



Neutral Citation Number: [2019] EWHC 1838 (Fam)

Case No: 2018/0078

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2019

Before :

MR JUSTICE FRANCIS

Between :

John Thomas O'Dwyer
- and -
Cindy Lea O'Dwyer

Applicant

Respondent

Valentine Le Grice QC (instructed by **Fletcher Day Solicitors**) for the **Applicant**
Nicholas Wilkinson (instructed by **Seymours + Solicitors**) for the **Respondent**

Hearing dates: 19th December 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE FRANCIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Francis :

1. This is my Judgment in respect of an appeal by John O'Dwyer (to whom I shall refer in this Judgment as "the husband") against an order made by His Honour Judge O'Dwyer in the Central Family Court in March 2018 following a draft judgment which was circulated on 19 December 2017.
2. At the hearing below and on appeal before me, the husband was represented by Valentine Le Grice QC and the Respondent Cindy Lea O'Dwyer (to whom I shall refer as "the wife") was represented by Nicholas Wilkinson of counsel. The appeal hearing took place on the 19 December 2018. Tragically, only a few days later, and completely unexpectedly, Mr Le Grice collapsed and died. Much has been said and will be said by others elsewhere but I cannot commence this Judgment without first paying tribute to one of the great, and greatly admired, family lawyers of his generation, and extending our deepest sympathy to the loved ones left behind.

Delay

3. This case has been beset by delay. The original hearing took place on 24, 25 and 26 July 2017. The case overran and so there were two further days on 20 and 21 November 2017. The Judge circulated a draft Judgment on 19 December 2017 and he asked for any suggested amendments to be provided to him by 8 January 2018. Although these amendments were provided, albeit a few weeks late, the Judge has never circulated a perfected Judgment.
4. Mr Wilkinson, for the wife, sent a draft order to Mr Le Grice on the 12 January 2018. After some reminders, Mr Le Grice returned an amended draft order on 6 February 2018. Counsel were unable to resolve the parties' remaining differences and agreed that it would be necessary to have a further hearing. This further hearing took place on 7 March 2018. Mr Le Grice sought permission to appeal on behalf of the husband but this was refused by the Judge. No perfected Judgment was handed down. Mr Le Grice emailed the Judge's clerk enquiring about the final Judgment on 15 March, 20 March and 26 March 2018. On 5 April 2018, Mr Le Grice's clerk hand-delivered a letter for the Judge at the Central Family Court which enquired about a final Judgment, enclosed a further copy of the agreed amendments and repeated an earlier offer to carry out the amendments. No reply was received to that letter.
5. Thus it is that we have neither a final version of the Judgment nor an agreed order, still less a sealed order. For the purposes of this appeal I treat the draft Judgment dated 19 December 2017 as the Judgment and I treat the draft order prepared by counsel as the order under appeal.
6. The failure to produce a sealed order led to considerable difficulties in the husband's solicitors issuing their notice of appeal. Mr Wilkinson, for the wife, contends that the notice of appeal should have been issued within 21 days of the decision, in this instance being either the draft Judgment or the draft order. It is, of course, the case that pursuant to rule 30.4(2)(b) FPR 2010, the husband had 21 days from the date of the Judge's decision to lodge an appellant's notice. Mr Wilkinson initially contended that the imposed time limits should have been adhered to and that, as no application has been made by the husband for permission to vary the time limit for appeals, permission should not be granted. However, I was told by Mr Le Grice, and accept,

that the court office would not issue, and therefore would not date or seal, the husband's notice of appeal without there being in place an order which was under appeal. Accordingly, it seems to me that it would be unfair and prejudicial to the husband to hold the relevant time limits against him in circumstances where those acting for him have done all they reasonably can to progress the application for permission to appeal. Upon hearing Mr Le Grice's explanation in full, the wife did not maintain her objection in this regard. I anticipate that these are extremely unusual circumstances, it being mercifully rare to have a situation where the Judge fails to perfect either his Judgment or his order. In the unlikely event that this should ever happen again then I suggest that, if repeated attempts to persuade the judge to finalise his order fail, the matter is taken up with the office of the President of the Family Division.

