SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SC PER 4

PER F205/15

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

BRIAN DOUGLAS

Pursuer

against

SHIRLEY DOUGLAS

Defender

Pursuer: M Stuart QC; Macnabs
Defender: Ennis, Advocate; Thompson Family Law

Perth, 13 November 2018

The Sheriff, having resumed consideration of the cause

FINDS IN FACT:

Pre-marriage

1. The pursuer is Brian Douglas, whose date of birth is 15 July 1955 and who is therefore now 63 years of age. The defender is Shirley Douglas, whose date of birth is 5 January 1967 and who is therefore now 51 years of age.
2. The parties first met and formed a relationship in 1992. At that time they both lived in Scotland. The pursuer had just taken up employment with Woolworths, having previously been employed as a regional manager with Whitbread. The defender was a

supervisor in a Marks & Spencer store, but then moved to Mothercare, first as an assistant store manager and then as a store manager.

3. In 1993 the pursuer was appointed as a regional director for Woolworths in the south of England, based in Surrey and London. The defender obtained a transfer of her employment and moved to England with the pursuer. They bought a cottage together in South Nutfield, Surrey, with title and mortgage in joint names, and began to cohabit from this time.

4. The pursuer paid the deposit on their cottage, of £33,000. Both parties contributed to their joint domestic expenses. In general terms the pursuer, with his significantly greater income, paid the household bills, bought the furniture, and paid for parties' holidays. The defender paid for food and ancillary items. The parties kept their own personal credit cards.

5. From 1993 the defender's employment was as manager of the Mothercare store in Redhill. This was less than 10 minutes by car from where the parties lived. Her responsibilities increased and by 1997, for a short period of time, she also had management responsibilities for stores in Horsham and Crawley. Her role included redevelopment of the stores and all aspects of running the business, including payroll, recruitment, etc. She worked longer hours at this time, often leaving home early in the morning and sometimes not returning until mid or late evening. Overall her role at this time was a responsible and demanding one. The total turnover of the three stores amounted to around £4 million per annum.

6. The parties' first child, BD, was born on 5 September 1997. The defender took maternity leave from Mothercare. During this time the parties moved to a converted barn near Bletchingly in Surrey. Again this was in joint names. The defender did not return to

work at the end of her maternity leave, but stayed at home to look after BD. The pursuer wanted the defender to do so. The defender was willing to do so. Ultimately the decision was a joint one, and for which both parties are responsible. As a result, the pursuer took on the sole responsible for providing for the family financially.

7. For the following two years the pursuer continued to work full time for Woolworths, being promoted to a role with UK wide responsibilities. It meant that he spent more time away from home during the week, but was generally home at weekends, and helped with some domestic tasks at these times. However overall the defender took a greater share of the responsibility of caring for BD and for the upkeep of the parties' home. The pursuer was generally in charge of and dealt with the family finances, and the defender was generally content to allow him to do so.

8. The parties continued to live in Bletchingly, but missed their friends in South Nutfield where they had lived originally. A house came on the market in this village and the parties bought it and moved back there. Again the title and mortgage were taken in joint names.

9. Toward the end of 1999 the pursuer was made redundant by Woolworths. He had a period of unemployment of around six or seven months, during which time the parties lived off his redundancy payment. In 2000 the pursuer obtained employment as managing director of Vision Express Europe. This job was based in Nottingham, but also involved the pursuer regularly travelling to Paris. He was generally away from home from Monday to Thursday if he was working in Nottingham, and from Monday to Friday if he was working in Paris. The parties' home was located reasonably close to Gatwick airport, so they did not move house as a result of the pursuer's new employment.

10. In around the middle of 2001 the pursuer was made redundant from Vision Express, again receiving a redundancy package. Shortly thereafter he obtained employment as a retail director with TJ Hughes. This job was based in Liverpool. The parties considered moving home, but decided not to do so. Instead the pursuer stayed in Liverpool from Monday to Friday and returned home to Surrey at the weekends. Accordingly the defender continued to be responsible for most of the child care and domestic duties.
11. Around this time the defender went to Guildford College for two years and undertook a part time diploma in beauty therapy. The pursuer was content that she do so, and paid for the cost of the course. Thereafter the defender sometimes offered beauty treatment to family and friends, for small amounts of money, fitted around her child care and domestic work.
12. The parties' second child, AD, was born on 21 November 2002.

Marriage

13. The parties were married on 25 October 2003.
14. Within a month of their marriage, the pursuer was made redundant from TJ Hughes. He was thereafter unemployed for more than a year before finding employment with Gretna Green Group in around the middle of 2005. Given his difficulties in finding work, he took this new employment at a salary of around £50,000 per annum, whereas he had previously been earning in excess of £120,000 per annum.
15. Initially, the parties continued to live in Surrey, with the pursuer travelling home from Gretna at weekends. However in around early 2006 the parties sold their home and moved to farmhouse accommodation near Gretna, provided by the pursuer's employer.

From this point, for almost the first time in their relationship, the pursuer was able to commute to work from the parties' home throughout his working week.

16. Following the parties' move to Scotland, BD was enrolled at a primary school in Carlisle. From around the end of 2006 AD went to nursery, also in Carlisle. Carlisle was around a 25 minute drive from the parties' home. Most of the time the defender drove the children to school and nursey and collected them, although on occasions she was able to access a car share scheme with other parents living nearby. On some occasions the pursuer took the children to school and nursery.

17. Given the reduction in the pursuer's income following the parties' move to Gretna, and the cost of the lifestyle which they still wished to enjoy, they discussed whether the defender should return to paid employment. With their children at school and nursery in Carlisle it would have been easier for the defender to have done so than before. The pursuer wanted the defender to get a job. However she did not do so. This was again a joint decision for which both parties are responsible.

18. Gretna Green Group was a family business. Alastair Houston was the chairman and chief executive. The pursuer was initially in charge of retail operations, but in around 2007 he was promoted, took on a more general management role and was later appointed to the board of directors. His salary increased, and ultimately reached around £110,000 per annum.

19. In around late 2006 the parties purchased a house called Mossknowe Steading, located around 5 miles from Gretna and 13 miles from Carlisle. This was next door to Alastair Houston's house. They then spent £70,000 on renovating and upgrading it and obtaining planning permission to develop a nearby barn. This expenditure was funded by sale of the parties' house in Surrey, and by increasing their mortgage.

20. The parties found it difficult living in Gretna. They did not particularly like the social group which they were in, nor the location of their house. The parties were also keen to send their children to what they thought would be better schools. In particular they decided to send BD to Glenalmond College and AD to Ardvreck Preparatory School, and to move the family home to Crieff to accommodate this. These too were all joint decisions, for which both parties are responsible.

21. Accordingly in around June 2010 the parties took a lease of a house called Oakwood, in Macrosty Gardens, Crieff ("Oakwood"), on a rent of £1,000 per month. Thereafter the parties and their children moved to Oakwood, with the pursuer travelling to and staying at Mossknowe Steading during the week to work, before returning to Crieff at weekends. Once again, the defender had the greater share of day to day responsibility for the care of the children.

22. The parties put Mossknowe Steading on the market in around July 2011, but it was not sold for some months after that. Thereafter the pursuer found a rented flat in Carlisle to live in during the week, and returned home to Oakwood at weekends. This rented flat became unaffordable for the parties, given in particular their outgoings on school fees and the rent for Oakwood. The pursuer accordingly found cheaper accommodation to live in during the week, namely a rented room in a shared student house.

23. Following the move to Oakwood BD started as a day pupil at Glenalmond, and AD started as day pupil at Ardvreck. In order to get to Glenalmond from Oakwood the defender would drive BD to the bus stop at around 7am, a journey of about 5 to 10 minutes. He would be collected by school bus and taken to Glenalmond, returning by bus to Morrison's School from where the defender would pick him up around 6.20pm. In order to get to Ardvreck School from Oakwood the defender would drive AD there at

around 8.15am, a journey of around 10 minutes. She would then drive to collect him from school around 6pm.

24. Both BD and AD had regular extra-curricular activities, particularly sports, many of which took place during the week. The defender had the main share for taking them to their respective activities and collecting them afterwards.

25. The parties decided to buy the defender a membership of Gleneagles Health Club, and she regularly made use of this membership.

26. The parties' original intention was to rent Oakwood for a short period, prior to purchasing a house. However it was not until 2012 that the parties purchased a property known as Blacksmith's Cottage, Madderty ("Blacksmith's Cottage"). At the date of purchase this property required extensive rebuilding and renovation. The parties financed the purchase from the proceeds of sale of Mossknowe Steading. The renovation and rebuilding was financed from a mortgage from the Furness Building Society. This was to a total of £225,000, available in periodic draw-downs, subject to approval, as the work proceeded.

27. Work on renovating and rebuilding Blacksmith's Cottage started in 2013. Meantime the parties continued to live at Oakwood. Numerous contractors were instructed to carry out the various aspects of the renovation and building work. As the pursuer continued to work in Gretna during the week, the defender was involved in dealing with tradesmen and keeping account of payments made to them.

28. Following the move to Crieff, the pursuer was increasingly keen for the defender to return to paid employment, in particular to help them finance their children's education and the costs of the works on Blacksmith's Cottage. The defender could in principle

have resumed employment, even if only on a part time basis, but did not do so. She was not prevented from doing so by the pursuer.

Pensions

29. The defender became a member of the Marks & Spencer occupational pension scheme when employed there prior to 1992. She ceased to make contributions on leaving this employment, but remained a member of the scheme. The defender then became a member of the Mothercare occupational pension scheme when employed there between around 1993 and 1997. She ceased to make contributions on leaving this employment, but remained a member of the scheme.

30. The pursuer's pension history is as set out at pages 2 to 4 of the report by Sandra Terras, production number 5/19/1. In particular, the pursuer was a member of the occupational pension schemes relative to his employments with Whitbread, Woolworths, Vision Express, and TJ Hughes. He was subsequently a member of Scottish Life and Standard Life personal pension schemes. The various funds were transferred and consolidated as the pursuer left one scheme and joined another. Such transfers and consolidations occurred prior to the start of the parties' cohabitation, between their cohabitation and marriage, and following their marriage.

31. In January 2008 the pursuer withdrew a lump sum of £68,715 from his pension fund. These funds were put into the marriage. The remaining funds arising from the pursuer's past and present memberships of all of his pension schemes were ultimately transferred to a Self-Invested Personal Pension scheme administered by AJ Bell ("the SIPP"). The pursuer became a member of the SIPP in 2010.

32. In the same year, in order to finance payment of BD and AD's school fees, the pursuer sought assistance from Jonathan Fisher, a financial adviser now employed by Grant Thornton UK LLP. Mr Fisher proposed a scheme whereby the pursuer could, because he was now over 55 years of age, pay school fees by tax free withdrawals from his pension, thereby in effect reducing the net cost by 40%.

33. At the pursuer's insistence Mr Fisher met with the defender too, in order to obtain her consent to this proposal. He explained to her what was planned. She had no difficulty in understanding it, and was happy to proceed on this basis. Mr Fisher's advice in part involved taking advantage of the defender's tax reliefs, and to this extent he was advising her as well as the pursuer. The decision to finance private school education for BD and AD via the scheme proposed by Mr Fisher was a joint one, taken by both parties.

34. Accordingly Mr Fisher set the scheme in motion and the pursuer began to make periodic withdrawals from his pension fund to pay school fees incurred in respect of BD and AD's attendance at Glenalmond and Ardvreck. The pursuer also took a salary sacrifice, that is, he made additional payments of salary into his pension so as to maximise the tax advantage to be obtained from withdrawals for payment of school fees.

35. The pursuer had earlier received shares in Kingfisher group as part of his remuneration with Woolworths, and had also been part of this employer's share save scheme. On Mr Fisher's advice, again in around 2010, the pursuer sold these shares, and cashed in this share save, for a total of £78,000. This sum was paid into the SIPP.

36. Between 2010 and October 2014 the pursuer withdrew a total of £169,148 from the SIPP pursuant to Jonathan Fisher's scheme, as more fully detailed at schedule 1 of Sandra Terras' report. These withdrawals were not made only from that part of the fund attributable to contributions made by the pursuer prior to the marriage, nor were they

made only from that part of the fund attributable to his contributions made after the marriage. Rather they were made from the pursuer's pension fund as a whole.

37. The sums withdrawn by the pursuer from the SIPP were all put into the parties' marriage, and in particular towards payment of the parties' children's school fees.

Separation

38. The parties' relationship had often been a volatile one, and they had separated for a short period in around 2001. However in the period between January 2013 and October 2014 the defender's behaviour became so difficult that the pursuer felt that he could no longer live with her. She began to behave aggressively towards him, and there were a lot of arguments between them. It was nearly always the defender who started these arguments. The defender would shout and swear at the pursuer. On occasions the defender threatened the pursuer when angry, to which the pursuer just turned and walked away.

39. By this time the parties were struggling financially. This was in particular due to the costs of the building and renovation of Blacksmith's Cottage and delays in obtaining draw-downs of mortgage funding from the Furness Building Society as the work progressed. As a result the pursuer felt under increasing pressure in relation to servicing the parties' debts. He repeatedly told the defender to moderate her spending but she refused. The defender spent money on gym memberships, beauty treatments, hairdressing and petrol for the parties' Range Rover, which she alone used. If the pursuer asked the defender to spend less or change the way she lived she would immediately lose her temper and would shout and swear at him. This happened frequently.

40. During this period the parties went on holiday to Cyprus and the defender refused to talk to the pursuer at all. During this same period the parties went on holiday to Brora. Whilst there the defender disappeared. She would not answer her phone and neither the pursuer nor the children knew where she had gone. This was very distressing for them. During this same period the parties went to a ball at a local hotel. The defender had been drinking. She started to accuse the pursuer of having an affair with a third party, which was not true.

41. The defender's relationship with BD and AD became very difficult. She was regularly verbally abusive towards them. For example, in the summer of 2014 the defender shouted and swore at BD while they were visiting Blacksmith's Cottage. She then ran out to the car and drove away with AD, leaving BD in the house, shouting and swearing about him as she did so. She later returned, picked BD up, and then took him to a bus stop at Tibbermore, where she braked suddenly, swore at him, and told him to get out. He refused, and she was forced to drive on. In around September 2014, the defender lost her temper with BD, and swore at him in a supermarket in Kirkcaldy. Around the same time AD reported to the pursuer that the defender had assaulted him by pushing him and kicking him.

42. As a consequence of the defender's behaviour the pursuer stopped sleeping with the defender in the matrimonial bedroom when at Oakwood and slept in a different room in the house. He would often walk out of the house to get away from her and to let her calm down.

43. On Monday 8 October 2014 the pursuer travelled from Oakwood to Gretna to go to work. The pursuer stayed in his rented room in Carlisle that evening and the following evening. On Wednesday 10 October 2014 the defender telephoned the pursuer, told him

that she had taken legal advice, and that she wanted a divorce. The pursuer travelled back to Oakwood and met with the defender who gave him a letter from Turcan Connell instructing him to leave the house. He did so, initially staying in a Travelodge before moving to stay with his sister in her house at North Cottage, Ardgaith Farm, Errol ("North Cottage"). The parties have accordingly not lived together since 8 October 2014, which is the date of separation for the purposes of this action.

Matrimonial property

44. As at the date of separation the parties owned the following matrimonial property:

i. Blacksmith's Cottage. The building and renovation works remained unfinished. When sold in April 2016 the net free sale proceeds were £54,189. This sum is being held by the selling agents pending conclusion of these proceedings;

ii. The pursuer's interest in the SIPP. The Cash Equivalent Transfer Value ("CETV") was £519,566;

iii. The pursuer's additional state pension. This had a value of £51,352, but only £15,412 of this was matrimonial property;

iv. The defender's interest in the Marks & Spencer occupational pension scheme. The CETV was £72,556, but only £25,538 of this was matrimonial property;

v. The defender's interest in the Mothercare UK Ltd occupational pension scheme. The CETV was £44,943, but only £22,649 of this was matrimonial property;

vi. The defender's additional state pension. This had a matrimonial property element to the value of £3,509;

vii. The pursuer's 234 Lloyds shares with a value of £176;

viii. The defender's 72 Lloyds shares with a value of £54;

ix. The credit balance in the parties' joint Barclays bank account number xxxx2520, being £142;

x. The credit balance in the parties' joint Barclays bank account number xxxx4073, being £21;

xi. The credit balance of the defender's Royal Bank of Scotland account numbered xxxx5004, being £15;

xii. An Aga cooker purchased for Blacksmith's Cottage. This had a refund value of £11,853, which was later paid to the pursuer;

xiii. The parties' Range Rover, which was subject to a personal contract purchase agreement with a surrender value of £6,152.

xiv. Furniture and plenishings from the parties' matrimonial home at Oakwood, with a value of £2,160.

45. As at the date of separation the parties had the following matrimonial debts:

i. The Furness Building Society mortgage secured on Blacksmith's Cottage, the balance of which was £198,457. This loan was repaid following sale of the property in April 2016;

ii. Various outstanding sums due to contractors relative to invoices rendered for works in connection with the renovation of Blacksmith's Cottage. These are more particularly detailed at paragraph 8(iv) of the joint minute number 37 of process ("the principal joint minute"). They totalled £20,933;

iii. A personal debt of £30,000 to Alastair Houston. This sum had been used to fund window and roofing works at Blacksmith's Cottage;

iv. The debit balance of the parties' joint Barclays bank account xxxx0405, being £2,076. On both 8 and 9 October 2014 the defender withdrew sums of £500. The account was closed in November 2014 at which time the debit balance was £14,947. This debit balance was transferred into an account in the pursuer's sole name;

v. The debit balance on the pursuer's American Express credit card, being £3,977;

vi. The debit balance on the pursuer's Virgin credit card, being £4,000;

vii. The debit balance on the pursuer's Barclaycard credit card of £6,119;

viii. The debit balance of the parties' Barclays loan account xxxx1098, being £8,811. This sum had been used to fund renovation and building works at Blacksmith's Cottage.

ix. The sum of £227 due by the pursuer to British Gas;

x. The pursuer's income tax liability for the year from April 2014. His total tax liability for the year to April 2015 was £5,000, and accordingly 7/12 of this amount, that is, £2,916 related to the period prior to the date of separation.

xi. The defender's liability to Turcan Connell in relation to legal services provided to her in connection with separation and divorce. An invoice for £7,254 was subsequently rendered, one half of which (£3,627) can be attributed to the period prior to the date of separation.

Events post separation

46. Immediately following the parties' separation BD and AD continued to reside with the defender at Oakwood. The defender continued to behave badly towards them. The pursuer continued to work in Gretna during the week and to stay with his sister at the

weekends. Typically, in the period between the separation and February 2015, the pursuer would travel to Oakwood on Friday evening and collect BD and AD. The three of them would then go to stay at North Cottage for the weekend, following which the pursuer would drop the children off at their respective schools and drive back to Carlisle to work.

47. Following the separation, the parties' household goods and furnishings remained within Oakwood. Thereafter the defender began systematically filling cases and removing items from the house in the family car. These included the defender's clothing but also rugs and other household items.

48. In February 2015 the pursuer, BD and AD went on a skiing holiday. This had been booked prior to the parties' separation. Whilst at the airport following their return from the holiday the pursuer received a text from the defender telling him that she had moved to a new rented property at Burrell Street, Crieff, and that he should return the children to her at this address. Neither the pursuer nor the parties' children had previously been aware that she had planned to move house at this time.

49. The pursuer drove to his sister's house with BD and AD and stayed overnight there. In the course of the car journey BD phoned the defender. The pursuer was frustrated and angry by the situation and expressed this in strong terms during the phone call. The following day they went to the defender's new house at Burrell Street. The defender was in the house along with a friend. The pursuer stayed in the car. BD and AD went into the house to collect their school clothes. The police were called and the pursuer was arrested on the basis of the comments he was said by the defender to have made in the course of BD's phone call with her the previous day. The pursuer was held in custody overnight and released.

50. BD and AD stayed overnight at the house at Burrell Street. The following day, 23 February 2015, BD went to school. Thereafter the police were called by the pursuer's sister following an allegation by AD in a phone call to her that the defender was physically abusing him. AD was removed from the defender's house. When BD returned from school that evening he returned to Burrell Street. The defender refused to let him in. He phoned the pursuer, who told him to get a taxi to the pursuer's sister's house, which he did. Neither BD nor AD have resided with the defender since this date.
51. The pursuer, who was continuing to work in Gretna during the week, subsequently arranged for both boys to become boarding pupils at their respective schools.
52. When the defender moved to Burrell Street she took the parties' said furniture and plenishings from Oakwood with her. At the end of February 2015, the pursuer and BD went to Oakwood and removed some miscellaneous items of the parties' property which remained in the house. These were cleared by them to a storage facility in Auchterader.

The safe

53. When they lived in Oakwood the parties had a safe, located in the defender's bedroom in a walk in wardrobe. It could be opened by punching a four digit code into a key pad. The code could be changed once the safe was open. The only people who knew the code were the pursuer, the defender and BD.
54. As at the date of separation certain valuables were kept in the safe. In particular, it contained the passbooks for BD and AD's savings accounts, the pursuer's father's professional football medals, three watches belonging to the pursuer (by Omega, Fabre Leuba and Longines), jewellery (including a 2.65 carat diamond ring belonging to the

defender), and gold cufflinks belonging to the pursuer. The passports of the parties and their children were also sometimes kept in the safe.

55. The pursuer had been married prior to starting his relationship with the defender. He had a canteen of cutlery from this first marriage. As at the date of separation it was kept at Oakwood in the dressing table, next to the dining room furniture. The pursuer had previously also owned three Mont Blanc pens. However these had been stolen and he did not still own these pens as at the date of separation.

56. Following the parties' separation, and prior to her leaving Oakwood, the defender emptied the safe and took possession of the pursuer's three watches, his gold cufflinks, and his father's football medals. She also took possession of the pursuer's canteen of cutlery.

57. Following negotiations between parties' agents, certain household items from Oakwood were delivered by the defender to the pursuer at North Cottage around January 2016. They were delivered on two pallets which were left on the grass outside the cottage. Included in these items were the pursuer's father's football medals.

