HOUSE OF LORDS

SESSION 2005–06

[2006] UKHL 24

on appeal from: [2005] EWCA Civ 984 and

[2004] EWCA Civ 872

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Miller (Appellant) *v.* Miller (Respondent)

McFarlane (Appellant) *v.* McFarlane (Respondent)

Appellate Committee

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Lord Hoffmann
Lord Hope of Craighead
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Miller (Appellant) *v*. Miller (Respondent)
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McFarlane (Appellant) *v*. McFarlane (Respondent)
1 and 2 February

ON
WEDNESDAY 24 MAY 2006

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Miller (Appellant) *v.* Miller (Respondent)
McFarlane (Appellant) *v.* McFarlane (Respondent)

[2006] UKHL 24

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. These two appeals concern that most intractable of problems: how to achieve fairness in the division of property following a divorce. In *White v White* [2001] 1 AC 596 your Lordships' House sought to assist judges who have the difficult task of exercising the wide discretionary powers conferred on the court by Part II of the Matrimonial Causes Act 1973. In particular the House emphasised that in seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties' contributions to the family there should be no bias in favour of the money-earner and against the home-maker and the child-carer. This is a principle of universal application. It is applicable to all marriages.

2. In the *White* case the capital assets were more than sufficient to meet the parties' financial needs. The two appeals now before the House again involve large amounts of money but they raise different issues from those in the *White* case. The first appeal concerns the division of capital assets where the marriage was short-lived. The *White* case concerned a lengthy marriage, of over 30 years. The marriage between Alan and Melissa Miller lasted less than three years. The second appeal concerns the marriage between Kenneth and Julia McFarlane. This lasted for 16 years. The parties' capital was insufficient to enable an immediate clean break, but Mr McFarlane was a notably high earner. The principal issue in the McFarlane appeal concerns the role of a periodical payments order in this type of case.

3. The facts in both cases are unusual. But before summarising these facts and identifying the issues in these cases it will be convenient to consider some general principles.

The requirements of fairness

4. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

5. At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

6. Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach.

7. This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance. As Lord Cooke of Thorndon said in *White v White* [2001] 1 AC 596, 615, there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice.

8. For many years one principle applied by the courts was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant's award.

Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling thus put in place was shattered by the decision of your Lordships' House in the *White* case. This has accentuated the need for some further judicial enunciation of general principle.

9. The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a suppliant. Each party to a marriage is *entitled* to a *fair* share of the available property. The search is always for what are the *requirements* of fairness in the particular case.

10. What then, in principle, are these requirements? The statute provides that first consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (b): 'the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future'.

11. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

12. In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment

the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.

13. Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.

14. When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176, 182, is an example where this was recognised expressly.

15. Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

16. A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R* [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.

17. This principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [2003] EWCA Civ 565; [2003] 2 FLR

299, 305, para 19 per Hale LJ. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership.

18. A different approach was suggested in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108, 121-122. There the court accepted the proposition that entitlement to an equal division must reflect not only the parties' respective contributions 'but also an accrual over time': page 122, para 40. It would be 'fundamentally unfair' that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contributions for more than 20 years: para 43. In *M v M (Financial Relief: Substantial Earning Capacity)* [2004] EWHC 688 (Fam); [2004] 2 FLR 236, 252, para 55(7), this point was regarded as 'well made'.

19. I am unable to agree with this approach. This approach would mean that on the breakdown of a short marriage the money-earner would have a head start over the home-maker and child-carer. To confine the *White* approach to the 'fruits of a long marital partnership' would be to re-introduce precisely the sort of discrimination the *White* case [2001] 1 AC 596 was intended to negate.

20. For the same reason the courts should be exceedingly slow to introduce, or re-introduce, a distinction between 'family' assets and 'business or investment' assets. In all cases the nature and source of the parties' property are matter to be taken into account when determining the requirements of fairness. The decision of Munby J in *P v P (Inherited Property)* [2005] 1 FLR 576 regarding a family farm is an instance. But 'business and investment' assets can be the financial fruits of a marriage partnership as much as 'family' assets. The equal sharing principle applies to the former as well as the latter. The rationale underlying the sharing principle is as much applicable to 'business and investment' assets as to 'family' assets.

Matrimonial property and non-matrimonial property

21. A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and

other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the 'matrimonial property' equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance: Family Law (Scotland) Act 1985, sections 9 and 10. In England and Wales the Matrimonial Causes Act 1973 draws no such distinction. By section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

23. The matter stands differently regarding property ('non-matrimonial property') the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the *White* case [2001] 1 AC 596, 610:

> 'Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's

financial needs cannot be met without recourse to this property.'

24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the *White* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs.

Flexibility

26. This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day. Similarly the 'equal sharing' principle might suggest that each of the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate. The case of Mr and Mrs Miller illustrates this only too well.

27. Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case.

The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.

28. I must mention a further matter where flexibility is important. In big money cases, the capital assets are more than sufficient to meet the parties' financial needs and the need for either party to be compensated when one party's earning capacity has been advantaged at the expense of the other party. In these cases, should the parties' financial needs and the requirements of compensation be met first, and the residue of the assets shared? Or should financial needs and compensation simply be subsumed into the equal division of all the assets?

29. There can be no invariable rule on this. Much will depend upon the amounts involved. Generally a convenient course might be for the court to consider first the requirements of compensation and then to give effect to the sharing entitlement. If this course is followed provision for the parties' financial needs will be subsumed into the sharing entitlement. But there will be cases where this approach would not achieve a fair outcome overall. In some cases provision for the financial needs may be more fairly assessed first along with compensation and the sharing entitlement applied only to the residue of the assets. Needless to say, it all depends upon the circumstances.

Periodical payments and the clean break principle

30. So far I have been almost entirely concerned with lump sum payments as distinct from periodical payments. I have therefore made only passing mention of an important principle now embodied in the statute: the clean break principle. This principle is relevant in the McFarlane appeal. Two issues arise in this regard. The first concerns the reach of periodical payments orders. The question is whether periodical payments orders may be made for the purpose of providing compensation as distinct from maintenance.

31. I see no difficulty on this point. There is nothing in the statutory ancillary relief provisions to suggest Parliament intended periodical payments orders to be limited to payments needed for maintenance. Section 23(1)(a) empowers the court, in quite general language, to order one party to the marriage to make to the other 'such periodical

payments, for such term, as may be specified in the order'. In deciding whether, and how, to exercise this power the statute requires the court to have regard to all the circumstances of the case: section 25(1). The court is required to have particular regard to the familiar wide-ranging check list set out in section 25(2). These provisions, far from suggesting an intention to restrict periodical payments to the one particular purpose of maintenance, suggest that the financial provision orders in section 23 were intended to be flexible in their application.

32. In particular, I consider a periodical payments order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.

33. It was not always so. At its inception the court's power to order the husband to make periodic payments to the wife was expressly limited to payments for her maintenance and support: section 1 of the Matrimonial Causes Act 1866. The rationale underlying this power seems to have been the wife's necessity. At that time the husband owned the entirety of the wife's property: *Leslie v Leslie* [1911] P 203, 205.

34. Times and attitudes have changed, and with them the content and language of the ancillary relief provisions. The history was conveniently summarised by Thorpe LJ in the McFarlane case at [2005] Fam, 171, 196-198, paras 87-99. The wife's financial needs, or her 'reasonable requirements', are now no more a determinative or limiting factor on an application for a periodical payments order than they are on an application for payment of a lump sum. I agree with Charles J's observations to this effect in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240, para 106.

35. This leads me to the second issue regarding periodical payments orders. It concerns the impact of the clean break principle on periodical payment orders made to provide compensation to a disadvantaged party. There is of course a significant practical difference between providing

compensation by appropriate division of existing capital assets and providing compensation by means of a periodical payments order. Of its nature a lump sum payment is once and for all. A lump sum payment represents, to that extent, the financial closure of a failed marriage. It draws a line under the past. Periodical payments represent the opposite. Future earnings and future payments lie in the future. They are a continuing financial tie between the parties. Today the undesirability of such continuing ties is regarded as self-evident. The modern approach was expressed succinctly by Lord Scarman in his familiar words in *Minton v Minton* [1979] AC 593, 608:

> 'An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.'

36. So I turn to the statute. Section 25A provides:

> '(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a) [power to order periodical payments] … in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> (2) Where the court decides in such a case to make a periodical payments … order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made … only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.'

37. This statutory statement of principle raises a question of a similar nature to that affecting the whole of section 25. By section 25A(1) and (2) duties are imposed on the court but the court is left with a discretion. The court is required to 'consider' whether it would be 'appropriate' to

exercise its powers in a particular way. But the section gives no express guidance on the type of circumstance which would render it inappropriate for the court to bring about a clean break.

38. In one respect the object of section 25A(1) is abundantly clear. The subsection is expressed in general terms. It is apt to refer as much to a periodical payments order made to provide compensation as it is to an order made to meet financial needs. But, expressly, section 25A(1) is not intended to bring about an unfair result. Under section 25A(1) the goal the court is required to have in mind is that the parties' mutual financial obligations should end as soon as the court considers just and reasonable.

39. Section 25A(2) is focused more specifically. It is concerned with the termination of one party's 'financial dependence' on the other 'without undue hardship'. These references to financial dependence and hardship are apt when applied to a periodical payments order making provision for the payee's financial needs. They are hardly apt when applied to a periodical payments order whose object is to furnish compensation in respect of future economic disparity arising from the division of functions adopted by the parties during their marriage. If the claimant is owed compensation, and capital assets are not available, it is difficult to see why the social desirability of a clean break should be sufficient reason for depriving the claimant of that compensation.

40. Against that background I turn to the facts and particular issues raised by these appeals, starting with Mr and Mrs Miller.

The Miller marriage

41. Mr and Mrs Miller were engaged to be married in July 1999 and they married a year later, on 14 July 2000. They did not live together before their marriage. They separated in April 2003. So the marriage lasted two years and nine months. The marriage was childless. Sadly, the wife had a miscarriage. When they separated the husband was aged 39 and the wife was 33.

42. The parties' backgrounds can be summarised as follows. The wife was born and brought up in the United States. She acquired expertise in the field of public relations. In February 1995 she moved to

England to take up employment in Cambridge. She was in charge of investor relations at a pharmaceutical company. In March 2000, in anticipation of her marriage, she changed her job. She left her Cambridge flat and moved to London to work for a financial public relations firm as an associate partner earning £85,000 per annum.