7. Baker J (as he then was) considered the notice of appeal on paper and on 8 August 2018 he ordered that the application for permission to appeal against the periodical payments order included in the order of HH Judge O'Dwyer dated 7 March 2018 was to be listed for an oral hearing with the appeal to follow immediately if permission was granted. He listed the appeal for one day, plus half a day's pre-reading. As soon as I saw the papers in this case on 18 December 2018 it was apparent to me that it would be impossible for this case to be heard and a Judgment delivered in one day. I have a bundle containing almost 400 pages as well as a bundle of 19 authorities from Mr Wilkinson and 5 authorities from Mr Le Grice. Further authorities were handed up during the course of the hearing. My options on 19 December 2018 were either (a) to adjourn this case for a proper listing or (b) to hear it but reserve Judgment. Neither of these options was satisfactory but it seemed to me that, given the history of delay referred to above, adjourning it for what would have been very many months would have been contrary to the interests of justice. My delay in delivering this reserved Judgment, whilst advertised clearly to the parties, has been a consequence of a full diary throughout this year to date. Whilst I accept that in this case the time estimate was initially made by Baker J (who disagreed with the longer time estimate suggested by Mr le Grice), there is a general duty on counsel and solicitors to inform the court if it is obvious that the time estimate is incorrect. Failure to do so is likely to result in the case not being heard and this plainly could have substantial costs implications.

The order under appeal

8. Paragraph 21 of the draft order of Judge O'Dwyer provides:

“The respondent shall pay to the applicant maintenance pending suit until the date of decree absolute and afterwards periodical payments. Payment shall be at the rate of £150,000 per annum, payable monthly in advance by standing order. Payment shall start on 1 February 2018, with credit for payments made, and shall end on the 1st to occur of:

- a. the death of either the applicant or the respondent;*
- b. the applicant's remarriage;*
- c. a further order; or*

d. the respondent's 66th birthday on 8 November 2022;

after which the applicant's claims for periodical payments and secured periodical payments shall be dismissed, and it is directed that:

- i. upon the expiry of this term, the applicant shall not be entitled to make any further application in relation to the marriage for an order under the matrimonial causes act 1973 section 23(1)(a) or (b) for periodical payments or secured periodical payments;*
- ii. pursuant to matrimonial causes act 1973 section 28(1A), the applicant may not apply for an order to extend this term;*
- iii. upon the expiry of the term, the applicant shall not be entitled on the respondent's later death to apply for an order under the Inheritance (Provision for Family and Dependants) Act 1975, section 2, provided that the respondent does not die before the order is otherwise terminated and any application shall be subject to the provisions at paragraph 5.e above. For the avoidance of doubt, the applicant may not apply for an order to extend this term."*

9. The husband sought a stay of the periodical payments order. An extant appeal does not, of course, operate as a stay unless the court orders a stay. However, the matter came before me as a paper exercise. The wife is a US citizen living in Texas, with no assets in the UK against which an order for the return of overpaid periodical payments, if made, can be enforced, apart from a modest property in Newcastle under Lyme. In circumstances where the wife had received £870,000 in January 2018, £500,000 in April 2018 and a final lump sum payment of £700,000 shortly thereafter, it was obvious that the wife would have sufficient funds for her own needs between the date of any stay and the date of my Judgment. I ordered that the husband should make the periodical payments into an account in the name of his solicitors, or a joint account between the firms, as he elected, on the basis that the sums are to be held until the outcome of the appeal is known. I understand that the husband has complied with this.
10. On 19 December 2018, when I reserved Judgment, I granted permission to appeal and, if needed, permission to appeal out of time. I indicated to the parties then that, whilst I had not made my decision because I wanted to consider the papers and the authorities with care and with more time than I had been allowed at court, I recognised that the husband's appeal had a real prospect of success.

