Neutral Citation Number: [2021] EWFC 23

Case No: ZC15F00024 - FD20F00049

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

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

- -
- -

Philip Cayford QC & Simon Calhaem (instructed by **Penningtons Manches Cooper**) for the **Applicant**
Michael Horton & Alexander Laing (by **direct access**) for the **Respondent**

Hearing dates: 1-5 March 2021

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Approved Judgment (Corrected)

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This judgment was delivered in private. The judge has given leave for this redacted version of the judgment to be published ("the public version"). Publication of any part of the judgment omitted from the public version, or of any of the information contained in those parts, will be a contempt of court.

Mr Justice Mostyn:

1. I shall refer to the applicant as "the wife" and to the respondent as "the husband".

2. I have before me for final disposal the wife's application under s.27 of the Matrimonial Causes Act 1973 dated 13 January 2015. I also have before me a Judgment Summons issued by the wife, together with an application by the husband to set aside, or stay enforcement of, an interim order for maintenance and legal services provision. I made it clear at the commencement of the hearing that I would not be dealing with the Judgment Summons. In those proceedings, in contrast to the others before me, the husband is not a compellable witness and the criminal standard of proof applies.

3. The six-year interlocutory journey of this case has taken it to the Supreme Court, where the husband unsuccessfully sought a stay of the wife's application. It is reported as *Villiers v Villiers* [2020] UKSC 30, [2020] 3 WLR 171, [2021] 1 All ER 175, [2020] 2 FLR 917 (1 July 2020). At [95] – [96] Lord Wilson set out the background facts:

> "95. The husband is aged 57 and the wife is aged 61. They married in England in 1994. From 1995 until their separation in 2012 they lived in Dumbarton, which lies north west of Glasgow. There was a child of the marriage, now adult. Upon separation, the wife came to live south of the border, now in London, and she has become habitually resident in England. The habitual residence of the husband continues to be in Scotland.
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> 96. In 2013 the wife issued a petition for divorce in England. In 2014 the husband lodged a writ for divorce in Scotland. Since they had last resided together in Scotland and had by then been habitually resident there for at least a year, the English court was obliged to stay the wife's petition: section 5(6) of, and paragraph 8(1) of Schedule 1 to, the Domicile and Matrimonial Proceedings Act 1973 ("the DMPA"). In January 2015, after it had been stayed, her petition was by consent dismissed. But thereupon the wife issued an application in England under section 27 of the Matrimonial Causes Act 1973 ("the MCA"). Such applications are rare."

4. In a 3-2 majority decision the Supreme Court held:

   i) Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011 No. 1484) ("Schedule 6") imported in modified form the jurisdictional and other legal rules in Council Regulation (EC) No 4/2009 ("the Maintenance Regulation") to intra-UK jurisdictional disputes.

   ii) There was no scope for the operation of a forum non conveniens discretion in the context of the legislative scheme of Schedule 6; it was not preserved by section 49 of the Civil Jurisdiction and Judgments Act 1982. Therefore the English courts had no discretion to stay the s.27 application on the grounds of forum non conveniens.

iii) Nor could the wife's application be stayed under article 13 of the Maintenance Regulation (as imported by Schedule 6) as a "related action". The fundamental object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation was to afford special protection for a maintenance creditor by giving her the right to choose the jurisdiction in which to bring a claim for maintenance. Interpreting article 13 of the Maintenance Regulation in the light of that object, "related actions" in article 13 referred primarily to maintenance claims of the kind to which the Maintenance Regulation applied and any extension of the concept of "related actions" beyond this was confined to cases where there was a risk of irreconcilable judgments. In the present case, there was no relevant connection between the wife's English maintenance claim under section 27 of the Matrimonial Causes Act 1973 and the husband's Scottish proceedings concerning marital status, and thus no risk of irreconcilable judgments. Therefore, the two sets of proceedings were not "related actions" for the purposes of article 13 of the Maintenance Regulation, as applied by Schedule 6 and, accordingly, the court had no jurisdiction to stay the wife's application for maintenance.

5. At [53] Lord Sales held that there was no risk of irreconcilable judgments. He wrote:

> "The wife's claim is not predicated on the result of the proceeding in Scotland, so there is no requirement that the two proceedings be heard and determined together to avoid the risk of irreconcilable judgments. An award of maintenance to the wife is in no way incapable of being reconciled with an order for divorce issued by the Scottish court."

Yet, in October 2020, a mere three months after this judgment, the wife applied in the Scottish divorce proceedings for payment to her by the husband of a capital sum of £1 million (plus interest at 8% from 12 August 2012). Meanwhile, she has pressed on with her s.27 maintenance claim before me. In these proceedings she sought a lump sum by way of capitalised "maintenance" (in its widest sense) of £3.15m together with an indemnity in respect of marital debts amounting to £936,000, although this was substantially scaled back by the time Mr Cayford QC came to make his final submissions. Plainly, the risk of duplicative, and therefore irreconcilable, judgments is now significant.

6. In almost his last judgment after a judicial career of the utmost distinction Lord Wilson issued a trenchant dissent. His view, with which Baroness Hale agreed, was that:

i) the wife's application and the husband's divorce writ in Scotland were "related actions" when a normal meaning of that phrase was applied to it;

ii) as such there was power under article 13(1) and (2) of the Maintenance Regulation to stay, or decline jurisdiction in relation to, the wife's s.27 application; and

iii) even if he were wrong and a narrow meaning to the phrase "related actions" was in fact the correct interpretation, then there was available nonetheless the general

> common law power to stay proceedings in favour of a more appropriate forum explicitly preserved by section 49 of the Civil Jurisdiction and Judgments Act 1982 (and s.49(3) of the Senior Courts Act 1981).

7. There is no point me fighting old battles by proxy. The decision of the majority is, naturally, binding on me. I would merely observe that if the framers of article 13 of the Maintenance Regulation had intended a "related action" to mean an identical counterclaim (as Lord Sales ruled at [44] – [45]) then they could easily have said so. I note that the same phrase is used in a number of allied EU Regulations, as well as in the Lugano Convention of 2007.

8. The ruling may well prove only to be of historical interest. It applies only to a dwindling number of transitional cases commenced before 1 January 2021. The outcome intended by Lord Wilson has in fact been achieved by Brexit. With effect from 11 pm on 31 December 2020 the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 have been almost entirely revoked by para 38 of the Schedule to the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 519). So far as England and Wales are concerned everything in the 2011 Regulations has been revoked, including, most relevantly for the purposes of this case, Schedule 6. Further, by virtue of paragraph 6 of those EU Exit Regulations the jurisdictional criteria in s.27(2) of the Matrimonial Causes Act 1973 have been altered from those in the Maintenance Regulation, to provide instead that jurisdiction will be established if (a) either party is domiciled in England and Wales, or (b) the applicant has been habitually resident in England and Wales for one year, or (c) the respondent is resident in England and Wales.

9. Therefore, between the component parts of the United Kingdom, and between England and Wales and other foreign states, forum disputes in maintenance matters (and indeed in almost all civil matters[1]) will henceforth be determined by applying classic forum conveniens principles in stay proceedings. The procedural treatment of "related actions" has been made redundant but may yet revive if the UK's application to join the Lugano Convention of 2007 is successful. That 2007 Convention covers maintenance in the same way as the old Brussels I Regulation used to do so. The jurisdictional rules in its article 2 are in closely similar terms to those in article 3 of the Maintenance Regulation. "Related actions" and their treatment are covered in its article 28 in identical terms to article 13 of the Maintenance Regulation. It is pure conjecture whether the government, following a successful accession to the Lugano Convention of 2007, would reinstate the 2011 Regulations and specifically Schedule 6.