43. The husband was born and brought up in England. He married his first wife in 1987 and was divorced in 1992. He has had a highly successful career in asset management. After graduating from Birmingham University he trained as an accountant. In 1994 he joined Jupiter Asset Management. He was a senior fund manager and became a main board director. In 1995 Jupiter was taken over by Commerzbank. Commerzbank gave Jupiter's employees a share of the equity to be bought back in the year 2000 on the basis of a profits-related formula. Jupiter was extremely successful, and the profits-related formula required Commerzbank to pay the staff of Jupiter £500 million. The husband's share was a cash payment of £13 million net of tax. He received this in March 2000.

44. The founder of Jupiter was Mr John Duffield. Relations between him and Commerzbank deteriorated, and they parted company acrimoniously in May 2000. Mr Duffield commenced an action for wrongful dismissal. The husband saw that his future lay with Mr Duffield, but at that time both he and Mr Duffield were bound to Commerzbank by non-competition agreements. In late May they agreed between themselves that, subject to being released from these restrictions, the husband would join Mr Duffield in a new company, New Star Asset Management Group Ltd. The dispute between Mr Duffield and Commerzbank was settled in November 2000 on terms which included the release of the two men from their employment restrictions. The husband then left Jupiter and joined New Star as chief investment officer in January 2001. He brought with him the management of three funds having total assets of £240 million. He paid £200,000 for 200,000 shares in New Star.

45. Mr and Mrs Miller separated in April 2003 on the day after the husband told the wife the marriage was at an end and that he had formed a relationship with the woman to whom he is now married. In July 2003 the husband petitioned for divorce, alleging unreasonable behaviour on the part of the wife. She refuted this allegation and cross-petitioned, alleging adultery. By consent the suit proceeded on the wife's petition and a decree of divorce nisi of 16 February 2004 was made absolute on 17 February 2005.

46. Meanwhile the wife sought financial ancillary relief. At the hearing before Singer J in October 2004 the husband's assets were worth about £17.5 million, plus whatever value should be attributed to his 200,000 shares in New Star. This figure of £17.5 million compared with £16.7 million when the parties married in July 2000, and £17 million when they separated in April 2003. The husband's basic salary at New Star was £181,000. His bonus for 2003 was £3 million and for 2004 £1.2 million.

47. The wife's financial circumstances contrasted sharply. At the time of the hearing she had assets worth £100,000, of which half were locked in pension funds. If she had paid her outstanding costs she would have been more than £300,000 in debt.

The hearing before the judge

48. The judge awarded the wife a capital sum of £5 million, made up of the former matrimonial home in London, worth £2.3 million, and a lump sum of £2.7 million. In addition she received goods worth about £150,000.

49. It is impossible to do justice to Singer J's wide-ranging judgment in a brief summary. Three points can be noted. First, the judge found he could not place a firm value on the husband's New Star shares. He said their present value was inestimable and their future value unfathomable. Their current sale value was variously estimated by the parties' experts at £12 million and £18 million. In fact the shares were subject to restrictions which precluded their current sale. But the judge was reasonably confident that, unless the husband meanwhile triggered an obligation to sell his shares, in December 2006 he was likely to receive £6 million for 75,000 out of his total holding of 200,000 shares.

50. Secondly, the judge had before him written and oral evidence from both parties about the reasons why the marriage had failed. The judge held that nothing either spouse alleged against the other remotely constituted conduct of such gravity that it would be inequitable to disregard it. But he added that, having heard this evidence, he regarded himself as better able to assess the wife's claims. He held it would be unfair to concentrate solely on the bare chronology without acknowledging that the wife did not seek to end the marriage. Nor did she give the husband any remotely sufficient reason for doing so.

51. Thirdly, the judge considered the court's approach to cases where the marriage was short but wealthy. He held that in the present case the key feature was that the husband gave the wife a legitimate expectation she would on a long-term basis be living on a higher economic plane than the rented flat and her £85,000 job had afforded her when she left her flat and her job to live with the husband as his wife at the house he had bought for that purpose. The judge said, in paragraph 65:

> '… the award should recognise that H has by this marriage, notwithstanding its short duration, given W a reasonable expectation that her life as once again a single woman need not revert to what it was before her marriage, and that she should be able to live at a significantly better standard in terms of accommodation and spendable income, even if at one which does not approach the level that H can afford for himself and his new family.'

The judge concluded that a global award equivalent to £5 million, plus the agreed furniture and other goods, was a fair outcome irrespective of whatever value the husband might in due course achieve for the New Star shares.

The hearing in the Court of Appeal

52. The husband appealed. The Court of Appeal, comprising Thorpe and Wall LJJ and Black J, dismissed the appeal. Thorpe LJ held that the judge's award could not be labelled plainly excessive, although it was at the top end of the permissible bracket. The judge was entitled to take into account that the husband was to blame for the breakdown of the marriage even though his conduct would not merit advancing under section 25(2)(g) of the Matrimonial Causes Act 1973 as amended. The husband's misconduct could be used as a counter-balancing factor to the brevity of the marriage. Further, the judge was entitled to regard the wife's legitimate expectation of living to a higher standard as the ex-wife of Mr Miller as the 'key element' in the case.

53. Wall LJ agreed that the reasons for the breakdown of the marriage were relevant in this case. His perception of the award overall was strongly influenced by the size of the husband's wealth. The husband was a very rich man. An overall 'clean break' award of £5

million was not excessive or disproportionate. Black J agreed with both judgments.

*The pre-*White *short marriage cases*

54. Several issues arise from these judgments. The first concerns the relevance today of the approach to short marriages enunciated in the 1980s. In the 1980s and earlier there were several reported cases concerning short marriages. The facts vary widely, but in these cases the general approach to division of assets was to concentrate on making provision for the financial needs of the claimant, usually the wife, and on compensating her for any financial disadvantage she had suffered from the breakdown of the marriage. To greater or lesser extent this approach appears in *S v S* [1977] Fam 127, *H v H (Financial Provision: Short Marriage)* (1981) 2 FLR 392, *Robertson v Robertson* (1983) 4 FLR 387, *Attar v Attar (no 2)* [1985] FLR 653 and *Hedges v Hedges* [1991] 1 FLR 196.

55. On the present appeal Mr Turner QC submitted this approach has not been invalidated by the decision in the *White* case. Both Singer J and the Court of Appeal declined to adopt this submission. They were right to do so. In the 1980s cases attention was directed predominantly at the wife's needs. There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties' needs. That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties' respective financial needs and any need for compensation. The court will look at all the circumstances. The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property.

'Legitimate expectation'

56. The next issue concerns the feature described by the judge as the key feature in the case. The judge said the key feature was that the husband gave the wife a legitimate expectation that in future she would be living on a higher economic plane.

57. By this statement I doubt whether the judge was doing more than emphasise the importance in this case of the standard of living enjoyed by Mr and Mrs Miller before the breakdown of their short marriage. This is one of the matters included on the statutory check list. The standard of living enjoyed by the Millers during their marriage was much higher than the wife's accustomed standard and much higher than the standard she herself could afford.

58. If the judge meant to go further than this I consider he went too far. No doubt both parties had high hopes for their future when they married. But hopes and expectations, as such, are not an appropriate basis on which to assess financial needs. Claims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage. Indeed, to make an award by reference to the parties' future expectations would come close to restoring the 'tailpiece' which was originally part of section 25. By that tailpiece the court was required to place the parties, so far as practical and, having regard to their conduct, just to do so, in the same financial position as they would have been had the marriage not broken down. It would be a mistake indirectly to re-introduce the effect of that discredited provision.

Conduct

59. Next is the question of the parties' conduct. The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.

60. Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.

61. At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the

undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel* [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'.

62. The Law Commission then considered the problem. The commission concluded that courts should be obliged to take account of conduct where to do otherwise would offend a reasonable person's sense of justice. To this end the court should be free to examine sufficient of the matrimonial history to enable the judge to 'get a feel of the case': see the Law Commission report on Family Law – The Financial Consequences of Divorce, (1981) Law Com no 112, paras 36-39.

63. Parliament gave effect to this recommendation in paragraph (g) in the new section 25(2) introduced by the Matrimonial and Family Proceedings Act 1984. One of the matters to which the court should have regard is 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. It is implicit in this provision that conduct outside this description is not conduct which should be taken into account.

64. This history is well known. I have mentioned it only because there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.

65. This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one

party's conduct, the statute permits that conduct to be taken into account.

Contribution

66. A point of a similar nature concerns the approach to be adopted when evaluating the contributions each party made to the welfare of the family. Apparently, in this post-*White* era there is a growing tendency for parties and their advisers to enter into the minute detail of the parties' married life, with a view to lauding their own contribution and denigrating that of the other party. In the words of Thorpe LJ, the excesses formerly seen in the litigation concerning the claimant's reasonable requirements have now been 'transposed into disputed, and often futile, evaluations of the contributions of both of the parties': *Lambert v Lambert* [2002] EWCA Civ 1685; [2003] Fam 103, 117, para 27.

67. On this I echo the powerful observations of Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); [2002] 2 FLR 1143, 1154-1155, paras 33-34. Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life.

68. This approach provides the principled answer in those cases where the earnings of one party, usually the husband, have been altogether exceptional. The question is whether earnings of this character can be regarded as a 'special contribution', and thus as a good reason for departing from equality of division. The answer is that exceptional earnings are to be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise. The wholly exceptional nature of the earnings must be, to borrow a phrase more familiar in a different context, obvious and gross. Bodey J encapsulated this neatly when sitting as a judge in the Court of Appeal in *Lambert v Lambert* [2003] Fam 103, 127, para 70. He described the characteristics or circumstances which would bring about a departure from equality:

> '.. those characteristics or circumstances clearly have to be of a wholly exceptional nature, such that it would very

obviously be inconsistent with the objective of achieving fairness (i.e. it would create an unfair outcome) for them to be ignored.'

Mr Miller's appeal

69. I accept the husband's contention that both the judge and the Court of Appeal misdirected themselves on the 'conduct' issue. Even so I would dismiss Mr Miller's appeal, largely for two reasons. The first concerns the increase in the husband's wealth during the marriage. The husband brought substantial wealth into the marriage at its outset. That was non-matrimonial property. That was a major financial contribution he made to the marriage. But it would be wrong to suppose that during the period of the marriage the husband's assets increased only by the comparatively modest amount of £300,000 or so represented by his property other than his New Star shares.

70. When the parties married New Star had not got off the ground, although some of the groundwork had been done. New Star then expanded and flourished, as a result of activities undertaken for the most part during the period of the marriage. New Star set itself to grow quickly, and it did so. By rights issues and placings spread over the period from March 2001 to December 2003 substantial numbers of shares were issued at prices ranging from £80 to £150 per share. As a result New Star paid out over £140 million in acquiring management of funds having assets worth the staggering amount of £3.73 billion. It is in this context that the experts' valuations of £12 million and £18 million for the husband's New Star shares, if they could currently have been sold, have to be seen.

