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WS v WS [2015] *EWHC 3941 (Fam)*

Judgment in financial remedy proceedings in which neither spouse wanted a pension sharing order, both sought equality of asset division overall with a clean break. The High Court decided the correct approach to pension offsetting should be based upon Duxbury calculations as opposed to sums required to purchase an annuity to generate an equivalent income to a pension.

Background

Mrs WS (W) applied in August 2013 for a financial remedy following the dissolution of her marriage to Mr WS (H). W was aged 56, H aged 61. The parties had begun cohabiting in 1983, had married in 1985 and had separated in 2012 with Decree nisi being pronounced on 14 April 2014.

There were two children of the marriage, a daughter (25), and a son (21). The son was at university, there being no dispute about any remaining responsibilities towards him.

Parker J had in November 2014 given directions to a final hearing, recording the parties' agreement that the court was to consider pensions by way of offsetting based on consideration of cash equivalent values (CEVs) of pensions. The Judge had refused an application by H for a pension sharing report, and had refused permission to appeal.

Assets

Apart from pensions, the assets totalled just over £12m, and consisted of commercial and residential properties, worth c. £4.3m net (including the matrimonial home), money invested or in bank accounts totalling c. £4.6m, and both parties' business interests in various companies which totalled £3.3m net, including H's director's loans to the companies of c. £630,000. The assets were broadly speaking all matrimonial, and the parties had made equal but different contributions.

It was common ground that there should be a clean break on income (subject to a last minute suggestion of a pension attachment order) and that the assets, including pensions, should be divided equally between the parties, but without a pension share: a pension share would "take the husband well over the lifetime allowance with severe taxation consequences" (§ 46).

W had had a successful high-earning career as an investment manager, and H, who had been made redundant from his job as a stockbroker in 1990, worked from home as a consultant, on various property projects and other ventures.

Having heard oral evidence only from the parties, His Honour Judge Lord Meston QC sitting as a Deputy High Court Judge (J) was required to determine two minor valuation issues and the outcome with respect to pensions.

The court quickly disposed of the former (§ 20). The parties' dispute as to the method of calculating pension offsetting dominated the judgment.

Pensions – quantification

H's defined contribution pension, held in a SIPP and a small money-purchase pension plan, now had a CEV of £971k, H having already taken the 25% tax-free lump sum. "The recent liberalising changes to pensions mean that [H] will no longer be obliged to invest his funds in annuities" (§ 54).

W's final salary pension was a defined benefit scheme from her previous employment at a bank. W had also drawn-down the 25% tax-free lump sum, leaving her with a fund with a CE value stated on her Form E in February 2013 to be c. £2.4m. The pension trustees produced an updating figure in October 2015 of £3.1m, ascribed to the decline in the long bond yield. W's pension was in payment, providing her with £50.6k p.a. net. W was critical of the revalued CE of her pension, describing it as perverse and artificial, and explaining that it was "of little or no use" for calculating an offset payment, when there was no intention on the part of either party to actually share it (§ 44).

In short, "[H had] available funds equivalent to cash which he can extract without difficulty. [W had] a guaranteed but non-transferable income stream" § 55.

H's pension, although itself substantial, was agreed to be worth less than that of W.

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Evidence from an actuary in November 2014 stated that the cost of buying equivalent benefits through an annuity was 50% more than the stated cash equivalent of W's pension.

The husband's proposed Options: A and B
Option A provided for H to retain the "substantial and sprawling" seven-bedroom matrimonial home, and two businesses, and to pay to W a lump sum of £750k within 3 months, and a further lump sum of £750k within one year.

Option B provided for equal apportionment of funds from the sale of the matrimonial home and (at least) one of the businesses, with W to pay to H lump sum payments amounting to c. £1.125m less any drawings from his loan accounts.

W was in agreement to the structure of Option B, but she calculated the appropriate lump sum to be £186.5k to equalise the values of non-pension assets, together with £300k to offset the difference in pensions. The parties were therefore £640k apart, and H also indicated at the final hearing that despite having given two possibilities he would now insist upon Option A.
W remained concerned about H's procrastination (referred to as "prevarication" in the judgment), his ability to make business decisions, and in Option A the matrimonial home at c. 50 – 60 acres exceeding his reasonable needs for accommodation. She was also concerned about delay and problems with promises of future payments.

The court found that "on a conservative calculation Option A would leave [H] with assets worth about [£5.1m] more than those with [W], requiring him to find at least [£2.5m]" subject to any pension offset payment due from W. At the hearing, H had provided evidence from a bank in 'indicative terms' that he could re-finance in order to pay W (via Option A).

Pensions – apportionment
The court considered the judgment of Thorpe LJ in Martin-Dye v Martin-Dye [2006] EWCA Civ 681 in which whilst:-

Thorpe LJ indicated that a pension in payment was "no more than a whole life income-stream

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akin to an annuity" (§ 50), and should be considered as "other financial resources" within s 25 (2) (a) MCA 1973.
Dyson LJ preferred to treat pensions as "non-transferrable income streams … quite different in kind from the other assets owned by the parties" (cited at § 51 of WS).
The court also considered Vaughan v Vaughan [2007] EWCA Civ 1085 in which Wilson LJ had recognised the difference in kind between disposable capital and the capital value of pension rights (§ 53).

Nicholas Francis QC sitting as a Deputy High Court Judge had in SJ v RA [2014] EWHC 4050 stated that in a needs case, it would be incorrect to distribute a pension fund on the basis of equality of income (§ 54).

The court considered an article in Family Law (December [2015] Fam Law 1485 entitled "Apples or pears? Pension offsetting on divorce?" which had criticised the failure of the court in SJ v RA to distinguish between defined contribution and defined benefit pension schemes, and had suggested six key factors to be borne in mind when considering offsetting (§ 57).