10. In [105] – [107] Lord Wilson charted the "slow movement" of the forum conveniens principle southwards across the border. At [107(e)] he wrote:

> "In the *Spiliada* case [1987] AC 460 the House of Lords, in squarely adopting the Scottish principle as part of English

[1] Regulation 4 of the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 519) revoked the Maintenance Regulation. Regulation 3 revoked the Brussels IIa Regulation. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019 No. 479) revoked the Brussels Ia Regulation and its predecessors as they applied in the UK and extinguished the effect of the Lugano Convention 2007 and the EU-Denmark Agreement in the UK.

> common law, defined the basis of it to be to permit a stay "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i e in which the case may be tried more suitably for the interests of all the parties and the ends of justice": Lord Goff of Chieveley, at p 476."

11. Prior to the acceptance of the forum conveniens principle in 1986 a stay would only be awarded in England if the proceedings here were vexatious and oppressive. At [107(c)] Lord Wilson explained:

> "The narrowness of the English ground, which persisted for 90 years, betrayed a degree of arrogance that proceedings in England were intrinsically better than proceedings elsewhere, exemplified by comments by Lord Denning MR in the Court of Appeal in *The Atlantic Star* [1973] QB 364, 381–382".

12. It will be important to bear in mind this chauvinism when I come to analyse the cases, all of which are of some age, concerning the appropriateness of making orders under s.27 Matrimonial Causes Act 1973 which are expressed to take effect after a foreign decree of divorce.

Failure to provide reasonable maintenance

13. Section 27 of the Matrimonial Causes Act 1973 was originally enacted as s.6 of the Matrimonial Proceedings and Property Act 1970; it was later re-enacted within the consolidating Matrimonial Causes Act 1973 (with s.27(8) being added at that time – see below). This provision allows an application to be made to the court by a party to a marriage for maintenance. It does not depend on the court having pronounced a decree of divorce, nullity or judicial separation. On the contrary, in order to invoke the jurisdiction the parties must be married at the time of the application.

14. When I refer to "maintenance" in this judgment I am referring to an award of this form of non-divorce-based maintenance, unless the context dictates otherwise.

15. Section 6 of the 1970 Act replaced s.22 of the Matrimonial Causes Act 1965, which replaced s.23 of the Matrimonial Causes Act 1950, which replaced s.5 of the Law Reform (Miscellaneous Provisions) Act 1949. The 1949 Act permitted for the first time applications for maintenance to be made to the High Court; in 1968 this jurisdiction was extended to the divorce County Courts and in 2014 to the Family Court.

16. Between 1895 and 1949 the power to award maintenance was reserved to Magistrates. The current Magistrates' jurisdiction is contained in ss. 1 to 7 of the Domestic Proceedings and Magistrates Courts Act 1978. This replaced ss. 1 and 2 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, which in turn replaced the Summary Jurisdiction (Married Women) Act 1895.

The common law duty to maintain

17. In *Northrop v Northrop* [1968] P 74 Diplock LJ at 116 explained why the 1895 Act had been passed:

> "At common law a husband was under a duty to provide his wife not with money, but with necessaries. This duty was not directly enforceable by the wife by action against her husband, but was recognised by her implied authority to pledge his credit for necessaries, an authority which could not be withdrawn if they were living apart in circumstances which entitled the wife to refuse to live with him, and the husband did not provide her with sufficient funds to enable her to maintain herself. But her right to pledge her husband's credit for necessaries was an inadequate remedy for the separated wife whose husband's credit was not pledgeworthy. That is why the Summary Jurisdiction (Married Women) Act was passed in 1895."

18. A valuable history of this legislation is to be found in the scholarly judgment of Purchas J in *Gray v Gray* [1976] Fam 324. There Purchas J demonstrated that the meaning of the phrase "wilfully neglected to provide reasonable maintenance" (which is what s.27(1)(a) of the 1973 Act originally stated) had to be interpreted by reference to the common law. This meant that a wife guilty of a "grave fault" (i.e. adultery (but not condoned, connived at, or conduced to), cruelty, or desertion) forfeited her entitlement to maintenance: see, among many other authorities, *Papadopoulos v. Papadopoulos* [1930] P 55, 68 per Hill J.

19. This common law rule had been expressly incorporated in ss. 6 and 7 of the 1895 Act whereby a wife who had committed adultery would either forfeit the right to an order for maintenance (s.6) or would have an existing order discharged (s.7). This rule of forfeiture was reiterated in the 1960 Act at s.2(3): see *Young v Young* [1964] P 152, 160 per Sir Jocelyn Simon P, and *Brannan v Brannan* [1973] Fam 120, 129 per Sir George Baker P. Although no such explicit provision was made in the 1949 Act, or in its successors, it had been held by high authority that the same principle applied: see *Price v Price* [1951] P 413, 418, per Denning LJ.

20. I shall refer to this principle as "the fault rule".

21. This brutal fault rule survived the passage of the Divorce Reform Act 1969 and the abolition of matrimonial offences. That this is so is proved by the enactment of s.27(8) of the Matrimonial Causes Act 1973 which provided that:

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

22. The only possible explanation for the insertion of s.27(8) into the 1973 Act is that it was intended by the legislature that the common law principles, and specifically the fault rule, should strongly influence the operation of s.27 of the Matrimonial Causes Act 1973 as well as proceedings under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, notwithstanding the abolition of the concept of the matrimonial offence by the Divorce Reform Act 1969. Certainly this was the view of Purchas J in *Gray v Gray* at 335.

23. It is noteworthy that the Law Commission in its Working Paper No. 9 of 25 April 1967, recommended a draft clause in a reformed neglect to maintain regime which said that the court could make an order notwithstanding that it was proved that the applicant had during the subsistence of the marriage committed a matrimonial offence (see p104). This proposed provision was not repeated in the Law Commission's Report No. 25 on Financial Provision in Matrimonial Proceedings dated 24 July 1969 and was not enacted by Parliament. Instead, in maintenance proceedings the fault rule lived on.

Reform of s.27; abrogation of the common law fault rule

24. The fault rule was, of course, completely barbarous. On 20 October 1976 the Law Commission issued its Report on Matrimonial Proceedings in Magistrates' Courts (Law. Com. No. 77). The report was not confined to proceedings before Magistrates; it also made recommendations about amendment of s.27. It recommended that adultery should not be an absolute bar to an order for maintenance. Instead, adultery should be seen as a species of conduct which should be taken into account as part of the general exercise of discretion. These reforms would require the repeal of s.27(8).

25. It is noteworthy that the Law Commission did not recommend the abolition of the common law duty to maintain, nor did it address the duration of orders for maintenance in the light of the influence of that duty in proceedings for maintenance.

26. The report additionally recommended that s.27 should be amended so that the requirement to prove that the failure to maintain was wilful should be removed, and, further, that the duty to maintain should be put on exactly equal footing as between the spouses. This equalisation would be achieved by amending the then asymmetrical right given respectively to the wife and the husband to sue for maintenance.

27. The report led to the passage of the Domestic Proceedings and Magistrates Courts Act 1978 of which Schedule 3 repealed the whole of the 1960 Act (and with it s.2(3)(b)) as well as s.27(8) of the Matrimonial Causes Act 1973. From that point, the fault rule ceased to operate as an absolute bar in maintenance proceedings whether conducted under s.27 of the Matrimonial Causes Act 1973 or under the Domestic Proceedings and Magistrates' Courts Act 1978.

