and appropriateness of matters being dealt with in the foreign court” do not support the Judge’s conclusion. Despite his view that he was not, the Judge was improperly giving undue weight to matters which would be relevant to an application for a stay on the grounds of *forum conveniens*.
141. The next issue is whether the wife’s application for a lump sum should be adjourned as sought by the wife. The Judge decided to make no lump sum order but was not asked, alternatively, to adjourn the wife’s application. I do not see that this prevents this court from doing so if that is the just outcome. As referred to above, this court is exercising the power to make an order under s.27 rather than remitting the matter for rehearing. This court must, therefore, exercise its own discretion. Further, the husband has known that this was being sought by the wife since her written submissions for this appeal, dated 26 April 2021.
142. There are two principal reasons why I consider that the wife’s lump sum application should be adjourned. The first is that I agree with Mr Cayford’s submission that, having regard in particular to the husband’s failure to comply with his disclosure obligations, the court is not currently able fairly and properly to determine the wife’s application for a lump sum. I also do not consider there is sufficient evidence about, or that sufficient consideration has been given to, the husband’s interest under his

father's will trust. The letter provided by the trustees during the course of the hearing below was not an adequate evidential basis for wholly excluding this asset as a financial resource.

143. Secondly, I consider that the court should retain the power to order a lump sum on any application to vary or discharge the maintenance order which I propose should be made. As referred to above, I consider it likely that the court, in any event, has such a power under s.31. However, this is not agreed on behalf of the husband. In my view it would impede the court's ability, to effect a fair outcome on any such application in this case, if the court was deprived of this power. It would, in particular, impede the court's ability to effect a clean break, if the application was made after a divorce and the court considered that the maintenance order should be discharged on payment of a lump sum. Accordingly, and to avoid further litigation in this case on what might well be another sterile legal issue, this supports my conclusion that the wife's application for a lump sum should be expressly adjourned.
144. In conclusion, for the reasons set out above, I would allow this appeal and make an order in the terms referred to above.

### **Lord Justice Coulson**

145. I agree that, for the reasons given by my Lord, Lord Justice Moylan, this appeal should be allowed. I also agree with the order which he proposes. However, in the light of my concerns about the judgment below, and the differences between my Lords on some of the issues, I set out my conclusions briefly in my own words. I do so under four headings: a) general observations; b) the condition precedent point; c) the duration point; and d) the issue concerning the lump sum.

#### *a) General Observations*

146. The Judge announced what he called the "condition precedent" point at the hearing, without any prior notice. It was not a point that had ever been taken by the husband. It was too late for the wife to deal with it effectively, with the inevitable conclusion that the Judge essentially struck out her claim. I regret to say, however it is analysed, that this was a manifestly unjust process.
147. Furthermore, the judgment makes clear the Judge's patent disagreement with the Supreme Court decision in this case (referred to in Moylan LJ's judgment). The references to the judgments of the Supreme Court include criticisms of the majority view, coupled with approbation for the view of the dissenters. It appears that the Judge believed that, because of the existence of the divorce proceedings in Scotland, this s.27 claim should never have been permitted; despite the fact that the majority in the Supreme Court took a different view.
148. This injustice was compounded by the fact that it favoured the husband who, despite being the apparent beneficiary of multi-million pound trusts and a share of a £9 million property sale, has failed to pay a penny in maintenance to his wife since she left in 2012. In addition, the husband has resolutely failed to comply with numerous orders of the court in respect of both disclosure, interim payments, and costs. He is in serial contempt of court. In the recent case of *Xanthopoulos v Rakshina* [2022] EWFC 30, the Judge described such conduct as "forensic cheating". It is a stark feature of the

present case that the Judge's last-minute introduction of the condition precedent point has allowed the husband to profit from his own brand of "forensic cheating".

*b) Condition Precedent*

149. The Judge said that there was a condition precedent, created by s.27(1)(a) of the MCA, which had to be satisfied before the court could go on to make an award of maintenance. At [128], he said that the wife had to show:

“...in the period immediately prior to the application the respondent has failed to provide reasonable maintenance for the applicant. That period might be quite long, and the failure may be intermittent, but it must be proximate to the application.”

In other words, the Judge ruled that the court had to consider the factual position as at the date of the application, not the position at the date of the hearing. Of course, in the usual case, there will be no significant difference between those two dates. But in the present case, because of the husband's unsuccessful forays all the way up to the Supreme Court, there was a delay of over six years (from February 2015 to March 2021) between the application and the hearing. The effect of the Judge's ruling was that nothing that happened within those six years was relevant to his consideration of the wife's s.27 application. Instead, he found that time was frozen as at 13 February 2015.

150. In my view, the Judge was wrong both as a matter of law, and as a matter of procedural fairness, to decide the application on that basis.
151. First, even on the Judge's approach, this was not a condition precedent. A condition precedent is a condition which has to be fulfilled before another step can be taken: the best example is perhaps where a contract stipulates that a claim for a certain remedy can only be made on receipt of a written notice within 14 days of the relevant event. But that is not what the Judge had in mind. He did not say that the wife had to fulfil a certain condition and then, if she did, her s.27 application would be considered. Instead, the judge decided that her application could only be determined by reference to evidence that existed on the day of the application (13 February 2015), and that any evidence after that date was irrelevant and inadmissible. He was not applying a condition precedent: he was ruling out of account, as a matter of law, all the evidence about events which occurred after the date of the application.
152. Secondly, in my view, this attempt to circumscribe the evidence was contrary to s.27(3) of the MCA. That makes it plain that, for the purposes of deciding both i) whether the respondent has failed to provide reasonable maintenance, and ii) what order it should make, the court is mandated (“*shall have regard*”) to consider “all the circumstances of the case including the matters mentioned in s.25(2).” That could not be clearer. It does not say “all the circumstances at the time of the application but not thereafter”. It is “all the circumstances of the case”. That is unqualified and should be read accordingly.
153. The factors in s.25(2) are equally open-ended. There is no attempt to limit those matters to the events which had occurred at the time of the application. Indeed some at least of those factors look to the future. It was therefore contrary to the express

cross-reference to s.25(2) for the relevant factors to be circumscribed in the way proposed by the judge.