Finally the court noted the comments of, and offsetting decision by, Sir Peter Singer at § 73 and 74 of JS v RS [2015] EWHC 2921 (Fam).

Wife's approach to pension sharing
W assumed that H's pension would provide income at 2.5% p.a. i.e. 2.5% x CEV of £971k. W's pension was assumed to rise by 2% each year. The total hypothetical income figures of the parties were notionally added together at present, in 12.5 years time and in 25 years time, to demonstrate the shortfall of H's income at each point as against W's. The appropriate Duxbury fund (taking out the state pension) could then be calculated. Three Duxbury figures resulted, being £210k, £324k and £472k. W decided that £400k would be appropriate, and then discounted this for "accelerated cash payment" by 25% to £300,000 (§ 60 – 63).

The court could not see "any justification" for the 25% discount and declined to apply it (§ 63).

Husband's approach to pension sharing

H used various approaches to calculate offsetting (§ 64). Either:-

a) cash equivalents (CEs) should be equalised, meaning payment by W to H of £1.3m; or

b) if H were to buy an annuity to achieve similar inflation-proofed income, he would require £1.2m to equalise incomes; or

c) equalisation of CE's after deduction of 40% tax would require payment to H of £750k; or

d) if H used his existing funds to buy an inflation-proofed annuity, equalisation of subsequent incomes would require payment of £1.3m.

H also reworked W's figures with more conservative investment returns, leading to higher Duxbury values of between £438k and £1.0m (§ 65).

Final offers in submissions
A late suggestion by W was for a contractual deed whereby H would be paid 25% of W's net pension during their joint lives, under Option B (§ 66).

H declined this proposal, and instead upped his Option A offer from £1.5m to secured lump sums of £1.75m (§ 67).

A further alternative offer from W was for a pension attachment order for her pension trustees to pay 25% of her net pension to H (§ 68).

Decision on pensions
There were "problems, pressures and delays" arising from Option A, particularly to the extent that it was reliant upon refinancing which itself was only indicative (§ 69). The court was also concerned that the husband "would struggle with the realities of putting Option A into practice with consequent delay and cost" (§ 70), and may have to sell the very assets he sought to preserve.

The court adopted Option B. There was "no obviously right figure or correct calculation" for offsetting but "[W's counsel's] argument for a conventional Duxbury approach is correct, and that is certainly preferable to an annuity based calculation.. the appropriate [offsetting] figure is £425,000 (§ 71, 73).

Summary by Gwyn Evans, barrister, Tanfield Chambers

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

Case No. FD13D04106

Neutral Citation Number: [2015] EWHC 3941 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Date: 11 December 2015

Before :

HIS HONOUR JUDGE LORD MESTON QC (sitting as a deputy High Court Judge)

- -

Between :

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WS Applicant

- and -

WS Respondent

- -
- -

Nigel Dyer QC instructed by Sears Tooth for theApplicant
Robert Peel QC instructed by Alexiou Fisher Phillipps for the Respondent

Hearing dates: 7-11 December 2015

- -

HIS HONOUR JUDGE LORD MESTON QC:

JUDGMENT

Introduction

1. This judgment is given following the hearing of the applications by Mrs WS for financial remedies under the Matrimonial Causes Act 1973 following the dissolution of the parties' marriage.

2. It is apparent that considerable efforts had been made to resolve the financial disputes and to define and narrow the issues. Subject to the very recent suggestion of a pension attachment order, it is common ground that there should be a 'clean break'. It is also common ground that the matrimonial property should be divided equally, there being no argument to suggest that any departure from equal sharing would be justified in the circumstances of this case. As the case has developed there have been fewer factual disputes of relevance. With the assistance of

experts' reports the value of the property and business assets available for distribution are largely agreed, with only some relatively minor disputes as to value.

3. During the hearing the court heard evidence only from the husband and the wife. Although these proceedings have been somewhat protracted and there was an unsuccessful private FDR appointment, in their written and oral evidence the parties have shown restraint and avoided any unnecessary point-scoring.

Background

4. Mrs WS (the wife) is 56 years of age. Mr WS (the husband) is 61 years of age. They began cohabitation in 1983 and were married on 18th May 1985. There are 2 children of the marriage, a daughter who is almost 25 years old and in employment; and a son who is just 21 years old and at university. There is no dispute as to the parties' remaining responsibilities towards their son.

5. The parties separated in 2012. Divorce proceedings were brought by the wife. A decree nisi was pronounced on 14th April 2014. It has not yet been made absolute.

6. There is reference in the statements to the wife's relationship with another man and she gave evidence about it indicating some uncertainty about how it might develop:there has been no evidence or argument about whether the relationship is likely to have any practical or financial consequences of relevance to this case.

7. In this case the evidence is clear that at least until the breakdown of the marriage both parties made a full, substantial contribution and that no proper distinction can be made between them in that regard. In the agreed case summary it is stated that the assets are a mixture of properties (residential and commercial), cash, listed and unlisted investments and pension funds, and that broadly speaking the assets have been acquired during the marriage and the parties have made equal (but different) contributions. Although the parties' financial positions are not wholly similar, neither of them could be categorised as the weaker party in economic terms or is likely to be significantly weaker following the equal division of assets.

8. For much of the marriage the wife has pursued a successful, high-earning career in investment management. She was formerly employed by Morburg Bank and for some time has been managing director of SGR Investments Ltd which is part of an international bank. In her Form E in September 2013 she stated her gross earned income from SGR in the last financial year as shown on her P60 to have been £357,207 gross and from her 2 non-executive directorships to have been £55,000 gross. Her P60 for 2014-15 shows income from SGR Investments Ltd of £704,490 gross which, in evidence, she explained was a combination of salary, bonus and vesting of bank shares. In a recent statement she explains that reorganisation within her company has meant that her role has ceased and that she has given notice of her retirement in February 2016.