28. The point of this somewhat lengthy historical excursus (for which I make no apologies) is to demonstrate that the legislature intended the original power of the High Court, County Court or Magistrates' Court to award maintenance to be a facilitation of the common law duty imposed on a husband to maintain his wife. The statutes of 1895 and

1949, and their successors, provided an accessible remedy from the court for breach of that duty, and extended the duty so that it operated mutually. But that duty did not apply if the wife was at fault. The fault rule was remorselessly applied: it was a matter of the high legal principle demanded by the incidents of the common law duty to maintain.

29. The position now is that fault rule has been abrogated, but otherwise the common law duty lives on. Is this relevant in proceedings for maintenance in 2021?

30. The common law duty to maintain has been abolished by s.198 of the Equality Act 2010, but a decade after this landmark statute was passed, this provision has not been brought into force. The failure to do so clearly confirms that the common law duty remains alive, albeit shorn of its most barbarous aspect namely the fault rule as well as anachronisms such as the agency of necessity (which was abolished by s.41 of the Matrimonial Proceedings and Property Act 1970).

Duration of the common law duty to maintain

31. A critically important feature of the common law duty to maintain is that it endures only for as long as the marriage subsists. Thus in *Hyman v Hyman* [1929] AC 601 Lord Atkin stated at 629:

> "Her marriage has been finally dissolved upon her petition. The Legislature has invested the matrimonial Courts in such a case with powers to make such provision for the future maintenance of the wife as the Court may think reasonable. Some powers were given by the Matrimonial Causes Act of 1857. They have been extended by the Acts of 1866 and 1907, and are now contained in ss. 190–192 of the Judicature Act of 1925. The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts. When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities."

It is clear that Lord Atkin considered that post-divorce maintenance should be dealt with in ancillary relief proceedings, that is to say in proceedings for relief ancillary to the divorce.

32. The principle that the duty to maintain only endures for as long as the marriage subsists is long-standing: see, for example, *Price v Price,* above. Thus, there is no duty to support a "wife" after a decree of nullity: see *Anstey v Manners* (1818) Gow 10 per Park J.

33. One might have thought, therefore, that if at common law the duty to maintain ended with the dissolution of the marriage, this principle would be carried across to applications for maintenance (whether before the magistrates or the High Court), in exactly same way that the common law fault rule had been carried across.

Maintenance orders surviving divorce

34. However, most surprisingly, there was not an equivalent carry-across. There are old cases, which I will analyse, which say that the court retains a discretion to allow an order for maintenance to continue after the dissolution of the marriage, whether by a domestic decree or a foreign decree. That power is, plainly, wholly anomalous, and, as Sir Henry Duke P has observed (see below), contrary to common sense. It appears to be a manifestation of the syndrome of chauvinism to which Lord Wilson referred in the Supreme Court. Curiously, the legal basis for the existence of the power was not considered by the Law Commission in either its Working Paper or its Report which led to the passage of the 1970 Act. Nonetheless, the Law Commission did propose in its Report, without comment, a provision in its draft Bill which permitted a maintenance order to continue after the dissolution of the marriage during joint lives (see clause 7(2)(c) on p.76). This was duly enacted as s.7(3) of the 1970 Act, and later re-enacted as s.28(2) of the Matrimonial Causes Act 1973 Act. Section 4 of the 1978 Act enacted a similar provision for Magistrates' maintenance orders.

Domestic divorces

35. These provisions were no doubt enacted to reflect the weighty authority which permitted, quite illogically, maintenance orders to be made which survived a later divorce. For domestic divorces the leading case was the decision of the Divisional Court in *Bragg v Bragg* [1925] P 20. In 1919 the wife had obtained from a Magistrate an order for maintenance for herself and the children of 17s. 6d. per week. In 1922 she obtained a decree nisi of divorce which was made absolute in 1923. No order for maintenance was made, or even applied for, in the divorce court. The husband applied to discharge the Magistrate's order on the ground that it had ceased to be operative. The Magistrate dismissed his application; the husband appealed. Sir Henry Duke P began his judgment saying:

> "On the face of it, it seems anomalous that a woman who has obtained an order for maintenance as a wife, such maintenance to be provided by her husband, when she has put an end to the relation of husband and wife may still say that the order for the maintenance of the wife by the husband subsists. It is not because it seems anomalous that that may not be the result of the statutory provision, and neither is it conclusive to show that it is contrary to common sense."

His ratio was expressed thus:

> "When this Act was passed in 1895 a woman who added to desertion a grievance of her husband's adultery might proceed for a divorce. One must assume that the authors of this Act and the Legislature which enacted it were aware of that elementary fact. They took the view which this appellant took, that such an order once made and while the parties are alive is not got rid of except by an order of the Court of summary jurisdiction, and that an application must be made. On the whole, I think the appellant was right in his original view that he must go to a Court of summary jurisdiction to get rid of this order, although there had been a decree absolute for divorce, and it seems to me to follow from that that if there were not the statutory grounds of discharge of the husband from his obligation under the order, then before the appellant could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged. He failed to so satisfy the magistrate. I entirely agree with the reasons upon which the magistrate founded that view. The magistrate thought it was a very convenient thing that this order should subsist and that a Court, which was close at hand to the parties, should be able to give the wife assistance if she needed it, or give the husband relief if he was entitled to it."

36. It can be seen that there was no analysis of the scope of the duty to maintain under common law which if not governed, then certainly strongly influenced, the disposal of an application under the 1895 Act. It is very hard to understand why one debarring feature of the common law, for example adultery, led to the discharge of a maintenance order while another debarring feature of the common law – divorce - did not. It is no answer to say that adultery is specifically mentioned in ss.6 and 7, because other matrimonial offences, for example desertion, which are not mentioned in the statute, led to the same result. Further, no debarring grounds are mentioned in the 1949 Act or its successors, yet the fault rule was applied ruthlessly in proceedings under them.

37. The decision can be justified, or at least explained, on pragmatic grounds where the divorce was domestic. Where the domestic divorce court (at that time only the High Court) could award maintenance there were pragmatic, practical, reasons for another more convenient local domestic court, close at hand, to be able to do so also. However, with the advance of mobility, and the devolution of divorce cases to divorce County Courts in 1968, these pragmatic reasons carry much less force. If a married woman had the benefit of a maintenance order but later applied for a divorce, then replacement by the divorce court of the maintenance order by an order for alimony *pendente lite*, or an order for permanent alimony, would be straightforward. It is hard to justify a state of affairs whereby all the financial questions between the parties should not be finally determined in one set of proceedings before the divorce court.

Foreign divorces

38. The pragmatic, but arguably unprincipled, approach becomes much more problematic where the marriage is later dissolved by a foreign court. A body of case law had built up which (rightly in my opinion) said that in such circumstances a maintenance order should be discharged on proof of such a foreign divorce. These cases were *Pastre v Pastre* [1930] P 80, *Mezger v Mezger* [1937] P 19 and *Kirk v Kirk* [1947] 2 All ER 130. The latter case involved a divorce in Scotland. The effect of those decisions was that where there had been a foreign divorce accepted as valid in England, the English courts would recognise that they no longer had jurisdiction over the parties, and would not interfere between them further except to entertain an application to discharge an existing order. These decisions were followed by the Divisional Court in the case of *Wood v Wood* [1957] P 254. In that case the husband, who was a showman who earned his living by displaying a troupe of performing chimpanzees, obtained a divorce in Nevada in 1954. He applied to the court to discharge a maintenance order made by a Magistrate in 1950. The Magistrate not only refused the application but increased the value of the order. The Divisional Court allowed the appeal and discharged the order. The wife appealed to the Court of Appeal which allowed the appeal and restored the order of the Magistrate.