71. Plainly the accretion to the husband's wealth during the marriage, as a result of work he did during the marriage, was very substantial indeed. Although the marriage was short, the matrimonial property was of great value. The gain in the husband's earned wealth during the marriage was huge.

72. Secondly, the judge was entitled to regard the high standard of living enjoyed by the parties during the marriage as a key feature of this case. That was not a standard of living the wife would be likely to achieve for herself.

73. Having regard to these two features I consider the sum of £5 million awarded by the judge is appropriate in this highly unusual case. The midway figure between the experts' valuations of the New Star shares was £15 million. Taking this as no more than some indication of the value of these shares, the husband's worth was of the very approximate order of £32 million. An award of £5 million, including in this the matrimonial home, represents less than one-third of the value of the New Star shares and less than one-sixth of the husband's total worth. An award of less than one-half of the value of the New Star shares reflects the amount of work done by the husband on this business project before the marriage.

The McFarlane marriage

74. Kenneth McFarlane and Julia Chocholowska married on 1 September 1984. They lived together for two years before then. There were three children of the marriage, a boy Jamie and two girls Sarah and Helen. They are now aged 16, 15 and 9 years. They are being educated at private schools. During their marriage the parties lived in south west London. They separated in December 2000. So the marriage lasted effectively for 16 years. A divorce decree nisi was made on 22 February 2002 and this was made absolute on 28 May 2003. The parties are now 46 years old.

75. By the time they married both parties had qualified professionally, the wife as a solicitor and the husband as a chartered accountant. They had each served their traineeship with leading City firms. After the birth of Jamie the wife returned to work. At the end of 1989 she moved to Freshfields, the well-known City firm of solicitors, where she worked a four-day week. In 1990 the husband became a partner in Touche Ross.

76. Until this time the wife earned as much as the husband. For a while she earned more than him. In 1991, before the birth of their second child Sarah, the parties agreed the wife should abandon her career and bring up the children on a day by day basis. They agreed to concentrate on the husband's career. Subsequently the wife did not return to work as a solicitor. On two occasions she began to re-train, first as a teacher and next as an independent financial adviser. The husband remained with Touche Ross and then its successor, Deloittes. He was the breadwinner for the family. He worked very hard and was, and continues to be, very successful.

77. In addition to the matrimonial home in Barnes, south-west London, the parties had a holiday home in Devon. At the trial the matrimonial home was valued at £1.5 million and the holiday home at £255,000. In June 2000 a flat in Clerkenwell, just north of the City, was bought in the husband's name for £415,000.

78. As to family income, the wife's income was minimal after she gave up work. In round figures the husband's gross partnership income rose from £455,000 in 1998-99 to £972,000 in 2000-01, the year of separation, and then to £1,286,000 in 2002-03. The corresponding net figures are £272,000, £579,000 and £753,000. The parties' standard of living rose as the husband's earnings increased and then as the mortgage on the matrimonial home was paid off over a period of five years. The wife's evidence was that the amount they spent on living costs, excluding school fees and mortgage repayments, rose from £66,000 in 1995 to £138,000 in 2000.

The hearing before the District Judge

79. After their separation the parties agreed on a broadly equal division of the capital assets of about £3 million owned by them. This capital was accumulated during their marriage, apart from an inheritance of about £40,000 the wife received from her father's estate. The parties agreed the wife should retain the matrimonial home and live there with the children. The husband was to have the holiday home in Devon, the flat in Clerkenwell and his partnership current account with Deloittes.

80. Before District Judge Redgrave it was common ground there was insufficient capital available to achieve a clean break. Further, it was common ground that the wife was entitled to a maintenance award on a joint lives or further order basis. The only substantial contentious issue was the level of the periodical payments for the wife and for the children. The parties gave oral evidence.

81. The wife estimated her income requirements at £215,000 per annum. Broken down, this was £87,000 for the three children and £128,000 for herself. This included private health insurance and some life insurance premiums. The husband estimated his personal spending requirements, excluding housing costs and pension provision, at £60,000 to £80,000 a year.

82. The husband's proposal was that he should make payments of £20,000 for each child, plus school fees, and £100,000 for the wife on a joint lives or further order basis, plus extras such as insurance. The wife sought £70,000 for the three children, plus school fees, and £275,000 for herself.

83. The judge's findings and conclusions can be summarised in this way. The wife was the primary carer of the children. Her financial needs were to maintain a home for herself and the parties' three children. This should be in the former matrimonial home. The wife had an earning capacity, but it was severely depressed by the length of time she had been out of the job market. Additionally, she was the single parent of three children, of whom the youngest was only six years old. It was unreasonable to expect her to take steps to acquire or improve her earning capacity until, at the very least, the youngest child reached secondary school age.

84. As to contributions to the family life, there was not a scintilla of criticism of the wife, either as a partner or as a mother. The parties' contributions to the marriage were of different but equal value. The judge said:

> 'The agreed split of capital is a reflection of the equal but separate contributions that these parties made to a marriage which lasted 16 years and which produced three children.'

85. The judge noted that part of the overall circumstances was that the joint decision of the parties to concentrate on the husband's career in order to fund the family's lifestyle resulted in the greatest fruits of his endeavours being available towards the end of the marriage and after its breakdown. The spadework for these rewards was carried out over a long period, and it would be unfair to take the view that the wife had not contributed to the recent increases in the husband's earnings after the separation. The wife's contributions enabled the husband to create a working environment which had produced greater rewards, 'of which she should have her fair share'. She had continued to make a contribution to the family in the nurturing of the children in a single parent household. That contribution had not come to an end when the parties separated.

86. The judge concluded that £60,000 a year for the children's maintenance was reasonable and that the appropriate award for the wife was £250,000 a year. This was one-third of the husband's current net income. This amount 'reflects [the wife's] needs, obligations and the contribution that she has made over the years of the marriage'.

The appeals to the judge and the Court of Appeal

87. The husband appealed. The appeal was heard by Bennett J. He held that the effect of an award of maintenance at the rate of £250,000 was to give the wife an amount of money 'way above' her needs. The reality was that the husband would be paying the wife money likely to be saved and accumulated. That would subvert the principle that the purpose of periodical payments is maintenance and an award of capital is made once and once only. On this the district judge fell into error and her award should be set aside. In the exercise of his own discretion Bennett J ordered payment of £20,000 for each of the children and a reduced amount, of £180,000, for the wife. To that extent the husband's appeal succeeded. As before, the payments to the wife were to be made during the parties' joint lives or until the wife should remarry or further order.

88. The wife appealed to the Court of Appeal. She sought reinstatement of the district judge's order. The appeal was heard by Thorpe, Latham and Wall LJJ, in conjunction with an appeal from Bennett J in the case of *Parlour v Parlour*: [2005] Fam 171. On the appeals the court disagreed with Bennett J on the sole ground on which Bennett J considered the district judge had misdirected herself. Contrary to the view of Bennett J, the Court of Appeal held that in exceptional cases periodical payments orders can properly be used as a means to enable a payee to accumulate capital.

89. Nevertheless, when restoring the district judge's periodical payments order of £250,000 a year, the Court of Appeal limited its duration to five years. The court adopted this course because it was concerned, of its own motion, that by making a joint lives order in the present case the court would not be giving due effect to the clean break principle. The court was uneasy that a periodical payments award as large as £250,000 should be made for an indefinite period. The parties' presentation of the case as one for a joint lives order had diverted attention from the opportunity to achieve a clean break 'years before either party approached retirement'. Thorpe LJ preferred an order for

periodical payments for an 'extendable' term of five years. After five years the court could reassess the prospects of a clean break in the light of the husband's capacity to re-mortgage his new home, the extent to which the wife had built up a capital reserve from the surplus of income over expenditure in the intervening years, and the revival of the wife's earning capacity: [2005] Fam 171, 192-193, para 70. Wall LJ was of the same view. He said that 'indeterminate and unfocused joint lives orders very substantially in excess of needs' are not within the statutory objective: para 138. From that decision the wife appealed to your Lordships' House.

Mrs McFarlane's appeal

90. The starting point of any discussion of the McFarlane case is to recognise its unusual combination of features. The parties' capital assets were insufficient to make an immediate clean break possible. That is not unusual. What is unusual is that, side by side with this (comparative) insufficiency of capital, there was a substantial excess of income. The husband's annual income was far in excess of the financial needs of the husband and of the wife even after they had separated. The latter feature is unusual. Normally the family income is not enough to meet the financial needs of both the husband and the wife after their combined household has split into two separate households. That is not so here.

91. A third feature is that the high level of the husband's earnings after the breakdown of the marriage was the result of the parties' joint endeavours at the earlier stages of his professional career. The wife gave up her career to devote herself to making a home for them both and for the children. As Bennett J noted, the husband was able to reap the benefits of the wife's contribution not just during the marriage. He continued to do so after the separation and after the divorce.

92. A fourth feature is that the career foregone by the wife was a professional career as successful and highly-paid as the husband's. This is not a case where the wife's future success was a matter for speculation. Speculation of this character is seldom helpful. Here the wife had a proven track record when the parties agreed she should give up her job. A fifth feature is that, as primary carer of the three children, the wife continued to be at an economic disadvantage and continued to make a contribution from which the children and, indirectly, the

husband benefited. He was relieved of the day to day responsibility for their children.

93. Clearly in this situation the wife is entitled to a periodical payments order in respect of her financial needs. She needed money to live in the former matrimonial home which was to be the continuing home for her and the children. But it would be manifestly unfair if her income award were confined to her needs. This is a paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage.

94. With that in mind I have an initial difficulty with the approach of the Court of Appeal. Before the district judge the parties were agreed that the appropriate order was a joint lives order. The judge assessed the quantum at £250,000 a year. Although she did not quantify the two elements separately, it is clear that this amount was partly in respect of the wife's financial needs and partly in respect of what I have labelled compensation. Further, the district judge had the clean break principle well in mind. Having seen and heard the parties, she was 'satisfied that this is not a case where the wife could adjust, without undue hardship, to the termination of periodical payments in her favour'. Although contrary argument was not addressed to the district judge on this point, I can see no ground for disturbing this assessment. There is no reason to doubt this was her considered view. And she recognised that the joint lives award might well need to be revised in later years.

95. The Court of Appeal, however, seems not to have had the distinction between needs and compensation clearly in mind when considering the way ahead. The court appears to have treated the surplus of income over expenditure as simply a means whereby the wife could accumulate a capital reserve. But that would be to mistake the purpose of this part of the district judge's award.