58. The present whereabouts of the pursuer's said watches, cufflinks and cutlery is unknown. It has not been established that the defender still has possession of them. Their value is unknown.

The pursuer's circumstances post separation

59. In around March 2015 the pursuer was summoned to a meeting with his employer, Alastair Houston. Certain allegations were made against him. He disputed these allegations, but in the light of them, and after taking legal advice, he considered that his relationship with his employers had broken down irretrievably and accordingly he

resigned in around May 2015. He entered into a compromise agreement. The pursuer repaid the parties' said £30,000 loan to Alastair Houston by way of an equivalent reduction in the amount received by him under this agreement.

60. Thereafter the pursuer gave up his rented room in Carlisle and moved to live full time with his mother at her home in Leven, where he remains. He has been unemployed since May 2015. Initially, he actively sought new employment, but without success. He has since given up looking for work, pending the conclusion of these proceedings. The pursuer's mother is elderly and suffers from dementia. She is in poor health and the pursuer provides care for her, which takes a moderate amount of his time.

61. The pursuer has continued to withdraw money from the SIPP. This has been his principal source of income since May 2015. However as the pursuer has been unemployed and has put no new contributions into the SIPP since this date, the fund has steadily diminished. Furthermore, the pursuer's withdrawals no longer attract tax relief, and so are subject to income tax. As at the date of the conclusion of the proof the value of the SIPP had been reduced to £337,000.

62. In addition to withdrawals from the SIPP the pursuer has since May 2015 received Child Benefit in respect of AD. This has been his only other source of income.

63. The pursuer had a stroke on 31 December 2017. He was admitted to hospital for two days. He lost the use of the left hand side of his body. He has been prescribed medication and has largely recovered, albeit he is unable to drive. His mental faculties were unimpaired. He is at increased risk of a further stroke. Given his current age and state of health, his employment prospects are now limited. It is unlikely that he will again achieve the high earnings which he had prior to May 2015.

The defender's circumstances post separation

64. The defender has continued to reside in the house at Burrell Street, Crieff. It is a three bedroom house, which she rents for £650 per month. She lives there alone.

65. The defender began working for Hometrust Care Ltd, a care home company, around June 2015. She was initially contracted to work 16 hours per week with a net income of around £550 per month. In January 2017 the defender was appointed to a full time salaried post with the same company, with a net monthly income of around £1,468.

66. Between around May and December 2016, although still technically a part time employee, the defender worked many additional extra hours due to a crisis in her employer's business. The defender was not paid for this work at the time that she did it, and the extra hours worked by her were not recorded on her payslips for the period. However in January 2017 the defender received a net payment of around £9,000 from her employer, additional to her monthly salary. This payment was recorded on the defender's payslip for January 2017, but was paid by cheque rather than bank transfer. This payment was described as a "bonus", although around half of it represented back pay for the additional hours worked by the defender over the previous 6 months.

67. The defender continues to work for Hometrust Care. She has joined a new pension scheme to which her employer makes contributions. The defender is well regarded by her employer. She is in good health. She has undertaken college courses with a view to bettering her employment and earning prospects in the future.

Liabilities arising after separation

68. Subsequent to the date of separation the parties continued to incur further liabilities arising out of the marriage:

i. Monthly payments to the said Furness Building Society mortgage in respect of Blacksmith's Cottage. By the date of sale of this property in April 2016 these totalled £16,092, together with associated mortgage protection payments totalling £1,836;

ii. The cost of ongoing portaloo rental in relation to the renovation of Blacksmith's cottage, totalling £211;

iii. Rent and services for Oakwood for the period to the end of February 2015 when the defender left this property. These liabilities are as more fully detailed at paragraph 11 of the principal joint minute, but totalled £6,313;

iv. In around November 2014 the parties surrendered the Range Rover and received the said surrender value. Of this sum, £4,500 was paid as a deposit on the lease of a Volvo motor car, which was taken out on 20 December 2014. The balance of £1,652 was paid into the parties' joint account xxxx0405. The lease of the Volvo was taken in the pursuer's sole name, and was for four years. The monthly repayments were £248. The Volvo has been used exclusively by the defender.

Payments made after separation

69. Since the date of separation the pursuer has paid the parties' following debts and liabilities:

v. Some of the said contractors' invoices in relation to the renovation of Blacksmith's Cottage, to a total of £15,785, leaving a balance of £5,148 outstanding (£20,933 – £15,785);

vi. All of the said monthly mortgage and mortgage protection payments on Blacksmith's Cottage between the date of separation and April 2016 (thus £17,928 (£16,092 + £1,836);

vii. The said portaloo rental costs in relation of Blacksmith's Cottage (£211);

viii. All of the said rent, council tax, utilities and services charges in respect of Oakwood for the period between October 2014 and February 2015 (£6,313);

ix. All of the said monthly lease payments in respect of the Volvo motor car. By November 2018 these amounted to £11,904 (48 months x £248);

x. The debit balance of the Barclays loan account xxxx1098 (£8,811). The pursuer paid the monthly sums due under this loan up to November 2015, at which time the balance had been reduced to £6,652. The pursuer then took out a new £10,000 loan, at a lower rate of interest, and paid off the balance of xxxx1098. The additional £3,348 obtained under the new loan was also used by the pursuer to pay sums still due in relation to the building and renovation works at Blacksmith's Cottage. Around £5,800 of the new £10,000 loan remains outstanding;

xi. The pursuer's said income tax liability for the tax year prior to the date of separation (£2,916). Since December 2016 the pursuer has been paying off his whole income tax liability for the tax year 2014/15 through an arrangement with debt collectors acting on behalf of HMRC. Under this agreement he has been paying £150 per month. The total sum paid is therefore around £2,700 (18 months x £150) and therefore £2,300 still outstanding, of which £1,341 relates to the period prior to the parties separation.

70. Prior to May 2015, these payments were made by the pursuer from post separation income which was not matrimonial property. Thereafter all payments have been made by the pursuer by his withdrawing money from the SIPP. The other said matrimonial debts at the date of separation, and all the other said matrimonial liabilities arising thereafter, remain outstanding and unpaid.

The aliment action

71. On 27 March 2015 the defender lodged an action seeking payment of aliment from the pursuer. At this time the pursuer was still employed by Gretna Green Group and continuing to earn a substantial salary, while the defender was unemployed. On 24 April 2015, on the defender's opposed motion for interim aliment, the pursuer was ordered to pay her £1,000 per month, net of his making the said monthly lease payment in respect of the Volvo motor car (£248), thus an effective total payment of £1,248 per month. On 19 May 2015 the pursuer sought leave to appeal the interlocutor of 24 April 2015, and to vary the award to nil. This motion was refused.

72. On 14 July 2016 the pursuer again sought to vary the award of interim aliment to nil. By this time he had lost his job with Gretna Green Group and was unemployed, whereas the defender had secured the said part time employment with Hometrust Care with a salary of around £550 per month. The sheriff refused to vary the award of interim aliment to nil, but reduced it to £750 per month, again net of the monthly car lease payments. In doing so the sheriff recognised that the pursuer now had no employment income and so was only able to pay an award of aliment by making withdrawals from the SIPP, at least some of the funds in which were likely to be a matrimonial asset. It

was therefore further recognised that any interim aliment paid from this source would have to be accounted for in the division of matrimonial property in the present action.

73. On 24 February 2017, on the pursuer's further motion to vary aliment to nil, the court reduced the award to £350 per month, again net of the car lease payments. Mr Alan Davies, the defender's then solicitor, accepted on her behalf that she had now secured full time employment with a monthly income of nearly £1,500. The defender's January 2017 wage slip was not produced to the Court. The Court was not told about the said £9,000 bonus payment which the defender had recently received. Concerns were raised on behalf of the pursuer that the defender's disclosed bank statements suggested additional income of more than £7,000 from unknown sources. It was submitted on the defender's behalf that these represented 'top ups' and 'loans' from her mother to 'keep the wolf from the door'. Ultimately the sheriff took the view, even accepting that the defender's salary had increased, that there was still an income deficit as against the statement of needs produced to the court on her behalf, hence the refusal to vary the award to nil. It was again recognised that as aliment would likely continue to be paid from the SIPP, an accounting would in due course be required in relation to the parties' matrimonial property. On 16 March 2017 the pursuer's motion for leave to appeal the interlocutor of 24 February 2017 was refused.

74. The defender failed to disclose receipt of the said £9,000 payment to Alan Davies prior to the hearing on 24 February 2017. She did so deliberately with the intention of misleading the pursuer and the court as to her true financial position at this time.

75. The pursuer applied to the Child Maintenance Service to assess the defender's liability to pay maintenance to him in respect of AD. The defender was assessed as liable to pay £49.08 per week from 5 March 2017. The pursuer did not receive any payments from the

defender pursuant to this said assessment. Instead, he began to deduct the equivalent of £49.08 per week from the payments of interim aliment which he made pursuant to the court order of 24 February 2017.

76. On 13 April 2017 the pursuer lodged a specification of documents, seeking in particular recovery of all the defender's bank statements and employment documentation so as to show her income and expenditure since the date of separation. The pursuer's motion for commission and diligence was ultimately granted on 5 May 2017. Certain documents recovered under the specification were received from the defender's employers and her bank in sealed envelopes.

77. The pursuer's motion to have these envelopes opened and their contents disclosed was granted on 12 June 2017. The documents thus recovered are now lodged as the thirty third inventory of productions in the divorce action. In particular they included the defender's January 2017 wage slip (production 5/33/3) showing payment to her of the said £9,000 bonus. The documents also included a bank statement for RBS account xxxx6439, in the joint names of the defender and her mother, Helen Munro, showing a credit receipt of £9,000 on 6 April 2017 (production 5/33/12).

78. RBS account xxxx6439 was originally in Helen Munro's sole name. The defender was not added as a signatory to this account until about 30 March 2017. Her name was then removed from the account on 8 September 2017. The £9,000 paid into this account on 6 April 2017 was in the form of a cheque made out to the defender from her employer, and was the bonus payment shown on the defender's wage slip for January 2017.

79. The defender arranged to become a signatory on her mother's account, and then paid the cheque for £9,000 into it, as a means to try to conceal receipt of this payment from the pursuer and from the court.

80. On 10 July 2017, and in the light of the documentation recovered under the specification, the pursuer lodged a further motion to reduce the award of interim aliment to nil. However on 14 July 2017 Alan Davies withdrew from acting for the defender. Thereafter the defender instructed her present agents.

81. At a hearing on 10 August 2017 a proof in the aliment action was fixed for 18 December 2017 (to be heard along with the proof in the present action), and a procedural hearing was fixed for 1 September 2017. At this hearing the sheriff granted the pursuer's motion to reduce interim aliment to nil and back dated the effect of this order to 7 July 2017. The defender's solicitor acknowledged in the course of the hearing that neither the January 2017 wage slip nor the RBS bank account statement had been disclosed to the court during the hearing on 24 February 2017. It was said on the defender's behalf that her position was that she had told Alan Davies of her receipt of the said bonus, but that he had not told the court about it.

82. On 3 October 2017 the defender lodged a motion seeking to dismiss her aliment action and to find no expenses due to or by either party. This motion was opposed and at a hearing on 13 October 2017 the defender's agent lodged a minute of abandonment instead. On 9 November 2017 the sheriff assoilzied the pursuer from the crave of the initial writ, and found the defender liable in the expenses of the action. The defender moved for modification of the expenses to nil on the basis of her legal aid certificate. This motion was opposed, and was continued to 18 December 2017. It was accepted that determination of the defender's motion for modification should await the outcome of the present action, and it was continued from day to day, tracking the proof. On 23 May 2018 the motion was further continued to await the present judgment.

83. Between the date of separation and the abandonment of the aliment action the pursuer paid a total of £23,393 to the defender by way of interim aliment. All of this sum was paid by way of withdrawals from the SIPP.

BD and AD's circumstances

84. At the date of separation BD was in his sixth and final school year. He continued to attend Glenalmond as a boarder until the end of the school year in June 2015. School fees in respect of the academic year 2014/2015 remain outstanding, totalling £15,788 (production 5/26/1). The parties are jointly liable to Glenalmond in respect of these fees (production 5/3/14).

85. After finishing school BD took a gap year and since then has attended Canterbury Christ Church University. Since autumn 2016 the pursuer has made payments towards BD's university fees and maintenance, additional to loans and grants he has received. These have amounted to around £16,000 so far, and all have been made from withdrawals from the SIPP.

86. Following the separation AD continued to attend Ardvreck school. The parties were jointly liable for the fees for the school year ending in June 2015 (productions 5/3/11, 5/12/3). As at the date of separation there was a nil balance on their account. Fees of around £10,000 were incurred by the parties relative to the remainder of the 2014/2015 school year. These fees were paid by the pursuer.

87. The pursuer decided to continue to send AD to Ardvreck for the school year beginning around August 2015. He was solely liable for the fees thus incurred for the 2015/2016 school year (productions 5/3/31, 5/12/3). The pursuer subsequently decided to send AD

to another private school, St Leonards School in St Andrews. He was solely liable for the fees thus incurred (productions 5/13/6, 5/13/7 and 5/34/8).

88. Between the date of separation and April 2017 the pursuer has paid a total of £26,853 toward AD's school fees, including both the said fees to Ardvreck for the school year 2014/2105 and for which both parties were liable, and those for which he was solely liable relative to the years thereafter. All these payments have been made from withdrawals from the SIPP. Further fees to St Leonards School, amounting to £12,000 remain outstanding as at the date of the proof.

89. AD currently attends St Leonards as a day pupil. He lives with the pursuer and the pursuer's mother in Leven. Since August 2016 he has travelled to and from school on the school bus, which picks him up from outside the house at 7.45pm and returns him around 6.10pm. The pursuer is responsible for his day to day care outwith school.

90. Neither BD nor AD is currently in contact with the defender. That is because they do not want such contact.

91. Overall the arrangements for AD's accommodation, education and care are satisfactory. Neither party seeks any order in respect of him, and no such order is necessary or appropriate.

FINDS IN FACT AND LAW:

1. The parties' marriage has broken down irretrievably as established by the defender's unreasonable behaviour;

2. An order for financial provision in the form of a pension sharing order in favour of the defender under section 8(1)(baa) of the Family Law (Scotland) Act 1985 is justified by the

principles set out in section 9 of the Act and reasonable having regard to the resources of the parties.

THEREFORE:

1. Sustains the first plea in law for the pursuer and grants decree divorcing the defender from the pursuer as first craved;
2. Sustains the first plea in law for the defender to the extent of making a pension sharing order in terms of section 8(1)(baa) of the Family Law (Scotland) Act 1985 requiring the pursuer's interest in the SIPP to be shared by debiting this scheme with the sum of £68,796, this sum to be credited to such approved pension arrangement for the defender as may be nominated by her, and providing that any charges arising in connection with this transfer under section 41 of the 1999 Act shall be borne equally between the parties in terms of section 8A of the 1985 Act;
3. *Quoad ultra*, repels the pleas in law for both parties, and dismisses the second to eighth craves for the pursuer and the first and third to seventh craves for the defender;
4. Reserves all questions of expenses meantime.

NOTE:

Introduction

[1] This acrimonious and protracted divorce action first called before me for a two day diet of proof on 18 and 19 December 2017. I had had no previous involvement with it. Mr Stuart, QC, appeared for the pursuer, and Miss Ennis, advocate, for the defender. Evidence was eventually led on 19 December 2017, 13, 14, 15 and 28 March 2018, and on 12 and 13

April 2018. Over those days I heard oral evidence from the pursuer, Mrs Sandra Terras, an actuary, the defender's former solicitor Alan Davies, the defender's employer Alyson Joyce, the defender herself, and Dr John Pollock, another actuary. The pursuer lodged his own affidavit, an affidavit from his sister, Lynn Douglas, two affidavits from his elder son, BD, and an affidavit from his financial adviser, Jonathan Fisher. The defender lodged affidavits from her mother, Helen Munro, and from a friend, Diane Crichton. Two detailed joint minutes were also lodged, the principal joint minute, and the minute lodged as number 44 of process. Some 37 inventories of productions were ultimately lodged for the pursuer, and 12 for the defender, comprising hundreds of documents, many of which were referred to in the course of the proof. Counsel set out their submissions in writing, which were supplemented by oral submissions at a hearing on 23 May 2018. Thereafter I made avizandum.

The relevant statutory provisions

[2] Section 1 of the Divorce (Scotland) Act 1976 provides that:

> "(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that—
>
> (a) the marriage has broken down irretrievably…
>
> …(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—
>
> …(b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
>
> …(d) there has been no cohabitation between the parties at any time during a continuous period of one year after the date of the marriage

> and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
>
> (e) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action…"

[3] Financial provision on divorce falls to be determined in accordance with the provisions of the Family Law (Scotland) Act 1985 ("the 1985 Act"). These are complex and detailed, and have been much amended. Given the orders ultimately sought in the present action, the following provisions are relevant. Section 8 provides in particular:

> **"8.— Orders for financial provision.**
>
> (1) In an action for divorce, either party to the marriage …may apply to the court for one or more of the following orders—
>
> (a) an order for the payment of a capital sum to him by the other party to the action;
>
> …(baa) a pension sharing order;
>
> …(c) an incidental order within the meaning of section 14(2) of this Act.
>
> (2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
>
> (a) justified by the principles set out in section 9 of this Act; and
>
> (b) reasonable having regard to the resources of the parties.
>
> (3) An order under subsection (2) above is in this Act referred to as an "order for financial provision"…"

[4] Section 8A of the 1985 Act provides:

> **"8A. Pension sharing orders: apportionment of charges.**
>
> If a pension sharing order relates to rights under a pension arrangement, the court may include in the order provision about the apportionment between the parties of any charge under section 41 of the Welfare Reform and Pensions Act 1999 (charges in respect of pension sharing costs) …"

[5] Section 9 of the 1985 Act provides, in particular:

> **"9.— Principles to be applied.**
>
> (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
>
> > (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage…;
> >
> > (b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
> >
> > (c) any economic burden of caring,
> >
> > > (i) after divorce, for a child of the marriage under the age of 16 years…
> >
> > should be shared fairly between the persons;
>
> …(2) In subsection (1)(b) above and section 11(2) of this Act—
>
> "economic advantage" means advantage gained whether before or during the marriage… and includes gains in capital, in income and in earning capacity, and "economic disadvantage" shall be construed accordingly;
>
> "contributions" means contributions made whether before or during the marriage…; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family."

[6] Section 10 of the 1985 Act, again insofar as material and relevant to the present case, provides:

> **10.— Sharing of value of matrimonial property…**
>
> (1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property… shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.
>
> (2) …[T]he net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage… —

(a) before the marriage so far as they relate to the matrimonial property… and

(b) during the marriage…

which are outstanding at that date.

(3) In this section "the relevant date" means whichever is the earlier of—

(a) …[T]he date on which the persons ceased to cohabit;

(b) the date of service of the summons in the action for divorce…

…(4) Subject to subsection… (5)… below, in this section and in section 11 of this Act "the matrimonial property" means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

…(5) The proportion of any rights or interests of either person –

(a) under a life policy or similar arrangement;

(b) in any benefits under a pension arrangement which either person has or may have (including such benefits payable in respect of the death of either person)

which is referable to the period to which subsection 4(b)… above refers shall be taken to form part of the matrimonial property…"

… (6) In subsection (1) above "special circumstances", without prejudice to the generality of the words, may include —

…(b) the source of the funds or assets used to acquire any of the matrimonial property… where those funds or assets were not derived from the income or efforts of the persons during the marriage…;"

…(8) The Secretary of State may by regulations make provision about calculation and verification in relation to the valuation for the purposes of this Act of benefits under a pension arrangement or relevant state scheme rights."

[7] Section 11 of the 1985 Act provides in particular as follows:

11.— Factors to be taken into account.

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and
(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property… or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;
(b) any expenditure or loss of earning capacity caused by the need to care for the child;
(c) the need to provide suitable accommodation for the child;
(d) the age and health of the child;
(e) the educational, financial and other circumstances of the child;
(f) the availability and cost of suitable child-care facilities or services;
(g) the needs and resources of the persons; and
(h) all the other circumstances of the case.

…(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage… unless—

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision…"

[8] The policy aim underlying these provisions has been said to be to achieve a fair, and presumptively equal, sharing of the matrimonial property on divorce, being the property held by the parties to the marriage at the relevant date (in this case, the date of separation). The legislation recognises and values non-economic contributions made by one or both of the parties. And it recognises that not all property held at the relevant date will have been derived from the parties' collective efforts during the marriage, and therefore that the contribution by one party of non-matrimonial resources over time to the creation of matrimonial property may be a special circumstance justifying departure from the

presumption of equal sharing: see *EP, G* v *GG* 2016 Fam LR 30 per Lady Wolffe at paragraph 71. But the mere fact that special circumstances are found to exist does not mean that an unequal division must necessarily follow. If such circumstances exist, the question remains as to whether they are such as to justify an unequal division in all the circumstances of the case: see *Jacques* v *Jacques* 1997 SC (HL) 20 per Lord Clyde at 22. These various considerations fall to be applied in the present case. Detailed though the legislation is, the question for the court remains essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense. As such, the appellate courts are particularly reluctant to open up the assessment of the details by the court of first instance: see *Little* v *Little* 1990 SLT 785 per Lord Hope at 786I – 787 D.

[9] Regulations have been made under section 10(8) of the 1985 Act in relation to valuation and apportionment of pensions, in particular the Divorce etc. (Pensions) (Scotland) Regulations 2000 SSI 2000/112 ("the 2000 Pension Regulations"). Regulation 3 provides in particular as follows:

> "**3. Valuation**
> (1) The value of any benefits under a pension arrangement shall be calculated and verified, for the purposes of the [1985] Act, in accordance with this regulation and regulation 4…"

Regulation 3 contains detailed provisions for calculation and verification which, in the great majority of cases, will have the effect that value of a pension arrangement is determined by its CETV at the relevant date.