39. In his judgment Lord Evershed MR held at 283:

> "In *Kirk v. Kirk* the wife, after obtaining a maintenance order from an English court, later obtained upon her own invocation of the jurisdiction a decree of divorce in Scotland, in which country the parties had at all times been domiciled. There were no children of the marriage. The Divisional Court, after directing an inquiry as to the (innocent) wife's rights in Scotland to the proper officer of the Court of Session, took the view that in all the circumstances of the case it would be more convenient and appropriate that all financial questions between the wife and husband should be decided by the Scottish court; but they expressly stated (in my view rightly) that the fact that the divorce had been obtained in a foreign country did not necessarily require that the court's discretion under section 7 of the [1895] Act must be exercised by discharging the original order. It is clear that the matter of convenience wears a very different aspect where the foreign court is at Edinburgh and not (say) in Germany or the United States of America.
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> …
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> And if, according to the terms of the statute, the discretion survives and was intended to survive the cesser of the marriage status, it must in my judgment follow that it is immaterial whether that cesser has been brought about by an English or a foreign decree; though I do not, of course, doubt that the proved incidents of the foreign decree, so far as relevant to questions of

> maintenance (including convenience), will be matters proper to be taken into account in the exercise of the discretion."

40. The decision rested merely on the literal words of s.7 of the 1895 Act. These stated:

> "A court of summary jurisdiction… may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made …"

41. The decision, like that in *Bragg v Bragg*, failed to grapple with (or even mention) the key point that the scope of the duty to maintain (which was given effect by the existing order in that case) was governed by the common law, and the common law terminated that duty on a dissolution of the marriage. I naturally accept, however, that the decision is binding on me. I acknowledge that it plainly validates and explains the reason for the existence of s.28(2) of the Matrimonial Causes Act 1973. However, I say that the duration of the common law duty to maintain should influence the exercise of the discretion to make a non-divorce-based maintenance order, whether under s.27, ss 1-7 of the 1978 Act or Schedule 5 (paras 39 to 45) to the Civil Partnership Act 2004. The common law is the foundation on which all of this legislation is built, and in my judgment, save where specifically abrogated, its incidents remain relevant.

42. The unspoken message of these old cases is that extension of an English maintenance order after a foreign divorce would be a good thing because of fears that the foreign court would not deal with the claim justly by English standards, which then were dominated by considerations of conduct. I consider below whether that chauvinistic concern continues to have any traction in the modern age.

Discretion to allow maintenance to continue after divorce

43. It is clear from the judgment of Lord Evershed MR in *Wood v Wood* that the court must, in the exercise of its discretion, take into account the "convenience" of the foreign forum. It is intriguing to find this concept in play 30 years before the adoption in English law of the principles of forum conveniens by the decision of the House of Lords in *The Spiliada*. It is also noteworthy how the proximity, geographically and culturally, of Scotland meant that convenience "wears a very different aspect" when compared to the convenience of the United States of America or a country in Europe. Plainly, the Master of the Rolls was signalling that the discretion would be much more likely to be exercised in favour of a discharge of the order where the foreign divorce was pronounced in Edinburgh rather than Las Vegas.

44. In this case the Supreme Court has ruled that there is no scope for a stay of the wife's application either under article 13 of the Maintenance Regulation (as applied in this case by Schedule 6) or under the principles of forum conveniens. In my judgment, that proscription does not prevent me from exercising my discretion in such a way to provide that no part of the award I might make in favour of the wife should take effect after a divorce in Scotland or go to meet needs arising after that event. On the contrary, such

a disposition would be squarely within the parameters of the discretion as defined by Lord Evershed MR. The terms of s28(2) do no more than define the maximum limit of maintenance; they merely stipulate how the discretion could be exercised, not how it should be. In *Scott v Scott* [1951] P 245, Hodson J held that a maintenance order expressed to endure during joint lives was "the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act 1949."

45. In the six decades which have passed since the decision in *Wood v Wood* principles of comity have come to the fore in the judicial application of private international law and there has been a marked retreat from the syndrome of chauvinism to which Lord Wilson referred. In my judgment, these developments when taken together with the influence of the common law rule as to duration, should lead to the discretion normally (and I emphasise normally) being exercised in the following manner:

    i) where a maintenance order has been made, and where there has later been a valid foreign divorce in a friendly state, or in another part of the British Islands, by ordering the discharge of the maintenance order; or

    ii) where, as here, there is a maintenance application pending and it is known that there will in the future be a valid divorce pronounced in a friendly state, or in another part of the British Islands, by disposing of the claim for maintenance in such a way that it covers only the period up to the date of the foreign divorce.

    That would be the normal way for the discretion to be exercised. There might be, however, exceptional circumstances which would justify a disposition which allowed maintenance provision to endure, or take effect, after the foreign divorce.

46. In my judgment, the influence of the common law rule that the duty to maintain subsists only while the marriage subsists is given effect by a normal exercise of the discretion in this way. A normal exercise of discretion in this way also reflects the following important factors:

    i) Section 25A and 28(1A) of the Matrimonial Causes Act 1973 do not apply in a s.27 case. In a s.27 case there is no duty on the court to consider whether it would be appropriate to exercise its powers such that the financial obligations of each party towards the other will be terminated as soon as the court considers just and reasonable. It cannot impose an immediate clean break under s.25A(3), or a non-extendable term of maintenance under ss.25A(2) and 28(1A). Where there has been a domestic divorce this duty should be applied by the Financial Remedies Court in proceedings ancillary to the divorce. The Financial Remedies Court should not in earlier proceedings under s.27 tie the hands of that court in later proceedings post-divorce.

    ii) As mentioned above, if the marriage is to be dissolved by a foreign court then the parties have their rights to financial provision in accordance with the law of that jurisdiction. If, however, the result of the exercise of those rights is demonstrably unjust then the aggrieved party can, provided that she can establish jurisdiction, apply for relief under Part III of the Matrimonial and Family Proceedings Act 1984. The fear of Lord Evershed MR that a wife,

habitually resident here, may be left unprovided for following a foreign divorce is now met by this safety-net.

iii) If the marriage is to be dissolved by a court in another part of the British Islands then by s.27 of the 1984 Act there can be no application for relief in England and Wales under Part III of that Act. However, it can be safely assumed that there is a right to apply for post-divorce maintenance in the British jurisdiction dealing with the divorce and that it will be fairly adjudged. That post-divorce maintenance should be dealt with in the divorce jurisdiction is implicit in para 11 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973. Under para 11(2)(b) where an English or Welsh divorce suit is stayed under para 8 in favour of another part of the British Islands then any order for maintenance pending suit or other interim maintenance order will generally come to an end three months after the stay takes effect. I agree with Mr Horton that it would be highly anomalous, in circumstances where the wife's English petition has been first stayed and then dismissed under the provisions of para 8, that she could obtain an order of longer duration under s.27 than she could have done within the stayed, and then dismissed, divorce proceedings.