Relevant factual background

11. The parties were married in March 1988 and have four grown up children. The husband is 62 and the wife is 60. They separated in March 2016. The wife, who is an American citizen, returned to live in the United States.
12. For many years the husband ran a business as a McDonald's franchise. This is now operated partly through a limited company and partly as a sole proprietorship. By the time of the final hearing, with the assistance of expert valuations, the parties agreed

that the business had a gross value of £6.4 million. The parties also agreed that there should be set off against this the sum of £3.89 million in respect of what has been referred to as the “McDonald’s reimaging programme”. As I understand it, this is necessary investment in various capital items. It was also agreed that the business would be subject to a modest CGT charge of £251,000, the husband qualifying for Entrepreneur’s Relief. Thus the **agreed** net value of the business was £2.409 million.

13. Although the business was 90% owned by the husband, the parties sensibly identified that this was a paradigm sharing case, given the length of the marriage and the full contributions that they had each, in their different ways, made. On behalf of the wife, Mr Wilkinson prepared a schedule of assets and liabilities totalling £5,865,478. In addition to the business referred to above, the schedule identified UK properties, US properties and miscellaneous bank accounts. Mr Wilkinson’s schedule asserted that the parties should therefore each exit the marriage with £2,932,739. The judge correctly dealt with these assets in paragraphs 12 to 26 of his draft judgment.
14. At one point before Judge O’Dwyer, Mr Wilkinson had contended on behalf of the wife that she should receive the value of the business when the husband ceased to operate it and sold it. She had contended that the business would be worth a great deal more at that stage. The judge found that fairness can be done to the parties by properly recording the division of the business at this stage and also recording that the value as per the expert report does not reflect the full extent of the income stream which the husband derives from it.
15. Accordingly, Mr Wilkinson’s figures were adopted by the judge (subject to one or two tiny and inconsequential amendments) and the husband has now paid the relevant lump sums to the wife such that the parties each have the figure identified by Mr Wilkinson’s schedule and agreed by the Judge, i.e. a sum just short of £3 million. No one seeks to complain about, still less to appeal, the capital distribution ordered by the Judge.

The order for periodical payments

16. Accordingly, this appeal relates only to the order for periodical payments. Mr Le Grice forcefully asserts on behalf of the husband that, particularly following the decision of the Court of Appeal in *Waggott v Waggott* [2018] 2FLR 406, the sharing of an income stream is unprincipled and that payments should be ordered only to meet needs or, possibly in some very rare cases, compensation. Compensation has (sensibly in my judgment) never been argued in this case. Nevertheless, in paragraph 23(d) of his skeleton argument Mr Wilkinson referred to “relationship generated disadvantage”, a phrase which seems to me to be synonymous with compensation.
17. It is clear that the Judge approached the periodical payments order by reference principally to the sharing principle. In paragraph 41 of his Judgment, he said, “*as a result of the joint enterprise of the parties the reality is that the business has been producing and will produce an income of approaching £1 million per year*”. In paragraph 42 the judge said, “*from that the parties live well. Why after divorce should only Mr O’Dwyer continue to live well upon it when clearly it is the product of matrimonial endeavour?*” Mr Le Grice asserts that in asking this question the judge fell into error. In paragraph 43 of the draft Judgment, the judge said, “*it is clear that the business itself produces these incomes and of course although Mr O’Dwyer*

should have credit for the management of the business to a significant figure [sic] however the ownership of these franchises is much valued asset [sic] for the income stream. I identify that they are matrimonial property. I identify that their value is not only the capital value at this point but also the income that they will produce over the coming years."

