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Case No: FD01D08002

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2009

Before :

Mr JUSTICE CHARLES

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Between :

JULIA HELENA CHOCHOLOWSKA McFARLANE	**Applicant**
- and -	
KENNETH IRVINE McFARLANE	**Respondent**

Nicholas Mostyn QC and Jonathan Southgate (instructed by **Family Law in Partnership**)
for the **Applicant**
The Respondent in person

Hearing dates: 19, 20 March and 17 June 2009

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Judgment Approved by the court for handing down (subject to editorial corrections)

Charles J :

Introduction

1. For convenience (as was done during the hearing) I shall refer to the parties as the wife and the husband. This judgment is to be treated as a public document and it incorporates my reasoning and conclusions in the light of the arguments at the hearing and the written and oral points made by the parties following the circulation of drafts.

2. This is one of the cases considered by the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 24. Paragraph (7) of the head note of that report of the case reads:

> "(7) McFarlane was a paradigm case for an award of compensation in respect of the significant future economic disparity sustained by the wife, arising from the way the parties conducted their marriage. Equal division of the capital was not enough to provide for needs or compensate for disadvantage but unusually the husband's very substantial earning power was far in excess of the family's financial needs after separation. The wife, having given up her own highly paid career for the family, was not only entitled to generous income provision, including sums which would enable her to provide for her old age and insure the husband's life, she was also entitled to a share in the very large surplus, on the principles both of sharing and of compensation. The Court of Appeal had been wrong to set a 5-year time limit on the order, on the basis that the wife would save the whole surplus above her requirements and that she would have the burden of justifying continuing payments at the end of the order, especially given the high threshold. The burden should be on the husband to justify a reduction, at which stage the court could consider whether a clean break was practicable, which would depend on the amount of capital generated by the husband. "

3. The issues now before me concern (1) the amount and period of periodical payments to the wife, whether they should be capitalised and whether there should now be a clean break, and (2) the amount and period of periodical payments for the children. These issues have not been brought before the court in the way that the House of Lords envisaged (i.e. by an application by the husband). The application before the court was issued by the wife. Initially her application issued on 17 May 2007 sought only an upward variation of the order of the District Judge dated 22 December 2002 relating to the periodical payments to be made for the children. The application was amended on 25 June 2007 to add an application for upward variation of the periodical payments to the wife. That application introduces the question whether the time has now been reached for a clean break or a deferred clean break.

4. The husband appeared in person with the assistance of his present wife, as a McKenzie friend. He produced and relied on well prepared written submissions, and he made his oral submissions and gave his evidence clearly and with sensitivity. In

doing so he clearly demonstrated aspects of his abilities and character that have led to him being very successful in his work.

5. The wife was represented. When giving her evidence she became upset when describing aspects of the history concerning the move of the husband to live near to her and the children. Her affidavit sworn on 13 February 2009 does not do her justice and contains a number of passages that have the character of submissions or assertions. As will become apparent in my judgment some of these were not made out. I however hasten to add that in my judgment by her oral evidence she demonstrated that she was transparently honest and was doing her best to give an accurate account in respect of all aspects of her evidence, and thus as to the past, the present and the future. What shone through from her evidence was that she was genuinely and understandably concerned about her medium to long term future and her ability to maintain her present, or an appropriate, standard of living throughout her life.

6. In short both parties were impressive and in their own ways demonstrated their scars arising from the breakdown of their marriage and thus the existence of emotional and other factors which support and found the public and private interests in favour of a clean break. For example, I note that the husband submitted that the words of Lord Scarman in ***Minton v Minton*** [1979] AC 593 in particular at 608G that an object of the modern law is to encourage each spouse to put the past behind them and to begin a new life which is not overshadowed by the relationship that has broken down, remained wise and appropriate guidance. I found this an interesting recognition by a paying party of the benefits of a clean break and the taking of the risks inherent in it for him. The problem for both sides and the court is whether in all the circumstances a clean break can be achieved fairly.

The background facts

7. During the course of argument I was referred to the bound volume prepared for the hearing before the House of Lords. This contains an agreed statement of the facts in the following terms:

> " 1. The parties are aged 45 years. Their relationship began in 1980 at Durham University. They cohabited for two years and then married on 1 September 1984. There are three children: J, born on 30 May 1989 --------, S, born on 20 April 1991 ----------; and H, born on 21 June 1996 ---------- . The family lived in South-West London. The children are being educated at private schools. The parties separated in December 2000.
>
> 2. When they began to cohabit in 1982, the Appellant was about to commence work as a solicitor's articled clerk working at Clifford Turner, a well-known City firm of solicitors. The Respondent was a trainee chartered accountant working for Touche Ross. Prior to their marriage, the parties purchased the first of four homes that they bought together during the course of their relationship and marriage. By about the time that they married in 1984, they had both qualified in

their respective professions. In 1985, the Appellant moved to 3i, a large venture capital company, which provided the parties with the benefit of a reduced rate mortgage. After the birth of J she returned to work for 3i. In 1990, the Respondent became a partner in Touche Ross. Until this time, the Appellant earned as much as and, for a period, more than the Respondent. In 1991, just before S's birth, the parties agreed that the Appellant should give up work. They agreed to concentrate on the husband's career in order to provide the funding of the family's lifestyle. The Appellant has not since returned to work as a solicitor, but has on two occasions begun to re-train. When J and S were in full-time education the Appellant started a P.G.C.E. (Professional Graduate Certificate in Education) course with a view to becoming a full-time teacher. This was abandoned when H was born. Later the Appellant trained as a teacher of English as a Foreign Language, having some paid employment in 2001 and 2002. In Summer 2002 the Appellant sat and passed two of the three exams required to become an Independent Financial Adviser. Her case was that this was primarily so that she could understand the advice she was being given in relation to her wish to secure her future and that of the children.

3. The Respondent is still with the successor to Touche Ross, namely Deloittes. He was head of corporate tax planning, but is now responsible for the operation of the tax practice.

4. In 1994, the parties bought the house known as 12 Ranelagh Avenue, Barnes, London SW13, which was valued at trial at £ 1.5m. It was purchased in the Appellant's sole name in an attempt to protect it from possible claims arising from the Respondent's profession. The parties resolved to and did pay off the large mortgage on the property in 1999. Shortly before they separated, the parties had purchased in their joint names a holiday home in Salcombe, Devon, which at trial was valued at £255,000. In June 2000, a flat was bought in the Respondent's name in Clerkenwell for £415,000. This gave rise to borrowings of approximately £450,000, which he paid off almost entirely in some 16 months. By 1 March 2002 he had reduced the borrowing to £50,000. After the parties separated in December 2000, the Respondent moved into this flat.

5. On 10 December 2001, the Appellant issued divorce proceedings in the Principal Registry. These were not defended. There was a decree nisi on 22 February 2002. This was made absolute on 28 May 2003.

6. By the early summer of 2002, the Appellant and the Respondent had agreed on a broadly equal division of the capital of approximately £3 million owned by then, all of which

had been accumulated during their marriage, apart from an inheritance of approximately £40,000 that the Appellant had received from the estate of her father in 2001. The parties agreed that the Appellant was to retain the former matrimonial home in Barnes, in which she and the children continue to live, and which at the trial before the District Judge had an agreed value of £1.5 million and no mortgage. The Appellant also had some modest investments and funds at the bank. The Appellant and the children continued to live in the former matrimonial home until the judgment of the Court of Appeal, when the Appellant then sold 12 Ranelagh Avenue for £1,790,500 and purchased a property in South Kensington for £2.542 million, including costs of purchase.

7. The parties further agreed that the Respondent was to have the holiday home in Devon and the flat in Clerkenwell and some insurance policies. In addition, he was to have his partnership current-account in Deloittes. The Respondent also retained other Deloittes interests. There was an issue between the parties as to whether the Respondent's partnership current-account should be included in the calculation of capital. The Appellant argued that it should and that the division of capital was therefore unequal in favour of the Respondent. The Respondent left it out of the account and argued that the division of capital slightly favoured the Appellant. The various capital figures changed over the course of the proceedings, but the District Judge, who did not expressly deal with the dispute about the partnership current-account, held that the division of capital "*is roughly a 50-50 split*".

8. In August 2002, the Respondent and his partner Ms Carol Atha (who were married in June 2003) purchased a new home at 108 Castlenau, London, SW13 for £2.94 million, including costs. The Respondent and Ms Atha executed a trust deed recording their interests in the property in the ratio of 70: 30 in the Respondent's favour to reflect their respective contributions. The Respondent had contributed £2.054 million to the purchase cost, of which approximately £1.6 million had been borrowed by way of mortgage. The balance of the Respondent's contribution came from the proceeds of the sale of the flat in Clerkenwell, which the Respondent sold for £551,000 net. Ms Atha, who is a junior partner in Deloittes, contributed the remainder of the purchase price, largely by borrowing. The Respondent stated that, as had been done in the case of the former matrimonial home at Ranelagh Avenue, he intended to repay his mortgage over five years at the rate of £347,000 per annum.

9. In view of the agreement as to capital division, by the time of the hearing before District Judge Redgrave, the live

issues were the level of periodical payments for the Appellant and the level of periodical payments for the children.

10. As to income, the Appellant was receiving child benefit and modest interest from about £90,000 worth of investments. The Respondent drew about £12,000 per month from his partnership. In addition, there was an annual distribution of the preceding year's profits on a quarterly basis. This amount was determined by the number of units allocated to each partner. The husband, then head of corporate tax planning, was on level five of seven possible levels, for which he was allocated a fixed number of units. He also had the ability to earn extra secondary units based on his performance throughout the year. At the date of the trial, he had 250 units and since the parties separated had been allocated a further 50 performance units for the year ended 31 May 2002.

11. The Respondent's partnership income for the five years preceding the hearing before the District Judge had been:

Fiscal Year	**Gross**	**Net**
1998-1999	£455,481	£272,156
1999-2000	£715,479	£427,264
2000-2001 (year of separation)	£971,909	£579,294
2001-2002	£1,075,568	£633,081
2002-2003 (Figures as at Dec 2002)	£1,285,963	£753,381

12. The parties had limited pension provision, having preferred to build up property assets and to reduce quickly the borrowings taken out in order to effect the purchases. Their intention was to use their property assets, which would exceed their housing needs on retirement, to fund part of their retirement needs. The Respondent had life insurance of £1m. He has declined to nominate this in the Appellant's or the children's favour.

13. During their marriage the parties had maintained a comfortable standard of living, which improved as the Respondent's earnings increased. The Respondent's evidence and analysis was that the family's spending for the Appellant, the Respondent and their three children, excluding mortgage costs and school fees, had been as follows:

1995	£66,000	
1996	£40,000	
1997	£73,000	
1998	£70,000	
1999	£85,000	(the year the mortgage was paid off)
2000	£138,000	(final year of marriage)

In the year before separation the mortgage on the former matrimonial home was paid off and the family was able to enjoy more extensive holidays and higher general expenditure.

14. Paragraph 3.1 of the Form E requires each party to complete a schedule of future income requirements. In the Appellant's Form E, her schedule suggested a figure of £215,000 per annum, of which £87,000 was referable to the children and the balance of £128,052 related to the Appellant herself. This figure included £14,200 for private health insurance and life-insurance premiums to 2017. The Respondent on advice, did not complete paragraph 3.1 of his Form E. In his oral evidence to the District Judge he estimated his personal spending requirements, excluding housing costs and pension provision, as £60,000 to £80,000 a year.

