IN THE FINANCIAL REMEDIES COURT

SITTING AT BRIGHTON

Before HHJ Farquhar

Neutral Citation: [2022] EWFC 96 (B)

BETWEEN

PAUL CLIFFORD GOODYEAR

Applicant

- and -

THE EXECUTORS OF THE ESTATE OF HEATHER GOODYEAR (DECEASED)

Respondents

Christopher Butterfield (instructed by Tisshaws Solicitors) for the Applicant

Rhys Taylor (instructed by BloomBudd LLP) for the Respondents

Judgment formally handed down on 12th August 2022

His Honour Judge Farquhar:

1. On 25th of January 2021 Paul Goodyear (the Applicant) and Heather Goodyear settled their financial remedy proceedings by way of a consent order which was approved by District Judge Pollard. In round terms the capital was split reasonably equally so that each party received just over £500,000 and there was a pension sharing order in favour of Heather Goodyear in respect of 51% of Mr Goodyear's Shell pension which had a cash equivalent in excess of £1 million. The pension credit so created would have been worth in the region of £600,000. Tragically Heather Goodyear died on 3 August 2021. The Applicant applies for the pension sharing order to be set aside. The executors of the estate of Heather Goodyear (the Respondents) oppose the application.

2. There are a number of issues that are raised within this application, but the fundamental issue is whether or not the death of Heather Goodyear has invalidated

the basis or fundamental assumption upon which the order was made as is required following the Barder line of authorities. The respective arguments can be crudely summarised as:

a. The Applicant states that a pension is intended as a form of income and upon the death of Heather Goodyear that income would not be required and could not be utilised. It is further added that if at the date of entering into the consent order it was known that Heather Goodyear would die within six months the pension sharing order would not have been made.
b. The Respondents argue that following all of the pension reforms/freedoms a pension is not to be considered in any different light to other assets and Heather Goodyear was entitled to the pension sharing order under the sharing principle following a lengthy marriage.

Factual Background

3. The parties to the financial remedy proceedings were married in 1979 and separated in 2017. As at the date of the consent order the Applicant was aged 66 and Heather Goodyear was 64. There were two children of the marriage: Chloe Goodyear who is now aged 36 and Craig Goodyear who is aged 32. They are acting as the executors for the purposes of these proceedings. Unfortunately, they are now estranged from the Applicant and the family tensions are apparent within this litigation. It is unfortunate to note that this animus features heavily in the statement prepared for the Respondents. It is not relevant information for the purposes of this hearing and not helpful. It will not be referred to within this judgment.

4. The Applicant issued his Form A on 2 August 2019 and within the negotiations a Pensions on Divorce Expert (PODE) report was obtained. That report set out the percentage required within a pension sharing order to provide equality of income which would have been 52.16% and also a figure for an equal share of capital value which would be 49.5%. The compromise that was reached between the parties was 51% by way of a pension share. As stated above the other substantial order related to the former matrimonial home which had equity in excess of £700,000 and there

was a further £330,000 of capital between the parties. The capital split was one of equality and the pension share was close to equality.

5. The order was drafted by the Applicant's solicitors and notably the wording of the pension sharing order clause did not contain the wording that appears within the standard family orders concerning an agreement to permit an application to vary or set aside the order if Heather Goodyear was to die prior to implementation. The order reads as follows:

"*20. There shall be provision by way of a pension sharing order in favour of the respondent of the applicant's rights under the Shell Contributory Pension Fund in accordance with the annex to the order."*

6. The former matrimonial home was sold, and the net sale proceeds were divided according to the Order. The Decree Absolute and the pension sharing order had been served on the Pension company, but the pension share had not been implemented. Heather Goodyear had made enquires in relation to what steps she was able to take concerning the pension share. On 24th July she had signed an "Expression of Wishes – Pension Death Benefit" form naming the two adult children as her beneficiaries. There was also a will drawn up in their favour on 22nd July 2021.

7. The Decree Absolute was pronounced on 8th July 2021 and Heather Goodyear died on 3rd August 2021. The Applicant swiftly made two applications on 4th and 5th August 2021 respectively:
   a. An application to set aside the consent order, particularly the paragraph dealing with the pension share, together with a stay of execution; and
   b. An appeal against the Consent Order.