96. This leads me to the point where I fundamentally disagree with the Court of Appeal: the replacement of a joint lives order with a five-year order. I agree with the Court of Appeal that when the husband has repaid the mortgage on his new home, and the wife's earning capacity has revived, the time may be ripe for a reassessment of the parties' position to see if a deferred clean break is practicable. A clean break might then be achievable by the court exercising its power to order the husband to make a lump sum payment to the wife as consideration for

discharging his liability to make further periodical payments. The court has this power under section 31(7A) and (7B) inserted into the 1973 Act by section 66 of the Family Law Act 1996.

97. That is something which will merit careful consideration at a suitably early date. But I do not see how this leads to the conclusion that the district judge's joint lives order should be set aside in favour of an extendable five years' order. The practice in the family courts seems to be that on an application for extension of a periodical payments order made for a finite period the applicant must surmount a high threshold: *Fleming* v *Fleming* [2003] EWCA Civ 1841; [2004] 1FLR 667, 670, paras 12-14. In the present case it would be altogether inappropriate, indeed unjust, to make a five-year order and place the wife in that position when five years has elapsed. In the present case a five-year order is most unlikely to be sufficient to achieve a fair outcome. Further financial provision of some sort will be needed. So, far from compelling the wife to apply for an extension of a five-year order, and requiring her to shoulder the heavy burden accompanying such an application, it is more appropriate for the husband to have to take the initiative in applying for a variation of a joint lives order when he considers circumstances make that appropriate. Certainly the district judge cannot be said to have erred in principle in making a joint lives order, especially when this was common ground between the parties. I would allow this appeal and restore the order of District Judge Redgrave.

98. One final point should be mentioned. The amount of £250, 000 substantially exceeds the wife's financial needs. The district judge said it was for the wife to decide whether to make pension provision for herself, and whether to insure herself and the children against the risk of the husband's premature death. The Court of Appeal disagreed. The wife, the court said, must invest the surplus sensibly, or take the risk that her failure to do so might count against her on an application for discharge of the order.

99. On this point I largely agree with the Court of Appeal, but not wholly. When a review takes place the court will consider, in the light of the prevailing circumstances, what further amounts should be paid to the wife by way of periodical payments, or capitalised and paid as a lump sum if that is practicable, in respect both of needs and compensation. As to needs, the claimant's resources are always a matter to be taken into account. And claimants for financial ancillary relief are expected to manage their financial affairs sensibly and responsibly. Thus far I agree with the Court of Appeal. But the wife's claim for

compensation stands differently. Her compensation claim is not needs-related; it is loss-related. So the compensation element of her claim is not directly affected by the use she makes of her resources.

LORD HOFFMANN

My Lords,

100. For the reasons given in the speech of my noble and learned friend Baroness Hale of Richmond I too would allow Mrs McFarlane's appeal and dismiss Mr Miller's appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

101. I have had the privilege of reading in draft the speeches of my noble and learned friends Lord Nicholls of Birkenhead and Baroness Hale of Richmond. I would find it very difficult to say to which of them I would give the award if, like Paris on Mount Ida, I was forced to pass judgment on which of them offered the better guidance. The fact is that they complement each other. The clarity and simplicity which is to be found in Lord Nicholls' speech is matched by the immensely valuable account which Lady Hale gives of the law's development and of the way the principles on which it is based should be applied in practice. On all points that are relevant to the disposal of these appeals I am in full agreement with them both. For the reasons that they give I too would dismiss the appeal in Mrs Miller's case and allow the appeal in Mrs McFarlane's case.

102. I should like however to add some observations on the way the problem raised by these cases is currently dealt with in Scots law. This was referred to by counsel in both cases in the course of the argument. Mr Posnansky QC for the husband in Mrs McFarlane's case relied on the way the clean break principle is given effect to in the Family Law (Scotland) Act 1985. This was to support his submission that a fair outcome had been achieved by the order which the Court of Appeal

made in her case. He said that the solution that Parliament thought appropriate in 1985 to achieve fairness in Scotland must be taken as a good guide to what the same Parliament had in mind as fair when it passed the corresponding legislation for England one year earlier. I do not think that the comparison which Mr Posnansky sought to draw stands up to examination. I should like to explain why.

The Scottish approach to fairness

103. The report of the Scottish Law Commission on Aliment and Financial Provision (Scot Law Com No 67) was submitted to the Lord Advocate on 17 July 1981 and ordered by the House of Commons to be printed on 4 November 1981. The report of the Law Commission on the Financial Consequences of Divorce (Law Com No 112) was submitted to the Lord Chancellor on 26 October 1981 and ordered by the House of Commons to be printed on 14 December 1981. A study of these reports shows that, despite their close proximity in dates, they proposed very different solutions to the basic problem as to how to reconcile the requirements of fairness with the desire for certainty.

104. As the Law Commission put it in para 19 of its report:

> "We believe the formulation of policy in this and indeed other areas of the law involves the resolution of two objectives, each intrinsically desirable, but perhaps mutually inconsistent. The first is that the law should be certain and predictable in its results. This objective is not only consistent with the popular concept of justice; it also means that it is easier for lawyers to advise their clients on the likely outcome of a dispute, so promoting the conclusion of reasonable settlements and minimising recourse to contested trials. The second objective is that the law should achieve justice and fairness between the parties; and it is said that this necessarily involves considerable flexibility of approach by reason of the widely varying facts of each case."

In para 35 the Law Commission, who were no doubt well aware of what the Scottish Law Commission were proposing, acknowledged that it was clearly desirable that the laws between these two parts of the United Kingdom should be based on the same principles. But they went on to

say that they did not think that it necessarily followed that the English and Scottish laws governing the financial consequences of divorce should be couched in identical terms.

105. The approach which was favoured by the Law Commission was loosely structured. They attached greater importance to flexibility than they did to certainty. In para 21 they said that they favoured a reasonable balance between these two objectives. In the summary of their recommendations in para 46 of the report they said that any future legislation dealing with the financial consequences of divorce should be subject to continuous monitoring and periodical reports to Parliament. Their recommendation as to how the guidelines in section 25(1) of the Matrimonial Causes Act 1973 should be revised avoided an approach that was too prescriptive. They said that the importance of each party doing everything possible to become self-sufficient should be formulated in terms of a positive principle. They said that "weight" should be given to the view that, "in appropriate cases", periodical financial provision should be "primarily" concerned to secure a smooth transition from the status of marriage to the status of independence. They left the formulation of the legislation to give effect to this flexible approach to Parliament.

106. The approach which was favoured by the Scottish Law Commission, on the other hand, was the reverse of that which was recommended for England and Wales. It was the product of extensive research and consultation. It was worked out in very much greater detail. It produced a result which favoured certainty in place of flexibility. The report contained a draft Bill, complete with explanatory notes, which was designed to implement its recommendations. It was presented as a fully worked out system. There was no recommendation that the legislation that was proposed should be subject to monitoring or to review. It was intended to establish the law not just for a generation. Like the Forth Bridge, it was built to last for a very long time.

107. It has to be acknowledged that the law relating to financial provision on divorce in Scotland was without any clearly laid down structure or objectives when the Scottish Law Commission began to look at it in 1976. Section 5(2) of the Divorce (Scotland) Act 1976 enabled either party to apply for financial provision by way of a periodical sum or capital sum or both. The court was directed to make with respect to the application such order, if any, as it thought fit. The amount of any award, and the principles on which the award should be

based, were left entirely to the court to determine. The court for its part refrained from laying down any clearly defined principles.

108. There was no obvious disadvantage in this system so long as exclusive jurisdiction in all proceedings for divorce remained in the Court of Session. This was a court where members of the Faculty of Advocates had the exclusive right of audience. The business was concentrated in the hands of a relatively small number of judges. The relatively small number of advocates who practised regularly in this field were able to predict the awards that were likely to be made by the judges in any given case without any real difficulty. But it was clear that that this system could not survive an extension of jurisdiction in divorce cases to the sheriff court, which the Royal Commission on Legal Services in Scotland had recommended in 1980. This reform was effected by section 1 of the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983. The sheriff court now has concurrent jurisdiction with the Court of Session in actions for divorce. It is in the sheriff court that almost all divorce actions are now brought.

109. The draft Bill which accompanied the Scottish Law Commission's recommendations for reform passed into law almost unaltered as the Family Law (Scotland) Act 1985 ("the 1985 Act"). The general note which introduces the annotations to this Act in *Current Law Statutes* pays tribute to the fact that the Act attracted so little in the way of criticism during its passage through Parliament. This was in sharp contrast to the controversy generated in the previous year by the Matrimonial and Family Proceedings Act 1984 which made changes in the same area in relation to England and Wales in response to the Law Commission's recommendations.

The risk of injustice

110. The law as enacted in the 1985 Act has remained almost unaltered for over twenty years. Apart from amendments which were introduced by the Welfare Reform and Pensions Act 1999 to provide for the sharing of pensions, the only significant change is that made by section 16 of the Family Law (Scotland) Act 2006. It amends the rule laid down section 10(3)(b) of the 1985 Act that the date on which matrimonial property is to be valued is the date when the parties ceased to cohabit. The fact that this rule could lead to injustice was revealed by the decision of the First Division of the Court of Session in *Wallis v Wallis*, 1992 SC 455. That case is instructive. It illustrates how

inflexible the 1985 Act's regime relating to the valuation and division of the matrimonial property is compared with that in the English legislation.

111. In *Little v Little*, 1990 SLT 785, 787C-D I said that division of matrimonial property under the 1985 Act was essentially a matter of discretion, aimed at achieving a fair and practicable result in accordance with common sense. Those comments were directed at the risk that treating each step in the process as raising an issue of law and not of discretion would open up decisions by the court of first instance for reconsideration on appeal: see also Lord Dunpark at p 790J-K. But there was no getting away from the fact that the directions in the 1985 Act were designed to reduce the scope of the court's discretion to the minimum that was consistent with enabling the court to deal with each case on its own facts. The Scottish Law Commission had rejected the unfettered discretion model that up to then had been part of Scots Law: see paras 3.37-3.39 of their report. There is almost no room here for what Lord Cooke of Thorndon referred to in *White v White* [2001] 1 AC 596, 615 as the development of general judicial practice.