15. In the event, the Respondent was ordered by the District Judge to pay £20,000 per annum for each child in addition to school fees. This has not been the subject of any appeal. However, what has been in dispute is the appropriate level of periodical payments for the Appellant and the principles by which they should be calculated. The District Judge imposed a joint lives order of £250,000 per annum. This was reduced to £180,000 per annum by Bennett J. on appeal. The Court of Appeal restored the quantum of £250,000 but imposed a term of five years.

16. The Respondent and his second wife are expecting the birth of their first child in April 2005.

The position reached after the decision of the House of Lords.

8. The wife's appeal to the House of Lords was against the term of 5 years imposed on the periodical payments to the wife. That was a term imposed without any order that the wife should not be entitled to make any further application under s. 25A(3).

9. The District Judge had ordered that the periodical payments to the wife and the children were to be index linked. Bennett J removed that provision and the Court of Appeal did not reinstate it.

10. So the order appealed to the House of Lords was an order for non-indexed linked periodical payments to the wife with a time limit of 5 years. In my judgment the husband is right that the order of the House of Lords (which I have not seen) did not reinstate the index linking and the result was that he was to pay periodical payments of £250,000 per annum to the wife for their joint lives (or earlier re-marriage or further order) and periodical payments of £20,000 per annum for each of the children until the age of 23 or the cessation of tertiary education plus school fees and health insurance. This is what he has paid without any complaint from the wife that the sums were not increased by reference to the RPI as the District Judge had ordered.

11. In her affidavit sworn on 13 February 2009 the wife seemed to be advancing an argument that the periodical payments should have been index linked. To my mind this is one of the assertions or submissions in her affidavit that is not well founded. It was not pursued in argument before me, rather it was in my view correctly accepted on behalf of the wife that the removal of index linking by Bennett J had unsurprisingly not been redressed by the Court of Appeal and the House of Lords and so the wife had not benefited from any increases over the last 6 years, although the RPI had increased by 19.3%. Index linking was only sought for the future (back dated to the date of the application to vary, namely from 25 June 2007).

Some updating.

12. The children have been and are doing well. J is at University and will graduate in 2010. S is still at school and is likely to go to the University of her choice in September 2009 to read chemistry. There is a real prospect that she will do an extra year after her first degree if she wants to be a working chemist. H is 12 and at school.

13. S's exam results (all at top grades at GCSE and A/S level) clearly demonstrate that she has achieved, and can achieve, high academic success. There have been problems relating to her health which have now been diagnosed and they can be managed but not cured. There are serious risks if the disease is not controlled but the prognosis is good. This is clearly a worry for both parents but with the early diagnosis and proper management there is every prospect that it will not hold her back in any way.

14. The wife told me, and I accept, that during the period of diagnosis she put on hold the exams she was taking. This is very understandable and a clear demonstration of the roles that the parties chose in the care and upbringing of their children. Although the children are now older the choice of lifestyle made by the parties still underlies the approach to the upbringing of their children and the effects of that choice therefore still continue and have an impact on the work the wife could (as between the parties) be reasonably expected to do.

15. The wife and the children still live in the property in South Kensington. This is a substantial and attractive family home in a convenient area for the family. There is a dispute as to its present value.

16. The wife has taken employment at a firm of Patent and Trade Mark Attorneys. She has taken and intends to take more exams to qualify as a trade mark attorney through the Institute of Trade Mark Attorneys (ITMA).

17. There was a suggestion made in the husband's affidavit, and by him orally, that the wife could have obtained, and still could obtain, other employment more closely related and suited to her qualifications as a solicitor and which would be much better paid. The husband linked this back to a theme of the wife's case that she was and is extremely talented and would have had a very successful career, if she and the husband had made a different choice as to how they would conduct their lives together.

18. This assertion by the husband was not well supported by evidence. It was based on a conversation he had had with a partner in a major professional recruitment consultant and some job particulars. The conversation he reported was in very general terms. The wife demonstrated that the possible posts put to her by the husband were unsuitable for her, and he acknowledged the force of her reasoning.

19. I accept that the wife faced, and has experienced, considerable difficulty in finding work because of her long absence from it. I therefore accept as she stated in her affidavit that it was through perseverance and luck that she was eventually offered a post as a trainee trade mark attorney. So I reject the husband's assertion (based on what he said he had been told by a professional recruitment agent) that the wife would be regarded as someone who a large firm of solicitors would be very keen to employ, even though she had not worked in the profession for over 15 years.

20. The husband and his present wife remain partners in Deloitte. Their son is now 3. He is their only child.

21. The husband's career has continued to be successful since the breakdown of his first marriage in December 2000 and thus during his second marriage.

22. He was an Equity Group 2 partner for 10 years up to 1 June 2008, and thus for the years referred to in the agreed statement of facts put before the House of Lords. (The reference to level 5 of 7 in paragraph 10 of the agreed statement of facts put before the House of Lords refers to the position before a change in the grading system; nothing turns on this change).

23. In 2006 his role within the firm changed. For the previous 10 years he had been serving clients and undertaking increasingly senior management roles. The change was that he stepped back from management and was appointed a Vice Chairman of the firm with a new challenge to secure and retain a portfolio of major client relationships for the firm.

24. In July 2008 he was, as from 1 June 2008, promoted to Equity Group 1. This is the highest group in his very large firm. He told me, and I accept, that it has less than 2% of the partners and that most partners are in Equity Group 3 and many of them never progress beyond that group. The husband has therefore after about 18 years as a partner joined the top group of partners in his large and well known firm, this is a very considerable professional achievement.

Some additions.

25. I record some further facts that do not appear in the statement of agreed facts put before the House of Lords but were confirmed in evidence before me, or are reflected in earlier evidence.

26. Part of the planning and lifestyle choices of the parties was to pay off the borrowings used to buy their home so that it was mortgage free and could be sold and utilised to fund retirement.

27. They were both very committed to providing their children with a good education and encouraging them from that base to make their own ways in life by utilising their training and talents, and through hard work and the making of their own choices. This reflects their own approach to their life together.

28. The wife had moved from 3i to Freshfields in the summer of 1990 and was working there when the decision was made that she should give up work, which she did in early 1991 shortly before S was born. She was working a 4 day week. At 3i and Freshfields she was not working in a fee earning role. At Freshfields she worked in a support role relating to information and know how, computers were gaining in importance and a lot of information was in paper form and was not organised properly. The job was a demanding, important and valuable one but by this stage she was not earning as much as the husband. She told me that a colleague of hers was made a partner about two years after she left (although she could not remember her name) and that at the time this was regarded as a big deal because it was unusual for a non fee earner to be offered a partnership and this was a recognition of the importance of such support roles in the building up of a successful partnership.

Some general comments

29. Although as the House of Lords commented the wife gave up her career to devote herself to the family and thus for their sake (see paragraphs 91 and 154) this was not a decision that was forced on her by economic or other circumstances, it was a choice made by the parties.

30. In her evidence before the District Judge in answer to a question whether she had grown to hate her work as a solicitor she said:

> " No, it was never an all consuming passion or obsession as it appears to be becoming to [the husband]. I had other interests, have other interests. I was successful at what I did. I found it stimulating, I found it interesting. I was well remunerated but it was a job, I didn't view it as the whole of my life "

A little later in respect of the decision for her to give up work she said:

> " It was a joint decision. It was something that we'd always ---- I mean, it was just sort of taken as read, really, as something that we had discussed. We discussed when it would be appropriate, decided it would only be appropriate when [the

> husband] had his partnership because up until then my earnings formed at least half of our family income. Because the reason that I had to go back to work after J's birth. We couldn't afford for me not to go back to work. And as soon as [the husband] got his partnership and I had my second child decided it was then time, time was appropriate for me to give up paid work and put all my energies into the family and into the children.
>
> Q Were you happy with that decision? A Yes. I love being with my children. I find them stimulating, interesting, exciting. There are things about it that I don't particularly enjoy but I think that's the same with every job. I work hard at it. Again, I think I have been very successful at it, and I do not regret having made that decision. "

31. These answers demonstrate that the plan had been for the wife to give up work. This may have influenced the decisions that were made relating to her early career path (but this is speculation by me).

32. These answers are obviously part of the evidence that led the District Judge (in her excellent judgment) to make the following findings:

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

33. On the same theme Baroness Hale says at paragraph 154 of her speech that the fact that the wife might have wanted to give up work to be at home with the children was neither here nor there and most breadwinners want to go on breadwinning. It seems to me that that passage recognises that it is the consequences of the agreement of the parties, and thus the way they chose to run their lives together, that are centrally relevant. Further, in my view, whatever reluctance or wish either party had for deciding on this way of life, and to my mind it is plain that the husband was committed to and wanted to pursue his career (and thus work hard and for long hours and as Baroness Hale says carry on breadwinning), what they decided to do resulted in benefits and burdens for both of them.

34. They might have chosen to both continue with their careers. If they had made that decision it would have been likely to have had an impact on their available income and wealth and on their respective relationships with their children during and at the end of the marriage. The lifestyle they chose was also likely to have, and has had, such effects.

35. In the answer I have quoted the wife encapsulates the responsibilities, benefits and burdens a wife and mother derives from staying at home with her children (and so compromising her career). An accurate monetary value cannot be put on those benefits and burdens of the wife or on the benefits that arrangement gives to the children and the husband.

36. The results to which each have contributed in their different and, on the correct non-discriminatory approach, equal ways, are of central importance.

37. An assessment of what the wife gave up in career, and thus income, terms is an assessment of the loss of a chance. It is not possible to determine with any accuracy how successful the wife would have been in her career if she and the husband had had different long term aims as to their respective roles when they married and /or had made a different decision in 1991 as to her continuing to work.

38. As Lord Nicholls points out in paragraph 92 of his speech the wife had a proven track record by the time when the parties agreed that she should give up her job and her future success was not a matter for speculation. But I read his earlier reference to the career foregone by the wife being "a professional career as successful and highly paid as the husband's" as a description of the past and the position before the husband was made a partner and not a prediction as to the future.

39. In any event, in my judgment it cannot be said on a balance of probabilities how successful or highly paid the wife would have been if she and the husband had not had a long term plan that she would give up work and she had not done so when she did (or at all). I therefore reject the assertion she makes in her affidavit that if she had not given up her career she "would have had at least as successful a career and earning capacity as" the husband. The District Judge made no such finding.

40. I therefore agree with the husband that the evidence does not establish that if she had continued it the wife's career would have been as successful and remunerative as his.

41. In my judgment what can be said on the evidence is that if she had not given up work in 1991 and had continued working as a solicitor (whether as a fee earner or in a supporting role) it is more likely than not that she would have been successful and well paid. She has remained healthy and her track record before she gave up work supports this conclusion. I accept her assertion that partners of her age in very large firms of solicitors earn equivalent amounts to the husband but it is also the case that successful partners of her age (and his age) in large firms of accountants and solicitors earn less (and significantly less) than the husband.

42. On the evidence it cannot be said what sums the wife would have been more likely than not to have earned, and be earning. I doubt that such evidence could be given. Evidence of earnings could be produced including, for example, the husband's figures, an average of all those admitted to partnership in Deloitte at the same time as

the husband, equivalent figures at say Freshfields or in respect of the wife's contemporaries. These would give a range or guide but it seems to me that any quantification of what the wife's likely earnings would have been would have a large element of conjecture.

43. Returning to the point that the consequences of the decisions the parties made, and their different but equal contribution to them, are of central importance in my judgment the essential relevance of what the husband has achieved and earned, and his earning capacity is that they comprise aspects of those consequences that can be assessed in monetary terms and which fall to be divided between the parties in a principled way to achieve a fair result.