   The matter came before me on 26th August 2021 and has proceeded since that hearing on the application to set aside as it is agreed that, on the facts of this case, this is the appropriate procedure pursuant to FPR 9.9A. However, the application for permission to appeal was not dismissed at that hearing in order to act as a bar on the pension sharing order taking effect as set out in reg 9 (2) Divorce etc (pensions) Regulations 2000 (SI2000/1123) which states : "*The filing of a notice of*

appeal within the time allowed for doing so prevents the order taking effect before the appeal has been dealt with." It is agreed that the appeal application will be dismissed once the decision in relation to the set aside application is concluded.

8. At the date when the Applicant made the application, he was not aware as to when Heather Goodyear first had knowledge that she had cancer. He raised this issue within his statement as to whether there may have been a lack of disclosure when the original agreement was reached. It is now agreed, following perusal of the subsequent disclosure that Heather Goodyear was not aware of any diagnosis at the time of the Consent Order. Indeed, tragically Heather Goodyear only became aware of the diagnosis in late June 2021. That issue is no longer pursued but it is not difficult to understand how this has raised the temperature of the litigation.

The Impact of failing to utilise the Standard order.

9. The standard order for a pension share reads (emphasis added) as follows:

"*There shall be provision by way of a pension sharing order in favour of the [applicant] / [respondent] in respect of the [respondent's] / [applicant's] rights under [his] / [her] pension arrangement[s] [pension name(s)] in accordance with the annex[es] to this order,* ***it being agreed between the parties that in the event that the [applicant] / [respondent] non-member spouse predeceases the [respondent] / [applicant] member spouse after this order has taken effect but before its implementation the [respondent] / [applicant] member spouse shall have the consent of the personal representatives of the [applicant] / [respondent] non-member spouse to apply to vary or to set aside the terms of this order under FPR 2010, r 9.9A or to appeal out of time against the order under the Matrimonial Causes Act 1973, s 40A or s 40B (as shall in the circumstances be appropriate)****.*"

10. It is suggested by the Respondents that the issue of death had been considered at an earlier date. This was upon the refusal of an application by the Applicant for Decree Absolute in August 2020 which, it is said, was refused due to the Financial Remedy application still being outstanding and there would be no protection for Heather Goodyear upon the death of the Applicant in relation to his pension if the DA was pronounced. Further, the Applicant had sent an email to Heather Goodyear's

solicitors on 10th March 2020 in which he refers to the impact of either his death or her death on the pensions held by each of them.

11. It is argued that once such issues had been raised and it being in the contemplation of the parties then the fact that the standard order was not utilised adversely impacts upon this application. This is on the basis that there must have been a deliberate decision not to include the consent to the application to set aside. This cannot be correct. The standard wording simply states that personal representatives shall consent to the Applicant applying to set aside the order. It does not state that they will agree to the order in fact being set aside. The issue was raised before me as to whether an individual can in fact bind one's Personal Representative in this way but that is not an issue that I need to decide.

12. The reality is that the basis of this application is founded upon the wording contained within s.31F(6) Matrimonial and Family Proceedings Act 1984 and r9.9A FPR. The application is now before the Court and it must be considered on its merits. The fact that the standard order was not used cannot impact upon that decision. It is always recommended to utilise the carefully draft standard orders but a failure to do so in this instance cannot prove fatal to the application.

What are the Rules on Implementation of the Order?

13. It is important to understand what will occur if the application is granted or not. In terms of the application being successful and the pension sharing order being set aside then it is simple to state the position. The Shell pension was already in payment and the implementation of the order will significantly reduce the income of the Applicant. If the order is set aside then the whole of the pension shall remain in the Applicant's name and his income will not be affected. This is a defined benefits pension, and the Applicant does not have any option as to how to take the pension. As at now it can only be drawn by him as a monthly income.

14. If the Pension Sharing Order had been implemented and Heather Goodyear had survived, then her options were far greater. There is no option for an internal transfer within the Shell pension scheme. This would have had to have been an

external transfer. This means that she would have had all of the freedoms that are now available to those holding such pensions. This would allow her to have used all of the funds to purchase an annuity, draw down money periodically or alternatively to have 'cashed in' the full amount. As stated (somewhat infamously) by the Pensions Minister, Steve Webb in 2015 it was the choice of the individual what to do with their pension including the option of purchasing a Lamborghini.