She hopes then to acquire perhaps 2 further non-executive directorships. It therefore appears that she has future earning potential, albeit probably not at the same level as hitherto.

She is presently living in rented accommodation in Hampstead.

9. The wife has recently received notice from HMRC claiming £254,240 for tax on the benefit of a written-off loan from her employers which, if justified, might also involve liability for interest and penalties. She has taken advice and is challenging this claim, and may also seek an indemnity from her company.

10. The husband was a stockbroker until redundancy in 1990 since when he has worked from home as a consultant and on property projects, mainly with CDP Ltd and its related holding company Avon Trust Ltd. It is apparent he has also involved himself in other ventures in Britain and abroad.

11. For a period the wife's employment took the family to America, and on their return in about 1996 they acquired the final family home High Trees Farm, with about 60 acres.

12. The husband has developed the parties' business and property assets. In his recent statement he has said that the result of the family's financial affairs being built up in that way over 30 years is that the wife is left with a very substantial earning capacity, while his ability to earn is tied up in the capital assets.

13. The husband has remained in High Trees Farm on his own since the end of the marriage. In 2013 the wife ended her monthly payments of £5,000 into the joint house account. The husband's recent statement refers to what he has found to be a growing administrative burden. He has suffered from depression and anxiety for which he has required medical attention, and a report has been provided describing his current problems and symptoms. It is to be hoped that these will reduce once these stressful proceedings have concluded.

14. The husband has an investment with a Kenyan company called YZ Fuels which, according to his answer to a questionnaire, he regards as a source of future income for so long as he continues to work in the business, rather than as a capital asset. In his most recent statement he described the nature of the business and his involvement with it and he suggested that his interest in it was worth £200,000. He has disclosed irregular but substantial consultancy payments received from YZ Fuels.

15. Because of the efforts and financial acumen of both parties the family appears to have enjoyed a high standard of living and to have acquired the assets now available for distribution. The wife has been able to maintain a high standard of living which includes renting a property in Switzerland and acquisition of a yacht.

The proceedings

16. The wife's application was activated by a notice in Form A dated 30th August 2013 in which she sought the full range of available financial remedies including property adjustment orders relating to 7 properties. There has been no cross-application by the husband.

17. An order made on 13th November 2014 by Mrs Justice Parker gave necessary directions leading to a final hearing. The order recited various agreements by the parties. One agreement was for the sale on the open market of 6 of the properties (with a provision that either party might seek to purchase any of the properties at open market value). Another agreement was as follows:

"The parties agree that neither of them will seek a pension sharing order, but instead will invite the court to consider offsetting in its approach to the difference between their respective pension provisions based on cash equivalent values".

Parker J refused an application by the husband for an expert pension sharing report and refused permission to appeal from that decision.

The remaining directions made by Parker J were designed to obtain evidence to assist in the efficient realisation of the assets.

18. At a pre-hearing review before District Judge Robinson on 9th October 2015 it was recorded that the parties agreed that the following issues then appeared to be in dispute:

(a) The value of residential properties subject to a report by Savills

(b) Which assets should be retained by either party.

(c) Whether a discount should be applied to the net asset value of CDP Ltd/Avon Trust Ltd if either party retains the shares.

(d) The methodology for offsetting between the parties' pensions.

(e) The value of certain assets.

The assets and liabilities

19. Given the agreement as to values it is unnecessary to reproduce in full the schedules of assets. Apart from pensions the assets are as follows:

(a) There are property assets worth a total of £4,333,437 net of mortgages, costs of sale and CGT. This includes High Trees Farm worth £3,500,000 before deductions. The mortgage to Lloyds Bank (formerly the Bank of Scotland) is £1,000,000 which is repayable as to half in December

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2015 and half in December 2016, although an extension of the first repayment has been agreed until February 2016.

(b) There are joint accounts and investments of £47,613.

(c) The husband has bank accounts and investments (less liabilities) amounting to £1,973,228. This is subject to an adjustment in respect of the husband's outstanding legal fees to £97,954, and to a dispute as to value of the husband's in a venture in Canada called Lecare.

(d) The wife has bank accounts and investments (less liabilities) amounting to £2,557,098.

(e) The parties' partnership known as High Trees Farm & Consultancy was shown in the schedule as worth £50,000 based on the husband's Form E, although the husband says that this represents fencing, machinery and vehicles now worth £30,000.

(f) The husband's interest in Avon Trust Ltd is valued at £724,759, and the wife's interest at £439,750, both after CGT. The husband has a director's loan to Avon Trust shown as £228,500.

(g) The husband's interest in CDP Ltd is valued at £1,519,008, and a director's loan of £400,000.

20. The only issues to be resolved as to value relate to:

(a) Lecare. The husband's Form E stated that he was owed £100,000 representing C$160,000 advanced to Lecare. An answer to a questionnaire indicated this to be the last part of an undocumented loan to a joint venture. The husband now suggests that £50,000 would be more correct. However in his latest statement and in oral evidence he referred to having recently advanced a further C$87,000. Having heard the husband's evidence about this venture there seemed no reason to assume that he could not, in time, recover his original investment and there seems to be no sufficient evidence to justify halving the figure he originally put forward. It should continue to be treated as worth £100,000.
(b) The farm partnership assets. The husband argues for a reduction of £20,000 to £30,000 which the court was asked to endorse based on the husband's knowledge of the equipment concerned.

Plainly there is no independent support for either the original or the suggested revised figure. However I will accept the husband's revised figure.

21. A further issue as to whether there should be a discount of at least 10% in respect of CDP Ltd to allow for illiquidity and risk only arises if the company is not disposed of (i.e. if Option A [below] is preferred).