44. In my view it follows from that approach that what the parties may have had for division, and their respective financial positions now, if they had taken a different course does not need quantification or valuation. Rather, in my view, the position if they had made a different choice of lifestyle in which they had both continued their careers, can and should be brought into account on the basis that if the wife had continued to work it is more likely than not that the family would have accumulated much greater wealth, and if that wealth had not been sufficient together with her earnings to found a clean break on their divorce the wife through her earning capacity (and any continuing, but much smaller payments, from the husband) would not have any reasonable cause for concern about maintaining a high standard of living for the rest of her life.

45. Their choice, with their eyes open, deprived them of that route to long term financial security and replaced it with one founded on the husband's success and earnings which have turned out to be considerable. This loss of the wife's earnings and earning power was a financial loss to the family assets (and thus to them both). But this was the lifestyle they chose for their family in which the wife took on the responsibilities, benefits and burdens of being the homemaker and the husband took on the responsibilities, benefits and burdens of being the breadwinner.

46. For reasons I discussed in ***H v H*** [2007] 2 FLR 548 at in particular paragraphs 80 to 87 another consequence of the choice made by the parties that cannot be accurately valued in monetary terms is the parts of the husband's earning capacity, and thus his present and future earnings, that are attributable to the wife's contributions during the marriage and the platform that created.

47. As with assessments of what the wife might have earned and be earning in my view generally a percentage or formulaic approach to the post marriage product of the husband's earning capacity, and thus his earnings, based on his earning capacity, the spade work for which was done during the marriage, should be avoided, as should argument based on a percentage calculated from earlier cases (e.g. *H v H*). This is because the assessment of what is a fair award (applying the guidance on the principled approach to be taken given by the authorities) having regard to the consequences of the choices made during the marriage is fact sensitive

48. Rather, it seems to me that the overall assessment should be informed by the points mentioned in *H v H* that there are a number of factors that have gone to make up the husband's earning capacity (a number of which will have been factors in the choice made during the marriage to rely on his abilities as the breadwinner e.g. his talents,

energy and dedication to hard work) and that the effects of the platform created (and the spade work done) during the marriage will be likely to reduce as time passes and be replaced by other factors (for example the contribution of a second wife).

49. To my mind these quantification points relating to the earnings the wife would have been likely to have made, and the continuing effects on the husband's earning capacity of the marriage partnership after it has ended are truisms that comprise relevant factors in the discretionary exercise required by the MCA 1973 and, by their nature, create problems for the courts (and advisers) because they do not lend them themselves to a formulaic approach.

Assets

The husband's future earnings

50. The husband was attacked on two fronts concerning his estimate of his likely future earnings. It was said that his estimates in the past have been shown, and found, to be pessimistic and he had failed to disclose material that tended to show that his present estimate was too low. I was unimpressed with both attacks.

51. The disclosure point focused on the omission from the material disclosed of accounts attached to the monthly reports circulated within the partnership and, in particular, the non-disclosure of the comments of the senior partner in the newsletter that accompanied the accounts the husband provided.

52. The first point I make is that the history of this case demonstrates that the husband is not a man who can fairly be said to have tried to hide anything. He is punctilious and has never missed or delayed a payment.

53. He is acting in person, although as I understand it has had access to some advice from lawyers who have acted for him in the past. In the correspondence relating to requests for further information the husband understandably raised points on the confidentiality of the information being sought. These were not met by a response setting out the approach of the court when balancing such issues against the need to produce relevant material to enable the court to decide the issues before it. In my view a reply containing a proper explanation of this may have led to the result achieved by consent on the summons issued on behalf of the wife. This represented a sensible solution.

54. The report of the senior partner accompanying the management accounts was produced in a redacted form and contains statements that found an argument that the prospects of the firm are better than the husband asserts, and as are indicated by an article in an accountancy magazine he produced. But in my view the remarks of the senior partner have to be read in their context, and thus on the basis that in the monthly report he would be likely to be take an approach that was designed to be upbeat and encouraging. Also the husband gave convincing explanations as to why certain parts of the report that were relied on by the wife as demonstrating that the husband was overly pessimistic do not carry an upbeat message as to overall profitability of the partnership to those who know about the impact of the issues being discussed on its affairs and profits.

55. In my view the comments of the senior partner in this report do not undermine the husband's reasoning relating to his future earnings.

56. The earnings of a partner depend on the profits, the number of that partner's units and the total number of units of all the partners entitled to share the profits. I understand that the last factor is the least important because although there is no limit on that total the issue of units is managed so as not to issue so many units that their individual value is significantly diluted.

57. As the husband explained a great financial benefit and comfort of being promoted to Equity Group 1 is that it puts a floor on the number of units he will have. Each Group has a range and to go below the bottom of that range a partner has to be moved down a group. The husband's caution did not extend to such a possibility and his record points very strongly against it.

58. Of course I accept that over the years the husband has never had a decrease in units (there has been a change of size of units 320 old = 480 new) and the point that in the past his estimate of his earnings has been found to be pessimistic. I am also of the view that, perhaps as a product of his nature, talents and success, he would for his own planning, without any reference to the wife, take a cautious view or estimate of his future earnings.

59. His evidence as to the level of units he was likely to have was convincing although in my view probably cautious (and modest) given his past record. In my view it would be folly for anyone in the present market conditions to take a bullish view on profitability.

60. The husband's estimate of his future sustainable net income on an estimated reduction in unit value of 20% to 25% (the combined effect of two consecutive years of profit reductions), and tax increase announced at the time of the hearing which was before the budget, is between £793,000 and £845,000. (After and applying the tax rate announced in the budget which introduces a top rate of income tax at 50% from 6 April 2010, which applies to profits earned from 1 June 2009, these figures become £720,000 and £770,000).

61. A table of his net income to 2002/3 (to 31 May 2002) is set out above in the agreed facts put before the House of Lords. The last of those years was on a unit allocation of 450. For the following years to date his earnings are as follows (excluding car and the interest on his tax reserve):

Year	Units	Net earnings
31 May 2003	450	£749,081
31 May 2004	480	£721,278
31 May 2005	480	£806,671
31 May 2006	480	£899,139
31 May 2007	480	£982,664

31 May 2008	480	£1,109,697

This shows that his earnings were reasonably steady for the years to the end of May 2002 to 2004 and thereafter, as before, there has been a steady rise in his earnings. For next year that is to 31 May 2009 he will be in Equity Group 1 in which the floor of his units will be 470 and he has taken 500 for his estimate of his earnings to 31 May 2009 and later years. If the 50% top tax rate had applied for the year to 31 May 2008 the net would have been £917,000.

62. In line with his case at the time of the hearing before the District Judge he plans to retire in or before September 2014 when he will be 55 and will have been a partner for about 25 years. It was not in dispute before me that the general aim of the parties during the marriage was that the husband would retire when they were both in their early 50s.

63. His plans have not changed by reference to the age of his young son, who will be 9 when he is 55.

64. His ability (or wish) to stay on longer, or take up other remunerative employment was not investigated in any depth. He did not envisage doing either but had in mind increasing his charitable work (which he does and will continue to do for no remuneration).

65. In my judgment his estimate is sensibly cautious. I accept that with hindsight it may prove to be pessimistic. Nonetheless I adopt it in the manner set out later.

66. During the hearing a point was raised, it seemed for the first time as between the parties, that a percentage share of income over a base figure or between a range of figures might be awarded. Given the uncertainties relating to the economic climate, and the recent graphic evidence that an approach based on the view that the income of high achievers in the City and the professions (and house prices) will continue to rise as they have in the recent past may well be seriously flawed, it seems to me that an approach which includes (or is entirely based on) a percentage of net earnings is likely to be sensible and one that caters for caution, optimism, inaccuracy and annual increases (decreases).

The second wife.

67. She is a partner in Deloitte and her earnings are significant and increased when she was promoted from Equity Group 4 to Equity Group 3.

68. So the husband and his new wife together have a very significant income. They hope to have a second child and their plan (which was not challenged) is that the second wife will give up work, after 10 years as a partner, at the end of May 2010. The husband estimated her future net income, on the same view on the likely decrease in unit values. She may retrain as a teacher, but this has not been decided.

69. His second wife bears more of the burden of child care than the husband because of their different working hours and travelling commitments. The plan is that she will stop working full time before the husband and thereby be able to spend more time at home with their son.

The wife.

70. In her oral evidence she told me, and I accept, that she thought that it is unlikely that she would be made a partner in a firm of Patent and Trade Mark Attorneys. She plans to finish her exams, and history indicates that she will pass and qualify albeit that the pass rates are not high. She hopes to have qualified by March 2011. This assumes that she is not diverted because of the needs of any of the children. Her present income is about £31,000 gross for a four day week (about £22,000 net). In her oral evidence she said that she would hope to go on working until she was about 60 and hoped that from earnings on qualification (when she will have had a few years experience) of between £40,000 and £60,000 gross (£29,000 to £40,000 net) she would be earning between £70,000 and £90,000 gross (£46,000 to £58,000 net) by that time. She pointed out that the firms are small and the earnings very different from those of partners in large firms of accountants or solicitors.

71. I accept that it is difficult for her to predict her earnings with accuracy. I accept her estimates.

The assets

72. There is a dispute over the value of the wife's home. She takes the figure agreed at the FDR less 16%, the husband takes an estate agent's value as at November 2008 less 16%. I heard no evidence as to this dispute and there was no valuation (the husband did not agree to one, I understand on costs grounds). I shall take the mid point of the figures. After deduction of the remaining mortgage debt of £224,548 and selling costs this gives a net value of approximately £3.73 million.

73. The wife has over the years since its purchase reduced the mortgage (from £643,000) reflecting the approach taken during the marriage of reducing the borrowing on the home rather than making other investments. In the year to 31 January 2009 she made capital repayments totalling about £105,000 (and interest of about £14,000). This is a reflection and continuation of the approach of the parties during the marriage to invest for the future by reducing the debt secured on their homes.

74. The purchase by the husband of his new home in Barnes for £1.82 million when the former matrimonial home was worth £1.5 million was said by the District Judge to involve expenditure for housing at a level that was higher than reasonable and unreasonable borrowing. Although the wife had good emotional reasons for moving when she did, and for moving out of Barnes, on the same approach her expenditure of £2.45 million (and associated borrowing) to buy her present home in South Kensington exceeded what was reasonable for housing, if that is looked at alone.

75. To my mind that categorisation is justified if only housing need by reference to the lifestyle of the parties during the marriage is justified but evaporates if the approach of the family of paying off the debt on their home to create a capital investment that can be utilised in the future is taken into account.

76. The wife has adopted that policy and it seems to me that as she has done so any criticism of the purchase of her new home, even if its running costs are higher than other suitable homes, evaporates.

77. The wife has bank accounts and ISAs (£75,000), and other assets (£20,000), total £95,000.

78. She has a pension worth about £28,000. Her pension with her present employer has negligible value at present.

79. The husband has an interest in three houses the net values of which are agreed:

    i) His present matrimonial home in Barnes, net value of 100% about £3.5 million.

    ii) The property in Devon he was transferred as part of the division of capital between him and the wife, net value of 100% about £388,000 (after deducting capital gains tax and selling costs). This is now owned by his second wife.

    iii) Another property in Devon bought in August 2007 in the joint names of the husband and his second wife with substantial borrowings, now paid off, net value of 100% about £1.6 million (without deducting capital gains tax).

    There is a dispute concerning the size, and thus the value, of the husband's interests in these properties. Capital gains tax will be paid on the sale of the second property of about £44,000 on the valuation used. No provision for capital gains tax was included for the third property. On the valuation used there is no gain over its purchase price in 2007 (£1.98 million).