[10] Regulation 4 of the 2000 Pension Regulations provides as follows:

> "4. Apportionment
> The value of the proportion of any rights or interests which a party has or may have in any benefits under a pension arrangement as at the relevant date and which forms part of the matrimonial property by virtue of section 10(5) shall be calculated in accordance with the following formula–

$$A \times \frac{B}{C}$$

where–

A is the value of these rights or interests in any benefits under the pension arrangement which is calculated, as at the relevant date, in accordance with paragraph (2) of regulation 3 above; and

B is the period of C which falls within the period of the marriage of the parties before the relevant date and, if there is no such period, the amount shall be a zero; and

C is the period of the membership of that party in the pension arrangement before the relevant date."

[11] As Lady Smith explained in *McDonald* v *McDonald* 2016 SC 118, paragraphs 20 – 25), valuation of pensions under the 1985 Act initially caused difficulty, with competing views as to the appropriate method of valuation. Different actuarial approaches of equal validity might produce different results. The 2000 Pension Regulations were intended to address and simplify this issue. Requiring most pension interests to be valued using the CETV method involves applying a degree of pragmatism in the interests of certainty. One must then look to regulation 4, the purpose of which is to identify that portion of the value of the person's rights or interests in a pension arrangement which is part of the matrimonial property. This is, as Lady Smith observes (paragraph 25):

> "…a straightforward time based apportionment. It is immediately obvious that it may not always seem to produce a fair result. Contributions to the pension may not have been regular throughout the period between entry into the scheme and the relevant date or they may have been of dissimilar amounts or the pension may not have grown at an even rate, but none of that is to be taken into account for reg 4 purposes."

Regulations 3 and 4 must be read together. As Lady Smith further explains:

> "…the purpose of reg 3 is to provide… the figure for the 'A' part of the reg 4 formula. To put it another way, regs 3 and 4 are plainly intended to be read together and as fulfilling the requirements arising from the terms of sec 10(5) of the 1985 Act. Regulation 3 … provides a means whereby the figure for the 'rights and interests of either person' … in a pension arrangement, at the

> relevant date, is to be ascertained and reg 4 directs what 'proportion' … of that value is to be regarded as matrimonial property."

I do not see these observations as inconsistent with or disturbed by the later judgment of the Supreme Court. They are without prejudice to the question of whether special circumstances or fairness may justify any unequal division of that part of the value of a party's pension which falls to be regarded as matrimonial property by virtue of the application of regulations 3 and 4: see *McDonald* v *McDonald* 2017 SC (UKSC) 142 per Lord Hodge, paragraphs 13, 32.

[12] Finally, it should also be noted that by virtue of regulation 2(1) of the 2000 Pensions Regulations, "pension arrangement" has the same meaning for the purpose of these regulations as it has in section 46(1) of the Welfare Reform and Pensions Act 1999. This provides that:

> ""pension arrangement" means:
> (a) an occupational pension scheme,
> (b) a personal pension scheme,
> (c) a retirement annuity contract,
> (d) an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal pension scheme, and
> (e) an annuity purchased, or entered into, for the purpose of discharging liability in respect of a credit under section 29(1)(b) [of the 1999 Act] or under corresponding Northern Ireland legislation"

This is therefore an exhaustive definition. It identifies the types of pension schemes membership of which will fall to be valued and apportioned under regulations 3 and 4 of the 2000 Pension Regulations.

Divorce

[13] It is matter of agreement that the parties separated on 8 October 2014 and have not cohabited since then. The present action was lodged on 30 July 2015 and served on the

defender shortly afterwards with the notice of intention to defend allowed to be lodged, late, on 2 October 2015. Accordingly the action was brought less than a year after the parties' separation. The initial writ contained a crave for divorce on grounds of irretrievable breakdown of the marriage as evidenced by the defender's unreasonable behaviour, with supporting averments and a plea in law to this effect. A proof on this plea was assigned for February 2017 but later discharged. In June 2017 the pursuer lodged answers to a minute of amendment by the defender and, two years having then passed since separation, deleted his averments of unreasonable behaviour on her part, and substituted averments to the effect that the marriage had broken down irretrievably as evidenced by non-cohabitation.

[14] At the outset of the proof, on 18 December 2017, I queried whether, notwithstanding the amendment, it was competent for the court to grant decree of divorce on the present averments. I referred counsel to my observations at paragraphs 27 to 34 of *McNulty* v *McNulty* 2016 Fam LR 145. In that case the action had been raised very shortly after separation on the basis of alleged adultery by the defender. A question arose as to whether it was competent, following proof more than two years later, to amend the grounds for divorce. Ultimately, it was accepted by parties' agents that it would not be competent. I said:

> "[32] Given the parties' joint position it is strictly unnecessary to consider whether their agents' concession – that it would not be competent to amend the action to enable it to proceed on grounds of non cohabitation – was properly made. I am conscious that there is authority to the contrary: see *Duncan* v *Duncan* 1982 SLT 17, a decision of Lord Murray sitting in the Outer House. In that case the parties separated in November 1979, and in February 1981 the pursuer brought an action seeking to establish divorce on the basis of her husband's unreasonable behaviour. In the course of the proof the pursuer sought to amend and establish divorce on the basis of two years' separation (as the law then stood) with consent. That motion was not opposed by the defender. In granting it, Lord Murray observed (at page 18, I – J) that:
>
> > "On the first point the wording of s. 1 (2) (d) of the Divorce (Scotland) Act 1976 provides for divorce on the ground of two

> years' separation with consent where "there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action". I think that it is quite apparent that where an amendment to a summons served on a different ground during the two years introduces that ground of divorce for the first time after two years, then the date of bringing the action *on that ground* is the date on which the amendment is allowed. I am fortified in this approach by the opinion of Lord Maxwell in the unreported case of *McBride v. McBride* where he took the same view. I respectfully agree with his conclusion."

I can entirely see the pragmatic good sense of this decision, and I suspect that it is regularly given effect to in practice, but with respect I query whether it is strictly correct as a matter of law.

[33] There is only one ground for divorce, namely irreconcilable breakdown of the marriage. That is the ground on which the action was brought, both in *Duncan* and in the present case. The ground can be established in the different ways prescribed in the sub-paragraphs of section 1(2) of the 1976 Act, but these sub-paragraphs do not themselves provide different grounds for divorce. If a pursuer brings an action for divorce and avers irreconcilable breakdown of the marriage as established by adultery, and then seeks to amend the action to establish it by non cohabitation, she is therefore not seeking divorce on a new or different ground than before. She is simply asking to be allowed to lead different evidence to establish the same ground in a different way. Even if that was wrong, and non cohabitation were to be treated as a different 'ground', it might also be said that if Parliament had intended section 1(2)(e) to be read as if the words 'on that ground' were added at the end, then it would have expressly provided for this. And in any event, I have difficulty seeing how a minute of amendment can be said to be an "action" for the purpose of this provision. "Action" must mean "action for divorce", defined earlier in section 1. What was being done in *Duncan* was to amend the terms of an existing action for divorce, not to bring a new action.

[34] For all these reasons, therefore, it seems to me that there are grounds to take the view that the wording of section 1(2)(e) of the 1976 Act means exactly what it says, with the consequence that divorce cannot be established on the basis of non cohabitation unless the requisite period has elapsed after the date of separation and before the action for divorce is brought. If this were correct, however, I can see that the results would likely be unfortunate. One might either see more divorces proceeding on contentious averments, or see more existing divorce actions being dismissed and new actions brought in order to introduce non contentious averments, with additional effort and expense. I am grateful therefore that I do not have to make a decision on this issue in this case."

That I should have raised this issue in the present case should not have come as any surprise to the defender, at least, given that Miss Ennis' instructing solicitor had also appeared for the defender in *McNulty*.

[15] I also drew counsels' attention to a more recent decision, the case of *Ray* v *Ray* [2017] SC BAN 60; 2017 GWD 31-501, where a different view was taken. In that case Sheriff Mann considered what I had said in *McNulty* but had held that it was competent to amend a divorce action to introduce a non cohabitation ground notwithstanding that the action had been raised within a year of separation. He observed as follows:

> "[7] The approach that I take is in line with that of Lord Murray in *Duncan* v *Duncan*. But, in doing so, I prefer to focus on the issue of irretrievable breakdown of marriage. Properly read, section 1 [of the 1976 Act] provides four separate grounds for establishing irretrievable breakdown of marriage on the basis of which the court may grant decree of divorce. The first is adultery, the second is the defender's unreasonable behaviour and the third and fourth are periods of non-cohabitation immediately preceding the bringing of the action.
>
> [8] There were originally five paragraphs in section 1(2) of the Act. One of those paragraphs was repealed by section 12 of the Family Law (Scotland) Act 2006, which has as its heading: "irretrievable breakdown of marriage: desertion no longer to be a ground". That is a clear indication that the legislature considered desertion to be a separate ground upon which irretrievable breakdown of the marriage could be established. If desertion was a separate ground then so too were, and are, adultery, unreasonable behaviour and periods of non-cohabitation.
>
> [9] What a pursuer in an action for divorce actually asks the court to do is to establish the irretrievable breakdown of the marriage on one of the four grounds as a basis for allowing the court to grant decree of divorce. Current and long established practice is and has been to express a crave for divorce in a way that asks the court to grant divorce on the ground of irretrievable breakdown as established in one or other of the four permitted ways. It would be more accurate to express a crave for divorce as follows: "to find that the marriage between the parties has broken down irretrievably on the ground that since the date of the marriage [specify one of the four grounds] and thereafter to grant decree divorcing the defender from the pursuer." I am prepared to read the crave for divorce in this case in that way.

> [10] Sheriff Collins in *McNulty* suggested that, by seeking to amend, the pursuer was not seeking divorce on a new or different ground than before but was simply asking to be allowed to lead different evidence to establish the same ground in a different way. But if there were no substitution of one ground for another there would be no need to introduce a new crave by way of amendment because any change in the way in which it was proposed that the ground be proved would be effected by adjustment of amendment of the articles of condescendence. In both *Duncan* and *McNulty* and also in this case what, actually, was being changed by amendment, and properly so, was the ground for establishing irretrievable breakdown. That is in no way affected by the fact that it is only upon irretrievable breakdown being established that the court may grant decree of divorce.
>
> [11] This action can be described as an action for divorce seeking to establish irretrievable breakdown of marriage originally brought on the ground of unreasonable behaviour but now brought on the ground of non-cohabitation. What the court did by allowing the minute of amendment was to allow the pursuer to abandon his action on one ground and of new to bring it on another ground. I am in no doubt that the action now before the court is an action that was brought as at the date of the allowance of the minute of amendment. That is the date of bringing the action for the purpose of section 1(2)(e) of the 1976 Act."

On this view of the law, it was apparent that it would have been open to me to grant decree of divorce in the present case on the basis of establishment of non-cohabitation, with or without consent, regardless of when the action was originally brought.

[16] Against this background, I invited counsel in the present case to consider how they wished to proceed. As was discussed, it seemed to me that a number of options were open. Parties could have simply continued with the proof in relation to financial provision, and in due course sought to persuade me that the concerns which I raised in *McNulty* were ill founded and that Sheriff Mann's understanding of the law in *Ray* was to be preferred. The difficulty with that of course was that if I could not be so persuaded then I would be liable to refuse to grant decree of divorce, and accordingly the proof in relation to orders for financial provision would have been a waste of time and effort. Alternatively parties could have agreed that the pursuer abandon the existing action and bring a wholly new action for

divorce based on averments of non-cohabitation. As all other pleadings and productions would have been the same as in the present action, this could in principle, and with cooperation on both sides, have been expedited to an early proof.

[17] However what Mr Stuart chose to do was to move, at the outset of the diet of 13 March 2018, to amend the pursuer's pleadings so as to (in effect) reintroduce averments of unreasonable conduct by the defender. The terms of this minute of amendment, and the particular allegations levelled against the defender, were then the subject of negotiations between counsel in the court and were as a result toned down substantially ("to take some of the heat out", as Mr Stuart put it). Thereafter the pursuer's motion to amend was not opposed by Miss Ennis, and no time for answers was sought. I therefore allowed the record to be opened up and amended in terms of the pursuer's minute of amendment. I took from all this that neither party was prepared to proceed with the proof on the basis of trying to persuade me that *Ray* was correctly decided and that my concerns in *McNulty* were ill founded. That being so, once again, I do not have to make a decision on the issue. Once again, as in *McNulty*, I am not sorry about this. But with all respect to Sheriff Mann, I consider that his analysis adds little of substance to Lord Murray's *dicta* in *Duncan* and I remain unpersuaded that it is correct.

[18] The basic issue is one of statutory interpretation. The question is as to the intention of Parliament in providing that the relevant period of cohabitation must be "immediately preceding the bringing of the action". Parliament must have understood, as every law student does, that 'bringing an action' and 'amending an action' are not the same thing. An action is brought when it is raised, that is, when the writ is warranted and served. An action is amended if and when permission of the court to alter the pleadings is granted, such permission being necessary because of the nature of the alteration which is sought, or

because of the stage at which it is sought, for example, following the closing of the Record. The basic point however is that amendment is something which can only be done to an action *which has already been brought*. There is nothing controversial in this. Amendment was required in *McNulty* because not only did the divorce crave specifically refer to adultery, but also because any alteration to the factual averments would have been after the proof had been closed. In *Duncan* too, the issue only arose after several days of proof had been heard.

[19] Another thing that every student of Scots law is taught is that there is only one ground for divorce, namely irretrievable breakdown of the marriage. In terms of section 1 of the 1976 Act that ground is to be "taken to be established" if one of the (now) four factual scenarios in section 1(2) exists (adultery, unreasonable behaviour, and non-cohabitation with or without consent). To describe these as 'grounds for establishing the ground' for divorce is to my mind neither helpful nor accurate. And the heading to a section in an amending Act in 2006 is a weak guide to the proper interpretation of the 1976 Act. In distinction to Sheriff Mann I consider that it is would be entirely proper for the pursuer to crave the court "to divorce the defender from the pursuer on the ground that their marriage has broken down irretrievably", supported by appropriate averments *anent* adultery, unreasonable behaviour, etc. Accordingly, and for example, if an action was brought more than a year after separation, craving divorce in these terms, supported by averments of, say, adultery, but the defender then consented to divorce on grounds of non-cohabitation for a year, I could see no difficulty in simply adjusting the averments, prior to the closing of the Record, so as to reflect this change in what the pursuer was now seeking to prove. I confess that I cannot see how this could possibly be characterised, consistent with well understood usage of the terms, as involving 'abandonment' of the action and 'bringing a new action' on another ground.

[20] Underlying all this, however, is the background to the 1976 Act. It is now perhaps easy to forget how fundamental a change to divorce law it was to provide that irretrievable breakdown of marriage could be evidenced by mere non cohabitation. The influence of the established church in this area, significantly greater than it is today, should also not be forgotten, and this is well seen in the careful consideration of the issue by the Scottish Law Commission in its pre legislative reports. The point is that it is readily conceivable, indeed probable, that Parliament really did intend that if divorce were to be available on the basis of evidence of mere non-cohabitation, and not on a fault based ground, that all of the stipulated period of non-cohabitation should pass between the date of separation and the initiation of divorce proceedings. The thinking would seem to have been that this would give parties, prior to starting divorce proceedings on this basis, the opportunity to attempt to reconcile. However this aspect of prescribing a minimum period of non-cohabitation is lost if divorce proceedings have already been raised within this period on a fault based ground. The parties will not have that full period for reflection on whether, absent fault on either side, they can no longer cohabit together as spouses. Whether reconciliation in such a situation is a realistic aspiration is not the issue. The point is that it should not be assumed that the result which flows from the plain and natural reading of the words of the statute is contrary to the intention of Parliament. Rather, the policy context suggests that the words were meant to mean exactly what they say.

[21] Of course, an enormous amount has changed in societal attitudes to marriage and divorce since 1976. Whether these changes have been good or bad is not a matter for me, as a sheriff, to express any view on. However I can well see that there has been a reasonable body of opinion since the decision in *Duncan*, if not before, that divorce should be available if the periods prescribed in the 1976 Act have passed, even if the prospects of reconciliation

during that period have been reduced or removed by an ongoing divorce action initially brought on averments of fault by one party to the marriage. If one takes that view as a matter of policy, then there are clearly strong practical grounds for arguing that the law should secure the result that Sheriff Mann argues for in *Ray*. But again, no matter how desirable it may seem, this is not a matter for sheriffs. The 1976 Act is primary legislation and on a plain reading the periods of non-cohabitation must precede the bringing of a divorce action on this basis. To hold otherwise, it respectfully seems to me, is to distort the meaning of the words used by Parliament and to fail to understand its intention set against the context in which the statute was passed. If the law is to be changed, then it is now for the Scottish Parliament to do so. As the Scottish Law Commission has recently proposed a review of family law in Scotland, it may be that it will consider the judgments in *Duncan*, *McNulty*, *Ray*, and in this case, and, if minded to secure the result proposed by Sheriff Mann, propose appropriate amendments to the 1976 Act.

[22] I would only add that it seems to me to make no difference that, in June 2017, the Court allowed the initial writ to be amended to introduce averments in relation to two years' non cohabitation. Whether or not permission was given to allow the pursuer to amend his pleadings seems to me to make no difference to the substance of the facts which he would need to prove in order to obtain a decree of divorce under the 1976 Act. Had I been asked to consider the motion to amend, I think it likely that I would have refused it on the grounds that the facts necessary to prove divorce on the basis of two year's non cohabitation could never be proved. However the mere fact that the court did allow the amendment does not amount to a judicial determination to the contrary. There was no suggestion that this point was ever raised, let alone determined, when the motion to amend was granted.

[23] Returning to the substance of the pursuer's crave for divorce in the present case, the evidence in support of it is contained in the affidavits of the pursuer, Lynn Douglas and BD, numbers 41, 42 and 43 of process. This evidence supports the pursuer's averments to the effect that the marriage broke down irretrievably as a result of the defender's behaviour. The pursuer was of course cross examined at length by Miss Ennis, and his credibility and reliability was challenged on a number of matters, but there was no challenge to the content of his affidavit. Lynn Douglas and BD were not called for cross examination on the content of their affidavits, as they could have been.

[24] Miss Ennis' decision not to oppose the pursuer's minute of amendment, nor to challenge any of the evidence in the pursuer's affidavits, can only have been a positive one, made on the defender's instructions. On one view it may be unsurprising. The defender wishes to be divorced and to obtain an order for financial provision which can only be made consequent on divorce. The difficulty for the defender is that, as became apparent in the course of her evidence, she rather wished to have her cake and eat it. On the one hand she did not dispute the truth of the factual matters set out in the pursuer's affidavits, nor that these facts were sufficient to establish that the marriage had broken down irretrievably as a result of her unreasonable behaviour. On the other hand she sought, for the purpose of bolstering aspects of her financial claims, to place the blame for the breakdown of the marriage squarely on the pursuer. In particular she made a number of serious allegations regarding his behaviour towards her, which had not been put to him in cross examination, and some of which were on the face of it inconsistent with her acceptance that the marriage had broken down irretrievably as a result of her own behaviour. If her position was that the marriage had broken down as a result of the pursuer's unreasonable behaviour, she could have lodged answers to the pursuer's minute of amendment and craved divorce on this

basis, supported by appropriate averments. She did not do this. So the pursuer agreed to 'take the heat out' of his averments in the minute of amendment regarding the defender's alleged conduct towards him, and the defender responded by then turning the heat up again as regards her allegations in relation to the pursuer's conduct towards her. In my view her approach to this issue does not reflect well on her own credibility and reliability, both generally, and in particular insofar as the allegations made by her bear on her certain aspects of her financial claim, discussed below.

[25] In all the circumstances, I was prepared to accept the evidence in the pursuer's affidavits, and have made findings in fact accordingly. I am satisfied that the marriage has broken down irretrievably as a result of the defender's unreasonable behaviour, and reject her evidence insofar as inconsistent with this conclusion. I am satisfied that there are no prospects of reconciliation and that the parties wish to be divorced. I will therefore grant decree of divorce as craved by the pursuer.

The children

[26] BD was 17 years old at the time of the parties' separation and is now 21, and so beyond the jurisdiction of the court in this action. AD is however now 15 years old and will not turn 16 until 21 November 2018. He lives with the pursuer and has done so since February 2015. The evidence suggests that both BD and AD are estranged from the defender and do not wish to have contact with her. The defender does not accept this, and in any event blames the pursuer for corrupting both children and turning them against her. Be that as it may, both parties were content that no order in respect of AD was necessary. The affidavits of the pursuer and Lynn Douglas numbers 42 and 43 of process provide unchallenged evidence that the present arrangements for AD's accommodation, education

and care are satisfactory. I accept this evidence and am satisfied that no order in respect of him need be made in these proceedings.

The aliment action

[27] I have made detailed findings in relation to the aliment action raised by the defender in March 2015. I have done so because Mr Stuart dedicated a significant amount of time and energy during the proof in seeking to establish that the defender had deliberately failed to disclose to her solicitor the £9,000 bonus payment which she had received from her employment in January 2017, and that she had done so with the intention of misleading the court as to the true level of her income when it considered the pursuer's motion to vary interim aliment to nil at the hearing on 24 February 2017. Mr Stuart also sought to show that the fact and timing of the defender becoming a co-signatory on her mother's bank account in March 2017, and the payment of the bonus into this account very shortly thereafter, showed a deliberate attempt to try to conceal receipt of this money, an attempt which was only discovered by recovery of the wage slip and bank documentation under the specification of documents in June 2017. This was all done, in effect, with a view to persuading me that the defender was so lacking in credibility and reliability that I should reject her evidence insofar as it conflicted with that of the pursuer on all other matters.