The open offers

22. There is some justified criticism of the husband for not having taken a consistent course when indicating the outcome he seeks, although I recognise that he has found it difficult to come to terms with may have to happen to the family assets. In cross-examination he was pressed as to why he had changed his position, in particular as whether or not the main assets should be sold. Although he suggested that in some respects the market had moved and said that he did not want to be forced into what he called "a fire sale", it seemed that he was largely motivated by an emotional attachment to the property and business and by a wish to give the children a chance to retain them.

23. By letter of 22nd July 2014 the wife through her solicitors proposed that the main assets, the former matrimonial home, High Trees Farm, and CDP Ltd and Avon Trust Ltd., should be sold and the net proceeds divided equally. At that point a pension sharing order in favour of the husband was proposed, something which has not been pursued by either party. The letter concluded by saying that if the husband wished to retain any of the properties or to retain CDP Ltd or Avon Trust the wife would consider an alternative structure. However it was said that the husband had told the wife on a number of occasions that he could not cope and did not want to be living in High Trees Farm or running CDP any longer as had also been confirmed in an earlier letter from his solicitors.

24. By letter of 7th August 2014 the husband through his solicitors agreed that High Trees Farm and CDP Ltd should be sold. At that stage it appeared that the only real point in issue was the amount of the balancing lump sum payment to be made by the wife to the husband.

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25. The subsequent order of 13th November 2014 recorded the parties' agreement to the sale of High Trees Farm and other properties including Court Farm Barn, and provided for jointly instructed experts' reports as to the efficient realisation of the business assets. However, there appears to have been no active marketing.

26. By letter of 2nd October 2015 the husband put forward a different offer. While still proposing the sale of High Trees Farm, he sought the retention of CDP. He also sought the incorporation of Court Farm Barn into an agreement previously recorded for the retention and development of land known as Summerfields. By letter of 15th October 2015 this offer was withdrawn pending further disclosure although the outline of his then proposals was confirmed.

27. By letter of 27th November 2015 the husband through his solicitors made an offer proposing 2 alternatives. Option A provided for the husband to keep High Trees Farm and CDP and Avon Trust and for him to pay a lump sum of £750,000 within 3 months and a further lump sum of £750,000 within a year. Option B provided for the sale and equal division of High Trees and CDP and for the wife to pay the husband lump sum payments amounting to £1,125,000 less any drawings by the husband from his loan accounts from the date of the letter.

28. It is important to note that Option B, as well as Option A, was put forward by the husband. The letter proposing those alternative options stated that his preference was for Option A "both for reasons of simplicity and speed, as well as to avoid having to sell the family home and business".

29. In response by letter of 2nd December 2015 the wife through her solicitors rejected Option A on the basis that £1.5 million was too low a sum to compensate her. She confirmed her agreement to the structure in Option B whereby the former matrimonial home and the companies were to be sold and the proceeds of sale divided equally. On that basis the only substantial question for determination was the calculation of a lump sum payable by the wife to the husband to offset the difference in their pension provision.

30. Under Option B the wife was offering to pay the husband 2 lump sums (or a single lump sum consisting of 2 elements): £186,513 to equalise the value of non-pension assets and £300,000 to

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offset the difference in pensions, making a total of £486,513. The husband's Option B offer involved a lump sum payment to him by the wife of £1,125,000 which was not specifically broken down. On that basis under Option B the parties appeared to be about £640,000 apart.

31. Despite (i) the fact that Option B was one of two alternative proposals advanced by the husband less than a month ago, and (ii) the wife's rejection of Option A and her essential acceptance of Option B, the case has proceeded on the basis that husband has made it clear that he prefers Option A and now invites the court to reject Option B. In addition there have been other less substantial issues for resolution. In his recent statement he said that "I would prefer not to put us through the painful process of having to sell some of our largest assets on divorce". He also said that he did not want to keep CDP but not High Trees Farm, or vice versa.

The arguments for the wife

(a) The lump sum of £1.5 million contained within Option A is far too low and would leave the husband with much more than half of the assets.

(b) The wife is concerned that the husband's tendency to prevaricate and his expressed difficulties in coping, particularly since the breakdown of the marriage, could lead to delay and problems in his raising and paying the lump sum (particularly if it was to exceed the £1.5 million offered). In evidence she expressed particular concern about the deferral of part of the lump sum, and about the difficulty the husband now found in making business judgements.

(c) The husband had previously agreed to the sale of High Trees Farm and to realisation of the business assets.

(d) High Trees Farm is a large, seven bedroom property with outbuildings set in 50 or 60 acres, and exceeds the husband's reasonable needs for accommodation. Indeed it was described in the opening note on behalf of the husband as "substantial and sprawling" and as requiring significant effort and cost to maintain in a good condition. The same note continued: "It is no secret that H finds it an enormous burden to continue to run the house and maintain it in good condition; he has had no assistance from W in this regard (either practical or financial)."

(e) CDP Ltd is a property investment company with a portfolio of commercial units which does not produce an income for the parties, the rental income being used to pay off borrowing.

(f) There is no sufficient basis for any or any significant discount of the value of CDP Ltd on the basis of illiquidity or that it is risk laden.

The arguments for the husband

32. The opening note on behalf of the husband did not advance any strong arguments for his retention of High Trees Farm as proposed under Option A. The court was asked to note that if a sale of that property was ordered some time and effort would be required to maximise the sale value, that until sale it would need to be kept in good condition, and that the extent of the PPR exemption would need to be negotiated.

33. Likewise in respect of CDP Ltd there were no direct arguments put forward for its retention as proposed under Option A. It was said that although the business is not unprofitable, cash generated is being applied to the substantial bank loan and that "H regards this business as unreliable in the current environment, but one which made sense when the family was together as the potential risk/reward was underpinned by the dependability of W's income. It is less liquid than other assets in the sense that any sale would have to be conducted in a very careful manner, over an appropriate timescale and with no guarantee of outcome." The experts had provided advice as to how best to maximise proceeds from the company and/or its properties. Again it was suggested that such sales would be far from straightforward and would require considerable time and effort.