154. Thirdly, in my judgment, Mr Horton was unable to supply an answer to that interpretation of the words in s.27(3). He took us on a long excursion into the history of s.27, and we considered a number of Law Commission Reports and earlier statutes. But none of that went to what I consider to be the straightforward heart of this point, that “all the circumstances of the case” means what it says.
155. Fourthly, there would be considerable practical difficulties if events after the application but before the hearing were to be ignored for the purposes of s.27. Suppose the husband had paid no maintenance at all on the grounds of impecuniosity, but then, one month after the application was made but two months before the hearing, he landed a job that paid £200,000 per year. Could it really be said that, because that employment had been arranged after the application had been made, it was irrelevant for the purposes of s.27? The answer is plainly No. If it were otherwise, the potential abuse of the process would be easy to achieve, with respondents refusing to pay any maintenance and waiting for the applicant to make an application under s.27 before then finding a job or realising other assets.
156. I accept that a process whereby the particular points relied on in support of an application do not finally crystallise until shortly before a hearing could be criticised as being unclear and potentially uncertain. But that seems to me to be inevitable in an iterative process like this, where neither party is required to provide statements of case. Moreover, in the present case, both parties prepared for the hearing before the judge by addressing all of the relevant events including - indeed focussing upon - events after the application in the six years before the hearing. So it did not seem to be a problem in practice.
157. Finally, there was also a suggestion that, by analogy with civil proceedings, the wife’s cause of action accrued when she made her application, and that events which occurred thereafter could not be relevant to that cause of action. I do not consider that to be an apt analogy. This is not a cause of action but an application under statute, in which it is agreed that the jurisdictional criteria have been met. But anyway, if it is akin to a cause of action, then it is similar to a continuing cause of action, like a continuing nuisance. On this analogy, the husband’s continued failure to pay a penny by way of maintenance gave rise to a continuing cause of action, similar to a neighbour’s continuing claim in nuisance against the owners of a waste disposal plant who refuse to do anything about the noxious smells emanating from their property. The relevant acts of nuisance are not limited to those which occurred before the issue of proceedings but encompass all further instances of nuisance that occurred between the start of proceedings and the trial.
158. The Judge not only concluded that the relevant evidence was limited to the events prior to the application, but was also further restricted to those events which occurred in the two years preceding the application, and not before. The ‘two year rule’, if I may call it that, finds no expression anywhere in the statute. It is not derived from any authority. It appears to be of the Judge’s own invention. No notice or indication of the two year rule was given by the Judge until he provided his judgment, so it was impossible for those representing the wife to make any submissions about it at all.

159. In this way, instead of looking at all the relevant events, the judge just looked at the period in 2013 and 2014, pursuant to his two year rule. That was a period in respect of which the husband had been repeatedly ordered to provide bank statements and financial details, but had refused to do so. The Judge found that, in the absence of any substantive evidence as to the husband's financial position during those two years, the wife had not made out her claim that the husband had failed to pay reasonable maintenance. The Judge's operation of the unheralded two year rule therefore allowed the husband to benefit from his repeated non-compliance and his own contempt of court. It is hard to imagine a more unjust way of deciding the wife's application.
160. Although the Judge said there was no authority for his condition precedent, Mr Horton found the case of *West v West* shortly before the appeal which, he said, was not only good law but was also binding upon this court. I reject both propositions. Happily, it is no longer good law that, as occurred in *West v West*, a husband who wrongly believes that his wife has committed adultery is entitled to avoid paying maintenance on the basis that his belief was genuine. And the case is not binding upon us because, as Moylan LJ explains at [97] above, it involved a different statute with different provisions and, critically, does not contain anything similar to s.27(3).
161. For these reasons, I consider that the Judge was wrong as matter of law to impose any limitation on the evidence admissible for a proper consideration of the s.27 application. But I also consider that what happened was procedurally unfair to the wife.
162. First, this was, on any view, an entirely new point. Mr Horton sought to submit that it was not new, and claimed that the husband had expressly raised the point in his opening submissions. He took us to paragraph 31(1) of those submissions. They read:
- “31. H submits:
- (1) W must establish that H has failed to provide reasonable maintenance for her: s.27(1)(a) and (6). When H has had no income to make any meaningful contribution to W's income needs, and where his creation of the sub-fund for Clarissa benefited both Clarissa and W (in W's case by way of a contribution to their rental expenses), W had failed to do so.”
- On any fair reading of those words, they manifestly do *not* take the point that the only admissible evidence concerned events prior to the application in February 2015. The fruitless attempt to suggest otherwise only serves to highlight the plain fact that the condition precedent point came as a surprise to everyone when the Judge first raised it.
163. Secondly, whilst a judge is entitled to raise points of law if he or she considers that they are important and need to be addressed by the parties, the judge must then give the parties a fair opportunity of dealing properly with the point. In the present case, the simple way of dealing with the Judge's point would have been to allow the wife to amend her application to make plain that she relied on events up to the date of the hearing. The application to amend should then have been agreed, since that was the basis on which the husband had prepared to meet the claim in any event. But if it was disputed, it would have had to have been fought out, and the substantive application



would have had to have been adjourned. In the alternative, a fresh application under s.27 could have been made, although Mr Horton indicated that the husband would have taken a further jurisdictional point to meet any such new application.