[28] As to the circumstance which led to payment of the bonus to the defender, Mr Stuart led evidence from her employer, Alyson Joyce. From this it was apparent that between June 2015 and the end of 2016 the defender was contracted to work for Mrs Joyce's company for 16 hours per week, at an hourly rate of £6.75, rising to £7.25 (amounting typically to net income of around £550 per month at the end of this period). From January 2017 the defender was employed full time at a salary of £21,000 per annum (with typical net monthly

income of around £1,469). However Mrs Joyce also explained that from around May to December 2016, due to a business crisis, the defender was actually often working a lot more than 16 hours per week, albeit on an irregular, and sometimes out of hours basis. Mrs Joyce was unable to put a precise figure to the number of additional hours worked, and these had not been recorded on the relevant pay slips for this period. Mrs Joyce was particularly asked about the defender's payslip for 5 January 2017. She said that about half the 'bonus' recorded there was (in effect) back pay for the additional hours worked by the defender since May 2016, with only the other half being a bonus in the true sense of the word. She confirmed that the whole sum had been paid to the defender by cheque.

[29] Mrs Joyce was extremely defensive in her evidence regarding her business and the difficulties in which it found itself in 2016. However neither side was concerned to critically explore or challenge what were on the face of it the unusual arrangements (to put it neutrally) by which the defender received her £9,000 'bonus', by cheque, in January 2017. Taking Mrs Joyce's evidence at face value around £4,500 of this sum was really back pay, for the period May to December 2016. Accordingly it can be seen that the defender ultimately received around an average of a further £650 per month for work done over this seven month period. Even allowing that – as Mrs Joyce said – the defender would sometimes have received an enhanced hourly rate for out of hours working, the picture still suggests that the defender must likely have doubled her hours from May 2016, and ultimately more than doubled her income for work done over that period. Mrs Joyce said that the defender self-reported her hours of work for payroll purposes, so she must have been keeping a record of the additional hours which she was working through 2016. It seems unlikely that the defender would have done and recorded these additional hours unless she expected, at some point in the future, to be paid for them. This all raises a question not only of what the

court was or was not told about the defender's income on 24 February 2017, but also what it was and was not told about it at the hearings in July 2016. Otherwise, Mrs Joyce's evidence was not controversial.

[30] Mr Stuart also called Mr Alan Davies as a witness for the pursuer. Mr Davies gave evidence that he is an accredited and very experienced family law solicitor. He had advised and represented the defender in both the aliment and divorce actions, until he had withdrawn from acting for her in July 2017. Mr Davies was able to give general evidence about what he understood to be the various elements of proper practice when acting as a solicitor in an aliment action including, in particular, obtaining full information from the client regarding their income and other financial resources. He was also able to give evidence about some matters in relation to his conduct of the defender's aliment action, for example, as to documents he had produced to the pursuer's solicitors in June 2017 in response to the specification of documents, or as to the interim aliment hearings in which he had appeared insofar as these were matters of public record. However Mr Stuart also sought to ask Mr Davies questions the real purpose of which was to elicit evidence as to what passed between him and the defender in the course of their solicitor-client relationship. These questions were, understandably, objected to by Miss Ennis. She made clear that the defender did not waive her right to solicitor-client confidentiality in relation to Mr Davies, and that Mr Stuart's questions sought to infringe that right. I agreed with these submissions, and sustained all of Miss Ennis' objections.

[31] Mr Stuart tried to approach matters from a number of angles. Having established, for example, that Mr Davies accepted that it would be proper practice to ask a client for up to date financial information in relation to an interim aliment hearing, Mr Stuart then asked whether Mr Davies had followed this proper practice when acting for the defender. But that

is simply another way of asking whether or not Mr Davies had asked the defender for up to date financial information in relation to the hearing on 24 February 2017. Next, having established that the defender's wage slip showing her bonus payment was not put before the court on 24 February 2017, Mr Stuart then asked whether, when Mr Davies addressed the court at this hearing, he did or did not know about it. But that is simply another way of asking whether the defender had or had not told him about this document prior to the hearing. Further, having accepted that he could not ask whether or not Mr Davies had obtained one of the critical bank statements from the defender directly, Mr Stuart then sought to ask whether he had got it from the bank. But that is simply trying to get an answer to an objectionable question by the back door, by a process of elimination. Finally, Mr Stuart asked Mr Davies, "hypothetically", whether it would be relevant for him to disclose recent receipt of a £9,000 bonus at an interim aliment hearing if the client had previously had an award based on an income of £550. But these are the facts of the present case, and to call this a hypothetical question did not make it so.

[32] Accordingly, however they were phrased, Mr Stuart's questions were in my view all intended to elicit evidence from Mr Davies as to what had passed between him and the defender in the course of their solicitor-client relationship, and in particular whether the defender had or had not disclosed to Mr Davies receipt of the bonus payment prior to the hearing on 24 February 2017. At the very least they were designed to elicit evidence from Mr Davies from which I would later be invited to draw an inference to this same effect, and to make a finding accordingly. In my view this was all covered by solicitor-client confidentiality, and Mr Stuart's questions sought to infringe the defender's rights in this regard. I also consider that it is irrelevant (as was later agreed by joint minute) that the defender's present solicitor had told the court on 1 September 2017 that her position was

that she had told Mr Davies of the bonus but that he had failed to tell the court about it. Mr Davies was still bound by his duty of confidentiality to the defender, and Mr Stuart was not entitled to try to elicit evidence from him as to whether what her new solicitor had later said had passed between her and Mr Davies was or was not true.

[33] Next, I had the evidence of the defender's mother, Mrs Helen Munro, which was also directed to this same chapter. As noted, the totality of this evidence is to be found in her affidavit, lodged as production 6/12 for the defender. In this affidavit Mrs Munro states that she had been giving the defender about £250 – 300 per month since the parties separated in October 2014, in addition to a deposit of £1,000 in relation to her present tenancy. Mrs Munro further states that the defender gave her £9,000 to repay this money, and that although she had not kept a record she was quite sure that she had given the defender much more than this over the years. Mrs Munro further states that she had been in hospital with heart problems, was thinking about things like how her funeral would be paid for, and decided to put the defender on her bank account so she could have access to it. Finally, Mrs Munro states that when the pursuer got wind of this he was unhappy about it ("I don't know why") so she decided to remove the defender as a signatory on the account and put her son on instead.

[34] Mr Stuart did not seek to call Mrs Munro as a witness to challenge her on the content of her affidavit. Presumably this was because it is rather brief and does not directly bear on the question of whether the defender had sought to conceal receipt of her £9,000 bonus payment from her solicitor and the court. But there are also difficulties arising from the content of the affidavit. Thus it is not suggested by Mrs Munro that she asked the defender to pay her the £9,000 in January 2017, nor indeed that she ever expected her to do so. It is not clear why this particular sum was repaid, if Mrs Munro had not kept a record of what

she had given the defender. Mrs Munro also throws no light on how it then was that the defender was able to afford to make this repayment, given that she had been the recipient of payments from her for the previous two and a half years. Mrs Munro's explanation for making the defender a co-signatory on her account is also unconvincing. Were she to die her funeral expenses would be a charge on her estate, paid in the first instance by her executor, and there was no obvious need to make the defender a co-signatory for this purpose. Finally, I think that it is also telling that Mrs Munro did not know why the pursuer should be unhappy when he found out about the defender being a co-signatory on her bank account. That suggests that Mrs Munro has at best a limited understanding of the issues involved, and their potential significance for the defender's credibility in this case.

[35] Finally, the defender gave oral evidence herself on this matter. Her position was that she had given Mr Davies her payslip for January 2017, which showed the bonus payment, and had done so before the hearing on 24 February 2017. The defender could not remember whether she had actually discussed the bonus payment with Mr Davies, but she had told him that she had been working extra hours, and that she had been receiving money from her mother to supplement her income. The defender was asked whether the money from her mother was a gift or a loan, and replied that she had always said to her mother that she would pay her back. The defender said that her mother had been ill in hospital over the winter of 2016/2017, and that during this period she had given the defender her bank card for one of her accounts and permitted her to use it to withdraw money for herself. They also agreed that the defender should be a signatory on her mother's bank account ending xxxx6439 "as a safeguard" so as to be able to withdraw money from that account if she needed to. The defender said that she had received the £9,000 bonus cheque in January 2017, but had given it to her mother because she owed her a lot of money by this time. The

defender said that she had never used the bankcard which she had got after becoming a co-signatory on account xxxx6439, but that her mother had continued (and was still continuing) to give her money.

[36] In cross examination the defender was asked by Mr Stuart whether she would waive her right of solicitor-client confidentiality and so allow Mr Davies to be recalled and asked directly about whether he had been made aware of the bonus payment. Having been given an opportunity to take legal advice from Miss Ennis, however, the defender declined to do so. I consider that she was well entitled to take this position. Although I was referred to no authority on the point, it also seems to me that if a party has a right to solicitor-client confidentiality, the exercise of that right cannot itself then be held against her. In other words, no inference adverse to the defender's position can be drawn from the mere fact that she declined to waive her right to confidentiality. Specifically, it cannot be inferred merely from her exercise of her legal right in this regard that the defender did not tell Mr Davies about the bonus payment.

[37] Accepting that, however, the defender's evidence gave rise to a number of questions which caused me to question its veracity. First, why did the defender choose to repay her mother £9,000 at the time when she did, in January 2017? The defender's account seems implausible. She did not suggest that her mother had asked her for repayment. On her own evidence she could not afford to make payment at this time. And no sooner had the payment been made than the defender started to receive it back in the form of further payments from her mother. Second, why did the defender give her mother the cheque in January 2017, at a time when her mother could not bank it, and why did they then both wait nearly three months until the defender became a co-signatory on one of her mother's accounts in order to deposit it? The defender could simply have paid the cheque into her

own account and then transferred the money to her mother's account. Even if the defender did want to repay her mother, what she says happened appears implausible as a way to do this. Third, if the defender's mother was already letting the defender use her bankcard to access one of her other accounts, why did she need to become a co-signatory on account xxxx6439? The defender agreed that she could have borrowed and used her mother's bankcard for account xxxx6439 as well. It hard to see why this would not provide the 'safeguard' which the defender said she was looking for. Accordingly this explanation for the defender becoming a co-signatory on account xxxx6439 appears implausible. Fourth, how can it be said that the defender was really 'paying her mother back', when the bonus cheque was paid into what by March 2017 had become a joint account, and to which the defender had equal access? Put another way, by paying the cheque into account xxxx6439 the defender was in reality paying the money to herself, as much as to her mother. I did not consider that the defender's evidence provided satisfactory answers to any of these questions, and I did not find it credible or reliable.

[38] It is clear and undisputed that the £9,000 payment which the defender received from her employer in January 2017 was not disclosed to the court at the interim aliment hearing on 24 February 2017. It is also clear that receipt by the defender of this payment was relevant and material to the issues in dispute at this hearing. Had it been disclosed, there is a real possibility that the outcome would have been different, and that the award of aliment might have been varied by reducing it by more than was in fact done. In the light of all the available evidence, it seems to me that there are only two plausible explanations for the failure to disclose the payment: either the defender told Mr Davies about it and he failed to disclose this to the court, or the defender did not tell Mr Davies about it.

[39] In my view the second explanation is more probable. In the first place, Mr Davies is an accredited family law solicitor of great experience. From what he told the court on 24 February 2017 it is plain that he had sought and obtained up to date information as to the defender's income, for example, that she had started working full time. Had he been made aware that the defender had also been paid a £9,000 bonus in January 2017 it would have been obvious to him that this would have to be disclosed to the court. Given in particular the size of the bonus payment he is unlikely to have simply forgotten about it if he had been told about it. He would have known that for him to fail to mention the bonus payment to the court would likely amount to professional misconduct. He would therefore have a strong reason to disclose it, and no good reason not to. All this suggests to me that it is unlikely that Mr Davies was made aware of the bonus payment prior to the hearing on 24 February 2017.

[40] The defender, on the other hand, plainly had a strong interest in opposing the pursuer's motion to vary the award of interim aliment to nil. Even with the award of aliment made in July 2016 she had been struggling to make ends meet and had obtained substantial financial support from her mother. The defender would likely have realised that her prospects of success at the hearing would be reduced if the £9,000 payment was disclosed. The defender would also have known, furthermore, that in effect this money represented a combination of back pay and a bonus for work done between May and December 2016, a period when she had claimed to be working part time (as had been maintained to the court on 14 July 2016), but was in fact working full time or close to it. The defender therefore had reasons not to disclose the payment to Mr Davies or to the court.

[41] Furthermore the defender's actions in relation to the bonus cheque, and the absence of credible and reliable explanations and answers to the various questions arising from the

evidence, suggest to me that not only did she not tell Mr Davies about the bonus, but that she deliberately sought to conceal it from the pursuer and from the court. She did not pay the cheque into her own bank account and transfer it, as she could easily have done if she wished to repay her mother. The most likely explanation for her not doing so, in my view, was because receipt of the cheque would then have shown up on her bank statement, and so would have become known to the pursuer. Instead, she made arrangements to be made a co-signatory on her mother's account, and paid the cheque into that account. The most likely explanation for this, in my view, was to conceal receipt of the bonus payment, while continuing to have access to it. But for the later specification of documents the pursuer would likely not have known about the creation of the joint account, and so the receipt by the defender of the bonus payment.

[42] I conclude therefore that the defender did not tell Mr Davies about the bonus payment prior to the hearing on 24 February 2017, and indeed that she deliberately sought to conceal receipt of it. I also conclude that she did this with the intention of resisting any attempt by the pursuer, such as was made on 24 February 2017, to seek to reduce payment of interim aliment. I therefore also conclude that the defender was not truthful in what she said in evidence in the present action, insofar as she maintained otherwise. In short, it seems to me that she has engaged and persisted in a gross and calculated deception, which seriously undermines the credibility and reliability of her evidence in relation to the factual disputes between herself and the pursuer in the present action.

[43] In any event, as mentioned above, it is apparent that the defender received approximately £23,393 by way of interim aliment payments from the pursuer in the period after the date of separation and 7 July 2017. As all these payments were made by the pursuer from withdrawals from the SIPP, and insofar as the SIPP falls to be regarded as

matrimonial property, it is necessary to consider whether or not to make an adjustment in the division of the matrimonial property in the pursuer's favour in order to account for this. I will return to this below.

The crave for delivery

[44] Distinct from the parties' craves for orders for financial provision in relation to the matrimonial property the pursuer also craved delivery by the defender, at common law, of certain specified valuables which he said belonged to him alone. These were (i) a gold Omega watch (ii) a Longines watch (iii) a Fabre Leuba watch (iv) a set of gold cufflinks with diamond studs shaped in the initials "BD" (v) a 2.65 carat solitaire diamond ring (vi) a set of three Mont Blanc pens and (vii) a canteen of cutlery said to be from his previous marriage. Failing delivery of these items the pursuer sought payment in the sum of £35,000.

[45] The pursuer's evidence, in summary, was that all of these items were in the matrimonial home at Oakwood when he left, that he had not taken any of them, and that he had not seen them since. In particular he said that the watches and jewellery were in a combination safe, located in a walk-in cupboard in one of the bedrooms. At the date of separation only the pursuer, the defender and BD knew the combination. Also in this safe were said to be a number of football medals inherited by the pursuer from his father, passports, and passbooks for the children's bank accounts. The pens and cutlery were said to be elsewhere in Oakwood when the pursuer left the house, but again he said that he had no knowledge of their current whereabouts. Shortly after the separation the pursuer, through his agents, had sought return of the above mentioned valuables, but the defender had denied knowledge of their whereabouts. It was submitted on the pursuer's behalf that I

should draw the inference that the defender had retained the valuables and was lying insofar as she maintained otherwise.

[46] In support of this submission the pursuer relied in particular on two other pieces of evidence. In the first place, in his affidavit of 8 June 2017 BD states that at the date of separation the safe contained, in particular, the defender's jewellery, the pursuer's watches, his grandfather's medals and his and AD's bank passbooks. He states that he looked in the safe on a number of occasions thereafter and that the contents were unchanged, with nothing significant having been removed. However BD further states that at some point between the separation and February 2015 the combination to the safe was changed, although he did not do this. He suggests that it must have been changed by the defender. Since the move from Oakwood in February 2015 BD states that he did not see the safe or its contents again. He concludes that the defender took them.

[47] The second piece of evidence related to a handwritten note, production 5/3/20. It was accepted that it had been written by the defender. The pursuer said that BD had retrieved it from a bin at Oakwood between Christmas and New Year 2014. It comprises a list, namely "4 watches/pearls/gold hook/medals/cards/wallets boys". It was said that this was a list of items which had been in the safe. Furthermore, there was evidence that certain items from Oakwood were returned to the pursuer at some point after the defender left this property, these being left on pallets at his sister's house. Reference was made to an inventory of these items, production 6/3/4, which includes an entry for "watches, medals, rings". The pursuer said that the watches in question were not the valuable watches referred to above, but that the medals were his father's football medals, which had previously been in the safe. All this showed, it was submitted, firstly that the valuables were still in the safe around two months after the date of separation, and secondly that it

must have been the defender who cleared out the safe, because the football medals stored there had later been returned to the pursuer by her. Again, it was said, this supported the inference that the defender had retained the other items in the safe, and in particular the pursuer's valuables.

[48] The defender's position in evidence was that the football medals had been given to AD, not the pursuer, and that they were not kept in the safe. She said that the diamond solitaire ring was her property, because the pursuer had given it to her for her 30th birthday present. She accepted that the pursuer's watches and gold cufflinks were kept in the safe along with other jewellery, although she had no memory of a Longines watch. She accepted that the pursuer had a canteen of cutlery which had been kept in the dining room at Oakwood. She accepted that the pursuer had previously had three Mont Blanc pens, but said that they had been stolen many years before when the pursuer had been on a trip to Italy. Fundamentally, the defender's position was that she had not taken the valuables from the safe, had not seen any of them since the end of 2014, and had not disposed of them. She said that the pursuer had been in Oakwood many times between the date of separation and February 2015, and must have cleared out the safe himself.

[49] In particular the defender relied on an affidavit from a friend, Dianne Crichton (number 6/11 of process) in which it was stated that following a visit to the house by the pursuer in December 2014 the defender had told her that the pursuer had cleared out the safe. She also relied on a valuation of the solitaire diamond ring, number 5/3/10 of process. The pursuer had obtained this valuation in February 2015, and it includes both a photo of the ring and a statement that the appraiser had "examined" it. This suggested that the pursuer must have had possession of the solitaire diamond ring in February 2015, and could only have done so because he had taken it from the Oakwood safe after the separation and

retained it. The pursuer had said that the valuer had not in fact seen the ring in February 2015, but had simply updated a valuation of it which he had made on an earlier occasion when he had seen it. As to the handwritten note, production 5/3/20, the defender could not remember why or when she had written it, but accepted that it could have been a list of items she had seen in the safe. When cross examined about the reference to medals in this list, the defender said that she had meant her swimming medals, not the football medals later returned to the pursuer's sister's house.

[50] In my view, in order to succeed in his crave for delivery which failing payment the pursuer has to establish, on a balance of probabilities, (i) that each of the valuables in question is his sole property, not matrimonial property; (ii) that the defender has taken possession of them; and (iii) either that she retains possession of them, or (iv) that they have the monetary value claimed by way of alternative. In my view the pursuer has not succeeded in establishing all these matters and his crave falls to be refused.

[51] As to the first matter, I am not prepared to hold that the solitaire diamond ring was the pursuer's sole property. His evidence has not satisfied me about this. I think it at least as likely that he gave it to the defender as a present, as she said. That he may have also liked to think that it was somehow still his property does not make it so. The pursuer's evidence has also not satisfied me that at the date of separation he still owned three Mont Blanc pens. The defender's evidence was that these pens had been stolen some years before. The pursuer did not appear to dispute this but seemed to suggest that he had since replaced them. Overall I did not find his evidence to be reliable on this point and did not accept it. Other than these two items, however, I accept that the pursuer was the sole owner of the valuables specified by him. The defender could not remember a Longines watch, but on

balance I am prepared to accept the pursuer's evidence that it existed and that it belonged to him.

[52] As to the second matter, I would accept that the undisputed evidence establishes that the specified valuables were in Oakwood at the date of separation, mostly kept in the safe. Either the pursuer took possession of them sometime between then and February 2015, or the defender did. There are no other reasonable possibilities. Both parties flatly denied taking or retaining any of the valuables of having any knowledge of their present whereabouts. The only reasonable conclusion is that one of them was being wholly and deliberately untruthful about this. On balance I am satisfied that the pursuer has established that it is more likely that it was the defender who was lying.

[53] In the first place, it is to be remembered that it is the pursuer who has made a claim for delivery, not the defender. If as the defender said, and as I have accepted, the solitaire diamond ring was her sole property, it seems surprising that she had not herself craved return of this item, particularly given its likely value (stated as being £23,400 in production 5/3/10). This alone points towards the defender having taken possession of it. Similarly, the defender's position has within it the proposition that the pursuer has advanced his crave for delivery in the knowledge that he has already recovered all the relevant items. Again, that would be surprising, given that it would have been quite unnecessary. This whole chapter of pleading and evidence would, in effect, have been an aggressive double bluff – framing and advancing a claim for recovery of property which the pursuer knew he already possessed. Little would surprise me about either party's conduct in this case, but ultimately I think that this is improbable.

[54] In the second place, and as explained above, I consider that the defender has been shown to have been responsible for a gross and calculated deception in the course of the

aliment action which has seriously undermined her credibility and reliability generally. True, in a number of respects I did not find the pursuer to be an impressive witness either. In his evidence he was at times arrogant and belligerent, contemptuous and dismissive of the defender, and expressed some rather antediluvian attitudes to a woman's role within marriage. But on this matter the real question is whether it is more likely that he or the defender was brazenly lying to the court, and in my view the defender's willingness to do so in other respects suggests to me that she is the more likely liar on this matter as well.

[55] In the third place, I did not find the affidavits lodged by each party to greatly assist in determination of this issue. As to BD's affidavit, he does not know and cannot say which of his parents emptied the safe. He assumes that it was the defender, but in my view he does not and cannot discount the possibility that it was the pursuer who did so, without his knowledge. In any event it is clear that he has very much taken the pursuer's side generally, and is hostile towards the defender to such an extent that I am not prepared to accept his affidavit as credible or reliable his conclusions on this matter. As to Diane Crichton's affidavit, her statements amount to little more than a narration of what the defender told her. Ultimately I consider that they are only as good as, and do not add to, the credibility of the defender's account. And in any event Mrs Crichton too appears to have taken sides in this dispute and, like BD, cannot be regarded as a wholly impartial or independent witness.