34. The court was not asked to reject Option B (which was hardly surprising given that it was one of the two options which had been advanced by the husband). It was stated that Option A was his preference and that to determine the case in that way, involving the payment of a lump sum of £1.5 million by the husband to the wife, had the advantage of simplicity and would avoid the delay and uncertainty of sales of High Trees Farm and the company and/or the commercial properties.

35. It was also argued that if the husband was to retain the illiquid and riskier assets (as he proposed) there should be a discount in his favour to reflect that potential disadvantage.

36. In the opening note on behalf of the husband the possibility of any modification of Option A appeared to be excluded when it was said that it was the husband's preferred option - but that realistically he could not afford a lump sum greater than the £1.5 million proposed.

37. The husband's ability to fund Option A came into closer focus during the hearing. In the course of closing submissions various figures were debated as to the effect of Option A (disregarding pensions) and I have looked at these again. On a conservative calculation Option A would leave the husband with assets worth about £5,130,765 more than those with the wife, requiring him to find at least £2,500,000 to make up the difference by an equalising payment subject to any pension offset payment due from the wife to the husband.

38. The husband put before the court during the hearing recent proposals for refinancing the mortgage on High Trees Farm and CDP Ltd through Handelsbanken. The documents provided from Handelsbanken were dated 26th November 2015 and described as provisional "indicative terms". These proposed a replacement of the £1,000,000 presently charged on High Trees Farm to be lent on an interest-only basis for 3 years, and a loan of £2,000,000 to CDP Ltd which after payment of the company's existing indebtedness of £1.4 million would leave £600,000 available, part of which, it was suggested, could be extracted by means of repayment of the outstanding director's loan. In addition it was said that the bank's representative had also indicated in a later conversation that the bank "would probably extend an additional loan facility of £500,000 to CDP". The remainder of any lump sum requirement would have to be funded from the husband's liquid capital.

Pensions

39. The court is required to concentrate on the considerations in section 25 of the Matrimonial Causes Act 1973 as amended, and under section 25 (2) the court is required to have particular regard to specified matters including the income, earning capacity, property and other financial

resources which each of the parties to the marriage has or is likely to have in the foreseeable future. Under section 25B(1) it is provided that these include any benefits under a pension arrangement which the party to the marriage has or is likely to have.

40. The parties have substantial pension entitlements, their respective pensions being different in nature. Although it is recognised in this case that there it is a disparity in the values of the pensions, there has been considerable difficulty in putting a value on the disparity as well as disagreement as to how any offsetting payment from non-pension assets should be calculated.

41. This is not a case in which it can be said that one party has seriously inadequate pension provision. The husband's pension provision is less valuable than the wife's, but both parties have other sources of income and remaining earning capacity.

42. The husband has a defined contribution pension held in a SIPP and also a small money purchase pension plan. He has recently taken the 25% tax-free element, leaving him with funds worth £970,696. Because of the recent reform of pensions he can take he can now take his pension funds as cash subject to payment of tax.

43. The wife is in receipt of a pension from her previous employment with Morburg Bank. It is a defined benefit scheme based on her final salary. She took the 25% tax-free gratuity some time ago, and this pension now continues in payment. It is linked to the RPI. It is taxed at source. Her present annual pension income from this scheme is £92,086 gross, which provides her with £50,600 net. She has no other potential pension entitlements. The pension trustees for the wife can only provide a value for her Morburg Bank pension as a Cash Equivalent (CE). [There is a full explanation of this terminology in the notes to the Pensions on Divorce etc. (Provision of Information) Regulations 2000 in the Family Court Practice 2015, pages 2870-1].

44. In February 2013 Morburg Bank provided a Cash Equivalent ('CE') value for the wife's pension which was given in the wife's Form E as £2,433,969. More recently (on 26th October 2015) the Trustee of the Pension Scheme has provided an updated CE statement (expressed to be a 'CETV') giving the figure of £3,064,154. This increase has been explained by the pensions' administrator as primarily due to the decline in the long bond yield. On behalf of the wife it is

submitted that this increase is perverse and illustrates the artificiality of using CE values, because in this case the CE value given for the wife has increased by about £600,000 between the two statements although the wife is that much older and she has been receiving her pension entitlement. Moreover, whatever the CE value, it can never be equivalent to, or converted to, cash in the wife's hands. It is submitted that CE values represent the rights accrued under a pension scheme and are used to calculate the benefits only in the context of their transfer to another scheme, and in particular for the purposes of pension sharing orders in the matrimonial jurisdiction. In this case there is to be no transfer of pension benefits from one scheme (i.e. the wife's) to another scheme. It is submitted that the CE value is of little or no use for calculating an offset payment.

45. In her most recent statement (of 2nd December 2015) the wife highlighted the differences between the pensions. She cannot cash in her pension but can only take income which ceases on her death, whereas the husband can withdraw his funds and, subject to payment of tax, can invest them as he chooses. Conversely, in his statement of the same date the husband pointed out that whereas her pension was index-linked and guaranteed for life, his is subject to the vagaries of the market and investment decisions.

46. Neither party has pursued the suggestion of pension sharing because it is recognised that pension sharing would take the husband well over the lifetime allowance with severe taxation consequences.This common view appears to have been based on the advice of a consulting actuary contained in a letter of 12th November 2014. Accordingly, as recorded in the order made last year by Parker J the court has been asked to consider offsetting, i.e. in the context of this case a payment or allowance in favour of the husband from non-pension assets to cover the disparity between the parties' pension positions, it being acknowledged that the wife's defined benefit pension scheme from Morburg Bank is more valuable than the husband's money purchase scheme.