164. Either way, what the Judge was not entitled to do, what in my view was plainly unfair, was to take a new point at the final hearing which doomed the wife's case to failure, and not give her advisers an opportunity to consider it and plan the best way of dealing with it. To present the wife and her advisors with a *fait accompli*, and not give them any proper opportunity to address its consequences, was procedurally unfair and contrary to the overriding objective.
165. In an ordinary case, these errors of law and procedure would usually result in the appeal being allowed, and the remission of the case for rehearing by another judge. But, understandably, the wife and her supporters are exhausted with this litigation, and remission is the last thing they want. Instead, they want to try and salvage whatever they can from the judgment, however flawed it might be. Accordingly, they wish to set aside the Judge's order and, in respect of maintenance, replace it with an order that the husband pay the wife £10,000 per year, the figure identified by the Judge at [142]. I consider that to be a pragmatic solution to this aspect of the appeal.

c) Duration

166. In the part of the judgment dealing with the Judge's exercise of his discretion (if he was wrong about the condition precedent point), the Judge limited the payment of £10,000 per year to the date of the decree of divorce in Scotland (in other words, ruling that the payments ceased on divorce). That is challenged by the wife as being wrong in principle.
167. The Judge's reason for limiting the payment of maintenance in that way is expressly the result of what he calls at [143] "the principles I have formulated above". Although those are not further identified, this appears to be a reference to the earlier part of the judgment and the various observations on the law that are made between [3] and [53]. For the reasons set out extensively by Moylan LJ above, I agree that those "principles" are no such thing: they are wrong or irrelevant. Furthermore, although he disclaimed any intention to do so, the Judge used these passages to introduce the idea of *forum conveniens* by the back door, by suggesting that "it would amount to an exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances". There is no authority for any such proposition and Moylan LJ has demonstrated why it is wrong in principle.
168. In summary, therefore, the first 53 paragraphs of the Judge's judgment do not provide a reliable guide to the law as it is, and should not be taken as setting out any applicable "principles", let alone ones which should inform the proper exercise of the court's discretion under s.27.
169. In my view, the applicable principles are simple. An order under s.27 of the MCA can be made prior to divorce, whether that divorce is going to take place in England or somewhere else. The only statutory limit imposed by s.28(2) is that an order comes to an end when the applicant remarries. So there is no statutory bar on making a s.27

order to continue beyond divorce. But plainly the court would wish any order to be sensibly constrained.

170. In consequence, I conclude that the Judge's ruling that maintenance of £10,000 per annum should stop on divorce was made by reference to incorrect "principles", and was not in accordance with the law. The right order is for the £10,000 to be paid per annum until further order of the court. That is in accordance with s.28(2).

*d) Lump Sum*

171. The final element of the order which the wife seeks from this court is an order that the hearing of the lump sum claim be adjourned. This is part and parcel of her attempt to avoid a rehearing, whilst at the same time seeking to salvage what she can from the judgment, in this instance by preserving her right to pursue a claim in respect of a lump sum. The argument is that, since this court is quashing the order made by the judge, and replacing it with its own order following the re-exercise of discretion, that is an appropriate course. Furthermore, it became clear during the hearing of the appeal that, on the husband's case, this was the wife's last chance to pursue a lump sum claim, because any fresh application would be met with a jurisdictional objection. I understand that such lump sum claims are not permitted in Scotland.
172. I agree with the proposed course as a matter of procedure. This appeal would ordinarily have been remitted for a full rehearing. That would then have included a rehearing on the lump sum aspect of the case too. Just because the wife is prepared to agree to the £10,000 does not mean that she should be deprived of the opportunity to have the lump sum element of her claim reconsidered. However, two points are taken in opposition to the wife's proposal: notice and substance.
173. As to notice, the basis for this aspect of the appeal was set out in paragraphs 82 and 83 of the skeleton produced on behalf of the wife at the time that she sought permission to appeal. These paragraphs link the lump sum claim to the husband's father's will and the recent sale of his former home in Notting Hill for just under £9 million. Accordingly, although it is not separately identified in the grounds of appeal, it is clear to me that proper notice of the point was given to the husband, and that it falls within the ambit of this appeal.
174. As to substance, I consider that there is an overwhelming case for ordering that the lump sum claim be adjourned and considered by reference in due course to all the up-to-date evidence. That is because, in my view, the Judge failed to address the issue of the husband's father's will properly.
175. For a case in which the husband has routinely said that he has no money, he appears to be beneficiary of a large number of wealthy trusts. These included what were referred to as the Grandchildren's fund, the Lady Elizabeth fund, and the Mount Stewart fund. The Judge considered those trusts and whether they should be taken into account in the judgment, starting at [105] through to [126]. He concluded that those trust assets should not be taken into account as a resource for the husband. He repeats that at [141].
176. However the problem is the Judge did not properly consider the one possible source of some real money, namely the husband's father's trust. This included a house in

Notting Hill which, we were told, was sold in February 2021 for just under £9m. The existence of this trust, and the fact that the wife may be a beneficiary in any event (quite apart from any entitlement through the husband), only fully came to light during the trial. At [61] the Judge set out a letter from the executors (written during the trial) referring to the fact that the property had been sold the previous month but that it was not clear to the executors at that point how much value would be available for distribution. The executors said that it was unlikely that money would be available, but that was a bare assertion, without any figures of any kind to support it. Whilst one of the beneficiaries apparently requires significant financial support because she is severely disabled, whether and to what extent either the husband or the wife can benefit from this will would largely be a matter of mathematics. It was wrong for the judge at [62] to rule out this source of a possible lump sum on the basis of one assertion, made in vague terms in one letter written during the trial, and at a time when the property had only just been sold.