112. The sheriff who granted decree of divorce in *Wallis v Wallis* made an order for the transfer by the wife of her half share in the matrimonial home to the husband as part of the division of the matrimonial property. The Court of Session held that the effect of section 10(3)(b) of the 1985 Act was that the whole of the wife's share of the increase in its value after the date of separation which passed to the husband as a result of the sheriff's order had to be left out of account in the computation of the amount of the matrimonial property that determined how much of it was to be paid by him to the wife: 1992 SC 455. Dr Eric Clive, the principal architect of the legislation and a Scottish Law Commissioner said that the decision was wrong (Financial Provision on Divorce – A Question of Technique, 1992 SLT (News) 241). Professor Joseph Thomson, then Regius Professor of law at Glasgow University, said that it was right (Financial Provision on Divorce – Not Technique but Statutory Interpretation, 1992 SLT (News) 245). When it came here on appeal your Lordships' House affirmed the decision of the Court of Session: *Wallis v Wallis*, 1993 SC (HL) 49. In *Jacques v Jacques*, 1997 SC (HL) 20, the House held, again affirming a decision of the Court of Session, that the sheriff was entitled to give effect to the principle of equal division in a way that had not been contemplated by the statute. He thought that the spouses could share equally in the increase in the value of the matrimonial property after the date when they separated. That could not be done under the rules laid

down by the statute. So he refrained from making any order for a financial provision.

113. The effect of the amendment made by section 16 of the Family Law (Scotland) Act 2006 is that property transferred to one of the spouses by order is now to be valued, unless otherwise agreed, at the date of the making of the property transfer order, or, in exceptional circumstances, such date as the court shall determine: see Joe Thomson's general note on this section in *Current Law Statutes*. But this amendment leaves untouched another problem which was mentioned in *Wilson v Wilson*, 1999 SLT 249. At p 253C-D Lord Marnoch drew attention, as he had done previously in *Latter v Latter*, 1990 SLT 805, to the fact that the definition of matrimonial property was capable in other ways, on occasion, of producing very real injustice. He thought it had done so in that case, where much of the wealth created during the marriage was vested in a farming company and the husband's shareholding in the company was excluded from the matrimonial property because it had been either held by him prior to the marriage or inherited by him from his father.

The clean break principle

114. The clean break principle lies at the heart of the argument in Mrs McFarlane's case about the effect of section 25A(2) of the Matrimonial Causes Act 1973. The Scottish approach to it is set out in section 9(1)(d) of the 1985 Act. In this paragraph the Act states that the principles which the court shall apply in deciding what order for financial provision, if any, to make under it include the principle that:

> "a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce."

This rule is reinforced by section 13(2)(a), which provides that the court shall not make an order for a periodical allowance under section 8(2) of the Act unless the order is justified by a principle set out in paragraph (c) (the economic burden of caring for children), (d) (financial support for no more than three years) or (e) (likelihood of serious financial

hardship) of section 9(1). Paragraph (b) (fair account to be taken of economic advantages and disadvantages) is omitted from this list. Section 11(4) sets out various factors to which the court shall have regard for the purposes of section 9(1)(d), including all the circumstances of the case: section 11(4)(e). But it does not allow the court to override the three year limit. It excludes compensation aimed at redressing a significant prospective disparity between the parties arising from the way they conducted their marriages.

115. A rigid application of the clean break principle, as enacted in section 9(1)(d), has the advantage of certainty. But it runs the risk of becoming outdated as social conditions change and the reasoning behind it no longer fits in with modern concepts of fairness. As Lord Nicholls has explained, the concept of fairness is ultimately grounded in what people think. Social and moral values change from one generation to the next. Lady Hale's comment in para 127 that statutory statements of principle translated into rules can operate harshly in some cases, particularly where the resources consist largely of income rather than capital, shows where the problem lies. The flexibility which sheriffs and judges need to adapt the law to what would be regarded as fair today as compared with what was regarded as fair 25 years ago is denied to them.

116. The way that Mrs McFarlane's case would have to be dealt with if the case had arisen in Scotland illustrates the problem. It would not be possible to design an award under the Scottish system that provided her with an amount of income for the future that gave fair recognition to her entitlement. She is entitled to an award that reflects the agreement that she and her husband entered into, because in their case the capital assets that would be needed for this are not available. They decided that she should sacrifice her own high earning career in the interests of the family while her husband developed his ability to generate income. Under the Scottish system he would continue to enjoy the benefits of his high earning capacity. But she could not be compensated for her future economic disparity, due to his lack of capital. She would be required instead to adjust to a lower standard of living. And she would have to do this over a period of no more than three years.

117. The annotation to section 9(1)(d) in *Current Law Statutes*, based on para 3.107 of the report by the Scottish Law Commission, explains the purpose of that paragraph. The principle is intended to enable the court to cushion the blow of divorce by providing funds to enable a spouse "to find employment or retrain, or to adjust to a lower standard of living." I agree with Lord Nicholls's observation, in para 94 of his

speech, that the situation in which Mrs McFarlane finds herself is a paradigm case for an income award that will compensate her for the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage. That is impossible under the rules which apply in Scotland.

118. With the benefit of hindsight, it can be seen how unfairly the principle which section 9(1)(d) lays down (it adopts the statutory convention avoided by the English legislation of referring to "him" not "her") discriminates against women. It operates harshly in cases where a high earning wife, or the highly qualified wife with the prospect of high earnings – and it is, of course, almost invariably the wife, not the husband who does this – gives up a promising and demanding career in the interests of the family. Women today compete on equal terms with men in business and in the professions for high earnings. They are being encouraged to do so by the measures for equal pay and the removal of discrimination on the ground of sex. These measures were already in place by 1985, but had not begun to realise their full potential for change by that date. Many more women than was foreseen in 1981 are now reaching the ranks of those who are highly paid for what they do. But many women are mothers too. The career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable.

119. As the district judge recognised in Mrs McFarlane's case, it is almost always impossible for a woman who has made that choice to achieve the same pattern of high earning on her return to work which she would have done if the progress of her career had not been interrupted by concentrating on her family. The price that her decision brings with it is made all the more severe by the difficulties which under current conditions couples are likely to experience in providing for a pension which will maintain their standard of living in the future.

120. These effects appear not to have been foreseen in 1981 when the Scottish Law Commission published their report. Achieving a clean break in the event of divorce remains as desirable now as it was then. But if this means that one party must adjust to a lower standard of living, the result is that a clean break is being achieved at the expense of fairness. Why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up, as his share of the bargain that they entered into when that choice was made, out of the earnings

that he is able to generate when she cannot be compensated for this out of capital?

Scots law in need of reform

121. I suggest that the time has come for taking a fresh look at this problem. The length of the period for which a periodical allowance should be awarded should no longer be confined to an absolute maximum of three years. The court should have a discretion to provide for a longer period where, in exceptional circumstances and applying the overriding criterion of fairness, the judge finds that one party to the marriage whose contribution to the marriage has resulted in a reduction in his or her earning capacity ought to be compensated out of the other party's future income because the capital needed to provide this is not available. This could be achieved by inserting a qualification to this effect into section 9(1)(d) and by inserting a reference to section 9(1)(b) in section 13(2)(a). There may be other ways of achieving this result. Whatever method is chosen, it seems to me that the principles on which current restrictions are based need to be reconsidered in the interests of fairness as soon as possible.

BARONESS HALE OF RICHMOND

My Lords,

122. There is much to be said for the flexibility and sensitivity of the English law of ancillary relief. It avoids the straitjacket of rigid rules which can apply harshly or unfairly in an individual case. But it should not be too flexible. It must try to achieve some consistency and predictability. This is not only to secure that so far as possible like cases are treated alike but also to enable and encourage the parties to negotiate their own solutions as quickly and cheaply as possible. This latter aim will become even more important once the new costs regime comes into force on 3 April, as each party will usually have to bear his or her own costs. We must therefore strive to identify some principles, consistently with the task set for the court by sections 25 and 25A of the Matrimonial Causes Act 1973.

The search for principle

123. English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts. But in real life most couples' finances become ever-more inter-linked and inter-dependent. Most couples now choose to share the ownership of much of their most significant property, in particular their matrimonial home and its contents. They also owe one another duties of support, so that what starts as individual income is used for the benefit of the whole family. There are many different ways of doing this, from pooling their whole incomes, to pooling a proportion for household purposes, to one making an allowance to the other, to one handing over the whole wage packet to the other (see Jan Pahl, *Money and Marriage*, 1989). Some couples adopt one or other of these systems and retain it throughout their marriage. But as the gender roles also become more flexible within the marriage, with bread-winning and home-making responsibilities being shared and changing over time, so too their financial arrangements may also become more flexible and change over time. It also becomes less and less relevant to ask who technically is the owner of what.

124. When the marriage comes to an end, the court's powers are also flexible. They are no longer based upon the assumption that there is one male breadwinner to whom all or most of the resources belong and one female home-maker in need of his support (and entitled to it only as long as she remains deserving). The court is directed to take into account all of their resources from every source. It is then given a wide range of powers to reallocate all those resources, be they property, capital or income. It is directed to take account of all the circumstances, and in particular the checklist of factors listed in section 25(2). But what, at the end of the day, is it supposed to do? What is it trying to achieve?

125. In its original form, section 25 directed the court to try and place the parties in the financial positions in which they would have been had the marriage not broken down and each had discharged their financial obligations towards the other. This made perfect sense when the assumption was that the financial obligations undertaken, mainly by the husband, at marriage endured for life even if the marital consortium came to an end (indeed, before the Matrimonial Proceedings and Property Act 1970 came into force, a rich man whose divorced wife married a poorer one might still have to support her in the manner to which she had become accustomed during their marriage). But it made

less sense once the basis of divorce was that the marriage had irretrievably broken down, the law no longer drew formal distinctions between the obligations of husbands and wives, and the court had a wide range of powers to distribute their resources in such a way as to enable each to go his or her separate way.

126. Hence the assumption of life long-obligation was repealed by the Matrimonial and Family Proceedings Act 1984, following the Report of the Law Commission (1981, Law Com No 112, *The Financial Consequences of Divorce*). The Commission's reasoning (see para 17) was essentially pragmatic. In the great majority of cases, it simply was not possible to enable two households to continue to live as if they were one. Nor in many cases was it desirable to perpetuate their mutual interdependence. The whole point of a divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives. But at least the discredited objective had encouraged a sort of equality: if the marriage had not broken down, the couple would still be enjoying the same standard of living. The object, therefore, was to get as close as possible to that for both of them. John Eekelaar dubbed this the 'minimal loss' principle (I used to refer to it as the principle of 'equal misery').