15. This was expressed by Nicholas Francis QC sitting as a Deputy High Court Judge (as he then was) in ***SJ v RA [2014] EWHC 4045*** in the following terms at paragraph 83 "*The recent well publicised changes to pension regulations will mean that pension investments are virtually to be treated as bank accounts to people over 55, as these parties are.*" The reality is that a pension is not the same as cash as the rules presently permit the first 25% to be taken tax free and the remainder would be taxed as income. In the case of this pension share in excess of £600,000 this would equate to a tax free sum of £150,000 and the remainder £450,000 would be taxed at marginal rates. This would mean if the pension credit was wholly 'cashed in' that the total capital available would be in the region of £420,000 (this is a rough estimate as no calculations were made available during the hearing).

16. The vast majority of individuals that have a pension pot of £600,000 would probably not be advised by a Financial Adviser to either invest it all in annuity nor convert it all to cash. These are simply the extreme options that are open to individuals. The documents indicate that Heather Goodyear intended to obtain a Transact Personal Pension which would have meant that all of the pension freedoms would have been available to her if she had survived.

17. The issue now is what is the position upon Heather Goodyear's death? Will the pension sharing order become ineffective or may it still be implemented? This is provided for in ***regulation 6 of the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000***.:

Discharge of liability in respect of a pension credit following the death of the person entitled to the pension credit

6.—(1) Where—

(a)the circumstances set out in paragraph (2) apply; and

(b)the rules or provisions of a pension arrangement provide that liability in respect of a pension credit may be discharged in accordance with this regulation,
the person responsible for the pension arrangement shall discharge his liability in respect of a pension credit in accordance with the provisions of paragraph 1(2), 2(2), 3(2) or 4(4)
of Schedule 5 to the 1999 Act (pension credits: mode of discharge—funded pension schemes, unfunded public service pension schemes, other unfunded pension schemes, or other pension arrangements) in favour of a person other than the person entitled to the pension credit, as if that person were the person entitled to the pension credit.
(2) The circumstances set out in this paragraph are that a person entitled to a pension credit dies before the person responsible for the pension arrangement has discharged his liability in respect of the pension credit.
(3) Paragraph (1) applies in relation to a pension arrangement to which paragraph 1, 3 or 4 of Schedule 5 to the 1999 Act applies, regardless of whether—
(a)the rules of that arrangement provide that appropriate rights may be conferred under that scheme on a person entitled to a pension credit; or
(b)in relation to the operation of paragraph 1(2) of that Schedule, the person entitled to the pension credit has consented to the conferring of appropriate rights under that arrangement on him."

18. The Pension Trustees indicated in correspondence dated 10th September 2021 and 4th November 2021 that they intend to implement the pension sharing order in line with the above regulation. In the earlier letter the trustees state that "*A more precise manner of implementation will be determined once the Trustees have clarity on the status of the Pension Sharing Order.*". The solicitors for the Applicant considered the Trust Deed and Regulations of the pension and could not see where the relevant provisions to allow for such implementation were located and the reply indicated the relevant regulation and repeated the previous statement as to the manner of implementation.

19. The hearing of this application took place on 26th November 2021 and on considering the issues further I caused enquiries to be made of the Pension Trustees in order to understand with greater clarity how the order would be implemented.

That has caused great delay. The solicitors for both parties have worked extremely hard on this issue and it is not straightforward.

The Enquiries of the Pension Trustees.

20. It has transpired that the solicitors for the Applicant were correct in their detailed reading of the Trust Deed and pension regulations. It was accepted by the Pension Trustees that the Trust Deed did not permit a payment out to the personal representatives in the manner that has been suggested and that they intended to amend the Deed and the Regulations to enable this to occur. This had not happened to date in Spring 2022 but they aimed to be in a position for this too occur shortly thereafter.