47. The difficulty has been finding an appropriate methodology for calculating the offsetting sum. The letter from the consulting actuary in November 2014 (when referring to the CE value of the wife's pension given in 2013) said that actual cost of buying an equivalent benefits through an annuity was approximately 50% more than the stated Cash Equivalent.

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48. Before setting out the competing arguments and proposals it is necessary to summarise the relevant case law and a recent article to which the court has been referred.

49. In the leading case of Martin-Dye v. Martin-Dye [2006] EWCA Civ 681, [2006] 2 FLR 901 both parties had pensions in payment by the time of the hearing at first instance before the district judge who decided that a fair division of the assets would be provision of 57% to the wife and 43% to the husband. The pensions in payment had been put before the court as assets with a combined CETV of £1,040,807. On appeal the husband challenged the district judge's treatment of pensions and rejection of a pension sharing order. The appeal was dismissed. On the husband's second appeal to the Court of Appeal Thorpe LJ (at para [54]) found that the judgment of the district judge was flawed on two grounds. First, in ignoring the essential differences between saleable property and an income stream derived from an inalienable pension in payment, the district judge having been hindered by the presentation of the husband's case and by the unquestioned use of CETV labels. Secondly, in rejecting the husband's application for a pension sharing order without sufficient reasons.

50. Thorpe LJ stressed (at para [48]) that a pension in payment is no more than a whole life income-stream akin to an annuity:

"It cannot be sold, commuted for cash or offered as security for borrowings. It has no capacity for capital appreciation. The benefit does not survive the death of the scheme member and thus cannot form part of his estate. Thus there are obvious distinctions between a technical value ascribed to a pension in payment and a market value ascribed to a realisable asset ...".

He went on (at para [61] to say that pensions in payment and cash equivalent benefits were to be characterised as 'other financial resources' within section 25(2)(a):

"For they do not sit comfortably in the category of 'property', since they are unrealisable and non-transferable.Nor do they sit comfortably in the category of 'income' because, although purely an income stream, the income does not derive from future endeavour but from past employment or contribution which will generally have been effected during the years of marriage."

Thorpe LJ said (at para [63]) that in a case in which a clean break order was inevitable the court had two alternative ways of treating the pensions: either they could be left undisturbed, compensating the wife (in that case) for disparity by offsetting, alternatively the judge could have made a pension sharing order. Thorpe LJ held that in the case then under consideration a pension sharing approach should have been adopted so that the husband's pension rights should be shared to give the wife 57% of the value of their combined pension rights.

51. Dyson LJ agreed (at para [88]) that in a case such as that before the Court of Appeal the better course was to take pensions out of the assets altogether and to make a pension sharing order:

"This reflects the reality that the pensions are in truth non-transferable income streams and are quite different in kind from the other assets owned by the parties."

In reaching that conclusion Dyson LJ had rejected (at para [87]) a submission that it might have been possible for the district judge to have borne in mind the different nature of pensions when conducting his or her appraisal of the parties resources and to have made an adjustment to reflect that. He considered that it was difficult to see how the adjustment would be calculated and that such an approach was unsatisfactory as it lacked transparency.

52. Because of the decision by the Court of Appeal in Martin-Dye v. Martin-Dye to prefer pension sharing there was no further guidance or discussion as how to calculate the value of an offset payment when that might be appropriate. If a pension in payment is not to be treated as a capital, but rather classified as "other financial resources" (per Thorpe LJ) or as income (per Dyson LJ), and if (as submitted on behalf the wife in this case) it is incorrect and artificial to use the CE value, the court is left to find some other principled basis for calculation. Obviously there is considerable scope for debate about the relevance of factors such as life expectancy, future taxation and fund investment policy and the various assumptions to be made.

53. Later in the case of Vaughan v. Vaughan [2007] EWCA Civ 1085,[2008] 1 FLR 1008 at para

[25] Wilson LJ recognised the difference between in kind between disposable capital and the capital value of pension rights, but said that the latter was often a very significant component of the parties' future economies.

54. The recent liberalising changes to pensions mean that the husband will no longer be obliged to invest his funds in annuities. In SJ v. RA [2014] EWHC 4054 (Fam) the parties each had pension investments similar in nature, the wife's funds being significantly smaller in value than those of the husband. The wife argued for a pension sharing order to provide her and the husband with unequal income which, given that she was younger and female, would have provided her with a greater share of the combined fund values. Mr Nicholas Francis QC (sitting as a deputy High Court Judge) said at para [84]:

"I would regard such an approach as unfair and anachronistic in a case where assets exceed the parties' needs. The recent well-publicised changes to pension regulations will mean that pension investments are virtually to be treated as bank accounts to people over 55, as these parties are.... In cases where distribution is being made on a basis which is not guided by need it is, in my judgment, incorrect to distribute a pension fund on the basis of equality of income and there is no need for actuarial reports in the overwhelming majority of such cases. I should expect the court is to be most reluctant in the future, in big money cases, to provide permission for actuarial reports on the basis of how to effect equality of income. Moreover I suspect that annuities will, in the overwhelming majority of cases, become a thing of the past."

55. Applying those principles to the present case the differences between the parties' pension arrangements are obvious. The husband has available funds equivalent to cash which he can extract without difficulty. The wife has a guaranteed but non-transferable income stream.