127. The 1984 Act put nothing in its place. The Law Commission, in their previous discussion paper (*The Financial Consequences of Divorce: The Basic Policy, A Discussion Paper*, 1980, Law Com No 103), had discussed various models of financial provision after divorce and found all of them wanting. Thus they deliberately eschewed recommending any overall guiding principle or objective, other than the attempt to disentangle the spouses' mutual interdependence. The Commission may have been inhibited because they were only considering financial provision, still usually referred to as maintenance, and not property adjustment and capital. This is in contrast with the approach of the Scottish Law Commission, of whose work the Law Commission were well aware. The Scots' Report (*Report on Aliment and Financial Provision*, 1981, Scot Law Com No 67) resulted in statutory statements of principle translated into rules. As my noble and learned friend, Lord Hope of Craighead has demonstrated, these can operate harshly in some cases, particularly where the resources consist largely of income rather than property.

Three pointers in the 1973 Act

128. Although the 1973 Act, as amended in 1984, contains no express objective for the court, it does contain some pointers towards the correct approach. First, the court is directed to give *first priority to the welfare while a minor of any child of the family* who has not attained the age of 18: section 25(1). This is a clear recognition of the reality that, although the couple may seek to go their separate ways, they are still jointly responsible for the welfare of their children. The invariable practice in English law is to try to maintain a stable home for the children after their parents' divorce. Research indicates that it is more successful in doing this than in securing a comparable income for them in future (see, eg, Sue Arthur, Jane Lewis, Mavis Maclean, Steven Finch and Rory Fitzgerald, *Settling Up: making financial arrangements after divorce or separation*, National Centre for Social Research, 2002). Giving priority to the children's welfare should also involve ensuring that their primary carer is properly provided for, because it is well known that the security and stability of children depends in large part upon the security and stability of their primary carers (see eg Professor Jane Lewis FBA, "Debates and Issues regarding Marriage and Cohabitation in the British and American Literature" (2001) 15(1) Int JLPF 159, 178).

129. Secondly, the checklist in section 25(2) is not simply concerned with totting up the present assets and dividing them in whatever way seems fair at that time. Despite the repeal of the statutory objective, *the court is still concerned with the foreseeable (and on occasions more distant) future as well as with the past and the present*. The court has to consider, not only the parties' present resources, but also those that they will have in the foreseeable future: section 25(2)(a). The 1984 Act included in these any increase in earning capacity which it was reasonable to expect either of them to achieve. Although clearly aimed at trying to get home-makers back into the labour market, it applies equally to each party. Breadwinners are not expected to give up work so as to diminish the claims of the home-maker and children. Changes introduced by the Pensions Act 1995 require the court to consider any benefits under a pension arrangement which either party has or is likely to have and in this case not just in the foreseeable future: see 1973 Act, section 25B(1). The checklist has always required the court to take account of any benefit which a party will lose the chance of acquiring because of the loss or marital status: section 25(2)(h). But until pension attachment and, more recently, pension sharing were introduced, there was often not much they could do to reflect this other than through periodical payments. The court also has to consider the parties' needs, both now and in the foreseeable future: section 25(2)(b). Finally, when

considering the parties' contributions to the welfare of the family, the 1984 Act inserted a requirement to look, not only to the past, but also to the contributions likely to be made in the foreseeable future: section 25(2)(f). Principally, of course, these will be the continued caring responsibilities resulting from the relationship.

130. Thirdly, several provisions were inserted in 1984 *to encourage and enable a clean break settlement*, in which the parties could go their separate ways without making further financial claims upon the other. One such provision has already been mentioned: the expectation that each party would take reasonable steps to increase their earning capacity. Three others are now contained in section 25A, which was much debated in argument before us. Section 25A(1) provides:

> "Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a) [periodical payments], (b) [secured periodical payments] or (c) [lump sum], 24 [property adjustment], 24A [property sale] or 24B [pension sharing] above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable."

This applies to the whole range of the court's powers, not just to the power to award future periodical payments. It assumes that the court has decided that some award is appropriate (in practice, there are very few cases in which some readjustment of the parties' strict proprietary rights is not required, if they cannot agree it, in order to disentangle their previously entangled affairs). The court is then required to consider whether it could achieve an appropriate result by bringing their mutual obligations to an end. This is a clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments. But it does not tell us much about what an appropriate result would be.

131. Section 25A(2) provides:

> "Where the court decides in such a case to make a periodical payments or secured periodical payments order

> in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party."

I assume that the reference to "such a case" is to a case in which the court has decided to exercise its powers under the listed sections rather than to a case in which it has decided that it would be appropriate to exercise those powers so as to terminate the parties' financial obligations as soon as possible after the decree. If it decides to make a periodical payments order, it must consider how quickly it can bring those payments to an end. It has therefore to consider fixing a term, although in doing so it must avoid "undue hardship". This is linked to two other powers: section 28(1) allows the court to specify the duration of a periodical payments order; generally, it is open to the recipient to apply to extend the term, provided this is done before it expires; but section 28(1A) gives the court power to prohibit any application for an extension. If there is an application for an extension, the court has the same duty to consider bringing the periodical payments to an end as soon as possible: section 31(7); and it now has power to order a lump sum, property adjustment or pension sharing instead: section 31(7B). Thus if there were not the capital resources to achieve a clean break at the outset, it may be achieved later if sufficient capital becomes available.

132. Section 25A(3) reverses the decision of the Court of Appeal in *Dipper v Dipper* [1981] Fam 31, and allows the court to dismiss an application for periodical payments at the outset. The logical consequence of the previous tailpiece had been that such claims should be kept alive unless the claimant agreed to relinquish them. The life-long obligation might be revived by events which had nothing to do with the marriage.

133. Section 25A is a powerful encouragement towards securing the court's objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident

between formerly married people. It is also the logical consequence of the retreat from the principle of the life-long obligation. Independent finances and self-sufficiency are the aims. Nevertheless, section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect.

White v White

134. Hence, these three pointers do make it clear that a clean break is not to be achieved at the expense of a fair result. But the Act still leaves us without much help towards what the court should be trying to achieve by its reallocation of their resources and why it should be doing so. The great leap forward was achieved by this House in *White v White* [2001] 1 AC 596.

135. In hindsight, *White v White* should have been a simple case. There was a long marriage in which the couple had been partners in both senses of the term. Both were farmers. There were two farms. Both wanted to carry on farming. One solution might have been to give one farm to one and one to the other; at all events, the resources were such that each could have been enabled to farm independently. But by that time practice had become entrenched: in cases where there was enough to provide for both, the wife was entitled to her 'reasonable requirements', preferably capitalised, and the husband got the rest (see, eg, *O'D v O'D* [1976] Fam 83; *Page v Page* (1981) 2 FLR 198; *Preston v Preston* [1982] Fam 17). On separate property principles, this was deeply discriminatory. Where the parties had collaborated, not only in the enterprise of living together and bringing up their children, but also in the enterprise of making their living, as this couple had, why should only one of them be entitled to the surplus? In such a case, it is clear that the yardstick should be equal capital division, although factors such as the source of some of the assets might justify some adjustment.

136. Thus were the principles of fairness and non-discrimination and the 'yardstick of equality' established. But the House was careful to point out (see p 605f) that the yardstick of equality did not inevitably mean equality of result. It was a standard against which the outcome of the section 25 exercise was to be checked. In any event, except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, equality of outcome is difficult both to define and to achieve. Giving half the

present assets to the breadwinner achieves a very different outcome from giving half the assets to the homemaker with children.

The rationale for redistribution

137. So how is the court to operate the principles of fairness, equality and non-discrimination in the less straightforward cases? As Lord Justice Ward has argued non-judicially ("Have the House of Lords abused Cinderella? Their Contribution to Divorce Law"), lecture at King's College, London, 23 November 2004, given that we have a separate property system, there has to be some sort of rationale for the redistribution of resources from one party to another. In my view there are at least three. Any or all of them might supply such a reason, although one must be careful to avoid double counting. The cardinal feature is that each is looking at factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended.

138. The most common rationale is that *the relationship has generated needs* which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in *White*: see pp 608g to 609a). This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices

are a perfectly sound rationale for adjusting the parties' respective resources in compensation.

139. But while need is often a sound rationale, it should not be seen as a limiting principle if other rationales apply. This was the error into which the law had fallen before *White*. Need had become 'reasonable requirements' and thus more generous to the recipient, but it was still a limiting factor even where there was a substantial surplus of resources over needs: see *Page v Page* (1981) 2 FLR 198. Counsel would talk of the 'discipline of the budget' and suggestions that a wife's budget might properly contain a margin for savings and contingencies, or to pass on to her grandchildren, were greeted with disbelief.

140. A second rationale, which is closely related to need, is *compensation for relationship-generated disadvantage*. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage.

141. A third rationale is *the sharing of the fruits of the matrimonial partnership*. One reason given by the Law Commission for not adopting any one single model was that the flexibility of section 25 allowed practice to develop in response to changing perceptions of what might be fair. There is now a widespread perception that marriage is a partnership of equals. The Scottish Law Commission found that this translated into widespread support for a norm of equal sharing of the partnership assets when the marriage ended, whatever the source or legal ownership of those assets (Scot Law Com No 67, paras 3.66 to 3.68). A decade earlier, the English Law Commission had found widespread support for the automatic joint ownership of the matrimonial home, even during marriage (*First Report on Family Property – A New Approach*, 1973, Law Com No 52). Earlier still, the checklist of factors accompanying the new powers of property allocation in the Matrimonial Proceedings and Property Act 1970 had introduced the contributions which each party had made to the welfare of the family, including the contribution made by looking after the home and caring for the children. Thirty years later, the authors of *Settling Up* (see para 128 earlier, at

p 56), found that "there appeared to be a relatively widespread assumption that an 'equal' or 50/50 division was the normal or appropriate thing to do", alongside a recognition of needs and entitlements (but their respondents' views on entitlements might not be quite the same as the lawyers', a point to which I shall return).

142. Of course, an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the needs of one party or the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution: see, eg, the observations of Munby J in *B v B (Mesher Order)* [2002] EWHC 3106 (Fam); [2003] 2 FLR 285. Recognising this is one reason why English law has been so successful in retaining a home for the children.

143. But there are many cases in which the approach of roughly equal sharing of partnership assets with no continuing claims one against the other is nowadays entirely feasible and fair. One example is *Foster v Foster* [2003] EWCA Civ 565; [2003] 2 FLR 299, a comparatively short childless marriage, where each could earn their own living after divorce, but where capital assets had been built up by their joint efforts during the marriage. Although one party had earned more and thus contributed more in purely financial terms to the acquisition of those assets, both contributed what they could, and the fair result was to divide the product of their joint endeavours equally. Another example is *Burgess v Burgess* [1996] 2 FLR 34, a long marriage between a solicitor and a doctor, which had produced three children. Each party could earn their own living after divorce, but the home, contents and collections which they had accumulated during the marriage could be equally shared. Although one party might have better prospects than the other in future, once the marriage was at an end there was no reason for one to make further claims upon the other.