21. The details of the position have been set out by the Solicitors for the Applicant in a letter to the Court dated 26th April 2022. It is accepted that at the time of the Consent Order, the time of Heather Goodyear's death and indeed as at the date of the hearing, the regulations did not permit any payment to the personal representatives within this pension scheme. As is set out in the regulation above: regulation 6(2) states "*Where the rules or provisions of a pension arrangement so apply….*" And at 6(4) "*Where the provisions do not apply, liability in respect of a pension credit shall be discharged by retaining the value of the pension credit in the pension arrangement from which the pension credit was derived.*" The Applicant argues that at present this must mean that if the pension sharing order stands the pension credit will be retained by the pension fund.

22. The Trustees stated an intention to amend the Trust Deed and Regulations as permitted in Clause 17(2) of the Trust Deed. This states :

"(*2) The Trustee may from time to time, with the approval of a majority of the Member Companies, by supplementary deed revoke or modify all or any of the provisions of the Trust Deed or the Regulations as they relate to Pre-2009 Members with immediate, prospective or retrospective effect, provided that no such supplementary deed shall:*
(a) Alter the main pension purpose of the scheme constituted by the Trust Deed and the Regulations,

or

(b) Result in any payment to any of the Member Companies out of the Fund except as provided

under Clause 1 8(I)(g); or

(c) Be such that the actuarial value at the date of the supplementary deed of the total actual and prospective benefits for Pre-2009 Members and their families and dependants, including Adult Dependants, under the revised scheme is less than the amount certified by the Actuary to be the actuarial reserve existing in respect of those Pre-2009 Members at the date of the supplementary deed (no account taken of any difference which in the opinion of the Trustee is not substantial) or

(d) Reduce any pension being paid at the date of the supplementary deed,.

23. It is pointed out by the Applicant's solicitors that any amendment must also comply with s.67 Pensions Act 1995 which states : "

(1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.

(2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied."

(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—

(a)the trustees have satisfied themselves that—

(i)the certification requirements, or

(ii)the requirements for consent,

are met in respect of that member, and

(b)where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.

(4) In subsection (3)—

(a)"the certification requirements" means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before the power is exercised, and

(b)"the consent requirements" means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies."

24. There also needs to be compliance with s.37 Pensions Scheme Act 1993 which the Applicant's solicitors state prohibits an amendment to the rules of salary -related contract out pension schemes in relation to "section 9(2B) rights" unless the scheme actuary had provided written confirmation that the scheme would continue to comply with the 'reference scheme test' if the amendment was made. They argue that the Shell scheme is a contracted out scheme. As a result, it is argued that the amendment that is proposed by the Trustees may fall foul of clause 17(2) together with the two statues set out above due to the fact that it would clearly reduce the Applicant's accrued benefits which are not permitted under any of those sections.

25. On that basis it is submitted on behalf of the Applicant that there is significant uncertainty that any amendment will be effective. Further, even if it was effective there is still no certainty as to how the pension credit will be implemented. The final correspondence from the Pension Trustees on 19 April 2022 in email form states "*How the trustee implements the Pension Sharing Order will of course depend on what the court orders following the outcome of the application to set it aside. However if the pension sharing order is not varied as a result of that process the*

trustee would, having made the necessary amendments to the rules that were discussed in my email of last week, discharge its liability in line with Regulation 6(2) . By way of reminder, Regulation 6 offers the trustee a degree of flexibility to make a lump-sum payment and or a payment of a pension to one or more persons or to enter into an annuity contract or a policy of insurance for the benefit of one or more persons. I am not in a position to confirm which of those options the trustee will choose as that is a trustee discretion. Similarly, I can't say to whom any such benefit would be paid as that is a trustee discretion. However it may be useful to consider the list of potential beneficiaries that the trustee can choose to pay a benefit to following death as set out in the trust deed and regulations – these are the usual categories of beneficiary you would expect to see e.g. spouse, child, parents, siblings, dependents et cetera"

26. It is suggested within the further submissions on behalf of the Respondents that the Applicant have made a fundamental misunderstanding in their letter to the court dated 26th of April 2022. In that letter the Applicant's solicitors state that "*Under the scheme rules as they currently are (and were at the time of Mrs Goodyear's death), the scheme rules do not provide for the implementation of the pension sharing order following the death of the recipient spouse. This now seems to be accepted by the Trustees as they recognise that the scheme needs to be amended. Pursuant to regulation 6(2) of the Implementation Regulations, the pension credit shall therefore be discharged pursuant to regulation 6(4) ie by retaining the value of the pension credit in Mr Goodyear's pension arrangement. Under the current rules the situation is therefore straightforward.* ***The pension credit should be retained by Mr Goodyear***."