177. For those reasons, therefore, it seems to me that, in the unusual circumstances of this case, it would be just, and in accordance with the overriding objective, to include in the order that this court makes an order that the lump sum claim be adjourned.

**Lord Justice Arnold:**

178. I agree with most of Moylan LJ’s judgment. While acknowledging his great experience in this field and my own inexperience, however, I respectfully disagree with him on two points. First, although I agree that the judge was wrong to dismiss the wife’s application for the second reason Moylan LJ gives (procedural unfairness), I do not agree with the first reason (the interpretation of section 27). Secondly, although I agree that this Court should make an order for periodical payments at the rate and for the duration he proposes, I do not agree that we should adjourn the wife’s application for a lump sum. My reasons are set out below. In addition, I would like to add a few words on the issue of procedural unfairness, because, although we are all agreed that the appeal should be allowed on this ground, it sheds light on the interpretation of section 27.

Interpretation of section 27

179. Prior to its amendment as a result of Brexit on 31 December 2020, section 27 of the Matrimonial Causes Act 1973 provided, so far as relevant, as follows:

- “(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent)—
- (a) has failed to provide reasonable maintenance for the applicant, or
  - (b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.
- (2) The court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.
- (3) Where an application under this section is made on the ground mentioned in subsection (1)(a) above, then, in deciding—

- (a) whether the respondent has failed to provide reasonable maintenance for the applicant, and
- (b) what order, if any, to make under this section in favour of the applicant,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(2) above, and where an application is also made under this section in respect of a child of the family who has not attained the age of eighteen, first consideration shall be given to the welfare of the child while a minor.

- (3A) Where an application under this section is made on the ground mentioned in subsection (1)(b) above then, in deciding—

- (a) whether the respondent has failed to provide, or to make a proper contribution towards, reasonable maintenance for the child of the family to whom the application relates, and
- (b) what order, if any, to make under this section in favour of the child,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(3)(a) to (e) above, and where the child of the family to whom the application relates is not the child of the respondent, including also the matters mentioned in section 25(4) above.

...

- (6) Where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above, the court may make any one or more of the following orders, that is to say—

- (a) an order that the respondent shall make to the applicant such periodical payments, for such term, as may be specified in the order;
- (b) an order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;
- (c) an order that the respondent shall pay to the applicant such lump sum as may be so specified;
- (d) an order that the respondent shall make to such person as may be specified in the order for the benefit of the child to whom the application relates, or to that child, such periodical payments, for such term, as may be so specified;
- (e) an order that the respondent shall secure to such person as may be so specified for the benefit of that child, or to that child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;
- (f) an order that the respondent shall pay to such person as may be so specified for the benefit of that child, or to that child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) above, to the restrictions imposed by section 29(1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen.”

180. Section 25(2) of the 1973 Act, which is referred to in section 27(3), provides:

“As regards the exercise of the powers of the court under section 23(1) (a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”

181. Section 28(2) of the 1973 Act provides:

“Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made otherwise than on or after the grant of a decree of divorce or nullity of marriage, and the marriage in question is subsequently dissolved or annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage or formation of the civil partnership of, or formation of a civil partnership by, that party, except in relation to any arrears due under it on the date of the remarriage [or formation of the civil partnership].”

182. In my judgment it is clear from the language of section 27(1) that the ground on which a party may apply to the court for an order is a *past* failure to provide reasonable maintenance for the applicant and/or a *past* failure to provide or make proper contribution to reasonable maintenance for any child of the family, as the case may be. That is to say, the failure must have occurred prior to the date of application. As counsel for the wife rightly accepted, section 27(1) does not enable an application to be made on the ground that the respondent will at some point in the future fail to

provide reasonable maintenance or contribution. Equally, it is clear from the language of section 27(3) that the court's task upon such an application is first to decide whether the respondent has *in the past* failed to provide reasonable maintenance and/or contribution, and if so secondly to decide what order to make. Given that it is clear from section 27(1) that the application can only be made on the ground of a failure prior to the application date, it must follow that the relevant date for first stage of the court's determination is the application date. This reading is confirmed by section 27(6) which says that the court may make one of the orders listed "where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above", that is to say, of the *past* failure to provide reasonable maintenance and/or contribution.

183. Not only is this the natural reading of the words used by Parliament, but also it makes perfect sense. As Lord Mackay of Clashfern LC stated in *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 AC 424 at 434 when considering section 31 of the Children Act 1989, which is expressed in the present tense:

"It would in my opinion be odd if the jurisdiction of the court to make an order depended on how long the court took before it finally disposed of the case."