The ultimate objective?

144. Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast

rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.

Conduct and contributions

145. Is there any need to qualify these aims, considered in the light of all the circumstances and the factors listed in section 25(2)? Two which have emerged in later cases should, in my view, be firmly rejected: conduct and special contributions. Section 25(2)(g) is quite clear: the court has to have regard to the parties' conduct if it would be inequitable to disregard it. In the olden days, when all the assets were assumed to be the breadwinner's and he was making an allowance to enable his wife to live separately from him, the wife's conduct might reduce the allowance she would otherwise have needed or even extinguish it altogether. She had therefore to be 100% blameless in order to be sure of her conventional one-third share of his income. In theory, if she were 50% to blame, her share might be halved, although in practice the divorce courts were more flexible than that (but see, for example, the approach in *Ackerman v Ackerman* [1972] Fam 1, where a wife who was assessed as 25% to blame for the breakdown of the marriage was subject to a 25% discount from what she would otherwise have received). But once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in *Wachtel v Wachtel* [1973] Fam 72, at p 80, the conduct had been 'both obvious and gross'. This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases. Yet in *Miller v Miller*, both Singer J and the Court of Appeal took into account the parties' conduct, even though it fell far short of this. In my view they were wrong to do so.

146. In my view, the question of contributions should be approached in the much the same way as conduct. Following *White v White* [2001] 1 AC 596, the search was on for some reason to stop short of equal sharing, especially in 'big money' cases where the capital had largely

been generated by the breadwinner's efforts and enterprise. There were references to exceptional or 'stellar' contributions: see *Cowan v Cowan* [2001] EWCA Civ 679; [2002] Fam 97. These, in the words of Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); [2002] 2 FLR 1143, at p 1154, opened a 'forensic Pandora's box'. As he pointed out, at p 1155:

> "[W]hat is 'contribution' but a species of conduct? . . . Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences. First, they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward, not back. . . . But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? . . . Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? . . . It is much the same as comparing apples with pears and the debate is about as sterile or useful."

A domestic goddess self-evidently makes a 'stellar' contribution, but that was not what these debates were about. Coleridge J's words were rightly influential in the later retreat from the concept of special contribution in *Lambert v Lambert* [2002] EWCA Civ 1685; [2003] Fam 103. It had already been made clear in *White v White* [2001] 1 AC 596 that domestic and financial contributions should be treated equally. Section 25(2)(f) of the 1973 Act does *not* refer to the contributions which each has made to the parties' *accumulated wealth*, but to the contributions they have made (and will continue to make) to the *welfare of the family*. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it should this be taken into account in determining their shares.

The source of the assets and the length of the marriage

147. Nevertheless, such debates are evidence of unease at the fairness of dividing equally great wealth which has either been brought into the

marriage or generated by the business efforts and acumen of one party. It is principally in this context that there is also a perception that the size of the non-business partner's share should be linked to the length of the marriage: see, eg, Eekelaar, "Asset Distribution on Divorce – the Durational Element" (2001) 117 LQR 552; and "Asset Distribution on Divorce – Time and Property" [2003] Fam Law 828; and *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108.

148. The strength of these perceptions is such that it could be unwise for the law to ignore them completely. In *White v White* [2001] 1 AC 596, it was recognised that the source of the assets might be a reason for departing from the yardstick of equality (see p 610c-g). There, the reason was that property had been acquired from or with the help of the husband's father during the marriage, but the same would apply to property acquired before the marriage. In *White*, it was also recognised that the importance of the source of the assets will diminish over time (see p 611b). As the family's personal and financial inter-dependence grows, it becomes harder and harder to disentangle what came from where. But the fact that the family's wealth consists largely of a family business, such as a farm, may still be taken into account as a reason for departing from full equality: see *P v P (Inherited Property)* [2004] EWHC 1364 (Fam); [2005] 1 FLR 576. So too may be the nature of the assets, where these are businesses which will be crippled or lose much of their value, if disposed of prematurely in order to fund an equal division: see *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69.

149. The question, therefore, is whether in the very big money cases, it is fair to take some account of the source and nature of the assets, in the same way that some account is taken of the source of those assets in inherited or family wealth. Is the 'matrimonial property' to consist of everything acquired during the marriage (which should probably include periods of pre-marital cohabitation and engagement) or might a distinction be drawn between 'family' and other assets? Family assets were described by Lord Denning in the landmark case of *Wachtel v Wachtel* [1973] Fam 72, at 90:

> "It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole."

Prime examples of family assets of a capital nature were the family home and its contents, while the parties' earning capacities were assets of a revenue nature. But also included are other assets which were obviously acquired for the use and benefit of the whole family, such as holiday homes, caravans, furniture, insurance policies and other family savings. To this list should clearly be added family businesses or joint ventures in which they both work. It is easy to see such assets as the fruits of the marital partnership. It is also easy to see each party's efforts as making a real contribution to the acquisition of such assets. Hence it is not at all surprising that Mr and Mrs McFarlane agreed upon the division of their capital assets, which were mostly of this nature, without prejudice to how Mrs McFarlane's future income provision would be quantified.

150. More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality? On the one hand is the view, already expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money's worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.

151. On the other hand is the view that this is unrealistic. We do not yet have a system of community of property, whether full or deferred. Even modest legislative steps towards this have been strenuously resisted. Ownership and contributions still feature in divorcing couples' own perceptions of a fair result, some drawing a distinction between the home and joint savings accounts, on the one hand, and pensions, individual savings and debts, on the other (*Settling Up*, para 128 earlier, chapter 5). Some of these are not family assets in the way that the home, its contents and the family savings are family assets. Their value may well be speculative or their possession risky. It is not suggested that the domestic partner should share in the risks or potential liabilities, a problem which bedevils many community of property regimes and can

give domestic contributions a negative value. It simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition. If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him. Further, great wealth can be generated in a very short time, as the *Miller* case shows; but domestic contributions by their very nature take time to mature into contributions to the welfare of the family.

152. My lords, while I do not think that these arguments can be ignored, I think that they are irrelevant in the great majority of cases. In the very small number of cases where they might make a difference, of which *Miller* may be one, the answer is the same as that given in *White v White* [2001] 1 AC 596 in connection with pre-marital property, inheritance and gifts. The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not 'family assets', or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, "Comment on *GW v RW (Financial Provision: Departure from Equality)*" [2003] Fam Law 386, at p 388) rather than in terms of accrual over time (see Eekelaar, "Asset Distribution on Divorce – Time and Property" [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

153. This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at

the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.

Application in the McFarlane case

154. There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision. In *McFarlane*, there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage. The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life. She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all. The fact that she might have wanted to do this is neither here nor there. Most breadwinners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours.

155. She does, of course, have to consider what she will do in the future. The children will eventually take up much less of her time and energy. She could either return to work as a solicitor or retrain for other satisfying and gainful activity. She cannot therefore rely upon the present level of provision for the rest of her life. But the Court of Appeal was wrong to set a limit to it on the basis that she would save the whole surplus above her requirements with a view to providing for herself once the time limit was up. They were wrong to place the burden upon her of justifying continuing payments, especially now that they have set a high threshold for doing so: see *Fleming v Fleming* [2003] EWCA Civ 1841; [2004] 1 FLR 667. On any view she will continue to be entitled to some continuing compensation, even if the needs generated by the relationship diminish or eventually vanish (although that cannot be guaranteed,

despite her best endeavours, given the length of time she has been out of the labour market and the difficulties of repairing her pension position). The burden should be upon the husband to justify a reduction. At that stage, the court will again have to consider whether a clean break is practicable, as it could be if the husband has generated enough capital to make it realistic.

156. Accordingly, I would allow Mrs McFarlane's appeal and restore the order of the District Judge.

Application in the Miller case

157. In *Miller*, the needs generated by the relationship are comparatively small. The wife will be able to re-establish herself in life within a relatively short time. But she was for some time the fiancée and then the wife of a very rich man. Much of that wealth accrued during the marriage. The New Star shares could not sensibly be valued, but that the husband stood to gain at least £6 million and probably a great deal more from them in the readily foreseeable future was undeniable. The company had been deliberately grown very quickly with a view to disposing of it advantageously in the relatively short term. Mrs Miller never sought to claim a half. The judge eschewed the yardstick of equality because the assets had not been generated by their joint efforts (cf *Foster v Foster* [2003] 2 FLR 299) but by the husband using his pre-marriage assets and expertise to generate substantial extra profits during the marriage. The judge quantified her claim without reference to the unfathomable value of the New Star shares acquired during the marriage, but in such a way as to give her a permanent income upon which she could live in the former matrimonial home albeit at a lower standard than she had been accustomed to during the marriage.

158. That is undoubtedly more than she would need to get herself back to where she would have been had the marriage not taken place. But that has never been the express objective of the law, even in the 1970s and 1980s when the Court of Appeal supported such an approach in short childless marriages. Even without the former statutory objective, the court has to take some account of the standard of living enjoyed during the marriage: see section 25(2)(c). The provision should enable a gentle transition from that standard to the standard that she could expect as a self-sufficient woman. But she is also entitled to some share in the assets. The couple had two homes and there is no reason at all why she should not have a share in their combined value, together with other

assets obviously acquired for the benefit of the family. She is also entitled to some share in the considerable increase of the husband's wealth during the marriage. Had the yardstick of equality been applied to all the assets which accrued during the marriage, she would have got much more than she did. In my view the judge was wrong to take account of the reasons for the break-up of the marriage, but there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage. Whether one puts this as the result of the contacts and capacities he brought to the marriage or as the result of the nature and source of the assets generated (or, put another way, whichever the rationale one chooses from *GW v RW* [2003] 2 FLR 108), it comes to much the same thing.

159. Together her shares in the home and the other assets would amount to something so close to what the judge awarded that it would not be right to disturb the figure which he, with his unrivalled experience as a trial judge in such cases, considered fair. Accordingly, I would dismiss Mr Miller's appeal.

LORD MANCE

My Lords,

160. I have had the benefit of reading in draft the speeches of my noble and learned friends Lord Nicholls of Birkenhead and Baroness Hale of Richmond. Happily, as Lord Hope has observed, there is very substantial common ground, with which I also concur, in the two comprehensive speeches of Lord Nicholls and Baroness Hale, and it would be wrong to venture on a third full speech covering the same ground. The main difference between the two speeches relates, as I see it, to the area covered by Lord Nicholls in paragraphs 17-19 and 54 and by Baroness Hale in paragraphs 148-152.