27. Mr Taylor on behalf of the Respondents appears to have interpreted the final sentence (highlighted in bold by myself) as meaning that if the Pension Sharing Order is not set aside the pension would be retained by the Applicant. He sets out in detail as to why this is obviously wrong. I agree with him: that would be obviously wrong. However, I disagree with him as to that being what the Applicant's Solicitors intended to convey. I understand the final sentence of the letter set out above simply means that as a result of the pension credit being returned to the pension fund as a whole if the order is not set aside then it follows that the

pension credit should be retained by Mr Goodyear, but this can only occur if the set-aside application is successful.

28. As such, I am satisfied that both parties agree the position. If the Trust Deed and Regulations are not amended and the Pension Sharing Order is not set aside the pension credit will be "discharged by retaining the value of the pension credit in the pension arrangement" and consequently neither of these parties would benefit. The parties also both agree that if the order is set aside in its entirety the pension credit shall be returned to the Applicant.

29. The parties disputed the likelihood of the amendment being made by the Pension Trustees. The Applicant's position is set out above when they state that no amendment would comply with the relevant statutes and the Trust Deed itself. The Respondents stated that the facts speak for themselves. They stated that the Pension Trustees have made it clear for many months that they intend to implement the amendment, they had provided the amendment in draft and had indicated that it should be fully implemented in a matter of weeks. It is submitted on behalf of the Respondents that in the circumstances of this case there should be a short further period of "purposeful delay" to allow for the amendment to be finally approved and at that stage the Court would be in a better position to decide the application as a whole.

30. There has been substantial delay, (the hearing was now over 6 months ago, since which date information has been sought from the Pension Trustees) in this case already and no final date was provided as to when the approval of any amendment would be finalised. In fact, it was confirmed that the Deed of Amendment was executed on 26th May 2022 and is effective immediately. It follows that this Court does not have to consider any arguments as to whether the amendment will be made. As pointed out by both parties, even if the amendment was made, there is still no certainty as to how the Pension Trustees would decide to implement the order and that would not be provided in advance of any decision being made.

31. In terms of the Applicant's interpretation that any such amendment would be in breach of the regulations and the Statutes, I am satisfied that this is not correct.

These all state that there must be no reduction in any pension being paid in the phrase "*adversely affect any member of the scheme"*. If the order is not set aside then the Pension Share would remain in place and there would be no adverse effect upon the Applicant. The only interpretation by which the Applicant could be adversely affected is if the amendment was effective and the Pension Share order was set aside. The regulations refer to: "*in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before the power is exercised*". This can only relate to the mathematical issues as it has to be *in the opinion of an actuary*. It cannot be referring to whether a pension share order has been made or not. Further the phrase "*entitlement, or accrued rights, acquired before the power is exercised*" can only have the meaning as of today. The accrued rights that the Applicant has at present are those that are subject to the Pension Sharing Order and consequently were not affected by the amendment itself.

32. It follows that I am satisfied that now that the Deed of Amendment has been executed that the amendment would be effective, with the consequence that there would be a presently undefined benefit to the Respondents. The only adverse effect that would occur is as a result of the Consent Order being amended. That will not be further affected by any amendment and the statutes and Regulations should not be interpreted otherwise.

33. It follows that the decision in relation to the Barder test can be considered at present, although it is against the backdrop of not knowing precisely how the Pension Sharing Order will be implemented.

The Barder Test

34. The test that was set out in **Barder v Barder (Caluori intervening) [1988] AC 20** is well known. Lord Brandon stated: "*A Court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption,*

upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition in that the grant of leave to appeal out of time should not prejudice third parties who have acquired in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

35. As noted above the procedural route is now an application to set aside rather than an application for Permission to Appeal but that does not alter the four limbs of the test that is to be applied. It is submitted on behalf of the Respondents that in ***BT v CU [2021] EWFC 87*** Mostyn J adds a further issue in that there is a discretion to be applied even if all of the 'Barder conditions' are met and that this should be applied in this case. One of the reasons put forward for applying such a discretion in this case is the failure to use the Standard order, which is dealt with above. It is to be noted however that Mostyn J adds "*this discretion will only arise where the final order was made by consent and where the applicant is a buccaneering market trader. It is hard to envisage other circumstances where the discretion will probably be exercised against set aside once all five conditions have been proved*."