80. As set out in the agreed facts put before the House Lords, when the husband and his present wife bought their matrimonial home they executed a trust deed declaring their beneficial interests to be 70:30. The husband's case, which was not challenged, was that this reflected their financial contributions at that time (before their marriage and decree absolute in respect of the husband's first marriage). They have since executed further documents that have changed their beneficial interests to 50:50 to reflect, as I was told by the husband, their agreement that their property and assets are all shared equally.

81. The second property was transferred to the husband on his divorce from the wife. It was transferred into joint names of the husband and his second wife in January 2006 (to reflect their equal partnership). When they decided to sell it this property was transferred to the second wife with a view to saving some tax. It is therefore now, through two gifts, beneficially owned by the second wife.

82. The third property was bought in 2007 with savings and borrowings (now paid off) and transferred to the husband and his second wife as tenants in common in equal shares. This was a joint venture purchase by the two of them to which they both made financial contributions. The detail of those financial contributions was not gone into in any detail in the evidence.

83. In my judgment the fair way to bring these properties into account as between the husband and the wife is to treat:

    i) the husband as retaining the shares in the first two that he has transferred by way of gift to his second wife, and

ii) the third as a property in which they both have a half interest.

84. This approach reflects:

i) the financial contributions of the husband to the other two properties that he brought to the second marriage and thus one of the reasons for departing from equality in respect of the second marriage, and

ii) the point that the third house was bought some years after the marriage and as a joint venture of the second marriage both financially and emotionally and is thus a family asset of that marriage.

85. All of the properties are in areas where properties have, until the recent falls in value, commanded high prices in London, Barnes and Devon. It is therefore realistic to bring them all into account on the basis that it is likely that further movement in their values will be equivalent. This reflects the approach taken by the parties (subject to the dispute over the value of the wife's home).

86. This approach to the shares of the husband in the properties coincidentally produces a result that the present net value of the respective interests of the parties in freehold properties are on the values I have taken approximately equal, namely:

a. the wife: £3.73 million,

b. the husband: (70% of £3.463 million = £2.424 million, plus £388,000, plus 50% of £1.613 = £806,500) £3.62 million.

On this basis the second wife is treated as having property worth £1.84 million, which is less than her entitlement on the deeds. The whole of the wife's investment in property is her principal private residence and, as such, is exempt from capital gains tax. This is not the case with the husband unless after selling their London home he and he second wife move to their holiday home and do not buy another London home.

87. The husband has other assets comprising his share of insurance policies, accounts and investments in his name and that of his second wife totalling £263,000.

88. He has pensions (£84,000), and an index linked annuity from his firm that is payable from 2020 (when he is 60). He may become entitled from 2020 to a maximum pension annuity of about £66,000. This unfunded annuity scheme was introduced in 2002 and, because of restrictions that may apply in the future to reduce the sum payable, partners are advised not to rely too heavily on it as a source of pension provision. No capital value has been put on this scheme, but by reference to the annuity rates in At a Glance it would require a payment of the order of £1 million to purchase an annuity of that amount from the age of 60. It clearly has a significant capital value after factoring in the words of caution relating to it. He also has a liability of £226,000 in respect of a partnership loan.

89. In broad terms the position is therefore that:

	Husband	Wife
Properties	£3.62 million	£3.73 million

Investments other assets	£263,000	£95,000

Less	£226,000	
	£3.655 million	£3.868 million
Pension	£84,000	£28,000

	£3.739 million	£3.896 million
Annuity	£66,000 per annum	

If a capital value is given to the husband's annuity notwithstanding the words of caution relating to it, and having regard to the point that the husband may have to pay capital gains tax on the disposal of part of his interests in property, on this analysis his present asset base is higher than that of the wife.

90. There was no evidence as to the ability of the husband to raise a loan to fund a lump sum payment or the cost of any such borrowing.

Approach in law

The main statutory provisions

91. The applications are governed by s. 31 MCA 1983, and in particular s. 31(7). The cases confirm that it is important for the court to apply the statute. I was correctly reminded by the wife's counsel of the terms and width of the powers conferred by the statute. The following extracts from the s. 31 are of particular relevance:

> "31(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and -
>
> (a) in the case of a periodical payments ----- order made on or after the grant of a decree of divorce or nullity of marriage, the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made ---- only for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court, where the marriage has been dissolved of its powers under subsection (7B) below) to enable the party in whose favour the order was made to

adjust without undue hardship to the termination of those payments ----------

(7A) Subsection (7B) below applies where, after the dissolution of a marriage, the court -

(a) discharges a periodical payments order --------- made in favour of a party to the marriage; or

(b) varies such an order so that payments under the order are required to be made ---------- only for such period as is determined by the court.

(7B) The court has power, in addition to any power it has apart from this subsection to make supplemental provision consisting of any of -

(a) an order for the payment of a lump sum in favour of a party to the marriage;

(b) one or more property adjustment orders in favour of a party to the marriage [subject to ss (7E)];

(ba) ----------

(c) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for -

(i) a periodical payments or secured periodical payments order, or

(ii) an extension of the period to which the original order is limited by any variation made by the court.

(7C) An order for the payment of a lump sum made under subsection (7B) above may -

(a) provide for the payment of that sum by instalments of such amounts as may be specified in the order; and

(b) require the payment of the instalment is to be secured to the satisfaction of the court.

(10) Where the court, in exercise of its powers under this section, decides to vary or discharge a periodical payments ---------- order, then, subject to section 28(1) and (2) above, the court shall have power to direct that the variation or discharge shall not take effect until the expiration of such period as may be specified in the order.

92. Section 31 therefore returns the court to ss. 25 and 28 MCA 1973. Section 31(7)(a) has a clear linkage with s. 25A (1) and (2), and s. 31(7B)(c) has a clear linkage with s. 25A(3), and s. 28(1A).

93. In my judgment s. 31(7) enables the court to discharge, or to vary an order for periodical payments by imposing a term for their payment, with or without making an order under s. 31(7B)(c), which is expressly a supplemental provision (and see s. 31(7A)(b)).

Authorities.

94. It is probably invidious to pick particular passages in the speeches in *Miller* and *McFarlane* and plainly all passages have to be read in context, with the other speeches and here with an eye to the application of the principles on the basis that that the *McFarlane* case is identified as the paradigm case for the application of the compensation principle. But with those words of caution it seems to me that the following passages (many of which were highlighted by the parties) are of particular relevance:

i) Lord Nicholls:

> "[10] What then, in principle, are these requirements? ---------- The first is financial needs.
>
> [11] This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and childcarer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.
>
> [12] In most cases the search for fairness largely begins and ends at this stage.
>
> [13] Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is

often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and childcarer.

[14] When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers ----------

[15] Compensation and financial needs often overlap in practice, so double counting has to be avoided. But they are distinct concepts, and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

[16] A third strand is sharing. ---------

[32] In particular, I consider a periodical payments order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.

Mrs McFarlane's appeal

[91] A third feature is that the high level of the husband's earnings after the breakdown of the marriage was the result of the parties' joint endeavours at the earlier stages of his professional career. The wife gave up her career to devote herself to making a home for them both and for the children. As Bennett J noted, the husband was able to reap the benefits of the wife's contribution not just during the marriage. He continued to do so after the separation and after the divorce.

[92] ---------- A fifth feature is that, as primary carer of the three children, the wife continued to be at an economic disadvantage and continued to make a contribution from which the children and, indirectly, the husband benefited. He was relieved of the day-to-day responsibility for their children

[93] ---------- This is the paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage.

[96] ---------- I agree with the Court of Appeal that when the husband has repaid the mortgage on his new home, and the wife's earning capacity has revived, the time may be right for a reassessment of the parties' position to see if a deferred clean break is practicable. A clean break might then be achievable by the court exercising its powers to order the husband to make a lump sum payment to the wife as consideration for discharging his liability to make further periodical payments. ----------

[97] This is something which will merit careful consideration at a suitably early date.

[99] ---------- When a review takes place the court will consider, in the light of the prevailing circumstances, what further amounts shall be paid by way of periodical payments, or capitalised and paid as a lump sum if that is practicable, in respect both of needs and compensation. As to needs, the claimant's resources are always a matter to be taken into account. And claimants for financial ancillary relief are expected to manage their financial affairs sensibly and responsibly. Thus far I agree with the Court of Appeal. But the wife's claim for compensation stands differently. Her compensation claim is not needs-related; it is loss related. So the compensation element of her claim is not directly affected by the use she makes of her resources."

ii) Lord Hope

"[118] ---------- [referring to a provision of Scottish Act] It operates harshly in cases where a high earning wife, or the highly qualified wife with the prospect of high earnings - and it is, of course, almost invariably the wife, not the husband who does this - gives up a promising and demanding career in the interests of the family. Women today compete on equal terms with men in business and in the professions for high earnings. ----------

[119] As the district judge recognised in Mrs McFarlane's case, it is almost always impossible for a woman who has made that choice to achieve the same pattern of high earning on her return to work which she would have done if the progress of her career had not been interrupted by concentrating on her family. The price that her decision brings with it is made all the more severe by the difficulties which under current conditions couples are likely to experience in providing for a pension which will maintain their standard of living in the future."

iii) Baroness Hale

"[133] Section 25A is a powerful encouragement towards securing the court's objective by way of a lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. ---------- It is also the logical consequence of the retreat from the principle of lifelong obligation. Independent finances and self-sufficiency are the aims. Nevertheless, s 25A does not tell us what the outcome of the exercise required by s 25 should be. It is mainly directed at how that outcome should be put into effect.

[134] Hence, these three pointers do make it clear that a clean break is not to be achieved at the expense of a fair result. But the 1973 Act still leaves us without much help towards what the court shall be trying to achieve by its reallocation of their resources and why it should be doing so. ---------

[138] The most common rationale is that the relationship has generated needs which it is right that the other party should meet. ---------- Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need maybe the way in which the parties' chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties respective resources in compensation.

[139] But while need is often a sound rationale, it should not be seen as a limiting principle if other rationales apply. This was the error into which the law had fallen before *White*. ---------- and suggestions that a wife's budget might properly contain a margin for savings and contingencies, or to pass on to her grandchildren, were greeted with disbelief.

[140] A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very

probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties needs, then a premium above needs can reflect that relationship generated disadvantage.

[141] A third rationale is the sharing of the fruits of the matrimonial partnership ----------

[144] Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.

Application in the McFarlane case

[154] There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision. In *McFarlane,* there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage. The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life. She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all. The fact that she might have wanted to do this is neither here nor there. Most breadwinners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours.