184. The requirement in section 27(3) to take all the circumstances of the case into account does not support reading section 27(1) as enabling an application to be made on the ground not of a past failure to provide reasonable maintenance or contribution, but a future one. Nor does it support interpreting section 27(3) as empowering the court to make an order where there was no failure to provide reasonable maintenance or contribution as at the application date. So far as the first stage of the enquiry is concerned, it plainly means all the circumstances which are relevant to determining whether there had been a failure to provide reasonable maintenance or contribution as at the application date.
185. The requirement in section 27(3) to take the section 25(2) factors into account does not support reading section 27(1) as enabling an application to be made on the ground not of a past failure to provide reasonable maintenance or contribution, but a future one, or interpreting section 27(3) as empowering the court to make an order where there was no failure to provide reasonable maintenance or contribution as at the application date, either. Counsel for the wife relied upon the fact that the section 25(2) factors require consideration of the future, but that submission proves too much given that it is accepted that section 27(1) does not enable an application to be made on the ground of a future failure to provide maintenance or contribution. The section 25(2) factors are to some extent forward-looking, but that is perfectly consistent with the fact that part of the court's task at the second stage of the enquiry is, where appropriate, to make an order which makes provision for future maintenance or contribution.
186. This interpretation of section 27(1) seems to me to be perfectly consistent with the purpose of section 27, which is plainly to ensure that the financially weaker party can obtain an order from the court where the financial stronger party has failed to provide reasonable maintenance for the applicant or any child of the family.

187. Although counsel for the wife accepted that section 27(1) did not enable an application to be made on the ground of a future failure to provide maintenance or contribution, he submitted that an application could be made where there was an immediate threat to fail to provide reasonable maintenance or contribution. He also submitted that in such circumstances the Court could make a freezing order under section 37 of the 1973 Act, but he accepted that section 37 did not itself inform the interpretation of section 27. Although the question does not arise in this case, I cannot see how section 27(1) can enable an application to be made on the ground that the respondent is threatening to fail to provide reasonable maintenance or contribution but has not yet failed to do so. This does not mean that a party faced with such a threat would have no remedy, for reasons that will appear.
188. This interpretation of the current statutory language is supported by the statutory history and previous authority of this Court. There are two aspects of the history that are relevant. The first, and most directly relevant, aspect concerns the powers of the High Court. The second concerns the powers of magistrates' courts.
189. Section 5(1) of the Law Reform (Miscellaneous Provisions) Act 1949 provided that, "[w]here a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court in England ... may, on the application of the wife, order the husband to make to her such periodical payments as may be just..." This provision was repeated in section 23(1) of the Matrimonial Causes Act 1950.
190. In *Tulip v Tulip* [1951] P 378 Birkett LJ, with whom Lord Asquith of Bishopstone agreed, said at 388 that "reasonable" in section 5(1) of the 1949 Act "must mean reasonable at the time of the application, in the light of all the circumstances then existing".
191. In *West v West* [1954] P 444 an application was made on 16 March 1953 under section 23 of the 1950 Act. Two days later the husband petitioned for divorce on the ground of his wife's adultery. The commissioner found on 12 February 1954 that the wife had not been guilty of adultery and dismissed the petition. The commissioner found on 15 February 1954 that, until the petition was dismissed, the husband had had reasonable grounds for suspecting her of adultery. Sir Raymond Evershed MR, Denning and Hodson LJJ unanimously held the husband was entitled to maintain on 15 February 1954 that he had an answer to the summons issued on 16 March 1953 even though, from 12 February 1954, he was no longer able to refuse to maintain his wife in the absence of some fresh ground of justification.
192. Counsel for the husband submitted that *Tulip v Tulip* and *West v West* were authorities binding on this Court establishing that the date on which the reasonableness of a failure to provide maintenance was to be assessed was the date of the application. I do not accept that they are binding, because the language of the present statute is different, but I agree that they are strongly persuasive unless there is some material difference in the present statutory scheme.
193. Section 23 of the 1950 Act was replaced by section 22 of the Matrimonial Causes Act 1965, which was in similar terms. Accordingly, the Law Commission noted in paragraph 21 of its report *Family Law: Report on Financial Provision in Matrimonial Proceedings* (Law Com No 55, July 1969):

“No order can be made under section 22 unless it is proved that the husband has been guilty of wilful neglect to provide unreasonable maintenance. This ... means that if the husband has not known that the wife is in need<sup>39</sup> or has genuinely thought that he has an excuse for not maintaining her,<sup>40</sup> the application has to be dismissed notwithstanding that it is clear that the wife is entitled to provision for the future and that the husband is unlikely to pay. Whilst the position is clearly less than satisfactory it cannot be properly reformed until the whole basis of the duty to maintain is reformulated in relation both to the divorce court and the magistrates’ courts. ...”

Footnote 40 cited *West v West*.

194. Clause 6 of the draft Bill appended to the report, which was enacted as section 6 of the Matrimonial Proceedings and Property Act 1970, gave effect to the Law Commission’s recommendations in the Report. Consistently with paragraph 21, there is nothing in the language of either the draft Bill or the Act to suggest that any change to the law as stated in *Tulip v Tulip* and *West v West* was intended. On the contrary, section 6(1) of the 1970 Act retained the past tense used in the preceding legislation. Furthermore, section 6(6) provided that “[w]here on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above, the court may make any one or more of the following orders ...”, which reinforces the reasoning in the earlier cases. Section 6 of the 1970 Act was replaced by section 27 of the 1973 Act. Although there were a few small changes, the language of subsections (1) and (6) was unchanged.
195. Before completing the story with respect to the High Court, it is first necessary to turn to the magistrates’ courts. Section 1(1) of the Matrimonial Proceedings (Magistrates’ Court) Act 1960 empowered a magistrates’ court to make an order for financial provision on any of nine grounds, the first of which was “the respondent: (a) has deserted the applicant” and the eighth of which was that “the respondent: ... (h) being the husband, has wilfully neglected to provide reasonable maintenance for the wife or for any child of the family”. As counsel for the husband pointed out, all of the grounds were expressed in the past tense, except for “(f) is for the time being an habitual drunkard or a drug addict”, thus serving to emphasise that, save for (f), the question was whether the ground existed as at the application date.
196. This understanding of the operation of section 1(1) of the 1960 Act is supported by paragraph 2.11 of the Law Commission report *Family Law: Report on Matrimonial Proceedings in Magistrates Courts* (Law Com No 77, October 1976):

“We think ... that the balance of advantage lies in retaining in the magistrates’ matrimonial jurisdiction some means by which a wife who has been deserted can obtain a maintenance order soon after the desertion, whether or not her husband has ceased to maintain her. We do not think that a deserted wife for whom her husband is providing reasonable maintenance should be required to wait until that maintenance has ceased before making her application. We have therefore concluded that desertion should remain as a separate ground for a maintenance order.”