36. It is difficult to see how such a description could be applied in this case. The only "buccaneering" action that is referred to is the failure to provide the standard order and I fail to see how that could possibly assist in a court refusing to set aside an order in circumstances such as this.

37. **The new events occurred within a relatively short time**. In this case Mrs Goodyear's death occurred just over six months after the order was approved. In

Barder itself it was stated that it is extremely unlikely that the event could be as much as a year after the order and would in most cases be within a few months. The Applicant refers to ***Smith v Smith [1991] FCR 791*** in which the order was set aside following the death of the wife in that case six-months after the original order. I am satisfied that the event in this case happened within a sufficiently short time to come within the "Barder test" and I note that this is not contested by the Respondents.

38. **The Application to set aside should be made reasonably promptly**. The application was made extraordinarily promptly within one day of Mrs Goodyear's death. Not surprisingly, no point is taken on this condition.

39. **No prejudice to Third Parties**. This is not a point that is taken by the Respondents.

40. Does the death of Mrs Goodyear "*invalidate the basis, or fundamental assumption, upon which the order was made"?*

41. It cannot automatically be assumed that a pension sharing order has been entered into for the purposes of ensuring that each party has an income and that the death of one of the parties would necessarily mean that the fundamental assumption behind the order was invalidated. As the nature of a pension can be flexible to the extent considered above, there will be cases where the pension is treated in precisely the same way as any other capital and is simply divided equally pursuant to the sharing principle. In such cases, especially if the pension is held in a SIPP, it is unlikely that the fundamental assumption was anything other than dividing the overall assets equally.

42. In ***Richardson v Richardson [2011] 2 FLR 244*** which was a case concerning capital rather than a pension, it was clarified that it was not a Barder event as the death of the wife did not invalidate the basis of the award. The headnote sets out the position in the following terms:

> *"Where the wife's future needs had been a central or critical factor in assessing the quantum of her award, it might not be very difficult for a surviving husband to argue that he should be permitted to appeal out of time. However, in a case such as this, whose magnetic feature had been that the wife had earned her*

equal share of the matrimonial assets, her unexpectedly early death very soon after the making of the final ancillary relief order did not entitle the husband to re-open the matter; the calculation of and obligation to pay the amount awarded had not been referable to the wife's needs or to her future expectation of life."

43. It is incumbent upon the Court to understand the reasoning behind the pension share in order to consider whether this limb of the Barder test is indeed met.

44. The starting point would be to assess the basis upon which the order was made. This was a Consent Order and consequently there is no judgment setting out the rationale behind the order that was made.

45. The PODE report from Caroline Bayliss sets out the pensions of the parties at the time:

	CE	Income
a. Husband – Shell	£1,184,617	£38,136
b. Husband – Shell Overseas	£100,361	£3,001
c. Husband – Standard Life	£114,749	£3,538
d. Husband – State		£7,480
e. Wife – TPS	£159, 573	£7,099
f. Wife – Prudential	£20,867	£661
g. Wife – State		£6,558

There were also calculations to show how the figures would differ if the post separation contributions to the Standard Life pension were not included – the income for that pension would reduce from £3,538 to £219.

46. On those figures the PODE report sets out the various percentage pension shares required to achieve the usual options:
    a. Equality of retirement income – 52.16% of the Shell Pension
    b. Equality of capital values – 49.5% of the Shell Pension
    c. Equality of income excluding post separation contributions – 47.58%
    d. Equality of capital excluding post separation contributions – 45.06%

The impact upon Mr Goodyear's overall pension income in retirement of the 52.16% pension share would be to reduce it by £19,891, meaning he would have an income of £32,264 rather than £52,155 if no pension share was ordered. The reduction would be one of £18,146 if the post separation contributions were not taken into account. The benefit to Mrs Goodyear would have been an increase in her income of £17,946 or £16,372 without the latter contributions.