> [155] She does, of course, have to consider what she will do in the future. The children will eventually take up much less of her time and energy. She could either return to work as a solicitor or retrain for other satisfying and gainful activity. She cannot, therefore rely upon the present level of provision for the rest of her life. But the Court of Appeal was wrong to set a limit to it on the basis that she would save the whole surplus above her requirements with a view to providing for herself once the time limit was up. They were wrong to place the burden upon her of justifying continuing payments, especially now that they have set a high threshold for doing so: see *Fleming v Fleming* [2003] EWCA Civ 1841; [2004] 1 FLR 667. On any view she will continue to be entitled to some continuing compensation, even if the needs generated by the relationship diminish or eventually vanish (although that cannot be guaranteed, despite her best endeavours, given the length of time she has been out of the labour market and the difficulties of repairing her pension position). The burden should be upon the husband to justify a reduction. At that stage, the court will again have to consider whether a clean break is practicable, as it could be if the husband has generated enough capital to make it realistic. "

95. I was referred to passages from two decisions of the Court of Appeal, all from judgments of the President:

i) *Charman v Charman* (No 4) [2007] 1 FLR 1246

> "[73] Then arises a difficult question: how does the court resolve any irreconcilable conflict between the results suggested by one principle and that suggested by another? Often conflict can be reconciled by recourse to an order for periodical payments: as for example in *McFarlane,* per Baroness Hale at [154]. Ultimately, however, in cases in which it is a reconcilable, the criterion of fairness must supply the answer. ---------- At least in applying the needs principle the court will have focused upon the needs of both parties; and analogous focus on the respondent is not present in the compensation principle and we leave for another occasion the proper treatment of irreconcilable conflict between that principle and one of the others. "

ii) *VB v JP* [2008] 1 FLR 742

> "[59] In my view there emerged from the post - *Miller* and *McFarlane* authorities to which I have been referred the following propositions in elaboration of, but consistent with, the House of Lords decision. First, it is at the exit of the marriage and in relation to the division / redistribution of the family assets that the consideration of the element of compensation immediately arises, but as a feature of the

concept of fairness rather than as a head of claim in its own right. Second, on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing ") unless and to the extent that consideration of her needs, or compensation for relationship generated disadvantage so require. A clean break is to be encouraged wherever possible. Third, in big-money cases, where the matrimonial assets are sufficient for a clean break to be achieved, a wife with ordinary career prospects is likely to have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided. Where, however, that is not the case and the parties accept or the court decides that fairness can only be achieved by an award of continuing periodical payments in respect of a wife's maintenance, then the matter of compensation in respect of relationship generated disadvantage requires consideration, again as a strand or element of fairness. Fourth, in cases other than big-money cases where a continuing award of periodic payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide for her own needs following the end of the matrimonial partnership. These considerations are of course inherent in s. 25(a)(b)(d) and (f) of the 1973 Act.

[60] This is not a big-money case; that is to say a case where the matrimonial assets are amply sufficient to provide for the needs of the parties and the area of debate relates solely to the fair and proper proportion of their distribution as between the breadwinner and the homemaker and carer. Nor is it a case like *McFarlane* where, although the assets were insufficient to make a clean break possible, not only was the husband's annual income far in excess of the financial needs of both the parties even after separation, but the economic disadvantage generated by the wife's abandonment of an established career as highly paid as that of her husband went well beyond the compensation afforded by a generous interpretation of needs: see *McFarlane* paras 90 and 92. It was of course those features which led the court to describe Mrs McFarlane as a "paradigm case" for an award of compensation for future economic disparity. (Per Lord Nicholls at para [93] and Lord Hope at para [117])"

96. Also in *VB v JP* at paragraphs [42] and [43], the President cites passages from the speech of Lord Nicholls and my decision in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 at para [106], and then at paragraph [62] he confirms that on an application to vary that the court is again concerned to apply the statute and that the principles to be applied in arriving at a fair result, as described in *Miller* and *McFarlane*, apply on an application to vary a joint lives periodical payments order.

97. *Fleming v Fleming* [2004] 1 FLR 667 is referred to by Baroness Hale (see para [155]). In paragraphs 13 and 14 of his judgment in that case Thorpe LJ referred to the power to extend obligations to pay periodical payments beyond a period set for them (as was done by the Court of Appeal in this case, without making an order under s. 28(1A) MCA, that the wife may not apply for an extension of the term) as something that required exceptional justification, and said that there was an enhanced obligation to bring the financial relationship between the parties to an end when a term for payment had been set by the original order.

Some comments.

98. Although this case is described by the House of Lords as the paradigm case for the application of the compensation principle, for understandable reasons their Lordships give little or no guidance as to how that principle is to be applied to it on the figures and in the circumstances that exist on a application to vary the order for periodical payments. Their Lordships confirmed the amount of the periodical payments. But, as the quantum of that award was not the subject of an appeal (as is for example shown by para [97] of the speech of Lord Nicholls when he is referring to the order made by the District Judge) I agree with counsel for the wife that that confirmation provides little assistance.

99. It can be said that the way in which the issues have been returned to the court for its consideration, and the issues that are before me, are not in line with what the House of Lords seems to have envisaged, namely that the court would now be considering an application by the husband for a reduction in the periodical payments. But the comments on which this assertion is based are not linked to either the sum awarded (with or without annual adjustments), or the percentage of the husband's income the award represented when the District Judge made her order. Further, the House of Lords and the Court of Appeal do not set out any reasoning that seeks to quantify or explain, by reference to what she would have received and saved, and what the husband would have, after the payment for 5 years of periodical payments of £250,000 a year, why:

    i) in the case of the Court of Appeal, the wife would have been likely to have received in total a fair award, or

    ii) in the case of the House of Lords, the wife may well not have received in total a fair award.

100. Also an aspect of the reasoning of the House of Lords was to move away from an approach that placed on the wife any need to justify a continuation of the award of periodical payments in her favour.

101. Further, and in any event, indications as to how the reconsideration of the joint lives order is likely to be returned to court cannot direct the result of any such application. Of course that does not mean that the reasoning behind the original award is not relevant.

102. In my judgment, as submitted on behalf of the wife the determination of this application is governed by an application of the relevant provisions of the statute on the basis of the principled approach set out by the House of Lords and thus their reasoning. It follows that, although this does not seem to be foreshadowed by the House of Lords, the wife's claim for a substantial increase in periodical payments and/or a clean break by reference to such an increase or potential increase, are points that are open to her.

103. The power to include within an award of periodical payments sums to satisfy a fair award by an application of the sharing and compensation principles causes some tension with the period for which periodical payments can continue to be paid (s.28 MCA). In my view this is a pointer in favour of making an award that avoids a payee not receiving in full his or her fair award because of this limitation on the period of payment of periodical payments by, for example, ordering a clean break, or utilising to the full the flexibility given by the statute (e.g. by making an order for a lump sum by instalments or for a series of lump sums). It also adds support to the inclusion in any award of periodical payments of a sum sufficient to enable appropriate insurance to be taken out by the payee.

104. Notwithstanding the cross reference to it by Baroness Hale (see para [155]) in my view the test or approach described and applied in *Fleming* does not survive the confirmation and points referred to in paragraph 97 hereof. Rather, as I indicated in *Cornick (No 3)* (see para [121]), in my view the reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case, and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation. The reasoning that underlies the earlier order is also likely to inform the resolution of the tension between (a) the limitations on the jurisdiction to vary a lump sum order, and (b) the ability to include within a varied periodical payments order provision based on the sharing and compensation principles and the jurisdiction (expressed in quite general terms after the trigger in s. 31(1) is satisfied) to make a lump sum order under s. 31(7B)(a).

105. Looking to the future I imagine that there will be cases that develop and clarify the approach to be taken on an application to vary and the nature and extent of orders that can then be made and the reasoning behind them.

106. For reasons that appear later it is not necessary for me to discuss the approach to be taken to ordering a lump sum on an application to vary. In my view understandably in the circumstances it was not argued that there should be an order for a lump sum payable by instalments or for a series of lump sums.

107. In my view looking to the future of this case there are relevant differences between the effects of:

i) a continuing joint lives order for periodical payments,

ii) an order that provides for periodical payments for a term, and

iii) an order that provides for periodic payments for a term and in addition that the wife is not entitled to make a further application for a periodical payments order or an extension of that term.

108. In the third case, absent a successful appeal, in my view that is a deferred clean break.

109. In the second case my view is that the *Fleming* test or approach does not survive but the reasoning behind the term imposed on the variation is relevant and could be a magnetic or determinative factor. If that view is wrong and the *Fleming* test or approach does survive the wife would have to overcome the hurdle it sets.

110. In the first case the position would be as it is now and again in my view the reasoning behind the varied order both on principle and on amount would be a relevant factor on future applications.

The principles.

111. These are expressions of the rationale to be applied to achieve the objective of a fair result. Fairness is the overarching objective or principle and the principles of need, compensation and sharing identify bases of reasoning to be applied to achieve it.

112. It follows that they should not be given a free standing life, interpretation or application as if they were themselves part of the statute rather than descriptions of the approach to the reasoning to be used in applying the statute to achieve a fair result (see for example *C v C* [2009] 1 FLR 8 at pars [31] to [36]).

113. So, an approach that isolates the principle of compensation and seeks to treat it in an equivalent manner to a damages claim is incorrect. This means that an approach that seeks to quantify what the wife would have earned and be earning and provides that the husband pays her that in compensation would be wrong. This goes back to the general point I have made earlier that it is the consequences of the choices that have been made that are of central importance and the focus should be on a fair distribution and allocation of the relevant resources they have produced. In my view this flows from, for example, paras [15], [32], [138], [140] and [144] in *Miller* and *McFarlane* and the emphasis on the overriding aim of achieving fairness highlighted for example in *Charman* paras [73] and *VB v JP* para [59].

114. It follows that in my judgment that although, as is pointed out in *Charman* para [73], the focus on the position of the paying party when applying the compensation principle will not be analogous to the focus on the needs of both parties this does not mean that the limits imposed by the nature and amount of the assets available are ignored or that a result that is fair to both sides is not the objective and overarching principle.

115. It is clear that there is overlap between the application of the three principles. For example both Lord Nicholls and Baroness Hale make it clear that the needs generated by the choices (imposed or made voluntarily) by the parties to the marriage generate needs and/or prospective economic disparities that provide a rationale for adjusting their resources in *compensation*, and that compensation and needs often overlap (see

paras [13], [15], [91] and [138]). These passages show that compensation is related to, or founded on, disadvantages or disparities arising from the way the parties conducted their marriage.

116. Albeit that there is a common theme in the authorities that Mrs McFarlane's relationship generated needs do not provide a complete rationale for all of her award it seems to me that it might be said that it could do so on the basis that the choice made that she should give up work creates a relationship generated need (generously interpreted) for her to receive an award that reflects the economic consequences of that choice. But this argument probably only reinforces that point that relationship generated needs and compensation flowing from the choices made by the parties are closely related. To my mind these points are reflected in para [59] of *VB* v *JP*, as is the point that compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision.

117. Baroness Hale indicates at para [154] that the principles of sharing and compensation can overlap, or lead to the same result, when a fair award is made in respect of a husband's earning capacity (as a family asset) having regard to the choice made by the parties that the wife should give up work. In my view this explanation makes it clear, as indeed does para [144] itself (by the use of the words "in general") that there can be sharing in respect of products of the marital partnership after it has ended. I acknowledge that, as pointed in *Charman* para [67], this is a point of potential complexity and potential confusion but it again shows at least the potential for overlap between the principles and their application and the folly of a formulaic approach.

118. I therefore do not agree with the submission made on behalf of the wife (said to be foreshadowed in *Charman* para [73]) that the correct approach is to consider each principle separately and then to adopt as the final result the highest of the three results. In my judgment that approach incorrectly:

    i) assumes that each principle can be applied separately with enough accuracy to identify different possible results,

    ii) ignores the overlap between the principles both as expressions of principle and in their application,

    iii) fails to have proper regard to the need to arrive at a result that is overall a fair one in all the circumstances, and

    iv) takes too formulaic an approach.

    In particular it seems to me that an approach that seeks to separate out the compensation principle, and on that basis quantify the amount of the award to compensates for economic disparity, is unlikely to be correct because of (a) the difficulties in quantification (see again *VB v JP* para [59] and my earlier comments on quantification of the loss of a chance), and (b) the high potential such an award being based on the other principles and thus the need to ask whether there should be any "add on" by reference to the compensation principle.