18. The sentence , "*I identify that they are matrimonial property*" lies at the heart of this appeal. There has for some years been debate as to whether part of Baroness Hale's speech in *Miller;McFarlane* suggested that an earning capacity could be a matrimonial asset subject to a sharing claim. The preponderance of authority has been significantly against such an outcome. Any remaining doubts as to whether an income stream is an asset which can be shared, save for the purposes of paying for needs or compensation, was clearly dispelled by the judgment of the Court of Appeal in *Waggott*. The Judgment of the court in *Waggott* was handed down on 7 April 2018 and so would not have been before Judge O'Dwyer. In paragraph 121 of *Waggott*, Moylan LJ posed the following question: "*is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?*". The judge answered his question by saying, "*in my view, there are a number of reasons why the clear answer is that it is not*". This answer was clear and unequivocal. Moylan LJ said that: "*any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle.....the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was seeking to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in Jones v Jones*".
19. Moylan LJ went on to say: "*looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Baroness Hale's observation in Miller that, even confined to in general, it can be assumed that the marital partnership does not stay alive the purpose of sharing future resources unless it is justified by need or compensation*".
20. In paragraph 128 of his judgment, Moylan LJ said: "*in my view Miller and the subsequent decisions referred to above, in particular Jones and Scatliffe, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (Charman). An earning capacity is not property and it results in the generation of property after the marriage.*"
21. In paragraph 131, Moylan LJ said: "*in my view it is clear from Miller and Charman alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs.*"
22. Applying the very clear dicta enunciated in *Waggott*, I agree with Mr Le Grice's submission that it is now settled law that income cannot be shared. An award of periodical payments (absent rare compensation cases) must be based on properly

analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted.

23. Mr Wilkinson disagrees with the submission that Judge O'Dwyer's decision cannot be sustained in the light of *Waggott*. In his skeleton argument Mr Wilkinson provided a list of distinctions that could be drawn between the two cases. Whilst he did not seek to rely on each point as a freestanding issue, and argues that they should be taken as a whole, I shall address that list. First, when addressing the question of fairness, he seeks to draw a distinction between the 12 year marriage in that case and the 30 year marriage in this case. I reject that submission as being plainly wrong and inconsistent with the clear analysis of the law by Moylan LJ in *Waggott*. It is not possible to discern from any part of Moylan LJ's clear Judgment that an earning capacity in a long marriage is to be treated differently from one in a short or medium length marriage.
24. Secondly, says Mr Wilkinson, this case is to be distinguished from *Waggott* because the income here is paid out as profit from a family partnership of McDonald's franchises built up over the 30 year marriage, subject to the Judge's finding that the husband should have credit for the management of the business to reflect post-marital endeavour. I also reject this submission, which in reality forms part of the previous point dealt with in the foregoing paragraph. The clear enunciation of the law, and the reasons for it, do not permit the sharing of an income for sharing's sake in the circumstances of the instant case. The court has a statutory duty to secure a clean break if this can be done. This is one of the principal reasons why the parties had the business valued. As at the date of the lump sum payment, the wife received half of the agreed value of the business.
25. Thirdly, Mr Wilkinson contends that the court was concerned with fixed term profits from a family partnership being prepared for sale as opposed to an earning capacity. I agree that it would have been possible for the judge, had he thought it right to do so in the exercise of his discretion, to award the wife a capital sum in respect of her half of the business together with some form of balancing payment in the event that the business sold for a substantially different amount than the agreed value. It will be a rare case when it is appropriate to do this, having regard to the statutory steer towards a clean break. Alternatively, in rare cases the Judge can adjourn the lump sum claims if it is thought appropriate to do so, for example when ascertaining value is extremely difficult. In my judgment the Judge was correct to decide that he needed to resolve the case now. In paragraph 43 of his Judgment, the Judge referred to the business producing "*these incomes*". The Judge referred to the income stream as "*matrimonial property*".
26. Somewhat incomprehensibly, with the greatest of respect to a very experienced judge, the judge then said, "*this approach also leads to a true determination of the reasonable needs of the wife*". In my judgment there is a disconnect between the income stream and the reasonable needs of the wife. It was the Judge's task to assess the reasonable needs of the wife and then to assess whether the capital provided to her was sufficient. Only if he found that the capital remaining in the wife's hands, after providing for her reasonable housing and other assessed capital needs, was insufficient to provide for her income needs could he then go on to consider an award of periodical payments. If he reached this stage, the Judge would then have a broad

discretion both as to the assessment of need and as to the issue of amortisation. I turn to this below.