47. Juridical advantage or disadvantage in the foreign court should not, therefore, amount to an exceptional circumstance justifying departing from the normal disposal. In this regard the final words of Lord Goff in *de Dampierre v de Dampierre* [1988] AC 92, when describing French matrimonial law, are singularly apt:

> "Such an approach is no longer acceptable in this country, though it bears a close resemblance to the principles applicable here not so very long ago. But it is evidently still acceptable in a highly civilised country with which this country has very close ties of friendship, not least nowadays through our common membership of the European Community; and I find it impossible to conclude that, objectively speaking, justice would not be done if the wife was compelled to pursue her remedy for financial provision under such a regime in the courts of a country which provide, most plainly, the natural forum for the resolution of this matrimonial dispute. "

I repeat, this is not to introduce a stay on the grounds of forum conveniens by the back door. Rather it is to exercise the discretion exactly in the way that Lord Evershed MR propounded. It is to exercise the substantive discretion by taking into account the convenience and appropriateness of matters being dealt with in the foreign court. And when so doing the court should have regard to the geographic and cultural proximity of the foreign court and to the principle of comity. In my judgment, it would amount to an exorbitant extraterritorial exercise of jurisdiction to allow a maintenance order to have effect after a foreign divorce save in exceptional circumstances.

48. Finally, I refer to the decision of Rees J in *Newmarch v Newmarch* [1978] Fam 79. Law students will remember this case as being about the recognition of an undefended Australian divorce. However the second part of the case concerns an application under s.27 which had been followed by that Australian divorce.

49. In that case the wife had obtained an interim order for maintenance in her English s.27 proceedings; that order had been sent to Sydney and registered there. The husband then filed his Australian divorce petition alleging the wife's desertion and applied in Sydney for the registered order to be discharged; it duly was. The wife never defended the Australian petition and in due course in an undefended suit the husband was granted a decree nisi, which was made absolute 15 days later. The wife applied to the High Court in London for a declaration that the Australian divorce should not be recognised. She further applied for a final order on her original application under s.27.

50. Rees J refused the first application and recognised the Sydney decree as valid. He granted the second application. He held that he was not bound by the finding in Australia that the wife was in desertion, which would have debarred her claim for maintenance under the fault rule had it been made here. He made a substantive award for maintenance to continue during joint lives.

51. I observe that by the time Rees J came to make the maintenance award he had recognised the Australian decree and the applicant wife was therefore no longer "a party to a marriage", although she was certainly married to the respondent at the time that she made her initial application. I do not have to decide if Rees J had jurisdiction to make the substantive order; but I note that in all the other many cases I have studied the substantive award, whilst stretching beyond the divorce, had always been made before the divorce. I note that no challenge was made to his jurisdiction to make the substantive award. Rees J was satisfied that he had jurisdiction, holding at 103:

> "Although Hodson L.J. was dealing with a case in which the court disposed of a variation order for maintenance which had itself been made before the divorce, I think, on balance, support is to be found in his observations for the view that a discretion remains to make an order for maintenance under section 27 of the Matrimonial Causes Act 1973 in the proceedings started before the divorce of the parties, even though before the order is made the parties were divorced by a decree in a foreign jurisdiction."

52. Rees J held that the wife's admitted adultery did not act as a bar to her claim as the respondent had clearly condoned it. He exercised his discretion to make an award which took effect after the dissolution of the marriage by a foreign court, saying:

> "Can it properly be held that a husband has wilfully neglected to maintain the applicant, when a competent court in the jurisdiction within which he resides has divorced him, and another competent court then has found that he is not obliged to comply with an interim order requiring him to do so? In my judgment, upon the whole of the facts in this case, including the two aspects mentioned, such a finding is open to this court. *Wood v Wood* [1957] P 254 clearly indicates that every relevant circumstance must be taken into account in reaching a decision. My findings show that this wife is entitled to, and is in dire need of, financial support from her husband, who at all material times

> has had the appropriate means for providing it. He is well aware that the court which granted the decree of divorce did not deal with the wife's financial provision. He has made no periodical payment to her since October 1973. Having regard to all the circumstances, I am satisfied that the justice of the case requires that I should exercise the power to make an order for maintenance under section 27 of the Matrimonial Causes Act 1973."

53. I must respectfully suggest that insufficient attention was paid in that case to considerations of comity, or to the underpinning common law rule concerning the duration of the duty to maintain. However, the core reason for the maintenance award was the wife's "dire need of financial support". I would accept that the alleviation of undue financial hardship might be another exceptional reason for exercising the discretion to make, or confirm, an award that took effect after foreign divorce. This would depend, however, on the court finding that no, or seriously inadequate, financial support would be awarded by the foreign court.

This case

54. In order to exercise my powers the wife has to satisfy me as a condition precedent that in the period prior to her application on 13 January 2015 the husband failed to provide her with reasonable maintenance: see s.27(1)(a). That is the first question I have to decide.

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

56. This case has been played out in the public eye and has attracted much lurid publicity. That has been a product of an exceptionally strong mutual antipathy. This has been a case where love has to hatred turned to an extraordinary degree. The cross-examination of the parties was reminiscent of a peculiarly vicious defended divorce. Hours were spent picking over ancient grievances. The husband has vented his spleen by alleging that the wife is a bigamist. He has sought to amend the Scottish divorce proceedings to plead nullity on the grounds that the marriage was void at its inception, and he has reported the wife to the police for the crime of bigamy. The allegation was completely spurious. He has more recently shifted his sights and has intimated that he intends to report the wife to the police for having fraudulently misrepresented her age at the time of the marriage. It was pointed out to him that this too, was absurd, but he nevertheless declined to confirm that he would withdraw the threat. The husband has accused the wife of being a fraudster, a fantasist and generally useless.

57. The wife, with some justification, has accused the husband of being dishonest, manipulative, vindictive and bullying. But she is not beyond criticism herself. She has

conducted her pursuit of the husband in this litigation in a completely disproportionate manner and has wilfully blinded herself to the reality that the vast amounts of inherited funds that she believes that the husband has at his disposal are, in fact, a chimera.

58. The result of this terrible litigation, which has endured for nearly 6 years, is that both parties are now financially ruined, and, I suspect, psychologically damaged.

The financial history

59 – 88 Omitted

The divorce litigation

89. I now turn to the divorce litigation between the parties. In its folly it matches the ruinous financial irresponsibility which I have described above.

90. The wife issued her English divorce petition on 17 July 2013. As mentioned above, the husband was made bankrupt in November 2013. The wife took no further steps in relation to her divorce petition at that time. On 22 October 2014 the husband filed his acknowledgement of service denying the English jurisdiction and on the same day lodged his writ for divorce in the Sheriff Court at Dumbarton. On 7 November 2014 the Central Family Court stayed the wife's petition until further order. On 10 November 2014 the husband was discharged from bankruptcy.

91. On 13 January 2015 the wife filed her application under s.27 of the Matrimonial Causes Act 1973. The following day she (a) filed her statement in support of an application for interim relief and (b) signified that she would consent to a dismissal of her English divorce petition. Her petition was dismissed on 16 January 2015. On 23 March 2015 the husband applied to stay the wife's s.27 application pending determination of the Scottish divorce proceedings. The wife filed her Form E1 on 30 March 2015. On 4 April 2015 the husband applied for permission not to file Form E1 and for dismissal or a stay of the wife's s.27 application. On 17 April 2015 it was ordered that the wife's application for interim relief, together with the husband's application for a stay, should be heard before a judge of High Court level[2]. On 24 April 2015 the husband filed his Form E1; he filed a second Form E1 on 14 May 2015.