56. The problems of offsetting to resolve pension disparities were discussed in an article in Family Law [2012] vol. 42 page 1234 which posed questions without suggesting answers. The difficulty in finding a suitable method for calculation has again very recently been demonstrated in an article to be published in Family Law this month (December 2015) entitled "Apples or pears? Pension offsetting on divorce". The article starts with a quotation from the decision of Sir Peter Singer in JS v. RS [2015] EWHC 2921 (Fam)

"[74] I am aware from my general reading that there is at present debate but as yet no conclusion on precisely this topic of appropriately arriving at an offsetting figure. I am not aware from my own knowledge nor have I researched what the competing methods might be. I am thus left in the unsatisfactory position where I must alight upon an amount which will necessarily be arbitrary if, that is, H is indeed to receive as part of the overall distributive process consideration for the fact that during this marriage unequal pension benefits have arisen."

57. The article describes a project in which 14 leading pension experts were asked to answer 3 short mock pension offsetting problems - which they did with significantly diverging results, described as making for "a fascinating but confused picture". It revealed the absence of any reliably consistent expert evidence as to methodology or outcome. The article also submitted that a Cash Equivalent (CE) value is often wholly misleading as to the true value of a defined benefit scheme. There was a discussion of the potential use of the Duxbury algorithm to calculate the sum required. The article contained criticism of the decision of Mr Francis QC in SJ v. RA (referred to above) for failing to make any distinction between defined contribution and defined benefit schemes (unjustified criticism in my view). It set out six suggested key factors to be borne in mind when considering different approaches to offsetting. This included (as a question rather than as a formulated factor):

"In the case of a defined benefit scheme or the replacement of benefits under a defined contribution scheme, should the offset value be the value to the member of that pension, or the value to the non-member of having an equivalent pension or share pension?"

58. Finally it should be mentioned that in a footnote [fn 20] within the article critical reference is made to the present case and to the decision of Parker J to refuse the application made on behalf of the husband for permission to instruct an actuary and to her view that counsel's submissions would be sufficient to deal with the issue.

59. Although I was not referred to decision of Sir Peter Singer cited at the start of the article I have looked at it in preparing this judgment. In that case the parties were in their early 40's and the marriage was relatively short. It is to be noted that in that case the court was provided with

an expert's report proposing the payment of £210,856 by the wife to the husband as an offset. In the paragraph preceding that quoted above Sir Peter said:

"[73]... I shrink from the suggestion that a payment in excess of £200,000 should pass from W to H to compensate him for the potential loss in 20+ years of a lifetime income stream of (at today's value) £5,300 annually subject to such tax consequences as may prevail at that time and for that uncertain term."

Accordingly the sum of £60,000 was ordered.

The competing submissions as to pension provision

60. For the wife Mr Dyer QC submits that there are 4 fundamental points

(1) When considering offsetting it is important to see the exercise in the context of the application of the factors in section 25 of the Matrimonial Causes Act 1973 and the jurisprudence thereon. In this case the court is not concerned with needs because each party will have over £6 million before pension provision is taken into account. This is not a case in which pension provision is, or will, be the only or main source of retirement income.In this case (in particular if Option B is selected) the husband will have capital to buy a home, be able to keep the flat in London, retain and use his own acquired pension funds and receive income from his investments including the Kenyan business.

(2) Offsetting (at least in this case) involves "apples and pears", i.e. does not involve comparing like with like. One party is being required to pay a large sum of money to reflect the other party's loss in not receiving a future share of a pension in payment during the pension scheme member's lifetime.

(3) Any methodology will be based on factors and assumptions which almost certainly will not in fact arise as may be predicted.

(4) The Duxbury calculation has stood the test of time in matrimonial proceedings for

capitalisation of future income requirements and should be used, particularly in a case in which a CE valuation is "illusory". The use of the Duxbury algorithm was strongly supported by Mostyn J in JL v. JL (No. 3) [2015] EWHC 555 (Fam), [2015] 2 FLR 1220, referring to the decision of the Court of Appeal in H v. H (Financial Remedies) [2014] EWCA Civ. 1523, [2015] 2 FLR 447.

61. Mr Dyer then provided 3 calculations of a suggested Duxbury fund. These calculations were each based on:

(a) The husband's pension fund of £970,696 providing a flat 2.5% net return of £24,267 p.a.;

(b) The wife's present net pension in payment being compounded at 2% p.a., rather more than the current RPI; and

(c) A discount for accelerated payment of 25%.

The 3 alternative calculations involved taking (i) the wife's pension income indexed at 2% in 25 years time (£83,015); (ii) the wife's pension income indexed at 2% in 12.5 years time (£64,811); and (iii) the wife's current net pension income (£50,600). To each of those figures was added the husband's notional pension income from his existing funds if providing a flat 2.5% net return of £24,267 p.a. The total pension incomes were then divided in half. The resulting figure, less the husband's £24,267, represented the net lost annual income for the husband if the pensions were to be aggregated and shared equally. What was described as the "net lost annual income" for the husband was then calculated as £29,374 if the 25 year figure was used for the wife's indexed income, as £20,272 if the 12.5 year figure was used, and as £13,166 if her current pension income was used.

62. The Duxbury fund required (taking out the state pension) would therefore either be £472,157, or £324,040, or £210,457.

63. It was also submitted that a 25% discount should then be applied for accelerated cash payment. The figure proposed on behalf of the wife for an offset payment was £300,000 (after the suggested discount for accelerated receipt). However, in this case I cannot see that it would

be appropriate to provide for any such discount, since whatever payment is made would not be to replace the benefit of sharing an income stream for which the husband would have otherwise had to wait a substantial time. The alternative basis upon which Mr Dyer argued for such a discount was that there should be some reflection of the fact that the wife might predecease the husband. However again I cannot in this case any justification for including such a discount in a Duxbury-based calculation based on current average life expectancies.