27. Fourthly, Mr Wilkinson asserts that in the instant case the wife would be suffering a considerable relationship generated disadvantage if the income is not shared. Mr Wilkinson refers to the fact that in *Waggott* there was no compensation claim. This defence is bound to fail since there was no suggestion of a compensation claim in the instant case and one was not articulated by the Judge.
28. Fifth, Mr Wilkinson says that in *Waggott* the wife received a share of the husband's bonuses, as recognition of the fact that they related to matrimonial enterprise. The issue of bonuses has arisen in many cases. If a bonus is earned during the marriage but not paid out until after the marriage has ended then there is every reason to treat it as matrimonial property in the true sense. Sharing bonuses that were generated or earned after the marriage ended would usually be possible only by reference to the principles of needs and compensation. As I have already said, the instant case is not a compensation case and there are almost no examples of successful compensation claims in the reported cases.
29. Sixth, Mr Wilkinson says that the husband in *Waggott* was only 53 whereas the husband here is 61, so that the proximity of the sale is much closer and the 4 year period of profits to be generated by the business pending sale more defined. In my judgment, Mr Wilkinson here is confusing income and capital. The capital value of the business was shared by the payment of the lump sum. Moylan LJ could not have been clearer that future income is not an asset to be shared. I do not find it possible to read into Moylan LJ's judgment that a distinction can in some way be made between a man of 53 and a man of 61 or, more properly put, I cannot accept from the judgment that age is of itself material to the principle that the Judge was discussing.
30. Next, Mr Wilkinson correctly identifies that in *Waggott*, the first instance court failed to give proper weight to the clean break principle. I agree that in this case the judge imposed a five-year term with a section 28(1)(A) bar. However, I cannot read into the judgment in *Waggott* that even a short period of sharing of income can be justified other than by reference to the doctrines of need and compensation.
31. Eighth, Mr Wilkinson says that in *Waggott*, the court found that the wife's capital should not be preserved and the approach taken was too narrow with no consideration of part deployment of capital. Mr Wilkinson says that in the instant case the Judge adopted a more broad approach and found that the wife's capital should only be preserved during the five-year maintenance term, whilst the family business continued to pay out £1 million per annum of profits. Again, I go back to the fundamental principles enunciated by Moylan LJ. The fact is that in the instant case the parties had agreed the value of the business as at the date of the hearing. The parties agreed that the husband would continue to operate the franchise as he always had.
32. Furthermore, central to all of these defences to the appeal raised by Mr Wilkinson is the Judge's finding, at paragraph 38 of the draft judgment, that there was insufficient evidence to support a contention that the business will be worth greatly more once the re-imaging programme has been effected. Mr Wilkinson has not sought to challenge this finding on appeal and the wife has not raised a Respondent's Notice in respect of this (or any other) issue.

33. Mr Wilkinson ends his defence on this point by saying that, factually, *Waggott* was a very different case from the instant case but that the legal approach adopted by the Judge was in line with the judgment in *Waggott* and within the ambit of his discretion. I agree that the two cases are factually different but it is clear that in the passages to which I have referred, as well as other passages to which I have not referred, that Moylan LJ was purposefully setting out general guidance rather than dealing with facts very specific to that case. I note that Sir James Munby, then president of the Family Division and MacDonal J both agreed with him.
34. Accordingly, in my judgment, the judge was plainly wrong to identify the income stream of the business as matrimonial property.