47. The correspondence between the solicitors representing Mr and Mrs Goodyear spans from June to September 2020. It appears that there was agreement for an equal division of the capital from the commencement of the negotiations (save for a balancing payment) and the main issue between the parties was the pension share. Mr Goodyear sought 47.58% in line with the PODE report above and Mrs Goodyear sought the higher figure of 52.16%. The correspondence continues by stating that the parties were not far apart, and a compromise was reached for a pension share of 51%. Not surprisingly, there is no rationale set out within the correspondence as to why this should be the appropriate figure.

48. It is noted that in the original offer letter on behalf of Mr Goodyear, dated 23rd June 2020 under the heading "Pension Sharing Order" it is stated: "*Your client will retain her Teachers Pension and her Prudential Pension. Her income, as set out in the report will be £24,133 plus her increase of her own pensions of £1,529 per annum. Total £25,662.68. Our client will have an income until January 2021 of £23,210 and thereafter £30,975 as set out in the report.*" The response from the solicitors for Mrs Goodyear included the sentence: "*The sole purpose of Mr Goodyear's assertions as to our client's income needs is to argue a departure from equality regarding the pensions. .....In a case where both parties are imminently reaching state retirement age, were married for 38 years and made equal contributions in all ways, it is wholly inappropriate for one party to exit the marriage with less than the other.*"

49. The majority of the points raised in relation to the pension share were concerning income and not that an equal division had been 'earned' pursuant to the sharing principle, although this was alluded to in the final sentence above. It is clear from the way that the arguments were set out within the correspondence that the main

thinking on the pension share was around the issue of the parties' respective pension incomes. Further, the two original offers made by either side were those that had been calculated by the PODE on the various options as to income as opposed to capital.

50. The evidence that is available clearly points to the fact that the income that was to be generated by the pension share was fundamental to the percentage that was agreed upon by the parties. This is on the basis that:

a. The PODE had been requested to provide the appropriate percentage required to provide equality of both income and capital;
b. Each party relied, in the negotiations, upon a particular percentage calculated by the PODE which related to equality of income on different bases and not those relating to an equal capital split;
c. The correspondence all refers to the income that would be generated by the various percentage pension shares and not the impact upon capital;
d. The capital in the case was not so significant to indicate that the parties would not require to utilise the pensions for income – Mr Goodyear would not have the option, in any event.

51. It follows that I am satisfied that the thrust behind the pension share was in order to ensure that the parties had sufficient income during their retirement. If it had been known that Mrs Goodyear would not live more than 6 months after the order was entered into then the same pension share would not have been agreed. It is the intention of the parties at the time that the order was approved that is important, rather than any intention that was formulated thereafter. It appears that Mrs Goodyear latterly formed the intention to ensure that she was able to pass on the benefits of her pension to her beneficiaries, but this intention is only evidenced after she had become aware of her terminal diagnosis and not at the time that the original order was agreed. As such, it is not relevant in considering the fundamental basis of the order when it was entered into.

52. On the basis that all of the Barder criteria are met, I am satisfied that the order must be set aside.

53. What Order Should be Made?

54. The first question to consider is whether it is appropriate to reach a conclusion to these proceedings now or whether to make directions for a further hearing.

55. In his skeleton argument, Mr Butterfield sets out the position as follows:

> "The Court has a considerable discretion as to how to determine a set aside application. In ***Kingdon v Kingdon [2010] EWCA Civ 1251***, *the Court of Appeal held that it was unnecessary to set the case down for a full re-hearing if the judge dealing with the issue of non-disclosure (in that case) was clear as to the correct outcome. The approach in Kingdon was also adopted by Moor J in* ***Neil v Neil [2019] EWHC 3330****:"The case of Kingdon is authority for the proposition that I do not have to set the case down for a re-hearing if I am clear as to the correct outcome. I have to apply FPR Rule 1.1. I have to deal with cases justly but that includes, so far as practicable, ensuring a case is dealt with expeditiously and fairly; dealing with it in ways that are proportionate to the nature, importance and complexity of the issues; ensuring that the parties are on an equal footing; saving expense; and allocating to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'*."

56. It is set out in FPR PD9A paragraph 13.8 that :

> "*In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide*

to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order."