[56] In the fourth place, I think that some weight can be placed on the evidence concerning the defender's handwritten note, production 5/3/20, and the subsequent delivery of the medals. I would accept that it was likely that in writing this note the defender was making a list of items in the safe, and that she was doing so subsequent to the separation. I did not find credible or reliable the defender's evidence that the medals to which she was referring in this note were her swimming medals, offered as this suggestion was for the first

time in cross examination. I therefore think it likely that the defender was in fact referring to the pursuer's father's football medals (whether or not they belonged to him or to AD). It follows that the defender can only have returned these medals to the pursuer with the other items delivered to his sister's house because she removed them from the safe at some point prior to leaving Oakwood. If the defender removed and took possession of these medals, it is inconsistent with her claim that it was the pursuer who cleared out the safe. Had he done so, I think it highly unlikely that he would have taken the valuables of which recovery is now sought and left the medals. Overall I do not give this piece of evidence the ground shaking significance that seemed to be claimed for it by Mr Stuart, but it does point in favour of the pursuer's account of events and against that of the defender.

[57] In the fifth place, I accept the pursuer's evidence regarding production 5/3/10, the valuation of the solitaire diamond ring in February 2015. This was that this valuation was, in effect, a desk re-valuation of the ring, and that the reference to the valuer having "examined" it was historical, not a statement that it had been seen by him at that time. I note also that this statement is not signed by the appraiser.

[58] I therefore accept that the pursuer has established that the most likely of the two possible scenarios is that it was the defender who took possession of the pursuer's watches, cufflinks and cutlery between the date of separation and the date when she moved from Oakwood in around February 2015.

[59] The third matter, therefore, is whether it has also been established that the defender likely still has possession of these items. The difficulty for the pursuer in this respect is that more than three years have passed since the defender took them. It by no means follows that she still has possession of them, rather than having sold or otherwise disposed of them. There is simply no evidence about this, and given the passage of time I am not prepared to

infer that the defender still has possession of any particular item. If she was prepared to take the valuables and then lie about it, I think that she would have no compunction about seeking to gain by disposing of them, particularly given her claims to financial hardship as expressed in the aliment action. Indeed, in his submissions, Mr Stuart accepted that it would be "almost impossible" for the pursuer to prove that the defender still had the items.

[60] As to the fourth matter (and leaving aside the diamond solitaire ring, which I have held was not his property in any event), the pursuer led no evidence as to the value of any of the items, nor from which their value could reasonably be inferred. The pursuer could, for example, have been asked how much he originally paid for any of the items, and/or asked to estimate their current value. But he was not. In the circumstances this seems to me to be an extraordinary omission. But in the absence of evidence I cannot simply guess at the value of any of the items. I agree with counsel for the defender that in order to grant the alternative pecuniary crave evidence of value would be required, but it is simply not available to me.

[61] Accordingly, although I am satisfied that the defender likely took possession of the pursuer's watches, gold cufflinks and cutlery, it has not been established that she still has possession of them, and there is no evidence on which I could properly grant a pecuniary crave as an alternative to delivery of these items. I will therefore refuse the pursuer's eighth crave and repel his fourth plea in law.

Matrimonial property

[62] The parties' matrimonial assets as at the date of separation (the relevant date) can be expressed as follows:

Asset	**Joint**	**Pursuer**	**Defender**
Blacksmith's Cottage	54,189		
AJ Bell SIPP		519,566	
Pursuer's Additional State Pension		15,412	
Defender's M&S Pension			25,538
Defender's Mothercare Pension			22,649
Defender's Additional State Pension			3,509
Barclays joint a/c xxxx2520	142		
Barclays joint a/c xxxx4073	21		
Pursuer's 234 Lloyds shares		176	
Defender's 72 Lloyds shares			54
Defender's RBOS a/c xxxx5004			15
Contents of Oakwood			2,160
The refund value of the Aga		11,853	
Range Rover surrender value	6,152		
Totals	60,504	547,007	53,925
Total matrimonial assets	**£661,436**		

[63] The parties' matrimonial debts at date of separation can be expressed as follows:

Debt	**Joint**	**Pursuer**	**Defender**
Barclays joint a/c xxxx0405	2,076		
Debt due to Alastair Houston	30,000		
Debts due re Blacksmiths Cottage works	20,933		
Pursuer's American Express credit card		3,977	
Pursuer's Virgin credit card		4,000	
Pursuer's Barclays credit card		6,119	
British gas bill		227	
Barclays loan a/c xxxx1098		8,811	
The pursuer's income tax liability		2,916	
Turcan Connell invoice			3,627
Totals	53,009	26,050	3,627

Total matrimonial debt **£82,686**

Accordingly the parties' total net matrimonial property at the relevant date was **£578,750** (£661,436 - £82,686). A presumptively fair, equal share of this property, per section 10(1)(a) of the 1985 Act, would therefore be **£289,375.** There was however considerable dispute in relation to both the scope and value of certain aspects of the parties' matrimonial property. Some explanation is therefore necessary in relation both to what I have included in the above schedules, and what I have not.

(i) Blacksmith's cottage

[64] The parties purchased Blacksmith's Cottage in 2012, with a view to rebuilding and renovating it for use as their family home. This work remained unfinished at the date of separation. Strictly speaking, the figure entered in the above schedule for the value of this property may not be the true net value of this asset at the relevant date. But while a value for the outstanding Furness Building Society mortgage at this date was agreed between parties, there was no evidence as to the likely value of the property itself. But there was agreement that the property was sold eighteen months later, in April 2016, that the outstanding balance of the mortgage was then paid off, and that the net proceeds after deduction of the costs of sale were £54,189. I have no evidence to enable me to say whether the value of the property would likely have risen or fallen between the relevant date and date of sale. In all the circumstances I consider that the simplest approach is to take the free sale proceeds, net of deduction of the mortgage and costs of sale, as being the relevant value of this asset for present purposes. This sum is held on joint deposit receipt, and absent any order of the court in relation to it, falls to be divided equally between the parties.

(ii) The SIPP

[65] There was no dispute that as at the relevant date the SIPP had a CETV of £519,566. However Mr Stuart submitted that not all of this was matrimonial property. The pursuer had been a member of many occupational and personal pension schemes continuously since 1983, and the funds from all of these had ultimately been consolidated in the SIPP. Accordingly although the SIPP had been taken out in the course of the marriage, in 2010, Mr Stuart submitted that doing this did not create matrimonial property. There had merely been a transfer of rights to funds in a succession of discretionary trusts, none of which

created new assets. The formula in regulation 4 of the 2000 Pensions Regulations therefore had to be applied by calculating the period of the pursuer's membership of all his pension schemes between marriage and separation as a proportion of his membership of all such schemes since 1983, and then applying this proportion to the CETV of the SIPP at the relevant date. The relevant proportion, it was submitted, was approximately 35%, with the consequence that only £184,077 of the CETV of the SIPP was matrimonial property. He founded on Mrs Terras' evidence in this regard.

[66] I am satisfied that all of the CETV value of the SIPP is matrimonial property. I reject Mr Stuart's arguments to the contrary. In order to determine for the purposes of section 10(5) of the 1985 Act what proportion of the CETV of the SIPP was referable to the period between the date of the marriage and the relevant date, it is necessary to apply the formula in regulation 4 of the 2000 Pensions Regulations. I consider, following Lady Smith in *McDonald* as mentioned above, that reference to this regulation is mandatory. Regulation 4 requires the Court to address the following questions: (i) does the party have any rights or interests in a "pension arrangement …as at the relevant date"? (ii) if so, what is the value of those rights and interests as calculated under regulation 3, that is (in the present case), the CETV ("A")? (iii) what is the "period of membership of that party in the pension arrangement before the relevant date" ("C")? (iv) what is the period of "C" which "falls within the period of the marriage … before the relevant date" ("B")? and (v) what is A x B divided by C?

[67] In the first place, in my view, the SIPP is the "pension arrangement" for the purpose of regulation 4. As noted above, and as provided for in regulation 2(1), "pension arrangement" has the same meaning in the 2000 Pension Regulations as it does in section 46(1) of the Welfare Reform and Pensions Act 1999. Reference to that section makes

apparent that "pension arrangement" is a collective statutory expression for a number of particular types of pension schemes, including personal pensions such as a SIPP. It is not to be understood as referring in a general sense to the whole of the 'arrangements' which a party may have made for pension provision through his working lifetime, to include each and every pension scheme he may have held in the past and from which funds have been transferred as he has changed jobs and/or become a member of different pension schemes. To read the expression in this way is to invite a return to the sort of complexity in pension valuation referred to by Lady Smith in *McDonald* and which regulation 4 was designed to remove. The question under regulation 4 is simply to apply the formula to any scheme or schemes, falling within the terms of section 46(1), in which the party has rights and interests as at the relevant date. In this case it is clear that at this date the pursuer did have rights and interests in a pension arrangement as so defined, namely the SIPP, and in no other pension arrangement.

[68] Mr Stuart repeatedly sought to place emphasis and draw support for his position from paragraph 18 of the Supreme Court judgment in *McDonald* where Lord Hodge said that:

> "The focus in section 10(5) is on the proportion of rights or interests under a pension arrangement referable to the specified period and not on the acquisition of the rights by a party to the marriage during that period. The proportion of rights under a pension arrangement referable to a specified period would reflect the enhancement in value of the pension arrangement during that period both by the plan holder's investment of further funds in the arrangement and by the passive growth in the value of the already acquired fund. Similarly, where there is no fund, the enhancement in the value of pension rights by survival during the specific period is referable to that period. If Parliament had intended that the proportion of the rights and interests be determined by the ratio of the part of the fund created by contributions to the arrangement during the marriage until the relevant date to the value of the total fund at that date, it could have said so."

Mr Stuart submitted that this made clear that fundamental to section 10(5) was assessment of the value of the enhancement of the pension during the relevant period, not the contributions during that period. That may be so, but it does not alter the fact that the way that Parliament has directed that the referable value be ascertained for the purpose of section 10(5) is via the 2000 Pension Regulations. Application of regulation 4 is not only mandatory in this regard, but also determinative. Lord Hodge's purpose in paragraph 18 was to explain why, when one came to look at the meaning of the expression "period of the membership of that party in the pension arrangement before the relevant date" in regulation 4 (the "C" value"), that this was not confined to the period when the party was an active member, that is, making contributions. But this is beside the point for present purposes. It says nothing about whether "pension arrangement" is to be read in the way which Mr Stuart suggests. It means, for example, that as in the case of the defender's occupational pensions in this case, the period of membership for regulation 4 purposes includes the period of membership since 1997, even though she ceased to make contributions from this date. Whether an unequal division of her pension fund at the relevant date would then be justified is, as Lord Hodge clearly recognises, a further and distinct question (see *McDonald* at paragraphs 13 and 32), and one to which I will return below.

[69] Accordingly I would answer the questions posed by regulation 4 as follows: (i) the SIPP, and the SIPP alone, was the "pension arrangement" in which the pursuer had rights or interests as at the relevant date; (ii) the value of these rights and interests was the agreed CETV, namely £519,566 ("A"); (iii) the period of the pursuer's membership of the SIPP ("C") was from 2010, when it was set up; (iv) the whole of that period fell within the period of the marriage ("B)"); and therefore (v) as "B" and "C" are the same, the value of the proportion of the pursuer's rights and interest in the SIPP which referable to the period of the marriage

is simply "A", that is, the whole of the CETV. Accordingly the whole of the £519,566 is to be taken to form part of the matrimonial property for the purpose of section 10(5) of the 1985 Act.

[70] I draw support for this view from the approach of Lord Tyre in *B* v *B* 2012 Fam LR 65. In that case the pursuer went into the marriage with pre-existing personal pension funds. He then took out a new pension with a different provider in the course of the marriage and transferred his pre-existing funds into the new scheme (see paragraph 17). As Lord Tyre noted, it was not formally a matter of agreement that the whole of the value of the new pension policy at the relevant date was matrimonial property, but in effect this was conceded. However his Lordship took the view that if concession there was, it was correctly made (paragraph 28(iii)):

> "As this pension arrangement was made [during the marriage], the whole of the pursuer's membership of it prior to the relevant date fell within the period of the marriage, and it appears to be me to be clear that it does require to be treated wholly as matrimonial property".

In my view the circumstances which Lord Tyre was considering were similar to those in the present case. Where I would part company with his Lordship somewhat is his further suggestion at paragraph 28(iii) that an apportionment under regulation 4 "is not therefore required". I would say, as it seems to me Lady Smith does in *McDonald*, that reference to regulation 4 is *always* required, because that is the means that Parliament has prescribed for calculation of the "referable" period for the purpose of section 10(5). As noted, if in applying the regulation 4 formula "B" and "C" are the same value, and therefore cancel each other out, this has the obvious result that all of "A" (that is, the whole of the CETV) is matrimonial property. But this just means that the calculation is easy, not that it is optional.

[71] In my view, therefore, a proper understanding of the statutory provisions provides a sufficient answer to Mr Stuart's submission on this point. However I would also have rejected his submission on two other grounds as well.

[72] Firstly, as noted above, Mr Stuart placed reliance on the fact that a pension scheme operates as a trust, with the assets of the trust held by trustees for the benefit of the members of the scheme. He submitted that the value of the member's funds can be transferred from one trust to another, but that he would have no ownership of these funds until crystallisation of the benefit on retirement. Accordingly, argued Mr Stuart, where as in this case there has been the transfer of rights between pension schemes during the course of the marriage, there has been no new matrimonial property created or acquired. Logically, it might be thought, this argument might suggest that the whole of the SIPP was not matrimonial property, but (as far as I could understand him) Mr Stuart seemed to suggest that it supported the proposition that only the enhancement in the value of the whole of the pursuer's pension funds during the marriage fell to be taken into account.

[73] In my view this submission is misconceived. It seems to proceed on the assumption that only those pension rights and interests acquired during the marriage will fall to be regarded as matrimonial property. But whether pension rights were or were not acquired during the course of the marriage is not relevant. The question of acquisition does arise in general in relation to matrimonial property under section 10(4) of the 1985 Act. But this provision is "subject to" section 10(5), which makes discrete provision in relation to pensions. There is therefore no need to ask whether or not pension rights or interests were "acquired" during the marriage: see *McDonald* per Lord Hodge at paragraph 28; and also per Lady Smith at paragraph 13 of the decision of the Inner House. Rather, the issue is to

determine the "period of membership" of the scheme for the purpose of applying the formula in regulation 4 of the 2000 Pension Regulations. That is a quite different issue.

[74] Even if acquisition were the issue, however, I would still doubt that Mr Stuart's submission is well founded. The property which the member of the pension scheme owns is not the funds which he has contributed, but the right which he holds to have payment of a benefit in accordance with the terms of the trust. That is a right which he holds against the particular trust of which he is a member. When he leaves one pension scheme and joins another, it is true that he does not become owner of the funds at any point. However he does acquire new and different rights under the new trust scheme, and holds those rights against the new trust (cf. my observations on the nature of the property acquired by the pursuer in *McNulty* v *McNulty, op. cit.,* at paragraphs 60 - 70). So had it been necessary to do so, I would therefore have held that the new rights which the pursuer 'acquired' by becoming a member of the SIPP were property acquired during the course of the marriage, with the consequence that the whole of the value of those rights as at the relevant date would fall to be regarded as matrimonial property.

[75] There is a third and quite distinct reason for rejecting Mr Stuart's submission that not all of the CETV of the SIPP should be held to be matrimonial property. This is that the principal joint minute, signed by both counsel and lodged at the outset of the proof, contains the following clause:

> "7. As at the relevant date the parties owned the following matrimonial property…
>
> …vi. The pursuer's Self-Invested Personal Pension administered by AJ Bell with a CETV of £519,566."

By contrast, in relation to the defender's pensions, the next two sub paragraphs of the joint minute are in the following terms:

> "vii. The defender's interest in the Marks & Spencer occupational pension scheme with a CETV at the relevant date of £72,556, *of which £25,538.18 is matrimonial property*.
>
> viii. The defender's interest in the Mothercare UK Ltd occupational pension scheme with a CETV at the relevant date of £44,943, *of which £22,649.78 is matrimonial property*." (my emphasis)

In other words, on a plain reading, it is apparent that what the pursuer agreed when Mr Stuart signed this joint minute was that the whole of the CETV of the SIPP was matrimonial property. Had this not been agreed, then sub-paragraph (vi) has no place in this part of the joint minute at all, or at least, it could and should have been expressly caveated in a manner akin to that used in relation to the drafting of the clauses as regards the defender's pensions.

[76] Standing the terms of the joint minute, Miss Ennis objected when Mr Stuart started to lead evidence from Sandra Terras in a manner directed to supporting a submission that not all of the CETV of the SIPP was matrimonial property. She submitted that the joint minute was conclusive on this matter. Mr Stuart appeared somewhat taken aback, but maintained that he would seek to argue the contrary. Having heard from both counsel I was prepared to allow Mrs Terras' evidence to be led under reservation. Somewhat surprisingly Mr Stuart then did not address this matter in his written submissions. Miss Ennis, however, renewed her objection and asked me to exclude Mrs Terras' evidence and hold the pursuer to the terms of the joint minute. Mr Stuart then argued that what was in the joint minute did not reflect the parties' intentions in this regard, did not reflect the pursuer's position on record, and that (in effect) Miss Ennis was being disingenuous in taking the objection which she had. He submitted that I should repel it.

[77] In *Jongejan* v *Jongejan* 1993 SLT 595 the court emphasised the importance to be attached to joint minutes of agreement, and did so in the context of an action for financial provision on divorce. In this case a joint minute had been signed by counsel and lodged,

setting out the terms of financial agreement. A different counsel later appeared for the defender and advised that there were further items which had should have been included in the minute as part of the matrimonial property. The Lord Ordinary refused a continuation and granted decree in terms of the joint minute. The defender's reclaiming motion was refused. The Lord President (Hope) observed (at 598D), that:

> "Where, as in this case, a joint minute has been signed by counsel, the rule is that it is as binding on the party on whose behalf it has been entered into as if the party himself had signed it… No doubt this legal right [of counsel, as explained in *Batchelor* v *Pattison & Mackersy* (1876) 3R at 918] places a heavy responsibility on counsel, but it is clear that it is not open to a party to say that a joint minute which has been signed by his counsel does not have his agreement. There is no suggestion in this case that the mandate to the defender's counsel to act on his behalf had been withdrawn at the time when the joint minute was signed by her or that she did not act within her mandate at the time when she signed it. In this situation the rule must be applied, and it is no answer to the point on competency to say that the defender now wishes to challenge the terms of the joint minute on the ground that an agreement had not yet been entered into or that it did not reflect what had been agreed."

These observations are apposite in this case. In my view the relevant paragraph of the joint minute is clear in stating that it is agreed that the whole of the CETV of the SIPP is matrimonial property, and I reject Mr Stuart's submissions to the contrary. It is also not open to him to now say, in effect, that it does not reflect what he thought he was agreeing to, still less (had this been his position) that he signed the minute in error and without proper attention to its terms. The SIPP is, after all, by far the most valuable piece of property in this case, and so particular care was obviously required in relation to what was or was not agreed in relation to it.

[78] Miss Ennis also made reference to the case of *B* v *Authority Reporter for Edinburgh* 2012 SC 23. In this case parents disputed grounds of referral relating to allegations of lewd, indecent and libidinous practices towards a child. Only on the last day of a 40 day proof

was consideration given to the question of whether the child should give evidence. In order to avoid this a joint minute was lodged admitting that the child had not been touched inappropriately nor seen anyone else being touched. The sheriff made findings contrary to this minute and found the relevant ground established. On appeal the parents argued that the sheriff had not been entitled to do so given that he was bound by the terms of the joint minute. The Inner House disagreed. Under reference to authority the Court noted that:

> "It has long been recognised that a joint minute is a form of making judicial admissions which are conclusive in a litigation".

However the purpose of the minute in *B* had been simply to reflect the evidence which it was accepted that the child would have given, and so to avoid the need for him to attend as a witness. It was not to usurp the sheriff's function by requiring him to ignore the many days of evidence which he had heard insofar as they were inconsistent with what the child would have said. The circumstances could also be distinguished from those in *Brown* v *North Lanarkshire Council* 2011 SLT 150, where although the joint minute had been lodged at the outset of the proof, evidence inconsistent with it was thereafter led without objection being taken.

[79] These authorities, submitted Miss Ennis, showed that a joint minute was normally conclusive, but that there were limited situations where it had been held not to be. Neither such situation arose in the present case. The joint minute had been lodged in advance of the start of the evidence. This was therefore not a case where, as in *B*, it was being lodged in the face of inconsistent oral evidence which had already been led. Furthermore, she had objected timeously to any evidence being led from Mrs Terras for the purpose of establishing that the SIPP was not matrimonial property. Her evidence had therefore been heard under reservation, and Miss Ennis now renewed her objection. This was therefore not

a case where as in *Brown* the pursuer had failed to object to the leading of the relevant evidence notwithstanding that it would have been obvious that it was inconsistent with the joint minute.

[80] In my view Miss Ennis' submissions are well founded. The terms of the relevant part of the joint minute are to my mind clear and unambiguous. It is apparent from the authorities that it is not open to Mr Stuart to now say that he did not mean to agree to what it says. The question is what he did actually agree to, and that is to be found in the wording of the joint minute itself. I read it as containing a conclusive judicial admission that the whole of the CETV of the SIPP is matrimonial property. It was lodged in advance of the start of the oral evidence, and Miss Ennis made timeous objection to Mr Stuart's attempt to lead evidence inconsistent with it. In the circumstances I do not see that there is scope to now allow this evidence to be admitted, and so will sustain the objection. This has the consequence of excluding Mrs Terras' evidence insofar as it goes to the question of whether the SIPP is, in part, not matrimonial property. It does not exclude her evidence insofar as that may be relevant to the question of whether (given that I have held that all of the value of the SIPP is matrimonial property) there are special circumstances justifying an unequal division of it. I will return to this issue below.