119. I hasten to add that in some cases, as is foreshadowed by *Charman* para [73], the fair result will be the higher of the application of the need and sharing principles. It is

easy to think of examples when this would be so. But, for example, in cases where there is a good reason for a departure from equality within the application of the sharing principle (see *Charman* paras [65] and [66]) it seems to me that an application of the need principle (generously interpreted) and/or an overview will inform the application of both principles and thus, for example, the amount and fairness of any departure from equality.

120. The comments and discussion in *Miller* and *McFarlane* that focus on the "compensation", and identify this case a paradigm case for compensation, focus on *economic* disparity or disadvantage resulting from the wife giving up her well paid career.

121. In another case this could raise the problem as to whether, and if so, why after a long marriage a wife who reluctantly, or willingly, gave up a career that she loved, but which was never going to be well remunerated and to which she realistically cannot return, should receive less than she would have done if the career she had so given up was one in which she would have been likely to have received substantial remuneration. Whatever the income or earning capacity that is given up, the choice and the support given to the family, and the husband's career, success and earning capacity would effectively be the same. Also if a wife can return to being a high earner could reduce her award below that of a wife who does not. The answers may lie in the overlap of the principles. Here however the compensation principle is fully in play and there is no need to consider the position when it is not.

122. How the product of an earning resource is to be shared in the future gives rise to difficult questions (see again *Charman* para [67] and *H v H*). Where the award (however categorised or explained) will be funded by the husband's earnings after the end of the marriage (derived from his earning capacity) and, as here, the "compensation principle" is fully in play, that principle provides an additional and helpful basis of reasoning for a spouse to continue to share in the earning resource of the other spouse after the end of the marriage. But as it will inevitably result in the wife receiving payments from the husband's income after the end of the marriage partnership and thus in her sharing that income, and as I have already indicated, in my judgment an attempt to numerically attribute parts of the award to "compensation" and other parts to "sharing" would be artificial and unnecessary.

123. Rather what is important is to remember when assessing the award to be made that the wife gave up her well paid career. To my mind this provides a solid foundation for an award that provides that by reference to what they both (but in particular she) gave up financially for their long term financial security (whether they were together or apart) the wife is to continue to share in the product of the husband's success and thus the main (or only) source of income that they would rely on to fund their lifestyle (together or apart) before and after retirement.

124. However as appears later need can be separated out and quantified albeit that need (generously interpreted) can contain elements for saving and compensation.

My approach

125. Building blocks in the arguments of both parties were:

i) the concept of the husband's surplus income after deduction of the payments for the children and the day to day living expenses of the parties, and then

ii) a consideration of what an application of that surplus (together with other assets and the wife's income) would be likely to produce for the wife for the rest of her life.

126. I agree with this approach and the point that both sides adopted it is an indication of its fairness even though they reached very different results.

127. In my view the amount and structure of the award is guided by:

i) an application primarily of the need principle, to identify the surplus income over and above need by reference to the standard of living during the marriage and the expectations of the parties concerning it, and

ii) an application of all three principles (having regard to the potential for overlap between them) to determine how that surplus should be applied as between the parties.

128. At stage (ii), I acknowledge that the approach of the House of Lords dictates that because this case is the paradigm case for an award based on compensation any relationship generated need of the wife for a comfortable old age, by reference to the standard of living enjoyed during the marriage should not be the sole justification for the award. But, as I have mentioned the application of the compensation principle must result in the wife receiving from (and thus sharing with) the husband part of his income earned after the end of the marriage (unless she was to be paid a lump sum and then she would benefit indirectly from his future earnings because they would be servicing the borrowing).

The surplus

The wife

129. Both parties have prepared budgets and identified the bases on which they have done so. The husband has carried out an analysis of the wife's budget and expenditure.

130. It is apparent from the fact that in 2008 she was able to repay about £105,000 of the mortgage debt that the present level of payments by the husband for her and the children is enabling her to make savings of that amount. That rate of saving puts her spend at about £145,000. Her budget in her Form E dated June 2007, which she divides between herself and the children, puts her element at £155,326 (an increase of £29,114 over her 2002 Form E). That excludes repayments and interest on the mortgage. It includes a figure of £31,021 for a full time housekeeper on her return to work plus £1,000 for babysitting and she attributed £7,000 of this to the children (£5,000 to the youngest). She recognises in her affidavit that she let her full time help go in 2008 and now spends in average £1,500 a month on regular help and babysitting (£18,000 a year). On the same apportionments this reduces her budget by £14,000 and thus to about £141,000. The wife says that she would like full time help for the next few years at least in the school and university holidays. This is understandable

but it seems to me that a full time housekeeper would be something of a luxury, albeit that it would promote the ability of the wife to focus on her work.

131. The husband also makes the valid point that in the year to 31 January 2009 the wife paid legal and IFA fees of about £48,000, which would otherwise have been available for saving or reducing the mortgage debt.

132. Her Form E budget also includes a sum of about £17,000 to provide critical illness cover for the husband until August 2019, this has now increased to about £19,000. The husband points out that his firm provide such cover in generous terms (the first two years at 100% of profit share and then in reducing but still substantial amounts). The wife's response is that she does not want to have to deal with the firm in such circumstances and wants the security of this insurance. I also note that the House of Lords recognised that her periodical payments should cover life (not critical illness) insurance premiums (see para [158]). In my view this understandable view of the wife on critical illness cover is again something of a luxury whereas the premiums for term life cover (I was told at £6,000 a year – but I have not found this listed separately) are not.

133. Points can be made that the wife's standard of living funded by the payments from the husband for her and the children has exceeded that enjoyed during the marriage even though that was comfortable (for its last year the husband calculates the spend at £138,000 excluding school fees) and have therefore reduced the amount that could have been saved each year. His analysis also shows that for the year to 31 May 2007 she spent £195,565 on herself and the children and the average for the years December 2002 to May 2007 was £178,030. These figures were not challenged. The total of the payments made by him for those years for the wife and children was £310,000. In my view correctly the husband did not pursue these points to reduce the wife's lifestyle spend as the basis of a calculation of the surplus. To my mind their main relevance is to demonstrate that, as I find, that over the years since the marriage:

    i) the wife has been able to provide generous support to the children (e.g. holidays and leisure activities) without hitting the budget she now puts forward for them all, and

    ii) the wife has had the ability to make some savings in addition to the savings she has applied in reducing her mortgage debt without reducing her standard of living below that enjoyed during the marriage.

134. In my view the fair figure to take for lifestyle spend, and thus to calculate the surplus specifically allocated for saving, is £150,000 per year for the wife.

135. In round terms, by reference to the lifestyle enjoyed during the marriage, the expectations at that time, the husbands past, present and future income and the need and plans (during and after the marriage) to save to provide for old age, it provides the wife with the generous income referred to by Baroness Hale to fund her lifestyle and that of the children (when the payments for them are added). To my mind it gives the wife an appropriate freedom and ability to make choices as to her lifestyle. For example, in my judgment:

i) she could make choices that I have described as something of a luxury and the point made as to the costs incurred in the year to 31 January 2009 reinforces this point,

ii) it covers the point that some of the wear and tear and repairs attributed to the children may have to be spent anyway, but also

iii) it includes an ability to make some savings by reference to the standard of living during the marriage.

The children of the marriage

136. The wife seeks an increase to £30,000 per year per child until they cease tertiary education, or attain 23, whichever shall be the sooner with the qualification for S mentioned in the next paragraph.

137. The husband accepted during the hearing that if S's choice of degree and future employment meant that she took a Masters, or its equivalent, for one year that the payments should continue to cover that period (if that takes her beyond the age of 23). I agree that the order as drafted should make provision for that. Further, in my view, this agreement also means that the order in respect of H should cover a gap year on leaving school, if she takes one, and up to 4 years at University (if that is what she does to complete an MA or its equivalent) and thus a maximum of 5 years from leaving school. Also as I indicated when dealing with issues relating to the terms of this judgment and the order, in my judgment the underlying logic of these provisions for the girls supports the view, and I direct, that in respect of J the order should continue until the completion of a Masters degree (or an equivalent) if he decides to take one after completing his first degree next year (when he will be 21) or his 23rd birthday whichever is the earlier (at present he is doing a three year degree course and may or may not embark on a further degree and it was not argued that his award should extend beyond the age of 23).

138. The husband offers (a) £24,200 which is the original annual sum of £20,000 plus RPI uplifts based on the November 2008 RPI, and RPI uplifts in April each year using the October to November RPI calculation, (b) to be responsible in addition for University tuition fees (probably by repaying the loans to the student to cover these), and (c) a continuation of the current order in other respects.

139. I agree with the wife's counsel that sometimes insufficient attention is paid to the amount of the payments for the children. Here the wife's budget is helpfully and appropriately detailed.

140. In my view that budget together with the husband's analyses of the past spending on the children by the wife and herself from his periodical payments (on which it is based) indicates that her claim is over generous by reference to the lifestyle and expectations of the parties during the marriage and their approach to bringing up and supporting the children. For example the sum for holidays of £27,000 for the three children is to my mind very high and those for clothes are high. Also her budget includes a sum for University tuition costs which the husband agrees to pay separately. Adjustments for these items would effectively cover the difference

between the parties. This also treats the school extras that are included as expenditure that is not covered by the order that the husband is to pay the school fees.

141. In my judgment the correct figure is £25,000 per year per child. (I add, for the avoidance of doubt that in my view this would cover the running costs of a car for the relevant child.) Unlike the change in respect of the wife I have concluded that this change should not be back dated. My main reasons for this are that (a) because, as I have indicated in the preceding paragraph, in my view parts of the wife's expenditure on the children (and her appropriately prepared budget by reference to that) have been or are over generous and I am therefore not satisfied that the payments made to date for the children have not covered all their reasonable costs over their years of payment (and indeed when considered with those to the wife have resulted in her being able to make significant savings as intended from her award), (b) my figure for the children is based on the present and the future, (c) the overall basis of my award is to look at savings that the wife can make from the payments to her from her present position (which reflects the savings she has made in the past based on the totality of the payments made by the husband), and (d) the back dating of her award provides her with a sum which would cover any shortfall in respect of the payments for the children and which she can apply in the manner I indicate later.

142. As has always been the case the husband can, if he so wishes, pay further sums to the children from time to time. I accept that it is prudent to seek to avoid tension arising from such top ups or gifts, but in my view an award of £25,000 per year per child should avoid this because it enables the wife to continue to be generous in what she provides.

143. I agree that these annual payments should be increased by the RPI.

144. The parties also reached effective agreement on what parts of the periodical payments should be paid directly to the children, namely the payments in respect of their accommodation and maintenance costs away from home. I agree that this is a sensible solution. In my view in any remaining area of dispute relating to direct payments the welfare of the children is likely to be best promoted by the payments being made to the wife for them. She provides them with their home and I agree with her that it is important that she should not have to ask them for money from sums paid by their father.

The husband

145. His budget on lifestyle spend (living expenditure) for himself, the second wife and their son is £181,512 including the cost of a full time nanny at £35,000, which he accepts will not be paid when his second wife gives up work.

146. In the comparison between the wife and the husband for the purpose of calculating the surplus in my view it is not unreasonable to attribute the cost of the nanny to the second wife from her earnings. There was no realistic prospect that husband would give up or reduce his work. Albeit that they regard their partnership as one in which they share capital and income equally it seems to me that for present purposes the nanny is fairly to be regarded as a necessary cost from her income of the decision that she should continue to work full time. In any event, for present purposes the whole of the cost should not be borne by the husband as it enables the wife to work full time

and the two of them to benefit from her income. As to that in his Form E the husband has attributed only half of the cost of the nanny to himself as he has divided the living expenditure of £181,512 (which includes that cost, the living costs of A and monthly payments to a fund for him – (£1,200 a year)) 50/50 between himself and his second wife.