197. The Report went on in section 9 to consider proposals for amendments to section 27 of the 1973 Act. It recommended a number of changes, including incorporation of the guidelines contained in section 25 of the 1973 Act. There is nothing in this section of the Report to suggest that the Commission intended that there should be any change to the date as at which the application should be assessed. Nor is there anything in the draft Bill appended to the Report. The draft Bill was enacted with immaterial amendments by the Domestic Proceedings and Magistrates' Courts Act 1978.
198. Section 1 of the 1978 Act enables either party to a marriage to apply to a magistrates' court for financial provision. It is in similar terms to section 27(1) of the 1973 Act except that it includes two additional grounds, the second of which is "the respondent ... (d) has deserted the applicant". This gives effect to the recommendation in paragraph 2.11 of the Report. Section 63 of the 1978 Act amended section 27 of the 1973 Act. Although section 27(1) was recast in gender-neutral terms, it retained essentially the same language to describe the ground of application, and in particular the use of the past tense. Subsection (3) was substituted by wording close to the present wording referring to "all the circumstances of the case" and to what was then section 25(1). Subsequently there have been minor amendments to these provisions, but they are not material to the present question.
199. Counsel for the wife submitted that the 1978 amendments made all the difference, and meant that *Tulip v Tulip* and *West v West* were distinguishable. As I have said, I agree that the changes in the statutory wording mean that those cases are no longer binding; but I see nothing in the changes which makes any difference to the reasoning or persuasive force of the earlier authorities. This is particularly so given that the amendments were made to implement a Law Commission report which did not recommend any relevant change to section 27 of the 1973 Act, but did recommend retention of desertion as a separate ground of application in the magistrates' courts precisely because maintenance would otherwise be unavailable where there had been no past failure to maintain.
200. Although counsel for the wife relied upon two authorities, *H v H* [2015] EWHC B24 (Fam) and *Re M Children (No 1)* [2015] EWHC 2257 (Fam), in which judges making section 27 orders expressed themselves in the present tense when considering whether there was failure to provide reasonable maintenance, those authorities do not assist because the issue was not raised or considered.
201. The wife's application in the present case, using the then applicable standard form D50C, was perfectly consistent with the interpretation of section 27 set out above. Her originating application notice dated 13 January 2015 stated:
- "I [the wife] of [address] The spouse of [the husband] (hereinafter called the 'Respondent') say that the Respondent has failed to provide reasonable maintenance for myself and has failed to make a proper contribution towards maintenance for the child(ren) of the family, namely [their daughter]."
202. Thus the ground of application relied upon in the originating application was explicitly a past failure to provide reasonable maintenance and contribution. (As counsel for the husband pointed out, the current version of the standard form D50C

also uses the past tense, the only material difference being that it requires a statement of truth to be completed by the applicant.)

203. Furthermore, on the same date the wife issued an application seeking an interim maintenance order under section 27(5) of the 1973 Act. This was supported by a witness statement made by the wife on 14 January 2015 in which she stated in paragraph 3:

“Since I left [the family home on 22 August 2012], [the husband] has refused to pay me any maintenance (including child maintenance ...) despite my requests for financial assistance”.

She went on to say that she understood that the husband had been discharged from bankruptcy; that she knew little about his finances, but she did know that he was a beneficiary under a discretionary trust and had received an inheritance; and that she believed that he was deliberately trying to avoid paying her any money.

204. It is clear from this evidence that the wife was basing her application on the husband’s failure to provide reasonable maintenance and contribution during the period from 22 August 2012 to 13 January 2015, alternatively from the date of the husband’s discharge from bankruptcy (on 10 November 2014) to 13 January 2015.
205. If one asks, could the wife have applied under section 27 on 13 January 2015 on the ground that the husband would fail to provide reasonable maintenance in the tax year 2019/20, in my view the answer is obviously no. Nor was that in fact the basis of her application.
206. Although I consider that the judge was correct to interpret section 27 as requiring the ground of application to be established as at the application date, I do not agree with his use of the expression “condition precedent” in this context. As Coulson LJ has pointed out, that is a legal term of art borrowed from other contexts, and I agree with him that it is not apposite here. Moreover, it seems to me to have had an unfortunate effect on the judge’s approach to the issue viewed from the procedural perspective.
207. The next question is what period of time the court should consider when determining whether the ground of application has been established. I agree with the judge that the natural inference is that it should be the period immediately prior to the application. I would also agree with his suggestion that “[t]hat period may be quite long, and the failure may be intermittent, but it must be proximate to the application”. Beyond that, it seems to me that it is for the applicant to specify the period relied upon. Only in that way can the parties know what period should be covered by their disclosure and evidence on the issue of whether there has been a failure to make reasonable provision.
208. As I have pointed out, in this case the wife fully complied with this obligation in her witness statement dated 14 January 2015. I do not therefore understand why the judge took the relevant period as being “the two year-period immediately prior to her application namely 2013 and 2014”. It is clear, however, that it would not have had any difference to his assessment if he had instead considered the two periods relied upon by the wife. On his findings of fact the husband had no ability to pay maintenance during either period.