(iii) The household contents and furnishings

[81] Parties agreed in the principal joint minute that household contents and furnishings from Oakwood to the value of £2,160 formed part of the matrimonial property, and that these were in the hands of the defender. A significant amount of time was however taken up by Mr Stuart in examining the pursuer and cross examining the defender in relation to household contents. He seemed to be seeking to establish that there were other valuable

items of furniture which also formed part of the matrimonial property (for example, items which had previously been in the parties' house at Mossknowe), that the present whereabouts of these items was unknown, that the pursuer did not have them, and that they did not fall within the items which the defender accepted that she now had possession of. The witnesses were taken though numerous productions and photographs. It appears that Oakwood was partially furnished, so when the parties moved there they took only some of their household contents from Mossknowe. The rest went into storage. When the defender moved out of Oakwood, she took some of the parties' furniture to her new accommodation, and a subsequent independent valuation of this formed the basis of the figure agreed in the joint minute. No evidence of an inventory or valuation of the items in storage was produced.

[82] I had rather assumed that the purpose of all this effort was to invite me to make findings to the effect that the defender did in fact have certain items not accounted for in the independent valuation, to put a value on them as part of the matrimonial property, and to adjust division of the whole matrimonial property accordingly. Ultimately however Mr Stuart did not ask me to make any such findings. He merely submitted that the only purpose of his leading evidence in this context had been to challenge the general credibility and reliability of the defender. I found that rather surprising, given the amount of time that had been taken up with this chapter of evidence. Ultimately, however, I was not satisfied that it had been established that the defender had taken or retained household furniture or contents to any significant value beyond that which had been agreed. Therefore I did not for this reason find her to be generally less credible or reliable. In the circumstances I have simply made a finding, as agreed at the outset, that the only contents and furnishings of the

party's home which fall to be taken as matrimonial property are those currently in the possession of the defender and having a total value of £2,160.

(iv) Archie the Cow

[83] The pursuer gave evidence to the effect that in around 2012 he had purchased an original oil painting of "Archie", a highland cow, by Georgina McMaster, for £4,000. I heard evidence that this was a very large painting, which by 2017 had increased in value to £8,000. The pursuer said that he had bought it as an investment. He said that he did not know where it now was. In the light of this evidence I anticipated that Mr Stuart would ask me to make a finding that this painting formed part of the parties' matrimonial property at the relevant date, and that the defender had taken it and had possession of it. However no such submission was made. I therefore do not know why time was taken up with hearing evidence about this picture. I would only note that notwithstanding the pursuer's evidence about it the evidence of BD in his affidavit was that the pursuer had given it to AD as a present. Assuming that is so - and it was not challenged – the painting was not owned by either party at the relevant date and is not part of the matrimonial property. In any event I will make no finding in relation to it.

(v) The Aga

[84] The parties purchased an Aga which they intended to install in Blacksmith's Cottage. They agreed in the joint minute that following their separation it was returned to the seller and that a refund of £11,853 was paid to the pursuer. It was submitted on his behalf that the refund was consumed by the negative balance on the receiving account (the parties' joint Barclays account xxxx0405), and so should be left out of account for this reason.

[85] I do not accept that submission. The Aga was an asset owned at the relevant date, is matrimonial property, and the pursuer was entitled to, and did, receive the refund value of it. As far as I can tell most of the sum obtained by way of refund was paid into account xxxx0405 in November 2014 but then immediately removed to another account by the pursuer, who thereby retained control of it. Accordingly I consider that it is appropriate to take the refund value of this asset as its value at the relevant date, and to take the pursuer as having possession of this sum at that date.

(vi) The Range Rover

[86] Parties were agreed that at the date of separation they had a Range Rover motor car which was subject to a personal contract purchase agreement. They further agreed that shortly afterwards the vehicle was surrendered, that £4,500 of the sum received in consequence was used as a deposit on the lease of a Volvo for the defender, and that the remaining £1,652 was paid into the parties' joint account ending xxxx0405. Accordingly I consider that it is appropriate to hold that the value of the Range Rover at the date of separation was £6,152, and (in the absence of evidence to the contrary) to take this to be a jointly owned asset.

(vii) The Turcan Connell invoice

[87] The defender obtained legal advice from Turcan Connell between 10 September and 11 November 2014, that is, during a period from shortly before, to shortly after, the date of separation. She was subsequently presented with an invoice dated 13 November 2014, in the sum of £7,254, now lodged as production 6/3/5 for the defender. The pursuer submitted that it would be inequitable for him to bear any of this debt. I do not agree. I do not see

that a debt incurred during the marriage ceases to be a matrimonial debt just because it was incurred by one party to the marriage in seeking legal advice about the marriage or indeed its possible termination. In the present case not all of the liability for the debt was incurred in the period prior to the relevant date, however, and it is not possible to determine exactly what proportion of this invoice relates to this period. I have taken one half of it as doing so, and hence have included the figure of £3,627 as a matrimonial debt.

(viii) The loan from pursuer's mother

[88] The pursuer gave evidence that he had borrowed £13,000 from his mother in two instalments over the course of the marriage in order to help finance the building works at Blacksmith's cottage. This loan was not documented, and its terms and conditions were not detailed. The pursuer's mother was not called to give evidence about it nor did she provide an affidavit. In the circumstances I am not satisfied that the pursuer has established that this sum should be included in the schedule as a matrimonial debt.

The pensions: special circumstances

[89] The bulk of the matrimonial property in this case consists of the parties' occupational and personal pensions, and in particular the pursuer's SIPP. For the reasons set out above I have held that all of the CETV of this particular pension, that is, £519,566, is matrimonial property. For her part, the defender was a member of two occupational pension schemes at the relevant date, with Marks & Spencer and Mothercare UK Ltd. As also noted above, it was agreed that her interest in the Marks & Spencer pension had a CETV of £72,556, but that only £25,538 of this was matrimonial property. It was further agreed that her interest in her Mothercare UK Ltd pension had a CETV of £44,943, of which only £22,649 was matrimonial

property. Both parties argued that special circumstances existed under section 10(6) of the 1985 Act justifying an unequal division, in their favour, of the matrimonial property elements of their respective pensions. Both, in substance, relied on section 10(6)(b), that is, the source of the funds used to acquire the matrimonial property elements of their pensions. Both, in effect, wanted to retain all of the value of their own pension, while being awarded half the value of the other party's pension.

(i) The defender's pensions

[90] The position in relation to the defender's occupational pensions is reasonably straightforward. It is clear that she was employed and made pension contributions up until BD was born in 1997. She then ceased to be in employment and made no further pension contributions prior to the relevant date. The increase in the value of her two pension funds during the period of the marriage after 2003 therefore derived entirely from investment income. The funds were never changed nor converted, and no complex tracing of the pension funds was necessary. In these circumstances I would accept that the whole value of the matrimonial property elements of the defender's two pensions were derived solely from her own income and efforts prior to the marriage and were not derived from the parties' efforts during the course of the marriage. I am therefore satisfied that special circumstances exist in terms of section 10(6)(b) of the 1985 Act in relation to the whole of the matrimonial property element of the CETV of the defender's two occupational pensions.

(ii) The pursuer's pension

[91] As discussed above, Mr Stuart's primary position was that not all of the CETV of the SIPP was matrimonial property. By way of fall-back position, however, he argued that the

source of the funds used to acquire this asset justified an unequal division in the pursuer's favour. In summary his approach again sought to focus on Lord Hodge's observation at paragraph 18 of *McDonald* to the effect that the focus of section 10(5) of the 1985 Act was the proportion of pension rights or interests referable to the period of the marriage, which on the face of it was that portion which reflected the "enhancement in value of the pension arrangement during that period". This, submitted Mr Stuart, required consideration of the pursuer's pension contributions and investment returns, but also the effect of withdrawals made from the pension during the marriage, diminishing the value of the pursuer's interest. It was submitted that this was consistent with a general principle of the 1985 Act, namely the aim of sharing property acquired by the spouses' efforts or income during the marriage. In the present case, of course, pursuant to the scheme set up with his adviser Jonathan Fisher, the pursuer had made substantial withdrawals from his pension scheme in order to fund private education for BD and AD.

[92] Against this background, the pursuer relied on the evidence of Sandra Terras, who had considered the whole history of the pursuer's many pension schemes since 1983 (set out in her reports numbers 5/3/19 and 5/35/1 of process), including in particular the various consolidations of these schemes, and the pursuer's contributions and withdrawals, both prior to and subsequent to the date of the marriage. Mrs Terras identified that the pursuer's pre-marriage pension had two components, a Scottish Life policy and a TJ Hughes occupational pension scheme. Having ascertained the total value of these schemes at the date of the marriage, Mrs Terras then calculated an internal rate of return, that is, the percentage annual return which if applied to the value of the pursuer's pensions at the date of marriage gave the actual CETV of £519,566 at the relevant date. This was around 3.89%. Mrs Terras then used this rate of return to calculate the total value of the contributions made

during the marriage (£291,209), and the effect on the value of the withdrawals made during the marriage on both pre (£136,274) and post marriage funds (£146,969), a total of £283,240. Mrs Terras' conclusion was therefore that the net value of the pursuer's contributions between the date of the marriage and the date of separation was £7,969.

[93] Mrs Terras had also considered the position of the pursuer's pre-marriage funds by applying a market rate of return (between 4.8% and 5.8%) rather than the internal rate of return, and assuming that no contributions or withdrawals had been made during the marriage. She concluded that in these circumstances the actual CETV of the SIPP at the relevant date would have been even higher, that is, between £548,449 and £591,813. In the course of her oral evidence I also asked Mrs Terras whether it would make any difference to her figure of £7,969 if one were to consider the net value of the enhancement from 1997 (that is, the date when BD was born) rather than the date of the marriage in 2003. She replied that it was likely to be a similar figure.

[94] In the light of all this, Mr Stuart submitted in effect that of the SIPP CETV of £519,566, £511,597 was derived from pre-marriage contributions. The enhancement of the fund during the course of the marriage, as a result of the many withdrawals made by the pursuer in order to pay the children's school fees, was only £7,969. Even if one looked back to the date of BD's birth, the enhancement was likely to be similarly modest. Accordingly all of the CETV of the SIPP at the relevant date, with the exception of this small amount, was derived from the pursuer's pre marriage funds. Even assuming (contrary to his primary argument) that all the CETV was matrimonial property, there were therefore special circumstances justifying an unequal division of the CETV under section 10(6), indeed all bar £7,969 of it should be allocated to the pursuer. That, he submitted, was consistent with the

approach required by *McDonald*, and in particular what Lord Hodge said in paragraph 18 thereof.

[95] For the defender Miss Ennis submitted in the first place that there were no special circumstances justifying unequal division of the CETV of the SIPP. In short summary, it had been created during the marriage, and the immediate source of funds had been from other consolidated pensions also created during the marriage. It took time and effort to trace back to the pensions which pre-dated the marriage. The withdrawals from the SIPP were a result of the pursuer's insistence that the children were privately educated, and the defender was excluded from the financial decision making in this regard. There being no good basis for an unequal division of the SIPP, the defender should be entitled to a sum reflecting a half share of its value.

[96] In my view none of these points meets the essential thrust of Mr Stuart's submissions based on Mrs Terras' evidence. That the SIPP had been created from consolidation of other pension funds also created during the marriage does not in itself preclude consideration of the source of those funds in turn, to see whether ultimately they derive from pre-marriage funds which were solely the property of the pursuer. Certainly such a tracing exercise takes time and effort, but that time and effort has been expended in this case and I have to address the arguments to which the resulting evidence gives rise. I am satisfied that part of the CETV of the SIPP can properly be traced to the pursuer's pre-marriage contributions, accepting that this will be a matter of fact and evidence in any given case: cf. *EP, G* v *GG*, *supra*, per Lady Wolffe at paragraph 33. In any event, I do not accept that it was the pursuer and the pursuer alone who insisted on private education for the parties' children, nor that the defender had no say in Jonathan Fisher's scheme to withdraw funds from the SIPP. I did not accept the defender's evidence to this effect. The essential question posed by Mrs Terras'

evidence is whether, given the withdrawals that were in fact made, the great bulk of what remains can be identified as having been derived solely from the pursuer's pre-marriage contributions.

[97] In that regard the defender led evidence from Dr John Pollock, who spoke to his report number 6/10 of process. Dr Pollock accepted that the history of the pursuer's pensions was as described by Mrs Terras in her reports, and accordingly there was no material difference between them as to the basic figures to be considered. Dr Pollock calculated that if the contributions to the pursuer's pension made during the marriage were accumulated at an internal rate of return of 3.9%, then their value would have been £290,500 by the date of separation. That however assumed that all withdrawals from the pension during the marriage be treated as having been made from pre-marital funds, which Dr Pollock considered would be inequitable. On the other hand he accepted that if, as Mrs Terras had done, one accumulated both the contributions and the withdrawals made during the marriage at 3.9% then this gave a net value of £7,900. However this involved treating all the withdrawals as having been made from post marriage funds, which again Dr Pollock considered would be inequitable.

[98] Dr Pollock's evidence was clear that at least some of the withdrawals must have come from funds attributable to contributions made prior to marriage. All the withdrawals were made tax free, and the funds attributable to post marriage contributions were not great enough to support the amount of tax free withdrawals that were in fact made. However it was not possible to precisely determine the split of the value of the pension fund between pre and post marital contributions at the time each withdrawal was made. He therefore suggested a pragmatic middle way, avoiding the two inequitable approaches just mentioned. He pointed out that leaving aside the question of investment returns it could be

seen that at the date of the marriage the pursuer's pension was worth £291,248 (the Scottish Life pension) + £86,510 (the TJ Hughes pension) and that further contributions totalling £249,557 were then made prior to the date of separation. Accordingly it could be seen that of a total 'contribution' to the pursuer's pension of £627,315, around 40% was paid during the marriage. That being so it was also reasonable to assume that the same percentage of the withdrawals could also be attributed to the post marital funds. Accumulating the contributions made during marriage with 40% of the withdrawals at 3.9% led to a conclusion that the value of the SIPP which was attributable to contributions made during the marriage was £177,900.

[99] As Dr Pollock further pointed out, and as detailed on page three of his report, the balance of the CETV of the SIPP (£341,666) attributable to the pre-marriage contributions could be further sub-divided into (i) the period prior to the parties commencing cohabitation in 1993 (ii) the period from then to BD's birth in 1997 and (iii) the period from then until the date of the marriage in 2003. Although the limitations on the available data precluded precise calculation, Dr Pollock estimated that the value of the CETV attributable to each of these periods was £116,508, £106,941 and £118,217 respectively.

[100] In the light of all this, Miss Ennis submitted that if it were accepted that there were grounds for an unequal division of the SIPP based on the source of the funds, that Dr Pollock's approach should be preferred. Mrs Terras' error was, as Dr Pollock had said, to adopt an approach which meant that the whole of the pursuer's contributions to the SIPP during the marriage be taken to fund the whole of the withdrawals. As a matter of fact that was simply untrue. The withdrawals had been made from the funds as a whole and it was impossible to ascribe any part of any withdrawals to that part of the fund referable to post

marriage contributions. In any event Mrs Terras' approach was contrary to the legal principle that any funds first into an account were deemed to be the first to be withdrawn.

[101] Both Mrs Terras and Dr Pollock appeared to me to be equally well qualified experts and both gave their evidence clearly and carefully. Mrs Terras in particular had analysed and set out in great detail the pursuer's pension history, and the basic figures which she produced were not significantly in dispute. Insofar as there were differences in their calculations (for example as regards the internal rate of return) these were not material. The real point of divergence between Mrs Terras' and Dr Pollock's evidence related to their respective approaches to determining the extent to which the pursuer's withdrawals from his pension should be treated as having been made from funds accumulated from pre and post marriage contributions. On this matter, I preferred Dr Pollock's approach. As a matter of fact withdrawals were made from the pursuer's whole pension fund, and I accept his evidence, in preference to that of Mrs Terras, that it is not possible to say that they were only made from that part of the fund which had arisen from contributions made post marriage, any more than it is possible to say that they had only been made from contributions made pre-marriage. Although roughly £250,000 was paid in during the marriage, and roughly £250,000 withdrawn, the withdrawals, as Dr Pollock said, were not "paired off" with the contributions made, but must in part have been taken from funds contributed prior to the marriage.

[102] I therefore accept that it is reasonable for present purposes, for the reasons which Dr Pollock gave, to attribute 40% of the withdrawals to the funds accumulated post marriage. This, as he said, is a pragmatic approach. It has the consequence that of the SIPP CETV £519,566, £177,900 is attributable to contributions made by the pursuer between the date of the marriage and the date of separation. It follows that the balance, £341,666, can be seen as

having been derived from contributions made by the pursuer prior to the marriage. The source of the funds used to acquire this part of the value of this item of matrimonial property was therefore his income and efforts prior to the marriage, not during the course of the marriage. I would therefore accept that there are special circumstances under section 10(6)(b) of the 1985 Act in relation to this part of the value of the SIPP.

(iii) Justification for unequal division

[103] I therefore accept that both the pursuer and the defender have established the existence of special circumstances based on source of funds under section 10(6)(b) of the 1985 Act, the pursuer in relation to £341,666 of the SIPP, the defender in relation to the whole matrimonial property element of both her Marks & Spencer (£25,538) and Mothercare UK Ltd (£22,649) pensions. The question is then whether these special circumstances justify unequal division of these pension funds in either party's favour, and if so, in what proportion: *cf. Jacques* v *Jacques, op. cit*.

[104] Having reflected hard on this I have come to the conclusion that the special circumstances which exist in relation to both parties' pensions justify each of them retaining the value of their respective pensions insofar as these are derived from contributions made prior to BD's birth in 1997. This was a particularly important point in the parties' relationship. They became parents for the first time, and the defender gave up her career and pensionable employment to care for their son and provide domestic services to the pursuer. From this point on they lived together as a family and took on what might be called traditional husband and wife roles: the pursuer as sole breadwinner, the defender as homemaker and mother. Of course, the parties disagreed strongly about whether the defender could or should have returned to pensionable employment after BD's birth, but the

fact is that she did not, and yet the parties stayed together. In these circumstances I consider that they both have to accept that the choices and decisions which were made in this regard were ones that were jointly made. In particular, they must both be taken to have decided that from 1997 onwards it would be the pursuer and the pursuer alone who would provide for the family financially. Implicit in this, it seems to me, is an acceptance that he would make pension provision, and that this would in effect be pension provision for both parties, and not just the pursuer. As a matter of fact this did not change when they married in 2003. What changed was that as a matter of law there ceased to be grounds under section 10(6)(b) for unequal division of the pursuer's pension fund as derived from his income and efforts thereafter. But in my view it would not now be right to treat the value of the SIPP derived from the pursuer's income in the period 1997 to 2003 in a different way, given the parties' personal and financial circumstance during this period. Therefore special circumstances do exist in relation to the value of the SIPP referable to this period, but I am not satisfied that they justify unequal division of it.

[105] What this means is that the defender will retain the whole of the matrimonial property element of her two pensions, amounting to £48,187, all of which is attributable to her contributions prior to 1997. In the pursuer's case it means that I am not satisfied that he should retain that part of the value of the SIPP which was derived from contributions made between 1997 and the date of the marriage in 2003. Accepting Dr Pollock's calculations at page three of his report, number 6/10 of process, this means that the pursuer will retain not £341,666 of the CETV of the SIPP, but rather £223,449 (£116,508 + £106,941), which is that part of the value of the SIPP which is derived from contributions made prior to 1997. The balance of £296,117 (£519,566 - £223,449) will fall to be divided equally between the parties.

Economic advantage and disadvantage: loss of earnings and pension

[106] The defender submitted that there were good grounds for unequal division of the matrimonial property in her favour by reference to section 9(1)(b) of the 1985 Act. The first aspect of the defender's argument under this provision related to her claimed loss of employment earnings. The defender gave up employment following BD's birth in 1997. Her evidence was that she was thereafter prevented from returning to employment by the pursuer who insisted that she stay at home to care for the children. In this regard Ms Ennis submitted that the pursuer was an abusive, arrogant, belligerent, vindictive, controlling and manipulative individual, by turns condescending and contemptuous of the defender, and who brutalised her emotionally and abused her physically. This reflected the tenor of the defender's oral evidence. As a result of the pursuer's behaviour towards the defender Miss Ennis said that she became worn down, brow beaten and vulnerable. But for this, it was submitted, the defender would have returned to employment after BD's birth, she would have pursued a successful career, and her income would likely have risen substantially, all as set out in the vocational report by Peter Davies number 6/4 of process. Instead, the defender made substantial domestic contributions to the marriage, and suffered economic disadvantage as a result. This should be reflected in an unequal division of the matrimonial property in her favour.

[107] The second aspect of the defender's section 9(1)(b) argument, linked to the first, related to a claimed economic disadvantage as regards reduction of her pension fund due to her giving up employment in the period after BD's birth. Evidence was led from Dr John Pollock about this. He spoke to his reports (now production 6/7), which in turn were based on projected earnings for the defender set out in Mr Davies' report. In short summary, had the defender not given up work in 1997 but had instead followed the career trajectory set out

in Mr Davies' report, continuing to make contributions to her Mothercare pension scheme (or to a similar scheme) Dr Pollock's opinion was that she could have accumulated an additional pension fund of between around £151,000 and £174,000 to the relevant date, and between £207,000 to £239,000 by 2017. These figures could be even higher, dependent on the discount rate selected for the calculation.