92. The applications came before Parker J on 22 and 24 July 2015. The wife was represented by leading and junior counsel; the husband appeared in person. Judgment was reserved and was not given until 23 March 2016. It is reported as *Re V (European Maintenance Regulation)* [2016] EWHC 668 (Fam), [2017] 1 FLR 1083. The court refused to stay or dismiss the wife's application. It held that the Scottish court was not seised of the issue of maintenance and that the English court had jurisdictional priority. It awarded the wife £2,500 per month interim maintenance backdated to the date of her

[2] The order of the deputy district judge purported to transfer the applications to the High Court. He did not have power to do so: see FPR r.27.19(3) & (4). Although the cases before Parker J, the Court of Appeal and the Supreme Court all assume that the applications were validly transferred to the High Court it is clear that they were not. I shall treat the deputy district judge's invalid order as having allocated the applications to be heard within the Family Court at High Court Judge level pursuant to the Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840), r.15(2).

s.27 application together with £3,000 per month by way of a legal services payment order.

93. Parker J's reasons for making the interim award were as follows:

> **"[109]** The material relied on by W satisfies me that H has access through the trustees to substantial funds from his late grandmother's and mother's estates, and outright to his mother's estate which appears to have liquidity. H relies on the fact that he has met his share of the joint debts. He is to be expected to approach the trustees to access these funds: see *Thomas v Thomas* (above). H has already persuaded the trustees to provide a trust fund of over £324,000 to the parties' daughter. In 2010 H wrote to W's brother thanking him of his loan of £100,000 stating that he hoped to repay it within 2 years not less than £100,000 from his grandmother's estate. I do not have direct evidence, but am informed that W's brother, a creditor in H's insolvency, has been told by Mr Bain the administrator that H is seeking a capital advance from the trustees to pay the debt. I record that H denies that he has access to any such sums. I also accept that H was adjudged bankrupt in 2013. He states that he paid his share of the joint debts from his mother's estate.
>
> **[110]** I do not consider that I can in any way trim W's expenses further even on an interim basis and I am satisfied that H has the ability to access funds to satisfy this claim.
>
> **[111]** I make an order in favour of W for interim maintenance of £2,500 per month backdated to the date of this issue of her application, namely 15 January 2015, payable monthly in advance, arrears to be paid within 6 weeks.
>
> **[112]** If it transpires that the sum is over-generous it can be revisited at a further hearing and readjusted.
>
> **….**
>
> **[115]** H must pay W's costs of this application. I am asked to direct summary assessment in the sum of £19, 636.10. This has been a complex case which has required the assistance of specialist counsel and W is entitled to her costs including the costs of the hearing before Deputy District Judge Bassett-Cross. I assess costs at the claimed amount, which does not seem unreasonable from what I know of this litigation. Mr Scott tells me and I accept that W is instructing the Oxford branch of Penningtons Manches, inevitably less costly than the office in London.

> **[116]** In order to make an order for a legal services (funding) order I require to be satisfied that W cannot reasonably procure legal advice and representation by any other means (see Lord Wilson of Culworth in *Vince v Wyatt (Nos 1 and 2)* [2015] UKSC 14, [2015] 1 WLR 1228, sub nom *Wyatt v Vince* [2015] 1 FLR 972, at [37] onwards). She is not able to claim capital so there is nothing to charge. I see no realistic basis upon which she can borrow from a commercial lender. The only question is whether her brother will continue to lend to her. This matter requires to be adjudicated on at the next hearing. In the meantime this case will continue, I am sure, to be hard fought. W shall be paid £3,000 per month for legal funding until the next hearing. If at that hearing the court finds that she can obtain funding then it will also be in position to adjust the payments to take account of any overpayment."

94. Whether the trustees would at that time have provided capital to the husband, or will at the current time provide capital to the husband, in order to meet the wife's claims is a central question which I will have to answer.

95. The order giving effect to this decision was not made until 8 July 2016. The order expressed the backdated arrears as a lump sum of £45,000, with the future payments to be made periodically commencing on 15 July 2016. The arrears have been calculated at £364,206 to 5 March 2021. This includes £16,706 interest on the lump sum of £45,000.

96. The husband has not paid a penny under the order.

97. The husband applied for permission to appeal to the Court of Appeal. In early 2017 he obtained pro bono assistance from Mr Horton and Mr Laing. Permission was initially refused on paper, but granted at an oral hearing by Black LJ on 29 June 2017.

98. The appeal was heard on 13 and 14 March 2018. Judgment was delivered on 17 May 2018. It is reported as *Villiers v Villiers* [2018] EWCA Civ 1120, [2019] Fam 138. The appeal was dismissed. On 13 June 2018 the husband applied for permission to appeal to the Supreme Court. On 19 December 2018 the Supreme Court granted permission conditional upon the husband providing security for costs of £30,000. *[Sentence omitted]*. The appeal was heard by the Supreme Court on 19 and 20 December 2019, a full 18 months after permission had been granted. The judgments were delivered on 1 July 2020.

99. Meanwhile, there had been continuous interlocutory skirmishing in relation to the wife's substantive application, which had not been stayed pending the appeals. Following the order of 8 July 2016 there have been a total of five interlocutory orders at High Court judge level. The final hearing was listed to take place before me commencing on 1 March 2021.

100. The order made by Ms Eaton QC on the pre-trial review on 1 February 2021 required the husband to produce bank statements from the date of the last disclosed statement to

19 February 2021. The husband's last disclosed statement for his Bank of Scotland account gave transactions up to 1 September 2014. The order therefore required the husband to produce for that account 6½ years of statements. Yet the husband did not produce even one statement. His explanation was absurd. He claimed that he was acting in the public benefit in the context of the pandemic by not going to his bank in person. He had no answer to my question why he did not at any point apply to the court to be relieved from the disclosure obligation on the ground that it was impossible to comply with.

101. This incident is illustrative of a general syndrome on the part of the husband of defiance, offensiveness, non-cooperation and truculence. The husband was a very poor witness. Time and again he had to be reminded that his role when giving oral evidence was simply to answer questions and not to engage in flights of amateur forensic oratory. It has to be said that the wife was not much better. Both parties were determined, notwithstanding the quality of their representation, to play the amateur barrister.

102. What conclusions should I draw from the husband's blatant refusal to provide basic disclosure in the form of his bank statements? It is analogous to telling lies to the court. Well-established authority teaches us that lies to the court can lead to a number of conclusions. First, and obviously, lies to the court may lead to the inference that something highly material, and highly adverse, to the witness is being obscured. But other conclusions may be drawn. Sometimes witnesses unwisely lie in order to bolster a true case. This is hardly a surprising phenomenon. Sometimes witnesses lie in order to conceal shameful, but irrelevant, behaviour. Sometimes witnesses lie simply in order to be difficult. The forensic process is so exacting, and often (as in this case) so prolonged, that it drives people, perhaps already so disposed, to behave unreasonably, combatively, and truculently. This is an especially common phenomenon in divorce litigation where personal relations will have already plunged to new depths.

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

104. My conclusion is that aside from his interests in the trusts, and his interest in his SIPP, there is nothing else to know about the husband's financial circumstances.