The consequence of my finding that the Judge applied the wrong test

35. I have already identified what I referred to as the disconnect in the judge saying that the income stream is matrimonial property and that this approach leads to a true determination of the reasonable needs of the wife. It is clear that, in selecting the figure of £150,000 per annum by way of periodical payments, the judge intended that the wife should preserve her own capital during the period of the term order. I accept that to the wife there may seem to be an unfairness in the fact that she has to start living on her capital straightaway (whether or not amortised), whereas the husband does not. That, it seems to me, is the inevitable and direct consequence of the fact that an earning capacity is not subject to the sharing principle.
36. In spite of the fact that the Judge plainly alighted upon this figure for periodical payments by reference to the sharing principle, he nevertheless also sought to justify it by reference to needs. The Judge said: “*as to the level of periodical payments I have considered the wife’s outgoings. In the main they are reflective of the standard of living of these parties however in the light of a net income available to Mr O’Dwyer in the region of £400,000, I am satisfied that the level of periodical payments of £150,000 per annum is appropriate*”. In the exercise of his broad discretion, the Judge was absolutely entitled to be generous to the wife in terms of assessment of her maintenance requirement by reason of the fact that the husband will be enjoying a substantial income. However, a judge is not entitled simply to take a round number without reference to any arithmetic, and in particular (a) the recipient’s needs; (b) the income that the recipient’s capital will generate and (c) whether or not the recipient’s capital should be amortised; and, if so (d) from what date the recipient’s capital should be amortised. Parties who conduct these cases up and down the land, often without the benefit of legal advice, need to know how judges alight upon a particular figure for periodical payments. Otherwise, discretion gives way to a risk of disorder or even chaos with people not knowing how or whether to settle.
37. The starting point must be to establish how much capital the wife will have once she has purchased a home for herself. In paragraph 27 of his judgment, the judge said: “*Mr O’Dwyer, while seeking to retain the FMH allocates housing of only \$600,000 to Mrs O’Dwyer’s needs*”. Mr Le Grice says that, whilst the husband might retain the former matrimonial home, it was never his case that he needed to retain it. In my judgment, the Judge was entitled to note that the husband aspired to living in the

former family home. In paragraph 27 of his Judgment, the Judge described the wife's chosen properties as "approaching the grandiose". The cheapest of these three, described by Mr LeGrice as properties that "might be described as approaching the grandiose" had an asking price of \$1.090 million. Using the exchange rate employed by the parties of \$1.33 to the pound, this equates to about £820,000. The Judge complained that both parties had presented unrealistic indications of appropriate properties. The Judge then allocated a total housing fund to the wife of \$1.5 million including cost of acquisition. This amounts to £1.128 million. I have some sympathy with the husband complaining, through Mr Le Grice, that the Judge on the one hand complains that the wife produces unrealistic properties and then allocates a sum for property which is in the range which he had previously described as grandiose. However, as a Judge hearing an appeal, it is not my function to tinker with the numbers taken by an experienced Judge after a long hearing where he has had the benefit of oral evidence. Whilst I agree that the figure allocated to the wife for housing seems quite high, it is not in my judgment plainly wrong and I therefore work with the figure taken by the Judge.

38. The Judge found that, after deducting £1.2 million to cover the costs of a car, currency fluctuations and other expenses, the wife would have £1.776 million. The parties have since agreed that the Judge was in error when arriving at this figure and that the correct figure is £1,732,739. I must infer that the Judge meant to include in the list of items totalling £1.2 million the £1.128 million allocated to her for the purposes of purchasing a property. In respect of that figure, the judge said, "*that sum, given the maintenance level for the next five years, would be entirely preserved and should grow*". In my judgment the Judge fell into error here. The Judge does not give any reasons why the wife should not spend the income generated by her capital. I infer that the words "should grow" refer to the ordinary investment growth, rather than the fact of saving from the periodical payments, however there is some confusion here since the judge later commented that the wife "*may wish to effect some savings*". The Judge failed to address the issue of amortisation.
39. If the wife is left with £1,732,739, it is necessary to attribute an income to that figure. One can argue endlessly about the appropriate rate of return but it seems to me that time and again the assumptions in *At A Glance* are used and I use them for the purposes of this case. At paragraph 136 in *Waggott*, Moylan LJ saw clear advantages in adopting the *Duxbury* assumptions, and whilst of course I have a discretion to depart from them it seems to me that I should follow the lead so clearly given by him. I therefore work on the basis of a return of 3.75%. This equates to an income of £64,978 (or \$84,471). This figure would be taxable in the wife's hands in the United States. In paragraph 34 of his skeleton argument in support of this appeal, Mr Le Grice set out tables with US tax calculations which were not challenged. Applying his figures, I round the wife's net income down to about £52,000 (or \$67,600).
40. If I were to amortise all of the wife's capital from day one (and working on the basis that the wife was aged 59 when the Judge heard the case), it produces about £100,000 net per annum. I appreciate that there is inevitable rounding of these numbers and that the wife will be investing her money principally in the United States.
41. Whether or not a spouse should be required to amortise their capital will be case specific. It is my view that, in a bigger money case, after a long marriage where contributions are likely to have been equal, if different, if the economically stronger