[108] Mr Stuart submitted that there were no good grounds for an unequal division of the matrimonial property in the defender's favour by reference to section 9(1)(b). Indeed, he submitted, that if unequal division were appropriate by reference to economic advantage and disadvantage, it should be made in the pursuer's favour, not the defender's. In the first place, he invited the court to reject key parts of the defender's evidence under this chapter, in particular her evidence that the pursuer had prevented her from resuming employment after BD's birth when she otherwise would have done so. He submitted that this evidence came from the defender alone, was unsupported by any other evidence in the case, and was neither credible nor reliable. If the defender's evidence was not accepted in relation to her claimed inability to work, the subjugation of her by the pursuer, and the impact that this had had upon her economically, then – as Miss Ennis had expressly conceded in her written submission – the defender's claim under section 9(1)(b) could not succeed.

[109] In the second place however, and in any event, Mr Stuart submitted that the defender's claim was ill founded even if her evidence was accepted. Even in the classic case where (typically) a wife gives up employment in order to bring up children and provide domestic services, the courts had recognised that her economic disadvantage as regards her loss of earning is likely to be offset by her husband's economic disadvantage in using his income to support her. But in this case the position was even stronger for the pursuer. It was not a situation where he came out of the marriage with his career advanced and

earnings increased due to the defender's domestic contribution during the marriage, while she was left in the same or worse economic position as at the outset. Rather it was clear that the pursuer was now unemployed, nearing retirement age, in poor health, and with limited future earnings potential. The defender, on the other hand, had since separation obtained full time employment with an employer who thought well of her abilities, had 17 further years of earning potential prior to retirement, and had been on courses with a view to furthering her career.

[110] Additionally, submitted Mr Stuart, and as Miss Ennis also conceded, the parties had little to show economically for their years of marriage. Given their matrimonial assets and debts, there was really little money left – except the pensions, and in particular the SIPP. As Mrs Terras had said, even if the pursuer had made no further contributions to the SIPP after the date of the marriage, the CETV at date of separation would likely have been significantly greater than it in fact was – between £548,449 and £591,813. This showed that the pursuer had made very substantial contributions to the marriage by withdrawals from his pension, and had suffered economic disadvantage in this regard. Since the date of separation, as was agreed, his withdrawals from the SIPP had brought its value down to £337,000. Some of this had gone on his own living costs, it was true, but much of it had gone to pay the parties' debts, support the parties' children, and to meet the defender's claims for aliment. All this showed an economic disadvantage to the pursuer from the marriage amounting to at least £200,000. The defender, on the other hand, left the marriage with pension funds which at the date of separation had a non-matrimonial property element totalling more than £70,000, and a total value of around £115,000. She was also now in a new pension scheme with her new employer. In all the circumstances the court should refuse to divide the matrimonial

property unequally in the defender's favour by reference to section 9(1)(b), and should consider instead making an unequal division in the pursuer's favour.

[111] In the main I prefer the submissions for the pursuer. In the first place I did not find the defender to be a credible and reliable witness on key aspects of her evidence on this chapter of the case. I accept that she gave up employment in order to give birth to and then care for the children, and to provide domestic support for the pursuer. However I do not accept that she was later prevented by the pursuer from returning to work when she otherwise would have done so, nor that this was due to the abusive and coercive control she complained of. As Mr Stuart submitted, the defender alone gave evidence in support of these matters, and I am satisfied that she is not a credible and reliable witness. As already noted, I think it likely that she dishonestly failed to disclose to her solicitor and the court the £9,000 bonus payment in the aliment action, and then lied to this court about it. I think that it is also likely that she took the pursuer's valuables from the safe at Oakwood, and lied to this court about this too. Further, and as I have already observed above, the very manner in which the allegations of abuse against the pursuer were made in this case, in the face of the attempts to 'take the heat out' of the divorce aspect, undermines their credibility and reliability. Further still, the defender presented in the witness box as an independent, smart and combative individual, well able to hold her own under some strong cross examination by Mr Stuart. She appeared far from the cowed and coerced victim, which at times she seemed to want to present herself as, and I did not accept that this was only because she had somehow recovered her confidence since the separation. I was left the impression that she would have given as good as she got in the course of the parties' marriage.

[112] There are also further specific pieces of evidence, as pointed out by Mr Stuart, which are inconsistent with the defender's account of a long term pattern of abusive control by the

pursuer preventing her from taking up new employment. Not least is the fact that the parties were severely financially stretched for much of the marriage, particularly after they returned to live in Scotland. By the time of the separation they were heavily in debt. This rather supports the pursuer's evidence that he had been very keen, to put it mildly, that the defender should return to employment. His rather contemptuous disregard of the value of the defender's domestic work – while it does him no credit on one level – rather underlines the strength of his belief that the defender could and should have returned to paid employment, and his desire that she do so. As Mr Stuart also pointed out, the defender's picture of the pursuer as abusive aggressor in the marriage is inconsistent with the terms of BD's affidavit, number 41 of process, in which he identifies the defender as the principal aggressor, both towards the pursuer and towards him and AD. The defender chose not to call BD to cross examine him on these statements, when she could have done so. She must therefore be taken to have accepted his evidence on these matters, with the consequence of further undermining the credibility and reliability of her own account insofar as inconsistent with it. Indeed, I have accepted the evidence put forward by the pursuer as to the reasons for the irretrievable breakdown of the marriage, and thus that it was the defender's unreasonable behaviour which caused this.

[113] For all these reasons I did not accept as credible and reliable the defender's evidence on the key points in this chapter. I think it likely that the parties had a volatile relationship, but am not satisfied that the defender has established that it was characterised by the abusive control of which she spoke, nor that she was prevented from returning to paid employment after 1997 when she would otherwise have done so. As a matter of express concession, therefore, her claim for unequal division under section 9(1)(b) fails.

[114] However I also accept Mr Stuart's secondary submission on this chapter. The defender was in career employment when she fell pregnant with BD and she gave up this employment. Even if her stated reasons for not returning to employment are rejected, the fact is that she gave up pensionable employment in the interests of providing child care and domestic services to the pursuer and their children. The pursuer seemed to set almost at naught the value of the defender's contribution in this regard, but I did not accept this. For much of the marriage the pursuer worked away from home during the week, and the defender was the primary carer for the children and primarily responsible for running the matrimonial home. Even accepting that the decision that she not return to paid employment was a joint one, or at least one that both parties were ultimately prepared to accept, it can be said that the defender sustained economic disadvantage as regards loss of employment income and pension contributions during the marriage, and that she did so in the interests of the pursuer and their children. However as section 11(2) of the 1985 Act makes clear, account must then be taken of any corresponding economic disadvantages sustained by the pursuer, and the extent to which these offset the defender's disadvantage.

[115] While each case will to some extent turn on its own facts, it seems to me that the case law supports the general position advanced by Mr Stuart in this regard. There is a recognition that the relative economic advantages and disadvantages enjoyed and suffered by parties to a marriage, where (typically) the wife gives up employment to care for children and provide domestic services, will often cancel each other out, at least to the extent that unequal division is not justified in the wife's favour by reference to section 9(1)(b). In particular the economic disadvantage resulting from one party giving up employment can be weighed against the economic advantage to her of being maintained by the other party's earnings, and the economic disadvantage to him of using a share of these earnings in

supporting her: see *Petrie* v *Petrie* 1988 SCLR 390 at 394; *Welsh* v *Welsh* 1994 SLT 828 at 835; *Kennedy* v *Kennedy* 2004 SLT (Sh Ct) 102 at 107. These features exist in the present case, and on the face of it point away from the sort of significant imbalance in economic advantage and disadvantage which would justify unequal division under section 9(1)(b).

[116] However I also agree with Mr Stuart that other features exist which further weaken the defender's claim. This is not a case where the pursuer has been able to take advantage of the defender's contribution to child care and domestic work in order to further his own career. It is true that for significant periods he was in well paid employment in senior management roles. But his career has been rather chequered, and appears now to have petered out. He moved from job to job during the parties' relationship, with periods of unemployment, and on his own evidence took a significant reduction in salary in order to get back into work with Gretna Green Group. He was made unemployed shortly after the separation and had been out of work ever since. It appears that he has not actively sought employment pending the conclusion of this litigation, but this too will hardly have improved his prospects of obtaining well paid employment now. He is close to retirement age and has (on his evidence, which was not challenged) recently suffered a stroke, although it does not appear to have left him with significant disability. Overall his prospects of returning to employment in the retail sector, at anywhere near the level of income which he enjoyed in the past, appear uncertain, at best.

[117] As for the defender, she argued by reference to her work history prior to 1997 and to Peter Davies' report, that but for the marriage she would have continued in employment and risen to regional retail manager level, whether with Mothercare or elsewhere. By reference to Dr Pollock's report, it is apparent that had her career followed the projected path her occupational pension fund would now be much larger than it is. I can accept that

the defender is a determined, focussed and hard-working individual, and would presumably have sought to further her career had she not had children. However I thought that the projected career and income path set out in Mr Davies' report was rather speculative, even if the factual account given to him by the defender was accepted. It supposes not only that the defender would have been willing and able to advance her career, but also that the opportunities would be there for her to do so. The well documented difficulties suffered by the retail sector over the relevant period – and which the pursuer himself appears to have experienced – suggested to me that this could by no means be taken for granted. In other words I do not accept that it can be assumed that but for the defender giving up employment in 1997 she would now have been earning the amounts suggested in Mr Davies' report, or have accumulated the increased pension fund suggested by Dr Pollock. As it is, the defender has picked herself up well economically since the date of separation. She has, as was submitted, found a new career, and since no later than the beginning of 2017 has been in full time employment. She is valued by Mrs Joyce, her employer. She earns a steady if unspectacular income, but is taking steps to improve her employment prospects through college courses. She is in good health and has around 17 years to retirement.

[118] Looking at the pension issue more directly, I agree with Mr Stuart that the position is that at the start of the marriage the pursuer had a substantial fund built up from contributions to a number of schemes over many years. The unchallenged evidence of Mrs Terras was that at this time the fund was such that, had no further contributions been made to it, and no withdrawals made from it, the CETV at date of separation would, applying an annualised rate of return, have been well in excess of £519,556. The internal rate of return, that is, the rate actually achieved, was lower. But in general terms it can be said that the

value of the pursuer's pension fund did not significantly increase over the course of the marriage, notwithstanding the significant contributions which he made during this period. This is because of the significant withdrawals which were also made, and which went in particular to funding the children's education. The net result is that the pursuer suffered a significant reduction in the value of his pension fund during the marriage, albeit that this has come about because of withdrawals of funds that were used for the purposes of the marriage. Whether he will be able to make further significant pension contributions prior to retirement age is, standing his relatively poor employment prospects, uncertain at best.

[119] As for the defender, her pension position, as already noted, is that she has two occupational pension schemes from prior to 1997 which at the date of separation had a combined value of more than £117,000 (although not all of this is matrimonial property). For the reasons set out above I consider that she should retain the whole value of these pensions, standing that the whole of the funds used to acquire them derived from her pre-marriage efforts and contributions. These funds will continue to grow in value until the defender reaches retirement age by reason of investment income, as they have done since 1997. Furthermore, the defender gave evidence that she has joined a new pension scheme in relation to her current employment, and to which her employer is making contributions. Again, given her age and health, she can reasonably expect to continue to work and increase her pension fund significantly prior to retirement.

[120] Finally, and as noted above, I have not been persuaded that there are special circumstances justifying unequal division of that part of the pursuer's pension fund which (following Dr Pollock's evidence) I have determined can be attributed to the period between BD's birth in 1997 and the date of separation. In effect, this means that the defender will receive (subject to other adjustments) a share of the pursuer's pension fund relative to the

period starting with the time she gave up pensionable employment and the end of the parties' relationship.

[121] Overall, even leaving aside Miss Ennis concession in relation to this chapter, I do not see the significant economic imbalance in relation to the parties' respective employment or pension positions which would justify an unequal division of the matrimonial property in the defender's favour under section 9(1)(b). I therefore agree with Mr Stuart that this claim should be rejected.

[122] As for the pursuer's corresponding claim, I did not understand Mr Stuart to be pressing this particularly strongly, his principal concern being to counter and refute the defender's claim in this regard. As both counsel recognised, the parties have little to show economically for the years of their marriage, and at date of separation (leaving aside their pension funds) their debts exceeded their assets. As to their respective employment positions, both parties have had to start again following the separation, and the fact that the defender seems to have made a better start than the pursuer is not a reason to penalise her in relation to division of such matrimonial property as remains. It also appears that the pursuer has, for reasons known to him, chosen not to actively seek new employment since 2015. As to pensions, it is true that large sums were withdrawn from the SIPP during the marriage, but all these funds were then put into the marriage, and in particular the education of the parties' children. I do not think that it is correct to say that the pursuer has been disadvantaged economically *vis a vis* the defender as a result of this. The decision to make the withdrawals during the marriage was a joint one, and the pursuer has jointly benefitted from them, as the defender did. I agree that account must be taken of the payment by the pursuer of some of the parties' debts following the separation, including some paid by withdrawals from the SIPP. That is a matter which I will address separately

below. But as regards any disadvantage in relation to the reduction of the value of the pursuer's pension during the marriage, I am unpersuaded that any unequal division of the matrimonial property in his favour by reference to section 9(1)(b) is appropriate.

Economic burden of caring for AD

[123] In his written submission the pursuer made a claim for unequal division under section 9(1)(c) of the 1985 Act. This appeared to be something of an afterthought, and was not strongly pressed by Mr Stuart. The claim was made in relation to AD alone, who will be 16 on 21 November 2018. He has lived with the pursuer since around February 2015, and will continue to do so for the remainder of his schooling at least. It was submitted that it was clear that the pursuer had borne and would continue to bear the economic burden of caring for AD. It was also submitted, as noted above, that the defender has failed to pay the child maintenance in respect of him which has been assessed as due. While the pursuer had initially accounted for this by netting off his aliment payments, it was said that no child maintenance has been paid since these payments ceased in July 2017. This was disputed by the defender, although she accepted that she was in arrears.

[124] In my view, and having had regard to the factors set out in section 11(3) of the 1985 Act, it is not appropriate or justified to unequally divide the matrimonial property in the pursuer's favour by reference to section 9(1)(c).

[125] In the first place, as noted above, section 9(1)(c) relates only to the "economic burden of caring… after divorce, for a child of the marriage under the age of 16 years." The parties will be divorced by the interlocutor to which this opinion attaches. AD will turn 16 shortly thereafter. There will be no significant economic burden on the defender in relation to child

care for AD in the short intervening period. On that basis alone section 9(1)(c) has no proper application in this case.

[126] However even if one could have regard to the cost of child care to the pursuer in the period since the start of the proof, or indeed throughout the time that AD has been residing with the pursuer, the position is that he has almost wholly financed AD's care by withdrawals from the SIPP. This, as I have held, is matrimonial property which on the face of it falls to be shared equally between the parties. The consequence is that, in reality, the pursuer has been meeting the economic burden of caring for AD by using matrimonial property half of which, on the face of it, belonged to the defender. I do not consider therefore that it would be accurate to say that the pursuer has met the whole economic burden of caring for AD since February 2015, and therefore not appropriate to make unequal division of the matrimonial property to accommodate any such burden.

[127] Further and in any event, the position remains that the defender has been assessed as liable to pay child maintenance in respect of AD. She has not paid what is due, it seems, but that is a matter for enforcement by the child maintenance authorities. It has been recognised that the introduction of the child support legislation has significantly reduced the likely scope of application of section 9(1)(c) of the 1985 Act: see Clive, *The Law of Husband and Wife in Scotland* (4th Edition 1997) paragraphs 24.071 – 24.072 and cases cited there; Stair Memorial Encyclopaedia, *Child & Family Law* (Reissue), paragraph 668. It has also been observed that the court should be slow to make an capital award under section 9(1)(c) in order, in effect, to top up the ongoing revenue costs to the parent with care going forward: see *Maclachlan* v *Maclachlan* 1998 SLT 693 at 698 B – K per Lord Macfadyen. For this reason too I would have refused the pursuer's claim for unequal division based on section 9(1)(c).

Post separation debt payments

[128] The parties had a large number of debts at the date of separation. Indeed leaving aside the pension funds, their debts exceeded their assets. Some of these debts ran in both names, some in the names of one party alone. Some have since been paid, and some have not. Some that the pursuer has paid have been paid by making withdrawals from the SIPP, that is, out of the parties' matrimonial property. Some, however, were paid (or likely paid) by the pursuer from sums that were not matrimonial property. Furthermore, the parties incurred a number of new liabilities since the date of separation. Although not matrimonial debts outstanding at the date of separation, these debts arise out of the marriage and some accounting for them is appropriate. Again, some of these liabilities are in joint names, some in the name of one party alone. Again, some of these have been paid, and some have not. Again, many of those paid by the pursuer were paid from the SIPP. As noted above, the pursuer had withdrawn nearly £200,000 from the SIPP between the date of separation and the end of the proof and at least some of this will have been used to pay the matrimonial and post separation debts.

[129] The overall picture is therefore complex, and the evidence was incomplete. However it seems to me to be necessary to make an attempt try to account for these various post separation payments, insofar as that is possible. They are capable of being analysed under section 9(1)(b) of the 1985 Act, that is, in terms of economic advantage and disadvantage, possibly as a matter of special circumstances justifying unequal division in terms of sections 10(1)(a) and 10(6), or simply as a matter of overall fairness under section 9(1)(a). Either way, it seems to me that the real question is whether adjustments to division of the net matrimonial property should be made, with the general aim of seeking to achieve a fair division.

(i) Barclays bank account xxxx0405

[130] It is agreed that the parties' joint Barclays bank account xxxx0405 was overdrawn by £2,076 at the date of separation. It is further agreed that the defender withdrew £500 on both 8 and 9 October 2014, that the account was closed with an overdrawn balance of £14,947 in November 2014, and that this balance was transferred into an account in the pursuer's sole name. It might therefore appear that the pursuer took into his own name a significant joint debt largely arising after separation, and that the division of the matrimonial property should reflect this.

[131] However the overdraft limit on this account was £15,000. It appears that following the defender's withdrawals on 8 and 9 October 2014, the pursuer transferred the sum of £10,600 out of the account on 14 October 2014 and into a saver account in his own name. This appears to have been with the intention of increasing the overdraft almost to its limit and thus preventing the defender from withdrawing further sums. The pursuer then paid smaller sums back into the account over the following few weeks, in particular, to meet ongoing direct debit withdrawals, and to keep the balance just within the overdraft limit. As already mentioned, when the Aga refund was received into this account in November 2014, the pursuer immediately transferred the bulk of this sum out to his saver account as well, thereby retaining possession of it. Following the joint account being put in his sole name, around 21 November 2014, the pursuer then appears to have transferred back into it the balance of the sums which he had transferred to his saver account.

[132] In these circumstances, as best as I can determine, there are no good grounds to adjust the division of the matrimonial debt arising from the overdrawn balance on account xxxx0405 at the date of separation. The defender withdrew sums from the account post

separation, but so did the pursuer. When the account was put into the pursuer's sole name the overdraft balance had increased to almost £15,000, but in large measure that was because the pursuer had withdrawn a large sum of money from the account to prevent the defender having access to it. He appears to have retained control of this money, and I consider that it is not appropriate, in effect, to treat the increased overdraft balance in November 2014 as if it were in itself a liability arising after the date of separation for which the defender had joint responsibility.

(ii) Barclays loan account xxxx1098

[133] As is agreed, at the date of separation the parties had a Barclays loan account xxxx1098 with a debit balance of £8,811. The pursuer paid the sums due under this loan up to November 2015, at which time the balance had been reduced to £6,652. The pursuer then took out a new £10,000 loan in his own name, at a lower rate of interest, and paid off the balance of xxxx1098. The additional £3,348 obtained under the new loan was also used by the pursuer to pay sums still due in relation to the building and renovation works at Blacksmith's Cottage. Around £5,800 of the new £10,000 loan remains outstanding. The repayments due under both loans, however, were and continue to be paid by the pursuer from money withdrawn from his SIPP.

[134] Ultimately, however, I consider that this is still a joint matrimonial debt, the defender's share of which has already been sufficiently accounted for by netting off the matrimonial property at date of separation by deduction of the debt. I therefore do not consider that it is appropriate to further adjust downwards her share of the net matrimonial property.

(iii) Credit cards

[135] It is agreed that at the date of separation the pursuer had three credit cards, with American Express, Virgin Money, and Barclays. At this date these cards had debit balances of £3,977, £4,000 and £6,119 respectively, a total of £14,096. By the date of proof the balances on these cards were £6,306, £4,700 and £6,989 respectively, a total of £17,995. The pursuer's position was that he had serviced the debt by withdrawals from the SIPP and claimed that the monthly costs amounted to £250, £124 and £200 respectively (see production 5/34/3).

[136] I consider that these debts are in a similar position to the Barclays loan xxxx1098. I am satisfied that the defender's share of them has already been sufficiently accounted for by netting off the matrimonial property at the date of separation, and it is not appropriate to make a further downward adjustment to her share.

(iv) Debt due to Alastair Houston

[137] It is agreed that at the date of separation a matrimonial debt of £30,000 was owed to Alastair Houston, the managing director of the pursuer's employers Gretna Green Group. It is also agreed that the pursuer later repaid this debt, and that he did so by way of a reduction from his compensation package following termination of his employment. I infer from this that absent the debt to Mr Houston the pursuer would have received £30,000 more by way of compensation than he in fact did. The circumstances in which the pursuer lost his employment were touched on in evidence but were subject to an objection and not further explored. I therefore do not know the basis or whole terms of the pursuer's 'compensation package', simply that whatever it was it must have been received by him well after the date

of separation. However it was not suggested that any part of it comprised matrimonial property.

[138] I therefore conclude that the pursuer, in effect, paid the whole of the joint £30,000 matrimonial debt to Alastair Houston, and that this was not a debt which he paid out of the SIPP, that is, from matrimonial property. But the pursuer was only liable for half this debt. I consider that it is therefore appropriate to adjust the division of the matrimonial property by reducing the defender's share by £15,000 in order to account for this.