The Charman question

105. Where a respondent is the beneficiary of a discretionary trust the central question always is whether the trust assets can be taken into account as a resource of the respondent for the purposes of assessing the applicant's claim. In such circumstances the court has to be satisfied, on the balance of probability, that the trustees, having been apprised of all relevant facts, would respond positively to a request by the respondent to make funds available to him to make provision for the applicant. This is sometimes called the Charman question, the relevant test having been set by Sir Mark Potter P in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [48] where he said:

> "Nevertheless we agree with both counsel that, before he attributed all the assets of Dragon to the husband, the judge had to be satisfied that, if so requested by the husband, Codan would be likely to advance them to him:"

106. There have been a considerable number of cases which have analysed this issue, but to my mind the most comprehensive and clear exposition is that given by the Chief Justice of Hong Kong in *KEWS v NCHC* [2010] HKCFA 10, at [36] – [53], which merit citation in full:

> **"E.3 Treatment of financial assistance from third parties under s.7(1)(a).**
>
> 36. In every case where third party assistance is involved, there are two critical evidential questions for the court to consider:-
>
> (1) What is the extent of the financial assistance provided by the third party to the husband or wife?
>
> (2) What is the likelihood of such financial assistance continuing in the foreseeable future?
>
> 37. It goes without saying that in the fact finding exercise, the court must look at the reality of the situation and have regard to matters of substance and not just form. In looking at reality, the court can take into account not only what a party actually has, but also what might reasonably be made available to him or her if a request for assistance were to be made. …
>
> 38. In addition, in looking at what may occur in the foreseeable future, past conduct is often a useful guide: see *SR v CR (Ancillary Relief: Family Trusts)* [2009] 2 FLR 1083, at 1091 (para 27).
>
> 39. Having ascertained the extent of the financial assistance provided by the third party and then finding on the evidence on a balance of probabilities that there is a likelihood of the continuation of such financial assistance in the foreseeable future, the court is then in a position in law first to take this into account in the identification of the financial resources of the parties and secondly, in determining the appropriate ancillary relief to be granted. This is an approach that is entirely consistent with the court's duty under s 7(1) of the MPPO[3]. Needless to say, the outcome in any given case is inevitably fact-sensitive.
>
> **E.4 Judicious encouragement**

[3] The Hong Kong counterpart to s.25(2) Matrimonial Causes Act 1973

40. So far, the approach set out in section E.3 is, I would suggest, non-controversial. To what extent is it then permissible for the court to frame its orders in such a way so as to encourage third parties to provide or continue to provide financial assistance to the husband or wife (as the case maybe) for the purpose of enabling his or her ancillary relief obligations to be met? Here, the position becomes more problematic and controversial, and this has in my view led to some confusion among judges and practitioners. I am here referring to the concept of "judicious encouragement".

41. To start with, the term itself is ambiguous. If one starts from the premise that save in exceptional circumstances [19], court orders can only apply to parties to a litigation and not non-parties, it is difficult to see where the concept of "judicious encouragement" fits as a matter of principle. Courts make orders that are intended to bind and if necessary, to be enforced. It is difficult to conceive of a situation where an order of the court merely "encourages" compliance, and all the more so in relation to a non-party.

42. The origin of the term "judicious encouragement" is the judgment of Waite LJ in the decision of the English Court of Appeal in *Thomas v Thomas* [1995] 2 FLR 668, where, at 670F-671A, it is said:-

"But certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. *There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case*. There are

bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed." (emphasis added)

43. The italicized words appear to introduce a principle to the effect that a court may somehow frame its orders in a way that will encourage third parties to provide financial assistance sufficient to enable a spouse to meet his or her ancillary relief obligations in accordance with the court's view of the justice of the matter.

44. It is this concept that in my view has caused unnecessary confusion among judges and practitioners. If this was intended to be a statement of principle, it appears at first sight simply to ignore:-

(1) The statutory requirement contained in s 7(1)(a) of MPPO that only assets or financial resources which a party "has or is likely to have in the foreseeable future" should be taken into account. It is difficult to see how a third party who is "encouraged" (albeit in a judicious way) comfortably fits into this rubric.

(2) The point made in para 41 above in relation to court orders affecting non-parties.

45. The italicized words in *Thomas* were made without any discussion of principle. Certain authorities were cited to the Court of Appeal in that case and it is illuminating to see the summary of the effect of those cases contained in the judgment of Glidewell LJ in *Thomas* (it is to be noted there is no reference to "judicious encouragement" in this passage). At 677H-678D, it was said:-

"The judge also had, as we have, the guidance to be derived from the various authorities to which Waite LJ has referred. Those which are the most helpful in this case are, in my view, the decisions of this court in *O'D v O'D* [1976] Fam 83, *B v B* (1982) 3 FLR 298 and *Browne v Browne* [1989] 1 FLR 291. From these authorities I derive the following principles:

(a) Where a husband can only raise further capital, or additional income, as the result of a decision made at the discretion of trustees, the court should not put improper pressure on the trustees to exercise that discretion for the benefit of the wife.

(b) The court should not, however, be 'misled by appearances'; it should 'look at the reality of the situation'.

(c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees."

46. In my view, the judgment of Waite LJ did not introduce any new principle along the lines stated in para 43 above, whereby third parties can be "encouraged" to provide financial assistance depending on the justice of the case. None of the authorities identified in his judgment support such a view. Properly understood, in my judgment, the judgments of the Court of Appeal in that case applied the approach set out in section E.3 above: where third party financial assistance is involved, the court will first ascertain the answers to the two questions set out in para 36 above before determining the appropriate order for ancillary relief.

47. In *Thomas*, in the passage set out above, Waite LJ himself warned against any undue pressure being imposed on third parties. It was also said that the court would not act "in direct invasion of the rights of or usurp the discretion exercised by, a third party." Glidewell LJ also emphasized the point that the court ought not apply undue pressure. He also referred, crucially, to the need to have regard to the likelihood of third party assistance in the foreseeable future.

48. It is extremely unlikely that the Court of Appeal in *Thomas* was advocating a novel approach based on "judicious encouragement".

…

49. This is also the way in which it would appear the English courts since *Thomas* have consistently approached the question of third party financial assistance. While there have been references to "judicious encouragement" and to that part of the judgment of Waite LJ referred to above, the courts have concentrated on the necessity to find, on the evidence before them, not only that third parties have provided financial assistance to the husband or wife, but that it was likely this would continue in the foreseeable future.

> …
>
> 50. If the true ambit of "judicious encouragement" is really no more than a restatement of the approach set out in section E.3 and in the previous paragraphs, I have no quarrel with that. However, if the term means a form of pressure on third parties to add to the relevant spouse's resources which, on the evidence, they would not do or are unlikely to do, I would for my part reject such a concept. It is an approach which is consistent neither with principle nor with the authorities. The approach of the courts should be that as set out in section E.3 above.
>
> 51. I have said earlier that the use of the term "judicious encouragement" has caused confusion among judges and practitioners alike. The Cases lodged in the present appeal indicate some confusion as to what exactly this concept means. This is not surprising when the courts in Hong Kong have themselves been unclear as to the meaning of that term. With respect to the judgments of the Court of Appeal, it appears the judges were not very sure as to the meaning either.
>
> …
>
> 52. In my view, it is time to reiterate the approach that in the assessment of the financial resources of the parties to a marriage for the purposes of considering an application for ancillary relief under s 4 of the MPPO, the court is guided only by s 7(1), in particular sub-para (a) thereof. The term "judicious encouragement" does not call for a different approach when third party assistance is involved.
>
> 53. For my part, it would be better if the term "judicious encouragement" were no longer to be used."

107. I therefore turn to consider the extent of assistance given by the trustees in the past and the likelihood of (a) whether, if asked, the trustees would have made further assistance available in the period prior to the wife's s.27 application; and (b) whether the trustees would now and in the future make available assistance over and above the income they are already providing.