64. For the husband Mr Peel QC referred to the guaranteed and index-linked nature of the wife's pension already in payment, something which the husband does not have. He suggested that (in the absence of an expert's report which had been disallowed) in calculating the offsetting the court should consider the following possibilities:

a. Based on the CE value the wife's pension is worth about £3.6 million, whereas the husband's is worth just under £1 million. To give the husband half of that difference would require payment to him of £1.3 million.

b. Alternatively, for the husband to buy an annuity to achieve a similar inflation proofed income would cost £3.4 million. Assuming he used his £1 million, to equalise the figures arithmetically and to give him 50% would require payment of £1.2 million.

c. Alternatively, if tax at 40% was deducted from the wife's pension CE value of £3.6 million and from the husband's fund of £1 million, she would have £2.1 million and he would have £600,000. To equalise the figures and give him 50% would require payment of £750,000.

d. Alternatively, if the husband used his existing funds to buy an inflation proofed annuity it would yield £27,000 p.a. gross, some £65,000 gross less than the wife's pension income of £92,000 p.a. gross. To provide the husband with 50% of the difference, i.e. with £32,500 p.a. gross, by means of an annuity would cost £1.3 million.

65. Mr Peel also provided a modified version of the calculations suggested by Mr Dyer on behalf of the wife. These figures were based on the husband obtaining a 1.5% net yield on his pension funds rather than 2.5%, it being submitted that conservative investment was appropriate for a

person of retirement age. They were also based on the wife's pension net income rising to £66,000 when she ceases to be a higher rate taxpayer (although it is hard to predict when that might be). Finally they were based on an assumed Duxbury real rate of return of 2.5% gross, not 3.75% gross (despite the observations of the Court of Appeal in H v. H (Financial Remedies). Mr Peel argued that the court should be very careful before applying Duxbury methodology which involves assumptions about income yield, growth, inflation, and life expectancy. A Duxbury fund has to be actively managed and so can involve annual charges whereas the wife's pension income does not. In this case the court is not being asked to capitalise the periodical payments but rather to replicate part of a guaranteed, inflation proof pension income. Mr Peel's modification of Mr Dyer's calculations produced a range of figures from between £1,017,450 and £438,900.

66. Towards the end of his submissions Mr Dyer on behalf of the wife put forward on her instructions an alternative proposal to deal with the pension element of the case. This was for there to be a contractual deed whereby the husband would be paid 25% of the wife's net pension during their joint lives. A deed was proposed to ensure that it would not be variable or capable of capitalisation under the Matrimonial Causes Act 1973 (pension attachment orders can be subject to future variation applications). It was recognised that such a proposal would only work if Option B operated. Under Option A the husband could not afford the likely lump sum required unless there was a significant pension offsetting amount.

67. I allowed Mr Peel until the next day (yesterday) to consider the offer and he responded that it was not acceptable. At the same time he informed me that he was instructed to increase the husband's offer under Option A from £1.5m to £1.75m payable as to (i) £750,000 within 3 months, and (ii)£1,000,000 within 1 year, those sums are to be secured over High Trees Farm and "to be paid in the most tax efficient way (e.g. by share buyback of [the wife's] shares) provided always that [she] receives the full £1.75m."

68. This was followed by the further alternative offer on behalf of the wife of a pension attachment order directing the pension trustees to pay 25% of the net pension to the husband.This further offer was rejected on behalf of the husband for reasons set out a short written submission by Mr Peel who pointed out that the case had proceeded on the basis of

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offsetting being the appropriate course and that "a pension attachment order would make Option A impossible." He further submitted that if it was to be considered at this late stage the pension trustees would have to be served and an expert might have to be instructed after all.

Conclusions

69. In closing submissions there were arguments both ways as to which of the 2 options for capital distribution provided the quicker, fairer solution. Having heard the husband's evidence and seen the way in which his position has varied, I can understand the wife's concerns about the problems, pressures and delays which may arise from Option A, particularly to the extent that it now relies on refinancing under the recently proposed arrangements with Handelsbanken which are still only in "indicative" form and somewhat imprecise, and (for the balance) relies on the husband's realisation of a substantial amount of his liquid assets.

70. In practical terms neither option is entirely straightforward, but I am particularly concerned that the husband would struggle with the realities of putting Option A into practice with consequent delay and cost. Indeed he could well find himself having to sell the assets that he has sought to preserve, particularly if the lump sum payment required was otherwise unachievable as it may well be.

71. An important element in the decision as to whether a lump sum payment under Option A is achievable or is unrealistic is the quantification of the pension offset payment. It is quite apparent when looking again at the rival arguments and different figures suggested that there is no obviously right figure or correct calculation. However I consider that Mr Dyer's argument for a conventional Duxbury approach is correct, and that it is certainly preferable to an annuity based calculation. I have decided that the appropriate figure should be £425,000.

72. It is now too late to start exploring a pension attachment order, particularly since it is opposed in principle and would involve the parties in further cost and delay, when I assume that both now require some finality and certainty.

73. In my judgment the correct course is to adopt Option B. I approve the draft order submitted

by Mr Dyer.

74. As to the detail of the order I agree that the Summerfields Farm agreement should exclude any charges in respect of the husband's time. That appears to be what was earlier agreed.

75. There should be a recital to the effect that the wife will use all reasonable endeavours to contest the claim against her for tax and to mitigate any liability arising in respect of that claim- unless paragraph 35 is considered adequate.

76. The references to reasonable professional fees in paragraphs 35 and 36 should remain.

77. The references to 9 months in paragraphs 38, 39 and 40 should remain to ensure the marketing can continue until the end of next summer.

78. APAM Ltd may be instructed in relation to disposal of the company interests. I am not confident that that husband will find it easy to identify another or obviously better agent. His fears about APAM Ltd can be addressed by stipulations in the letter of instruction.

79. Under paragraph 45e) the time limit should be 18 months from the appointment of the selling agent.

80. I hope that the other parts of the order can now be completed by agreement.

81. The order should be expressed to be subject to the making of decree absolute (which will now require compliance with FPR rule 7.32(3)).