(v) Aliment

[139] It is agreed, against the background of the aliment action discussed above, that defender has received £23,393 in aliment payments since the date of separation. It is also agreed in the principal joint minute that all of this came from the SIPP. Miss Ennis submitted, in effect, that in dividing the matrimonial property no account should be taken of the aliment which the defender had received. As I understood her this was because the obligation to aliment arose distinctly from the question of financial provision on divorce. The pursuer had been found by the Court to be liable to pay aliment based on his income from the SIPP. Furthermore, he had positively chosen not to seek further employment after April 2015.

[140] I reject Miss Ennis' submissions. The pursuer was only found liable to pay aliment to the defender because he was able to make withdrawals from the SIPP, which forms part of the matrimonial property in this case. As a matter of fact the pursuer had no other employment income after April 2015, and in my view it is not relevant for this purpose that he may have chosen not to look for new employment since then. In the unusual circumstances of this case the aliment payments are really akin to an advance payment to

the defender of part of her share of the matrimonial property. On an equal split of the matrimonial property at the date of separation, the defender would have been entitled to only half of the sum which she actually later received by way of aliment. In my view, therefore, and notwithstanding Ms Ennis' submissions to the contrary, it follows that it is appropriate that the division of the matrimonial property is now adjusted such that the defender's share is reduced by £11,696 (£23,393 / 2), thereby accounting for that part of the property already received by her in the form of aliment payments.

(vi) The Volvo

[141] It is agreed that in December 2014 the pursuer took a four year lease of a Volvo motor car for the defender's exclusive use. The deposit was £4,500, which was paid out of the surrender value of the Range Rover. The monthly lease payments were £248. The lease is in the pursuer's name. He has paid all the monthly payments and will continue to do so until the end of the lease in November 2018, a total of £11,904 (48 x £248). It is likely that all of these monthly payments will have been made by the pursuer by withdrawal of money from the SIPP.

[142] In these circumstances it is apparent that the defender has received a total of £16,404 (£4,500 + £11,904) in relation to the Volvo, and that all of this has come from the matrimonial property held at the date of separation. On an equal split of the matrimonial property, she would have been entitled to only half this amount. It follows that it is appropriate that the division of the matrimonial property is now adjusted to account for the Volvo deposit and lease payments already received by the defender, that is, by reducing her share by £8,202 (£16,404 / 2).

[143] I think that it is irrelevant in this context that the monthly lease payments between April 2015 and July 2017 were made partly in lieu of payments of interim aliment. That is because like the interim aliment payments they were all made by the pursuer by withdrawals from the SIPP, and thus all ultimately came from matrimonial property.

(vii) Child maintenance

[144] The defender has been liable to pay child maintenance to the pursuer in respect of AD from 5 March 2017 @ £49.08 per week. She has not paid this. For the period between 5 March and 7 July 2017, a period of around 18 weeks, the pursuer deducted the amount due by way of child maintenance from the aliment which he paid to the defender. That equates to approximately £882. Had the defender paid this sum to the pursuer, as she should have done, she would of course have received the same amount back from him by way of aliment. But, for the reasons already noted, all of this aliment payment would have come from the matrimonial property, and the defender is entitled on an equal split to only half it. Again, therefore, it seems to me to be appropriate to account for this by reducing the defender's share of the matrimonial property by £441 (£882 / 2).

[145] As regards the child maintenance which the defender has been liable to pay since July 2017, I consider that this is a matter between the parties and the Child Maintenance Service. It is not appropriate to further adjust the division of the matrimonial property to seek to account for it. The defender accepted that she was in arrears. The adjustment in respect of the period 5 March to 7 July 2017 is only appropriate because the pursuer himself adjusted the aliment payments for this period that he was otherwise liable to make, and all of which were derived from the matrimonial property. The failure of the defender to pay

the child maintenance for this period therefore bears on the division of matrimonial property while her failure to pay it since then does not.

(viii) Matrimonial debts in connection with Blacksmith's cottage

[146] It is agreed that as at the date of separation there were a number of outstanding matrimonial debts to various tradesmen and suppliers in connection with the rebuilding and renovation works at Blacksmith's cottage. These are detailed at paragraph 8.iv of the principal joint minute. By my calculation these debts amount to £20,933, which is the figure included in the schedule set out above. It is further agreed that subsequent to the relevant date the pursuer paid all of these debts with the exception of the sums stated at sub paragraphs 8.iv(c), (h) and (i) of the principal joint minute. These amount to £5,148 (£2,374 + £2,017 + £757), and I take it to be that these debts remain outstanding. Accordingly it can be taken that the pursuer has paid the sum of £15,785 (£20,933 - £5,148) towards these matrimonial debts since the date of separation.

[147] It is also agreed that the payments which the pursuer made to the various tradesmen and suppliers to settle these matrimonial debts were made in the three month period between the date of separation and January 2015. The pursuer was still in employment throughout this period. Insofar as he was making withdrawals from his SIPP at this time these were (as far as I can tell) going towards payment of the children's school. It seems likely that payment of these debts was made by the pursuer from his post separation, non-matrimonial income, rather than from matrimonial property. Accordingly I consider that an adjustment to the division of matrimonial property is appropriate to reflect the conclusion that the pursuer alone likely paid the sum of £15,785 towards these particular

matrimonial debts. The appropriate adjustment is therefore to reduce the defender's share of the matrimonial property by half this figure, that is, by £7,892.

[148] As to the unpaid invoices, totalling £5,148, in the absence of any evidence to the contrary, I will assume that they run in joint names. They are thus a joint debt for which parties remain jointly liable. I do not therefore consider that any adjustment in the division of the matrimonial property is appropriate in relation to this. Each party will simply have to pay their share of the debt after the conclusion of this action.

(ix) British Gas bill

[149] It is agreed that at the date of separation the pursuer owed British Gas the sum of £227. I do not know whether that bill has ever been paid but in the context of this action the sum is trivial, and I will make no adjustment in relation to it.

(x) Income tax

[150] The pursuer was liable for income tax liability for the tax year from April 2014 to April 2015. His total tax liability for this year was £5,000, and accordingly 7/12 of this amount, that is, £2,916 related to the period prior to the date of separation. I am satisfied that this amount is therefore a matrimonial debt, and the defender's share of it has been accounted for by including it in the schedule of net matrimonial property. I consider that no further adjustment is therefore appropriate.

(xi) Post separation debts in respect of Blacksmith's Cottage

[151] It is agreed (paragraph 7.i of the principal joint minute) that between the date of separation and the date when Blacksmith's Cottage was sold in April 2016 the parties

continued to incur new joint liabilities in relation to this property. These comprised the monthly mortgage payments, the mortgage protection payments, and an ongoing sum in relation to Portaloo rental at the site. By my calculation these liabilities total £18,139 (£16,092 + £1,836 + £211). In the absence of evidence to the contrary I take these to be debts for which parties were jointly liable. It is agreed that they were all paid by the pursuer. They were likely paid by way of withdrawal from the SIPP in the period after April 2015. They are not matrimonial debts existing at the date of separation and therefore no account has been taken of them in the schedules. I consider that an adjustment of the division of the matrimonial property in the pursuer's favour is therefore appropriate in the sum of half the total debt, amounting to £9,069 (£18,139 / 2).

(xii) Post separation debts in respect of Oakwood

[152] Between the date of separation and February 2015 the defender continued to reside in the former matrimonial home at Oakwood. The parties continued to incur liability in respect of the defender's occupancy of this property. It is agreed (paragraph 11 of the principal joint minute) that these liabilities comprised rent, council tax, internet, Sky television and utilities. By my calculation they total £6,313. It is agreed that they were all paid by the pursuer, and given the time they fell due it is likely that they were paid by him from post separation income which was not matrimonial property. Again, they are not matrimonial debts existing at the date of separation and therefore no account has been taken of them in the schedules. An adjustment of the division of the matrimonial property is therefore appropriate to reflect this. I recognise that the defender had sole use of the property during the relevant period, but still consider that the appropriate adjustment is to

reduce the defender's share of the matrimonial property by half of the total, thus £3,156 (£6,313 / 2).

(xiii) School fees and university costs

[153] It is a matter of agreement (paragraph 9 of the principal joint minute) that between the relevant date and April 2017 the pursuer paid school fees in respect of AD to a total of £26,853. All of this sum was paid by the pursuer from withdrawals from the SIPP, that is, from matrimonial property to which on the face of it the defender was entitled to an equal share. It was submitted, and I accept, that by the end of the proof the pursuer had also incurred a further £12,000 of school fees in respect of AD, which remain to be paid.

[154] It is also agreed (paragraph 10 of the principal joint minute) that between the relevant date and BD leaving school fees of £15,788 were incurred, payment of which remains outstanding. The pursuer also led evidence that he had made payments in respect of BD's attendance at university (productions 5/21/1 and 5/34/3) to a total of approximately £16,000.

[155] The pursuer's position, as I understood it, was that an adjustment in the division of the matrimonial property should be made to reflect the whole of the sums paid and due to be paid by the pursuer in respect of BD and AD's education since the date of separation. The defender's position, again, as I understood it, was that these sums should be entirely left out of account in making an order for financial provision.

[156] There was much evidence as to whether it had been the pursuer or the defender who wanted the children to attend expensive private schools in the first place. The pursuer blamed the defender, saying in effect that she had insisted on this and that he had only agreed because she had promised to go back to work to help pay for it. The defender

blamed the pursuer, saying in effect that it was all his idea and that he had refused to allow her to go back to work even though she wanted to. She said that the pursuer so controlled the family finances that she had no idea how much the school fees were, but I thought this implausible and did not accept it. By her account the defender previously managed three retail stores for Mothercare with a combined turnover of around £4 million. I thought that she was considerably more aware and astute in relation to family finances than she was prepared to admit.

[157] For what it is worth I think it likely that both the pursuer and the defender wanted to send their children to expensive private schools. They were far apart on this issue, but insofar as they were capable of making a joint decision, I think that they did so in this respect. In any event it was a decision for which they were both jointly responsible. I think it likely that they both saw private education for their children as appropriate to what they regarded as their proper financial and social position. I do not discount the possibility that they also wanted their children to be well educated. But the issue for me at this stage is not so much the decision to send the children to private schools initially, but the decision to maintain them at such schools following the parties' separation, and whether the cost of so doing should now be reflected in an adjustment – in either party's favour – of the division of the matrimonial property.

[158] In that respect I accept, in the first place, that when BD and AD went back to school in August 2014, this was a result of, in effect, a joint decision by the parties that the boys should stay at their respective schools throughout the school year. That being so, I consider that both parties were willing and able to make the commitment to pay the fees for the year. The pursuer was of course still in well paid full time employment at this stage. As regards payment of the fees the parties had jointly arranged a scheme with Jonathan Fisher some

years earlier whereby tax efficient withdrawals would be made from the pursuer's SIPP for this purpose. It follows from this that when the parties separated in October 2014 it was not unreasonable for BD and AD to remain at their respective schools. Nor did it become unreasonable for them to stay at those schools after they moved to live with the pursuer and his sister from February 2015. Nor, given that the pursuer continued to work in Carlisle throughout the week, was it unreasonable at this time for the boys to board at school rather than attend as day pupils. By the time that the pursuer lost his employment in April 2015, the moral and financial commitment to maintain BD and AD at their private schools until the end of the school year had already been made. I consider that the sums paid and due by the pursuer in respect of the children's private school education in the period from the date of separation to the end of June 2015 are ones in respect of which it is appropriate that they accept joint responsibility. Liability for both sets of school fees for this school year is any event joint, as the invoices run in the names of both parties.

[159] However I think that the position changed after June 2015. BD left school at that time, so no further school fees became payable in respect of him. But as regards AD, there was plainly a decision to make as to whether to continue to educate him privately from the beginning of the school year in August 2015. In my view that was a decision which the pursuer alone made, for which he took on sole liability, and for which he has to take financial responsibility. He was unemployed. His only means of financing AD's school fees was by making withdrawals from the SIPP. He knew, or ought to have known, that it was at least a real possibility that his SIPP would fall to be regarded as matrimonial property. He knew or ought to have known therefore that for him to commit to spending substantial sums of money on private education for AD might involve spending money which on the face of it fell to be shared equally with the defender. The defender, as I

understand her submission, is not prepared to accept that she should now have to share the cost via an adjustment to the division of the parties' matrimonial property. She would have liked her children to continue to be educated privately, for example had a scholarship been available, but did not consider that it was now affordable.

[160] It might be said that it was in AD's best interests to continue at private school, and that the pursuer should not be penalised, in effect, for making the decision to send him there. But the reality is that by August 2015 the pursuer could not afford to send AD to private school. He had no income from employment. It was not unreasonable of the defender not to want to continue to privately educate AD, given that the only funds available to do so were from the SIPP. She was entitled to take the view by this point that she could not afford to send AD to private school either. Ultimately, my reading of the situation is that the pursuer alone decided to continue to send AD to private school. In the circumstances I am not prepared to adjust division of the matrimonial property to reflect the sums paid by the pursuer, and those for which he remains liable, in respect of AD's education since August 2015.

[161] Since August 2016 BD has been at university in England, and the pursuer has made payments to him at the rate of around £8,000 per year. Again, I consider that this was a choice for the pursuer and the pursuer alone. One can well understand his wish to assist BD financially, who might otherwise have been wholly reliant on loans in respect of both fees and maintenance. But again, the question is whether the pursuer is now entitled to an adjustment of the matrimonial property which would have the effect of having the defender pay half of what BD received, when (as far as I can see) she did not agree to this, and when it is not unreasonable for her not to, given the parties' financial circumstances.

[162] Accordingly, I consider that no adjustment of the division of the matrimonial property should be made in the pursuer's favour in respect of the sums which he has paid in respect of BD's university education. The net result of this is that the pursuer alone will have paid these sums, in effect from his own share of the matrimonial property.

[163] As regards the fees in respect of BD's final year at school, these remain outstanding, but as I understand it both parties remain jointly liable for them. Again, in these circumstances, and given my decision as regard this debt, it is not necessary to make any adjustment to the division of the matrimonial property in respect of it. The parties must each pay half of the £15,788 which they are jointly due to the school (thus £7,894), and do so out of their own share of the matrimonial property as determined in this judgment.

[164] In relation to AD, I accept that the pursuer has already paid the whole of his school fees for the school year to June 2015, in circumstances where both parties were jointly liable for and committed to meeting the cost therefor. This amounted to roughly £10,000. This liability was not a matrimonial debt at the date of separation and has not been accounted for in the schedules. Therefore I consider that an adjustment in the pursuer's favour of half this amount (thus £5,000) is appropriate. However in the period from August 2015 to April 2017, as noted, the pursuer continued to incur fees in respect of AD's education, for which he was solely liable, yet which he also paid out of matrimonial property (the SIPP). I take it that these fees amount to the remainder of the sum agreed at paragraph 9 of the principal joint minute, that is, around £17,000. As half of this sum, on an equal split, would have been due to the defender, a corresponding adjustment is due in her favour, thus £8,500. The net adjustment in the defender's favour is £3,500.

[165] As for AD's school fees due in relation to the period since April 2017, the pursuer is solely liable for these fees, and as far as I understood it they remain unpaid. As explained, I

am satisfied that the pursuer will have to pay these fees out of his share of the matrimonial property, and thus that no adjustment of the division of the matrimonial property should be made in his favour.

[166] In summary, as regards the post separation school and university fees for BD and AD the position is that an adjustment of the division of the matrimonial property in the defender's favour is appropriate in the sum of £3,500. Beyond that the parties will remain jointly liable for the outstanding fees running in their joint names, and the pursuer will remain liable for the outstanding fees which run in his sole name.

(xiv) The Turcan Connell invoice

[167] This invoice remains unpaid. The defender is solely liable for it and will have to pay it. For the reasons set out above I consider that half the invoice (£3,627) is a matrimonial debt. It has therefore been accounted for in the schedule of net matrimonial property and I do not consider that any further adjustment of the division is appropriate.

Conclusions

[168] In the light of the above, I consider that the parties' matrimonial property should be divided as follows. The starting point is the net matrimonial property which, for the reasons set out above, is £578,750 at the date of separation. In terms of section 9(1)(a) division must be fair, and in terms of section 10(1) the presumption is that fair sharing means equal sharing. If the matrimonial property were to be equally shared according to this presumption, each party would be entitled to £289,375. However, as will be apparent, I am satisfied that in this case fair sharing requires a departure from equal sharing. I consider that a reasonable approach to this is make a number of adjustments to the figure achieved by

equal division, by reference to special circumstances, economic advantage and disadvantage, and overall fairness.

[169] In relation to the parties' pensions, as noted above, the defender will retain all of the matrimonial property element of her two occupational pensions, that is, £48,187, while the pursuer will retain £223,449 of the SIPP. This can be accounted for by deducting these amounts from the net matrimonial property. This leaves £307,114 (£578,750 - £48,187 - £223,449) for division between them.

[170] As discussed, I also consider that it is appropriate to make the following adjustments in the pursuer's favour in relation to the post separation debt payments:

(i)	Alistair Houston debt	£15,000
(ii)	Aliment	£11,696
(iii)	The Volvo	£8,202
(iv)	Unpaid child maintenance	£414
(v)	Blacksmith's Cottage debts (as at date of separation)	£7,892
(vi)	Blacksmith's Cottage debts (arising post separation)	£9,069
(vii)	Oakwood debts post separation	£3,156
	Total adjustments (pursuer):	£55,429

In the defender's favour, the sole adjustment to make is in respect of AD's school fees in the sum of £3,500, for the reasons discussed above. The net adjustment of the matrimonial property in the pursuer's favour is therefore £51,929 (£55,429 - £3,500).

[171] In other words I consider that the pursuer should receive £51,929 in addition to a half share of the property remaining after deduction of the pensions. Half of £307,114 is £153,557. Thus the pursuer's share is £205,486 (£153,557 + £51,929), while the defender's share is the balance, thus £101,628. Overall, therefore, taking account of the pensions, the pursuer's share of the net matrimonial property of £578,750 is £428,935 (£205,486 + £223,449), and the defender's share is £149,815 (£101,628 + £48,187).

[172] In addition to her occupational pensions, the defender has retained property to the value of £5,738, as set out in the schedule (£53,925 - £48,187). She is therefore entitled to a balancing payment to the value of £95,890 (£101,628 - £5,738).

[173] There remains the question of exactly how effect should be given to this conclusion. Mr Stuart suggested that I might consider putting the case out by order following judgment in order to hear submissions on this. As he candidly accepted, this was because significant matrimonial debts remain to be paid, and both parties are legally aided. His concern, as I understood it, was that (leaving aside the parties' pension funds) the only money available to meet the outstanding debts was the proceeds of the sale of Blacksmith's Cottage, £54,189, which remains on joint deposit receipt. If no order was made in relation to this sum, it would fall to be distributed equally between the parties. In that circumstance, as money recovered or preserved by them, Mr Stuart anticipated that it might have to be forwarded to the Scottish legal aid board, which might then claw it back in part satisfaction of the parties' legal expenses under their respective certificates. As far as I understood him, Mr Stuart seemed to be suggesting that I might be persuaded to engineer some means of making payment of the outstanding debts direct from the Blacksmith's Cottage proceeds, so as to avoid possible claw back, in which case the parties would see none of this money, yet would still have to find some way to pay the remaining matrimonial debts.

[174] I have reflected on this, but am satisfied that it is not for the court to engage in the kind of engineering that Mr Stuart suggested. Both parties have conducted this litigation as assisted persons. They must have been made aware that although the matrimonial property in dispute might not be taken into account in determining their eligibility for legal aid, any money or property recovered in the action might fall to be clawed back by the legal aid board so as to meet, in whole or in part, the legal expenses incurred under their legal aid certificate. They have been incapable of agreeing or compromising numerous factual and legal issues, which have as a result been litigated at considerable public expense. Questions relating to claw back are for the legal aid board to determine, not me. My task is simply to decide whether orders for financial provision should be made between the parties and if so what. It is not to make orders in order to advantage or disadvantage the parties *vis a vis* the legal aid fund and/or third party creditors.

[175] Accordingly I propose to make no order in relation to the sale proceeds of Blacksmith's Cottage. This sum will therefore fall to be divided equally between the parties, with each therefore being entitled to £27,094 (£54,189 / 2). Deducting this sum from the balancing payment to the defender referred to above therefore gives a net balancing payment due to her of £68,796 (£95,890 - £27,094).

[176] Still that is not the end of the matter. The pursuer too will be entitled to half of the proceeds of Blacksmith's Cottage, but even assuming that the legal aid board does not claw this sum back from him he has further matrimonial and non-matrimonial debts to pay. In reality he has no money available to pay a capital sum. What he has is the remaining SIPP funds, which at the time of the proof had, as agreed, a value of £337,000. In these circumstances the appropriate order for financial provision is a pension sharing order requiring the pursuer's interest in the SIPP to be shared by debiting this scheme with the

sum of £68,796, this sum to be credited to such approved pension arrangement for the defender as may be nominated by her in terms of section 8 of the 1985 Act. Any charges arising in connection with this transfer under section 41 of the 1999 Act should be borne equally between the parties.

[177] In broad summary what it all comes to is this. Both parties will keep all of that part of their respective pension funds attributable to their contributions made prior to the defender giving up employment when BD was born. The defender will get a half share of the pursuer's pension attributable to his contributions from that point on. That half share will be adjusted downwards to take account of the payment by the pursuer of some of the parties' many debts at and following separation. The parties will split equally the proceeds of sale of their only other significant asset, Blacksmith's Cottage. The balance due as regards the defender's share of the whole matrimonial property will be paid by way of a pension sharing order, the pursuer having no other assets from which to pay it. Each party will remain solely liable for those unpaid debts which run in their own name, and jointly liable for those that run in both parties' names. Standing back from the detail of the various calculations which I have set out above, and having regard to all the facts and circumstances of the case, I am satisfied that this represents a fair division of the parties' matrimonial property, and is reasonable having regard to the resources of the parties: 1985 Act, sections 8(2) and 9(1).

[178] If any further or incidental orders under section 14 of the 1985 Act are thought appropriate or necessary in the light of this disposal, the appropriate motion can be enrolled and a hearing assigned if need be.

Expenses

[179] As requested I will reserve all questions of expenses, and certification of counsel and expert witnesses.