108 - 126(x) Omitted

126(xi) My finding is that both in the period preceding the wife's application, and at the present time, the answer to the Charman question is no.

The condition precedent

127. Section 27(1)(a) of the Matrimonial Causes Act 1973 provides:

> "Either party to a marriage may apply to a court for an order under this section on the ground that the other party to the marriage has failed to provide reasonable maintenance for the applicant".

The court has to be satisfied of this fact as a condition precedent before it can go on to make an award of maintenance. In making that factual determination the court is required by s.27(3) to have regard to all the circumstances of the case including the matters mentioned in section 25(2).

128. Plainly, the requirement to make this preliminary factual determination must be interpreted purposively and not literally. Plainly, the condition precedent would not be satisfied, say, on proof of a failure to have provided reasonable maintenance for a short period 10 years earlier. It must mean that in the period immediately prior to the application the respondent has failed to provide reasonable maintenance for the applicant. That period might be quite long, and the failure may be intermittent, but it must be proximate to the application.

129. Curiously, there is no authority on this point. My interpretation is supported by the following statement in Jackson's Matrimonial Finance (Lexis Nexis 10th Edition) at para 11.2:

> "A party to a marriage may not be maintaining the other party or any child of the family at the relevant standard because he cannot or because he will not. In the former situation he does not have the means and is not reasonably in a position to remedy the situation: in the latter situation he has the means, or refuses to obtain them when they are reasonably available to him, so that he fails to provide reasonable maintenance for the other party, and fails to provide or to make a proper contribution towards the reasonable maintenance for any child of the family. If there is such failure to maintain, relief on that basis may be sought and either party to a marriage may apply"

No authority is cited in support of this statement but in my judgment it is plainly correct. Its use of the present tense shows clearly that the court must be looking at the here and now, that is to say the period immediately preceding the application. The criterion of reasonableness first requires the court in determining the preliminary factual criterion to consider what sum, if any, the respondent should have been expected to pay from his means to maintain the wife. It requires the court to determine initially whether the failure to pay maintenance was the result of 'won't pay' rather than 'can't pay'. If it is the former then the court moves to the second stage where the criterion of reasonableness plays a different role. Here it requires the court to make an evaluative assessment of what proportion of the respondent's means should go to the wife as maintenance having regard to the s.25(2) factors including, prominently, the marital standard of living, the length of the marriage, and the wife's own means.

130. In *Scott v Scott* [1951] P 245, an application under s.5 of the 1949 Act, Hodson J held

> "…the question of what is reasonable maintenance for the wife and children has to be considered, with reference to the husband's common law liability to maintain his wife and children, and the word "reasonable" no doubt has to be interpreted against the background of the standard of life which he previously had maintained. … It seems to me that, provided the existing state of affairs is that the husband is paying, and has been paying, what is prima facie reasonable maintenance for his wife and two children, as I find is the fact in this case, the maintenance does not become unreasonable when tested against the amount which a wife might obtain if she had succeeded in some proceedings which she might have taken, or which she indeed might yet take; because if the wife has left her husband because of his cruelty, of which she is complaining, she can take proceedings against him on the ground of that cruelty either for a judicial separation or for divorce. In those proceedings she is entitled to claim alimony pendente lite and, in the event of her succeeding in those proceedings, she is entitled to claim a permanent provision for herself whether by way of alimony or by way of maintenance. In the event of divorce, she is entitled to claim maintenance to be secured to her for her life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act 1949."

Therefore, reasonable maintenance is to be judged by reference, first, to the respondent's ability to pay and, second, to the marital standard of living. What the applicant might succeed in obtaining on an application for ancillary relief is not a relevant metric.

131. The preliminary factual criterion is important. It is not a mere permission filter. The court cannot shrink from addressing it squarely.

132 – 134 Omitted

135. I therefore reach the conclusion that the condition precedent is not satisfied in this case. The wife's application of 13 February 2015 must therefore be dismissed.

136. I now consider what should happen in the light of that decision to the interim order of 8 July 2016. Mr Horton argues that if the substantive application is dismissed then the interim order must logically be discharged *ab initio* with the consequential erasure of all the arrears. If the evidence now shows, contrary to the findings of Mrs Justice Parker, that the respondent did not have the means to pay at the time the order was made, or subsequently, then as a matter of logic the order must be discharged. After all, in her judgment at [112] Mrs Justice Parker stated that if it transpired that the sum awarded by way of maintenance was overgenerous it could be readjusted.

137. If the interim order had in fact been paid (a big if in this case, because I cannot identify any source from which it could have been paid) but the substantive application is later

dismissed, I cannot identify a power which would allow me to order repayment of the interim maintenance. Section 33 of the Matrimonial Causes Act 1973 would not seem to apply because the husband's circumstances would not have changed. The only change would have been the court's view of the evidence. Section 38 would definitely not apply. So it might be argued that if, in that scenario, the husband cannot be recompensed then it should not make any difference if he has not paid the order. Why should he benefit from his default?

138. The answer is that it is illogical, and would be grossly unjust, if the respondent was ordered to pay a sum which on my finding he was then, and is now, not able to pay.

139. Therefore, the interim order, and the order for legal costs funding will both be discharged *ab initio*. The costs orders made by Mrs Justice Parker and the Court of Appeal, are however, judgments which may not be altered. It is right that the husband should be required to pay those: they reflect the result that he lost on the legal point, and his ability to pay was not a relevant consideration in their making. That it may be difficult to enforce these orders is not a reason for disturbing them, even if I had the power to do so (which certainly in relation to the Court of Appeal order, I do not).

140. Finally, I consider the position if I am wrong in my assessment of the condition precedent as it may be that a higher court disagrees with me. What order for maintenance, if any, should I make if the condition precedent is satisfied?

141 Omitted

142. The only question is whether the husband, in circumstances where he is now receiving about £28,000 a year in net income from the two funds, should be maintaining the wife. In my judgment, on this hypothetical scenario, the husband ought to pay £10,000 p.a. in maintenance to the wife. It would be a drop in the ocean when set against her current needs and debts. But there is no good reason why she should be entirely dependent on the charity of her family and friends. This was an 18-year marriage and the husband ought to make some attempt to discharge his duty to maintain his wife. Payments would commence on the date of my order. There would not be any backdating as the husband has no capital to discharge any arrears and the trustees certainly will not give him any for that purpose.

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

144. However, for the reasons I have given, my decision is that the wife's application under s.27 dated 13 January 2015 is dismissed and that the orders for interim maintenance and legal costs funding dated 8 July 2016 are discharged *ab initio*. Although I stated at the beginning of this judgment that I would not be dealing with the Judgment Summons issued by the wife, it follows from the decisions I have made, that it must be dismissed as the interim order on which it is founded has been discharged *ab initio*.

145. Finally, I cannot forbear from observing that had the husband not chosen to challenge the jurisdiction of this court to hear the wife's s.27 application of 13 January 2015 then it would have been heard on its merits in 2015. I am certain that the same result would have been reached as I have reached in this judgment and the application would have been dismissed. That would have saved the parties the better part of six years of stressful, contentious, ruinously expensive and psychologically damaging litigation warfare. There would have been a divorce long ago in Scotland. Years ago the Sheriff Court at Dumbarton would have finally resolved all financial questions between the parties. I am not blaming the husband for the course that he took; after all, he came within one vote of victory in the Supreme Court. With the benefit of twenty-twenty hindsight I can, however, lament his decision.

146. That is my judgment.