147. No equivalent analysis of the husband's expenditure was carried out. But his analysis of the wife's expenditure supports the view that by reference to equivalent factors a budget of £150,000 a year for him would produce the same generous approach to his lifestyle spend. So it would enable him to make some savings, and to continue to make the payments he does to his parents. Generally it seems to me that for this purpose (namely deductions from his income to identify a surplus available to them both for saving) it would not be fair to attribute a lower figure than that included for the wife because for example his lifestyle spend is contributed to by his second wife.

148. In his Form E he attributed half of the living expenditure of £181,512 covering himself, his second wife and their son A to his second wife. That budget does not include school fees for A but does include nursery fees and classes (£4,500) and a nanny (£35,412) and it includes A's general living costs within the household expenses. My figure, for this purpose, attributes much more than half of the budgeted total to him. Indeed £150,000 is only about £10,000 more than his budget for living expenditure less the cost of the nanny and his son's nursery fees. In 2009/10 these fees will be replaced by school fees of £11,625 (and as he gets older other and higher school fees). As appears under the next heading I have included a further sum for A and other children of the husband's second marriage for the purpose of calculating the surplus.

149. This sum for the children of the second marriage adds to the generosity of the provision for his lifestyle spend.

The child / children of the second marriage

150. In his approach to identifying the surplus for future years the husband includes provision for this that is considerably higher than that included in his Form E, which relates to current expenditure.

151. On my sum for periodical payments for the children of the first marriage his provision is (a) £25,000 a year equivalent to the periodical payments to the children of the marriage, (b) £50,000 a year to fund future such payments after he retires, (c) £13,000 per year for school fees (equivalent to the prep school rate) and (d) £33,000 per year (equivalent to twice the pubic school rate) to fund school fees after he retires. A total provision of £121,000 a year.

152. Plainly a sensible part of the planning of the husband and his second wife for the future includes provision for these costs as well as their own living expenses. Also the provision of a good education for their children was fundamental to the thinking of the parties and remains fundamental to the husband's thinking in respect of the child (and any more children) of his second marriage.

153. The underlying approach of the husband and his second wife is that she will also contribute equally from their total income for these expenses. Her expected

contribution from high earnings is time limited as is that of the husband. And although their intention is that she will give up work as an accountant first, the decision that his second wife should continue to work means that her income helps (and has helped e.g. in paying off the mortgage on the Salcombe property as part of their retirement planning) in the funding of their future expenses on their family after they retire.

154. In my judgment the provision the husband seeks to make for present purposes is excessive, essentially because:

i) this is a part of the expenditure relating directly to his second marriage,

ii) some of it, as it relates to provisions for retirement should in any event be attributed to the surplus, and

iii) also in any event the amounts are too generous.

155. It is arguable that such points found the view that there should be no additional provision for the children of the husband's second marriage in the calculation of the surplus but I have concluded that for present purposes a sum of £40,000 per year (with RPI increases as with the children of his first marriage) should be included to cover the items referred to in paragraph 151 in respect of both the present child and any further children of his second marriage.

156. This figure is not based on a calculation. At present on my approach the second wife can be said to be funding the costs of the nanny and so whilst that continues the £40,000 can be put aside. When that stops £40,000 is still likely to exceed annual expenditure and therefore part of it could still fund future provision.

The amount of the surplus

157. On the above basis this is the husband's net income less:

i) £150,000 lifestyle spend for the wife,

ii) £150,000 lifestyle spend for the husband,

iii) £75,000 for the children of the marriage (with RPI increases),

iv) £6,290 university tuition fees (this looks to next year when S's school fees will be over and so replaced, and will probably be paid later when repayment of the interest free loan is due),

v) H school fees £14,523

vi) Provision for the child/children of the husband's second marriage £40,000 (with RPI increases),

vii) Miscellaneous £5,000 e.g. health insurance for the children.

This totals £440,813, say £440,000 (which is £140,000 if the £300,000 for the lifestyle spend of the parties is deducted). This figure will change, for example when J's

periodical payments end and by RPI increases. For that and other reasons it is necessarily an approximate or guide figure.

158. It falls to be deducted from the total of the net projected income of the husband and then the projected income of the wife has to be factored into the calculations and estimates.

The application of the surplus

The wife's home

159. It is understandable why the wife would want to keep her home but in my view the plans of the parties during the marriage, carried on by both after it, to reduce the borrowing secured on their homes so that they could be utilised in retirement has the result that it would not be fair to proceed on the basis that she should not have to do this at an appropriate time.

160. The aim that the husband would retire by 55 which he has continued after the marriage is also to my mind a strong pointer to a conclusion that there should be a clean break on or before his retirement.

161. The difficult question is whether this can be achieved fairly.

162. That gives rise to the subsidiary questions whether it would be fair to make an order now:

i) under s. 31(7B)(c) that the wife is not entitled to make any further application for a periodical payments order or to extend the period of payment, or

ii) as the Court of Appeal did, that the periodical payments are to end after a defined period, or

iii) as the House of Lords did, that the periodical payments are for the joint lives of the parties.

163. Absent the payment of a one off or instalment lump sum, or a series of lump sums, the relevant sources of the components of what will make up the funds that will be available to the wife at or before the retirement of the husband are (i) savings from her share of the surplus, (ii) savings from her income if it is not included in the calculation of her share of the surplus, and (iii) capital released on a sale of her home.

164. To my mind the essential ingredient for assessing her award, pursuant to the principled approach I have discussed, is the identification of a result that fairly provides her with lifelong security by reference to the following consequences of the decision the parties made that she should give up work, namely:

i) they would look to the husband's financial success and resources to fund their lifestyle, savings and pension provisions,

ii) they would give up the financial benefits that would have accrued and contributed to the funding of their lifestyle, savings and pension provisions, if the wife had continued her career,

iii) if they had not given up those financial benefits and, as has occurred, the marriage came to an end by divorce the wife would be in the position set out in paragraphs 41 and 44 hereof,

iv) if, as has occurred, the marriage came to an end by divorce the wife would, as has occurred, be severely disadvantaged in returning to work at a high income and in making savings and pension provision for herself,

v) the general points made earlier as to the consequences of their choice of lifestyle (see paragraphs 29 to 45 hereof),

vi) the general points made (and referred to) earlier (see paragraphs 46 to 48 hereof) relating to the husband's earnings and the factors that go to make up his success and high earnings (including the points emphasised by the husband that his role in the firm has changed since the marriage and in any event as time passes the importance of the foundations of knowledge and experience built during the marriage reduces (albeit I add that without them he would not be were he is now), the part played over the last 8 years by his second wife and the part played by his own talents, hard work and luck),

vii) the plans for retirement that the parties had, and thus their approach to increasing the equity in their home with a view to utilising, or being able to utilise, that capital in retirement,

viii) their aims and hopes for their children, and

ix) the comparative positions of the parties that the award produces.

165. As I have explained it is difficult to weigh and quantify these factors numerically. In my view the appropriate way to do so is, as was done by the parties, to look at the results of possible awards.

166. The approach to be taken necessarily has regard to, and is relative to, the available resources and assesses and compares the respective positions of the parties.

167. In the eyes of many the wife could live comfortably for the rest of her life if no further payments were made to her. This view has a resonance with the period for payment of the periodical payments at the level set by the District Judge ordered by the Court of Appeal.

168. But, in my view correctly it was not suggested that the wife should receive nothing more. This was correct because if it was to happen she would not be able to enjoy a lifestyle that is commensurate with the lifestyle she now enjoys, or with the standard of living enjoyed and the expectations of the parties during the marriage as to their lifestyle in the long term.

169. Further it is plain that the success and intentions of the husband makes it possible for him to make further provision for the wife without any hardship, or a change in his work plans. Also, in my view, the conclusions I have reached concerning the approach to be taken to their respective capital bases (namely that they are similar) mean that future divisions and sharing of income is possible without risking a result

that he would be less well provided for in the long term than she would be. To my mind this is so notwithstanding that the back dating of the change that I propose will result in a shift in the asset base because it will in round terms enable the wife to pay off her mortgage and reduce the husband's assets by the same amount (a shift of around £400,000). In this context, as I have mentioned earlier it seems to me that his annuity (notwithstanding its uncertainties) has a significant capital value.

170. Moving on from there in my view the plans and expectations of the parties when deciding that the wife should give up her career point strongly towards the conclusion that the relevant provision should be made for the wife from the husband's earnings on or before his retirement if this is practical and can be fairly done.

171. To my mind the combination of the factors I have identified founds the conclusion that if within that timescale provision can be made that results in the wife having a capital sum, which together with a release of capital from her home, would give her an appropriate income for life and an appropriate mortgage free home, that would be a fair result.

172. That approach involves provision being made from, and thus a sharing of, the product of the resource that the parties agreed would provide for their support whilst the husband continued to work and thereafter. During the marriage the sharing principle points strongly towards an equal division of that product. Further in my view such a division of the surplus it produces, after the end of the marriage is highly likely to set the maximum of an award. And after the end of the marriage there are a number of factors that can found a move away from that which increase in force as time passes. So after making provision for the children, these factors point in favour of a division of the surplus that is unequal.

173. In my view a major focus of the analysis of what is a fair award should be on the result and thus on what is likely be achieved by the making of possible awards. In one sense this works backwards but in my view it is preferable to an approach that seeks to devise a formula and then work forwards.

174. As I have proved to myself in writing this judgment, it is easy to do a range of calculations that by reference to the assumptions used provide indications of the result and fairness of an award. They can also provide a mathematical or formulaic analysis. But to my mind the uncertainty of the underlying assumptions means that in many respects such an analysis is artificial.

175. The variables and uncertainties in any prediction of the position in the next five to six years mean that I do not feel able to predict the level of savings and overall provision that an award would be likely to provide with sufficient accuracy or certainty to make an order based thereon that the wife is not entitled to make a further application for a further periodical payments order or an extension of the period of their payment.

176. But in my view the prospects that the award I propose which is based on further periodical payments from (and thus a sharing of) the husband's income (and thus the resource the parties chose to rely on) of achieving a fair result by 31 May 2015 are high enough for me to order that the periodical payments are to end on that date.

177. What follows is an explanation of the thinking that underlies that conclusion, and my consideration of whether it is likely that a fair result can be achieved at or before the husband's retirement.

178. In my view a fair income in retirement for the wife has to be judged by reference to the lifestyle chosen by the parties during their marriage, and thus its benefits and sacrifices and the product of the husband's career which as a result of the choices made represents the main source of finance. The lifestyle spend used to identify the surplus available for making provision is a helpful guide as to that appropriate level of income. As the reasoning relating to the lifestyle spend shows the sum chosen of £150,000 allows for the wife to live at her present standard, be generous and make some savings.

179. Duxbury provides a guide. The Duxbury sums to provide the incomes set out below are as follows:

Income	£150,000	£125,000	£100,000
Duxbury funds in millions			
Now	£3.492	£2.862	£2.235
55	£3.172	£2.599	£2.029
60	£2.810	£2.3	£1.795

180. The wife's plan is to continue working until she is 60 which would supplement her income for those 5 years. By that means it is likely that she could delay any need to sell her home, or not draw so much income from her savings. But she is not likely to build up any significant pension.