party (here the husband) has a very substantial income, it is fair to determine that the economically weaker should not have to amortise their capital for a period of time. In *Waggott*, Moylan LJ made clear that there should be flexibility in respect of the extent to which capital should be amortised. In my judgment, there is every reason in the present case not to amortise the wife's capital during the remaining years when the husband will enjoy very substantial income. It seems to me that this will also give proper effect, post *Waggott*, to the Judge's assessment of fairness. I note that, in paragraph 134 of his Judgment in *Waggott*, Moylan LJ referred to "*the range of options from full amortisation to an assumed rate of return*" and said that "*it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases*". It is clear that the Judge left a substantial element of discretion in this respect. I am satisfied that in this case, after a long marriage with full contributions, where the husband has a large income from a business developed during the marriage, it is fair not to amortise the wife's capital for the remaining years of the husband's employment. In my judgment this strikes the correct balance between NOT sharing income, which is proscribed, and applying my discretion in the wife's favour as respects amortisation.

42. Accordingly, I find that the wife's net return from capital is the sum of £52,000 referred to above.
43. The wife made many presentations of her budget, and the figures "kept changing", as Mr Le Grice asserted. I am troubled by the absence of any proper analysis of the wife's budget. It is clear to me that it is the judicial function to analyse the budgets put forward, albeit that a detailed analysis of every item is not required. A judge must always, of course, be alive to forensic manoeuvrings by experienced family lawyers.
44. In her Form E, the wife assessed her needs at "not less than £10,000 per month". I am told that, at the last minute, the wife produced a budget of £15,000 per month. It is clear that there was extensive cross-examination of the wife on her various budgets. The transcript shows that the Judge intervened even to the extent of asking about the price of a litre of milk, the sprinkler systems in the wife's garden and the cost of toll roads, which make the lack of analysis in the Judgment all the more surprising.
45. I have considered whether I should remit the case to the Judge for him to carry out the analysis of budget that is absent from his Judgment. In the light of the delay referred to above I am certain that this course would simply add further to the already unacceptable delay and that such a course would be unfair to all. Mr Le Grice submitted that £75,000 a year would be a generous assessment". Mr Wilkinson asserted that the Judge did carry out an assessment, a submission which I have already explained that I cannot accept. I am alive to the fact that I have criticised the Judge for just alighting on a number without a proper analysis and that I must take care not to repeat that mistake. I am entitled to assume, and do so, that the wife's asserted figure in her Form E was carefully thought through. By any standard, £120,000 a year is a substantial net income, and there was clear evidence that her cost of living in Texas is lower than in England. I propose to adopt that figure. It is considerably higher than the figure contended for by Mr Le Grice but I bear in mind that there is significant judicial discretion in the assessment of need and that the Judge made his assessment after a long hearing, albeit, at least in part, on what I have found to be a flawed basis.

46. On the basis that I have assessed the wife's net return on capital is £52,000 per annum, in my judgment the correct figure for periodical payments should have been £68,000, and not the £150,000 ordered by the Judge in paragraph 21 of the Order. I propose to substitute the figure of £68,000 for the figure determined by the Judge. I am not going to interfere with the term set out in that paragraph. I accept that the term could have been different, but I do not think it appropriate, in an appeal, to substitute my discretion for that of the Judge who heard the case.
47. The Order will be amended accordingly and I shall of course hear any submissions in respect of costs, I suggest that these are presented electronically as soon as possible, in order to obviate the need for a further hearing. The parties will need to agree on the figure to be paid to the wife from the accumulated sum and the amount to be returned to the husband.