209. Counsel for the wife pointed out that the husband had served a Form E1 on 24 April 2015 and purported to give financial disclosure only for the preceding 12 months as required by the Form. As counsel for the husband pointed out, however, the wife served a questionnaire asking questions relating to the period prior to 24 April 2014, but she did not seek disclosure of documents for that period.

### Procedural unfairness

210. Although I have concluded that the judge's interpretation of section 27 was correct, it does not follow that he was correct to dismiss the wife's application on this ground. As Moylan LJ has explained, it is plain that, prior to the hearing, the wife was alleging that there was a continuing failure by the husband to provide reasonable maintenance. For example, in her "updating" witness statement made on 24 February 2021 pursuant to the order of Deborah Eaton QC, the wife said:

"39. ... the Respondent does not want to pay me a penny ... It is hugely important to me (and [the daughter]) that the proceedings are brought to a final conclusion binding the Respondent to pay me a lump sum ... My own needs are that I require an income and a permanent home ... As maintenance would never be paid by the Respondent, I respectfully ask the court to grant me a capitalised maintenance order based on an income of £60,000 p.a. ... together with a further lump sum order to enable me to buy a small two bedroom property ... Whilst [the husband's father's] Will Trust is being administered it is evident that it will be worth no less than £10 million, and the Respondent's share, together with capital from his interest in [his mother's] Trusts could be employed to produce a lump sum settlement.

40. It is my view that the Respondent's interest in [his mother's] Estate trusts and his father's will trust (subject to pending enquiries) are resources which will be made available to him to meet (in full or in part) the lump sum order sought ..."

211. As Moylan LJ has also explained, at no stage prior to the hearing did the husband object that it was not open to the wife to rely upon a failure to pay reasonable maintenance after the date of the application. Nor did counsel for the husband take this point in the husband's skeleton argument for the hearing. On the contrary, the husband's skeleton argument proceeded on the basis that it was the husband's current financial situation which was material. It was the judge himself who raised the point on the first day of the hearing, and invited submissions from the parties.
212. In my judgment this was procedurally unfair for two reasons. First, it amounted to an abandonment by the judge of his role as an independent and impartial judge of the cases advanced by the parties and a descent into the arena to raise a point favouring one party's case which that party had not raised. Secondly, if the point had been taken by the husband in advance of the hearing, the wife could have responded in one of two ways.

213. The first thing the wife could have done was to issue a fresh application to be heard at the same time as the first application and upon the same evidence. If this had been done after 31 December 2020, the wife might have been met with an application by the husband for a stay on *forum non conveniens* grounds, but it seems unlikely that such an application would have succeeded. Even if it might have succeeded, however, the wife was deprived of the chance to bring a second application.
214. The second thing the wife could have done was to seek to amend her application (whether by amending the application notice itself or in some other way) so as to rely upon a later period of time, such as the period to the end of the 2019/2020 tax year or even the period up to the hearing. I acknowledge that it is not clear that this would have been a permissible course given the interpretation of section 27(1) set out above. It would have been arguable, however, that an analogy could be drawn with the line of cases (such as *Hendry v Chartsearch Ltd* [1998] CLC 1382 and *Maridive & Oil Services SAE v CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 1 All ER (Comm) 653) decided under the Civil Procedure Rules in which claimants have been permitted to amend their Particulars of Claim to plead facts completing their causes of action which post-date their claim forms in circumstances where no limitation point arose. I should make it clear that those cases were not cited in argument, and I express no opinion as to whether the analogy is a good one. Again, the point is that the wife was deprived of the chance to make the application.
215. As Coulson LJ has pointed out, having taken the point himself, the judge did not even give the wife the opportunity to issue a fresh application or to amend, albeit that either course would probably have necessitated an adjournment of the substantive application.
216. In conclusion, I would allow the appeal against the judge's dismissal of the wife's application on the basis that, although the construction of section 27 adopted by the judge was correct, it was procedurally unfair for the judge to take the point when it had not been taken by the husband.

#### Adjournment of the application for a lump sum

217. In her counsel's skeleton argument for the hearing before the judge the wife claimed a lump sum totalling £3.15 million plus an indemnity in respect of marital debts of £836,000. In closing submissions counsel for the wife submitted that the wife should receive a minimum lump sum of £435,251. As discussed above, the judge held that no order could be made on the wife's application because the "condition precedent" had not been satisfied. At [140]ff he set out his assessment of what order he should make if he was wrong about the "condition precedent". His conclusion at [142]-[143] was that he would order the husband to pay the wife £10,000 per annum until the date of the decree in the Scottish divorce proceedings. Although he did not say so in terms in this passage, it is clear both from what he said at [141] and in a number of earlier passages in the judgment that he would not have ordered any lump sum to be paid.
218. Thus the wife's position before the judge was that there should be an immediate lump sum order. She did not ask the judge to adjourn the application for a lump sum order even in the alternative. As a result, the judge was not addressed by the parties on the principles applicable to such a request or on how he should exercise his discretion in

the circumstances of the present case. As a further result, the judge did not say anything on this subject in his judgment.