181. In my view it is fair to take this further 5 years of work by the wife into account although the husband proposes to retire at 55. This is because (a) this is what the wife understandably and fairly intends to do and therefore it is a factor mentioned in s. 25 MCA, (b) the ending of the major resource chosen by the parties, namely the husband's earnings, when he was in his 50s was the common intention, which he still has, (c) that resource through his success is sufficient to ensure that both of them have long term financial security to enable the husband to carry out his intentions as to and after retirement His earnings after he retires are also a factor mentioned in s. 25 MCA and if through his choice they do not match those of the wife he correctly does not seek to rely on this now, and it is unlikely that he ever could rely on it.

182. In broad terms it seems to me that if the wife continues to reduce the mortgage to zero a capital release of about 25% of the net proceeds of her home at a time of her choosing would be a fair and reasonable contribution to her long term support and maintenance. This correlates to, but is not only based on, the value of the homes bought by them both after the marriage (see paragraph 74 hereof). Rather in my view it reflects a fair and appropriate downsizing.

183. Estimates of the husband's income are affected by similar factors to those which influence the returns on savings that the wife would be able to make.

184. The low end of the husband's estimate of his net income as a partner in Deloitte still represents a high income and thus a successful career. At that level of income the choice made by the parties to look only to his earnings has resulted in a resource that can provide them both with long term financial security.

185. A percentage approach to his income provides a way in which the product of his earning capacity can be shared that takes account of changes in it and departures from an equal sharing of that income.

186. Taking the husband's projected income at:

i) at £800,000 before the announced tax change to a top rate of 50% (which is at the lower end of the husband's bracket based on the pre budget announcement of a 45% top rate) the surplus on my approach would be £360,000. If they shared that equally the wife would receive £150,000 + £180,000 = £330,000 or 41.25% of a net income of £800,000, and he would receive the same, and

ii) at £750,000 to take account of the 50% top tax rate (which is just above the mid point of his bracket applying that rate), the surplus on my approach would be £310,000. If they shared that surplus equally the wife would receive £150,000 + £155,000 = £305,000 or 40.66% of a net income of £750,000, and he would receive the same.

But as time passes it is likely that he would get more than the wife because the deductions from his income to identify the surplus are likely to reduce. An approach using a percentage of 41.25% or 40.66% carries with it an inference of accuracy that is artificial and therefore I take 40%.

187. If she was to receive 20% of the balance of his net income up to a defined figure she would receive an additional £20,000 per annum for every additional £100,000. If she was to receive 10% thereafter she would get an extra £10,000 for every £100,000.

188. I have set the percentage levels by reference to the husband's estimate for the future taking account of the announced increase in the top rate of tax and thus his net future income on what is in my view likely to be the tax rate. A net figure based on an estimate represents the product of the income resource chosen by the parties and is thus in my view a sensible and fair starting point for setting sharing bands, albeit that I accept that, if the analysis is only focused on the product of future sharing, the bands could be based on a figure that was between the competing estimates or indeed aspirational (because whatever the income it would be shared on a percentage basis). But, as I have indicated, the husband's estimate is a high income that would represent the product of a successful career in his field and in my view that, and the points made in paragraphs 184 and 185 hereof, are factors in favour of choosing it as a figure for setting a change in the percentage share. The tax rate for profits earned up to the year to 31 May 2009, was (is) lower than those used in that estimate. But for consistency I have used the lower estimate of his future net income of £750,000 to set the 40% share and then up to £1 million (which is more than his present net earnings at the

new tax rates which will apply to profits earned from 1 June 2009) for the 20% share and 10% above that.

189. A standard, and in my view appropriate, order would be to back date any variation to the date of the application, 25 June 2007. Albeit that the wife's claim was not particularised until some time after the application was made the litigation and the stances taken in it demonstrate that it is unlikely the particularisation would have led to agreement that was equivalent to my award, but if it had done so that supports the back dating. On that approach the variation would cover the 11 months to 31 May 2008 and if the varied rate is based on the net income to 31 May 2007, it would be based on an annual net income of £982,664.

190. Applying the following percentages to a net income of £982,664 by reference (40% up to £750,000, 20% up to £1 million and 10% thereafter) the wife would be paid £346,532 a year, and thus £28,877 a month. Her present monthly payments are £20,833. The increase over 11 months would therefore be approximately £88,484. If her net income is added (£22,000 net at present) she would be in a position to pay about £110,000 off the outstanding mortgage debt.

191. For the year 31 May 2008/2009 based on a net income of £1.1 million to 31 May 2008 the wife would on those percentages receive about £110,000 more than at present and with her income would have about £132,000 that she could apply in discharging the balance of the mortgage (now £224,000) and to make some savings (about £20,000).

192. For the next six years 2009/2010, 2010/2011, 2011/2012, 2012/13, 2013/14 the year in which the husband is 55 in September (and the wife is 55 in November), and 2014/15 using the net earnings to 31 May at the beginning of each of those years. On what I have concluded is a cautious estimate of the husband having a net income of £750,000 the wife with her income, should be able to make savings of around £170,000 to £190,000 and thus between £1.02 and £1.14 million without any interest and capital growth. This is based on her net earnings being between £20,000 and £40,000 (see paragraph 70 hereof) and makes no allowance for increases in the lifestyle spend by reference to the RPI or any other method.

193. On the estimate of the husband's net income that she advances on the new tax rates, £917,000 – see paragraph 61 above (which apply to the last 5 years, but not the year 2009/2010) that would become savings of around £200,000 to £220,000 a year and thus between £1.2 and £1.32 million without any interest or capital growth.

194. This approach is based on the earnings of the husband up to 31 May 2014 by basing payments on the profit share for the previous year. It leaves out of account his earnings from 31 May 2014 to 29 September 2014 if he retires on his 55th birthday but continues the periodical payments for 7 months after his 55th birthday. Part of the husband's profit share is paid monthly in advance (£25,000 a month in the year to 31 May 2008) and the balance is paid quarterly in arrear. In my view this is a cash flow or timing point and does not render the calculation of the payments to be made to the wife based on the profit share for the previous year unfair or inappropriate because it shares profits earned.

195. These figures do not attempt to take account of compound interest or capital growth on the sums available to the wife for saving. The parties did not attempt this either. The uncertainties this would introduce are considerable. Other similar uncertainties relate to the movement in house prices. An uncertainty with less impact is the level of the wife's income.

196. Looking to the future, in my view:

i) if before 31 May 2015 it can be established that from the funds built up, a 25% release of capital from her home and her own income the wife will receive £150,000 (in to-day's terms) for her lifetime then there would be a strong pointer in favour of ending the periodical payments,

ii) if at the end of the period those resources produce an income of between £120,000 and £150,000 (in to-day's terms) that would be a strong pointer in favour of no extension being ordered, and

iii) if at the end of the period those resources do not produce an income of £120,000 (in to-day's terms) the reasons for this would have to be considered and in particular whether this was because of the level of the husband's income.

I identify these pointers to further inform those who have to consider my thinking. I accept that the circumstances in the future, and the reasons for the result produced by my award, may found the conclusion that the income available for the wife for her lifetime should be outside the bracket I have used.

197. In my view the prospects of reaching positions (i) or (ii) and in any event a fair result if the percentage approach described above is taken are high enough to warrant putting a time limit of 31 May 2015 on the order. This is a return to the approach of the Court of Appeal supported by reasoning as to why I have concluded that it is appropriate to put that time limit on the order.

198. It is apparent that I have chosen the income bracket in those pointers, and the Duxbury sums, by reference the lifestyle spend used to assess the surplus because in my view it provides a helpful benchmark. Naturally I acknowledge that the bracket is based on income resources and capital that are lower than would have been available if the wife had continued her career and represent a retirement income and capital base for them both that is less than they would have had if they had both continued their careers. But the decision they made inevitably had these effects. Also it had the effect that if their marriage ended part of the resource they chose to rely on would not produce all its fruit during the marriage.

199. Often a person's total pension income is less than that earned in the years leading up to retirement and his or her income needs reduce as they get older. To my mind, together with an appropriate mortgage free home on trading down;

i) the continuation of an income for life in to-day's terms equal to a generous lifestyle spend identifies a stopping point before 31 May 2015, and

ii) a continuation of such an income with a drop of £30,000 (20%) from that level identifies a good reason for not continuing any financial provision.

Both results have flexibility that could enable the wife to keep her home but still maintain a good standard of living.

200. Returning to the application of the principles I have discussed earlier, factors that underlie a continuation of income at a level which equals or is close to the provision for lifestyle spend, rather than one that factors in a significant drop on retirement, are the financial benefits foregone by the wife as a result of the choice made by her and the husband and the sharing of the product of the resource they chose to rely on produced by the very considerable success of husband.

201. The approach is likely to result in the wife having capital that is lower than the husband's on his retirement on the basis of my approach for present purposes to their capital (and that of the second wife) and a wider divergence will be created if he maintains his present level of earnings. But that level represents a very high level of success that is to a large degree based on his talents and hard work. If his income drops the disparity will be less and this would in my view be a factor in favour of an award which by its result provides less for the wife.

202. In my view the benchmark and bracket I have used meets the wife's needs (generously interpreted) for her lifetime. Also in my judgment, by reference to what she gave up and thus decided should be the main financial resource for the family it sets her income and capital at a fair level when compared with that of the husband.

203. Looking at the position for the husband's side, in my view a "clean break order" at the end of the period set (31 May 2015) would not be unfair to the husband because of the percentage nature of the award. It seems to me that that would protect him against falls in his income as a partner of Deloitte. The award leaves out of account other income that he may have but to cover the risk that the husband does not continue to work full time as a partner the order is to provide that if that occurs the periodical payments are to be either (a) calculated from the total of his actual net income in the relevant year or from such other sum as the court may fix, or (b) at a rate fixed by the court.

204. Further in my view the percentage approach based on his net income as a partner in Deloitte that I have set out:

i) has regard to the factors he advances relating to the high degree of his success that has continued after the marriage and has resulted in him joining the top tier of partners,

ii) has regard to the points that the spade work during the marriage has a continuing effect, and

iii) means that he will be able to make the same or greater savings than the wife up to his retirement against a background that his pension position is better than hers and my view as to the fair attribution of the existing capital assets.

205. I repeat that I have not started with the percentages used above. Rather they are a product of what in my view has a real prospect of creating a fair result looked at from both sides in all the circumstances of this case.

206. Albeit that I have not built in RPI or other increases on the lifestyle spends into the calculation of the available surplus until 31 May 2015, in my view the percentage approach means that it would not be appropriate to provide for increases in the periodical payments to the wife by reference to the RPI or any other index. The order will have to make provision to cover the period between the end of 31 May during which the profit share and thus the income for the previous year ending 31 May is not known.

Overall conclusion

207. The husband is to make:

i) periodical payments for the children at the rate of £25,000 per year for each child from the date of the order for the periods referred to above, and on the basis referred to above as to the parts of them that can be paid directly to the children, (see paragraphs 137, 141, 143 and 144 hereof), and

ii) periodical payments to the wife from 25 June 2007 until 31 May 2015 in an amount per year equal to the total of the following percentages of his net income as a partner in Deloitte for the relevant year, namely 40% up to £750,000, 20% between £750,000 and £1 million and 10% of the balance over £1 million. The change in the yearly rate is to take place annually from midnight 31 May / 1 June each year and from that date is to be based on the net income for the year up to the date of change. Provision is to be included to cover the manner of payment (e.g. monthly as at present unless otherwise agreed) and to provide that if on a date for payment the relevant net income (and therefore the annual rate) is not known, payment at the old rate is to continue with a balancing adjustment when the new rate is known.