57. Neither party has suggested that there should be any further hearing in this matter and have each suggested that final orders should be made. All of the information that is required to make a decision is before the Court by way of the disclosure that the original parties had made to each other. There is no known financial information about the beneficiaries but that is not relevant to consider the correct order that would have been made in January 2021, if the true factual picture was known. I am satisfied that it is appropriate and proportionate to set aside the order and substitute an alternative order.

58. In the hearing it was submitted on behalf of the estate that if the Court was satisfied that the order should be set aside then it may be appropriate to amend the pension share to one of capital equalisation. This is on the basis that Mrs Goodyear had 'earned' an equal share of the pension following a 38 year marriage. This would result in a percentage share of 49.5% if the post separation contributions were ignored or 45.6% if they were taken into account.

59. There is no suggestion on the part of Mr Goodyear that the non-pension capital element of the order should be set aside. The argument is made that the pension, in the hands of Mrs Goodyear, is simply a different form of capital and consequently the only amendment that should be made to the order is the tweaking set out in the paragraph above.

60. The argument on behalf of Mr Goodyear is that the reality is that the purpose behind the pension share was to meet the income needs of Mrs Goodyear and as those needs no longer exist there should be no pension share at all. The question is posed; "Would a Judge approve a pension share Order if it was known that Mrs Goodyear would die within 6 months?" Mr Butterfield suggests that the judge would not

approve such an order. It is added that Mr Goodyear would not have agreed to such an order.

61. I am satisfied that, bearing in mind the hybrid nature of a pension, that both arguments are correct. Mrs Goodyear had 'earned' her share of this particular pension through this long marriage, but it would also have been required to provide for her income needs at least in part. It is clearly a legitimate desire for Mrs Goodyear to be in a position to pass on the capital in which she is entitled to share to her beneficiaries, so long as the needs of the parties are met. The sole question is as to how to fairly reflect these conflicting positions in terms of a pension share.

62. This was a long marriage. The pensions, taken as a whole, amounted to a larger sum than the other capital. The pensions in Mr Goodyear's name amounted to just under £1.4m whereas those in the name of Mrs Goodyear had a total CE of £180,440. Is it realistic to consider that such disparity could be justified after a 38 year marriage without any pension share order being granted? If it was known that Mrs Goodyear would die within 6 months, then steps could have been taken to ensure that the external transfer occurred as swiftly as possible to permit her to convert the pension credit to a capital sum. When the flexibility of pensions is taken into account, I am satisfied that it would not have been considered a fair outcome if there was no pension share order granted.

63. The sole question to consider is what is the appropriate percentage for the pension share? On the basis that the order would not be made to meet the needs of Mrs Goodyear on an income basis then the relevant figures from the PODE report are those that relate to equalisation of the capital position. They are in the figures of 49.5% or 45.06% depending on whether the post separation contributions were taken into account or not. However, if either of those figures were utilised then there would be no consideration given to the fact that the income needs of Mr Goodyear would be continuing, whereas those of Mrs Goodyear would not. I am satisfied that this is a sufficient justification for there to be a departure from equality. If it was known at the time that the order was agreed that Mrs Goodyear would only live a further 6 months I consider that a significant reduction in the percentage share

would have been clearly appropriate as that share of the pension which was required for her income would never be utilised.

64. The correct level of pension share to order is one of 25% of Mr Goodyear's Shell pension. This will ensure that he receives some 75% of the pension income that had been earned throughout the marriage but would also provide a significant pension credit for Mrs Goodyear's estate which will be implemented by the Pension Trustees. This will appropriately reflect the 'earned' share whilst providing a 'discount' for the many years over which income will not be required for Mrs Goodyear. The order is one that balances the competing arguments as to the nature of the pension asset in a way that fairly meets the income needs of Mr Goodyear and a fair sum for the estate of Mrs Goodyear.

65. **Costs.** I have not heard any submissions as to costs. I would seek short written submissions on the issue, if either party is pursuing an order for costs. Each party is to inform the other party of any order for costs which they wish to pursue within 7 days of service of this judgment and then all parties must provide their written submissions, limited to 5 pages, 7 days thereafter. At the same date the parties are to provide any suggestions as to any typographical or other errors within the judgment. If any clarification is sought on any point by any party any such request is limited to 2 pages maximum.