219. In section 9 of her appellant's notice the wife asks this Court to set aside the order below and substitute an order for "[m]aintenance at a rate not less than £10,000 pa pursuant to paragraph 142 of the judgment" and "[a]djourned lump sum". None of the wife's grounds of appeal concern the question of an adjournment of the application for a lump sum. There is no ground of appeal contending that the judge was wrong not to order an adjournment. This is hardly surprising given that, as I have explained, the judge was not asked to make such an order and therefore did not give any reasons for not making such an order.
220. Paragraph 10 of the wife's skeleton argument in support of her application for permission to appeal and her substantive appeal states that the object of the appeal was to overturn the judge's order "and ultimately achieve (i) an adjourned sum order in the appellant's favour (pending the receipt by the respondent of any of his potential trust interests under the will of his grandmother ... and his father ...) <sup>4</sup> and (ii) ongoing (joint lives) maintenance at a rate of not less than £10,000 pa". Footnote 4 simply lists six authorities. The skeleton argument proceeds to develop the wife's submissions as to her four grounds of appeal. Nothing further is said about an adjournment of the application for a lump sum order: no submissions are made as to the applicable principles, nor are any submissions made as to how the discretion should be exercised in the circumstances of this case.
221. Paragraphs 82 and 83 of the wife's skeleton argument, which have been mentioned by Coulson LJ, were part of the section of the wife's skeleton argument supporting ground 4 of the appeal. Ground 4 of the appeal is that, "[h]aving recited the extent of [the husband]'s non-disclosure and breaches of court orders at paragraphs 100-102, the judge was wrong not to draw any or any sufficiently adverse inferences against [the husband] by his litigation conduct". This ground of appeal was not pursued by counsel for the wife at the hearing.
222. Paragraph 5 of the husband's skeleton argument for the appeal refers to the orders sought in the appellant's notice and points out that "the judge was not asked to adjourn the lump sum. He cannot be wrong not to make an order which was not sought in the hearing before him".
223. When opening the appeal counsel for the wife confirmed in answer to a question from Moylan LJ that the wife sought an adjournment of the application for a lump sum, but at no stage did he advance any submissions as to the principles to be applied or as to how the discretion should be exercised in the present case. Not only was the Court not taken to any of the six authorities cited in footnote 4 of the wife's skeleton argument, but also none of them had even been placed in the bundle of authorities for the hearing of the appeal.
224. Counsel for the husband pointed out in his submissions that, not only was the judge not asked to adjourn the application and therefore could not be wrong, but also there is no ground of appeal addressed to this question. Later he briefly submitted that an adjournment would not be appropriate anyway because adjournment was an exceptional course which should only be taken where some resource was likely to be

available to be the respondent in the near future. In this context he mentioned a seventh authority which was not in the bundle of authorities either.

225. In his submissions in reply counsel for the wife reiterated the wife's request for an adjournment of the lump sum application. He accepted that the wife had not requested an adjournment before the judge, but rather had claimed an immediate order for payment of lump sum. He also accepted that there was no basis on which this Court could make an immediate order. He submitted that the Court should adjourn the application for a lump sum so as to give the wife a chance to pursue the application in the future, in particular in case some money became available to the husband from his father's estate. He did not, however, address the Court on the principles to be applied to an adjournment application or cite any authorities or address the Court in any detail on how the discretion should properly be exercised in the present case.
226. There was some discussion during the course of argument as to whether other courses of action were open to the wife in the event of a change of circumstances, such as making a fresh application under section 27 or an application to vary any order for periodical payments made by this Court under section 31 of the 1973 Act. Counsel for the wife explained that she was concerned that jurisdictional objections to such applications might be raised by the husband. No such applications or jurisdictional objections are before this Court, and the issues potentially arising in such circumstances were not fully explored in argument, nor could they be.
227. In these circumstances I consider that it is not open to this Court to adjourn the application for a lump sum, nor would it be proper to do so even if it were open, for three distinct reasons.
228. First, this Court is a court of appeal, not a first instance court. It is not open to the wife to ask this court to make an order which is not only not an order which she asked the court below to make, but also is inconsistent with the order she did ask the court below to make. It is no answer to this to say that this Court is re-exercising the discretion.
229. Secondly, there is no ground of appeal challenging the judge's failure to make an order for an adjournment. It is well established that the grounds of appeal (together with the respondent's notice, if any) define the scope of this Court's jurisdiction: for example, this Court has no jurisdiction to consider a ground in respect of which permission to appeal has been refused.
230. Thirdly, and in any event, this Court is not in a position properly to exercise the discretion as to whether or not to adjourn. We were not addressed by counsel on the relevant principles or taken to the relevant authorities, nor were we given any real assistance as to how the discretion should be exercised in the circumstances of the present case. I do not know what conclusion I would have reached if we had been addressed on these matters.
231. My Lords evidently take the view that there can only be one answer to the question given (a) the husband's appalling conduct in these proceedings and (b) the possibility that the husband might benefit from his father's estate. I have some difficulty in seeing that (a) can be a sufficient reason. As to (b), the judge's assessment at [62] was that "the husband has no realistic prospect of benefit from his father's estate in the

foreseeable future”. It is not obvious to me that the judge was wrong about that (still less that he was not entitled to take that view).

232. The best argument in favour of an adjournment I can see is that it will enable the wife to restore her application for a lump sum in the event that the husband receives some substantial benefit from his father’s estate, and if that never happens the adjournment will do no harm. But the obvious counterargument is that it is contrary to principle to adjourn an application on the basis of a speculation as to what may happen in the future, and that the adjournment will do harm because it will leave these warring parties with an unresolved application hanging over them indefinitely. In the absence of proper submissions I am unsure as to which of these arguments should be preferred.