161. I would however add some observations on particular points, including that area, relating to the appeal in *Miller v. Miller*. First, I agree that both the courts below decided the case on an erroneous legal ground, in so far as they accepted the wife's contention, based on the Court of Appeal's decision in *G v. G (Financial Provision: Separation*

Agreement) [2004] 1 FLR 1011, that the husband's supposed bad conduct, falling short of the threshold stated in section 25(2)(g) of the Matrimonial Causes Act 1973, could be taken into account "as a significant counterbalancing factor to the point made on behalf of the husband that this was a short marriage".

162. In this connection, Singer J said:

> "37. This marriage may well have been doomed, but my conclusions …. are these. H may well have developed an irritation with aspects of W's personality and behaviour. This reflects more his lack of adaptability than any shortcomings on her part. The sum of what he complains is not marriage-breaking stuff. I do not subscribe to his view that his burgeoning relationship with the woman with whom he lives was a consequence rather than a cause of the breakdown.
>
> 38. None of this, to state the obvious, is conduct which it would be inequitable to disregard in arriving at a resolution of the financial dispute. But it has the result that it would be unfair to W to concentrate solely on the bare chronology of this marriage without acknowledging that she did not seek to end it nor did she give H any remotely sufficient reason for him to do so."

163. The Court of Appeal followed its reasoning in *G v. G*, and held that Singer J was entitled to "give much less weight to the duration of the marriage than he would have done had he found that the wife was to blame for its breakdown or that the parties had separated consensually each acknowledging unexpected incompatibility" (per Thorpe LJ, paragraph 31). Thorpe LJ went on in paragraphs 39-40 to cite paragraph 48 of the judge's judgment as showing that:

> "the decisive factor for the judge was that the marriage, taken in its full context, gave the wife a legitimate entitlement to a long term future on a higher plane of affluence than she had enjoyed prior to marriage".

164. There can be few who marry believing that their marriage will be short-lived, however likely this may be on the statistics. Reasonable

expectation of a long marriage cannot itself justify ignoring the reality if it is short-lived. Where there is no conduct which it would be inequitable to disregard, the court should not seek to weigh the parties' respective conduct or attitudes in an attempt to assess responsibility for the breakdown of a marriage, or to attribute "legitimacy" or "reasonableness" to the wish of one party to continue the marriage against the wishes of the other. One problem about any such attempt is evident from the first sentence of paragraph 37 of the judge's judgment quoted in paragraph 162 above. If "this marriage may well have been doomed", what significance can there be in the fact that one party recognised this earlier than the other? How is one to judge between harsh realism and wishful thinking? More fundamentally, section 25(2)(g) recognises the difficulty and undesirability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions - conduct and contributions are in large measure opposite sides of a coin: see e.g. *G v. G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, per Coleridge J at paragraph 34.

165. Both decisions below therefore involved a potentially significant error of approach. The error requires reconsideration of the judge's and Court of Appeal's conclusions as to the appropriate award. The error was obviously material to their reasoning in arriving at their decisions.

166. Secondly, the course of this litigation has to my mind been complicated by the fluctuating stance taken on the part of the respondent, Mrs Miller, in relation to what has been described as the matrimonial *acquest*, the increase in value of the parties' assets during the marriage. Before Singer J Mrs Miller claimed a share of such increase. But Singer J, having heard expert evidence on both sides, found difficulty in ascertaining its size to the point where, as I read his judgment, he effectively abandoned the search for such a measure altogether: see paragraphs 49 to 64 of his judgment. The respondent did not seek to revisit this aspect until the appeal to your Lordships' House, when in her written case and oral submissions she argued that more specific account should have been taken of the matrimonial *acquest*, and sought to demonstrate that certain conclusions could safely be drawn about its size.

167. Thirdly, this is the area where the approaches of Lord Nicholls and Baroness Hale diverge in some measure, at least in principle. On the one hand, on Lord Nicholls' approach, non-matrimonial property is viewed as all property which the parties bring with them into the

marriage or acquire by inheritance or gift during the marriage (plus perhaps the income or fruits of that property), while matrimonial property is viewed as all other property. The yardstick of equality applies generally to matrimonial property (although the shorter the marriage, the smaller the matrimonial property is in the nature of things likely to be). But the yardstick is not so readily applicable to non-matrimonial property, especially after a short marriage, but in some circumstances even after a long marriage.

168. On the other hand, Baroness Hale's approach takes a more limited conception of matrimonial property, as embracing "family assets" (cf *Wachtel v. Wachtel* [1973] Fam 72, 90 per Lord Denning MR) and family businesses or joint ventures in which both parties work (cf *Foster v. Foster* [2003] EWCA Civ 56; [2003] 2 FLR 299, 305, paragraph 19, per Hale LJ). In relation to such property she agrees that the yardstick of equality may readily be applied. In contrast, she identifies other "non-business-partnership, non-family assets", to which that yardstick may not apply with the same force particularly in the case of short marriages; these include on her approach not merely (a) property which the parties bring with them with into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits), but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.

169. Baroness Hale acknowledges that the difference between the two approaches will in the great majority of cases be irrelevant. Further, it seems to me that after a short marriage it may in reality often be difficult to determine precisely what assets (other than family assets) were generated during the marriage. The present case is an example, with arguments about whether Mr Miller can be said (by reason of his contacts, his gentleman's agreement with Mr Duffield and/or his experience) to have brought into the marriage any asset relating to his potential interest in New Star. To take into account the shortness of a marriage could enable a court to cut through some of these more intricate arguments in a manner consistent with section 25(2)(d) of the 1973 Act. More fundamentally, to allow the duration of a marriage as a relevant factor would cater for the considerations that, while some people may make a large amount of money in a short time, the nature of their work or other factors may mean that they do not do so at a consistent rate over their lives as a whole or for more than a short period of their lives, and furthermore, as Baroness Hale has pointed out, that there may be long-term risks in relation to non-business-partnership, non-family assets which remain with those directly involved in generating them. The longer the marriage, the less likely these are to be

significant considerations. In a short marriage, the timing of which may or may not coincide with a period of significant increase in the value of non-business-partnership, non-family assets, such considerations argue in favour of some further flexibility in the application of the yardstick of equality of division. I see force in and would agree with the views expressed by Baroness Hale in paragraphs 152-153 of her judgment to the effect that the duration of a marriage, mentioned expressly in section 25(2)(d) of the Act, cannot be discounted as a relevant factor.

170. Fourthly, and whatever the position on the third point, I agree with what Baroness Hale has said in paragraph 153, which is, as I see it, also consistent with the last sentence of paragraph 25 of Lord Nicholls' speech. The present marriage had what one might call a traditional aspect. Mr Miller worked, and Mrs Miller gave up work to look after him. But there can be marriages, long as well as short, where both partners are and remain financially active, and independently so. They may contribute to a house and joint expenses, but it does not necessarily follow that they are or regard themselves in other respects as engaged in a joint financial enterprise for all purposes. Intrusive enquiries into the other's financial affairs might, during the marriage, be viewed as inconsistent with a proper respect for the other's personal autonomy and development, and even more so if the other were to claim a share of any profit made from them. In such a case the wife might still have the particular additional burden of combining the bearing of and caring for children with work outside the home. If one partner (and it might, with increasing likelihood I hope, be the wife) were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony. Once needs and compensation had been addressed, the misfortune of divorce would not of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married.

171. Fifthly, Singer J was inclined to assimilate to property inherited or brought into a marriage property which was generated by one spouse "using his or her pre-marriage assets or on the back of his or her pre-marriage 'fledged' experience" (paragraph 69). The word "fledged" arises from the reasoning of Mr Nicholas Mostyn QC in a judicial capacity in *GW v. RW (Financial Provision: Departure from Equality)* [2003] EWHC 1 Fam; 2 FLR 108, paragraph 51, where he treated "a developed career, existing high earnings and an established earning capacity" as "as much a non-marital asset as the provision of hard cash"

and as "a contribution unmatched by any comparable contribution by W". In the present case, Mr Mostyn QC representing Mrs Miller was accordingly prepared before the judge to discount any claim by Mrs Miller relating to the matrimonial *acquest* (from 50% to 37.5%) to take into account that Mr Miller "brought very valuable acquired expertise and acumen to this marriage".

172. A possible difficulty about this approach is that it reintroduces, at the commencement of the marriage, a requirement to attempt to assess and compare the value of the contributions which each party is or would be likely to make during or apart from the marriage. I am not very confident that an established earning capacity or very valuable acquired expertise and acumen would, if viewed as "assets" brought into a marriage, be easily or reliably measurable or comparable with other qualities, or indeed how far would one carry the enquiry into expertise and acumen. The concept of "fledging" is probably anyway one which would diminish in relevance, the longer the marriage, so that, in the light of the answer I would give to the third point above, the answer to this fifth point may be correspondingly less important.

173. On the other hand, where at the beginning (or end) of the marriage an actual transaction is under way or in view which in due course yields a considerable new asset, there is no difficulty in principle (even if there may be some difficulty in valuation) in accepting that part of that asset may have to be excluded from any assessment of the matrimonial *acquest* or included in what the parties brought into the marriage. In the present case, Mr Miller already had, at the marriage date, real connections in the form of the Jupiter funds which he later took to New Star and real prospects under the gentleman's agreement made with Mr Duffield of acquiring, as he subsequently did, valuable shares in New Star. I would regard these as real contributions brought into the marriage, which should on any view be taken into account accordingly.

174. Sixthly, if account is taken of the increase in the value of the parties' assets during the marriage (the matrimonial *acquest*), a question may arise about the date up to which one should measure it. Should this be up to date when the parties ceased effectively to live as married partners (here April 2003), as Mr Mostyn considered in his judicial capacity n *GW v. RW (Financial Provision: Departure from Equality)* at paragraph 34? Or should it be up to a later date such as the date of trial, or even, in a case where an appellate court thinks it right to re-exercise the discretion, up to the date of the appellate decision? Reference was

made by Mr Mostyn to my remarks in *Cowan v. Cowan* [2002] Fam 97, paragraphs 130-135. The matters to which the court must have regard under section 25 include several which exist or appear likely as at the date the court has regard to them (cf section 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look back at the past (e.g. section 25(2)(c), (f) and (g)). To the extent that the focus is on the matrimonial *acquest*, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance. The present may be viewed as a case (paralleling the then unreported decision of Coleridge J in *N v. N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 to which I referred in *Cowan v. Cowan*) where the increase in value of the New Star shares between separation in April 2003 and trial in October 2004 or judgment in April 2005 was contributed to by the husband's further investment of time and effort, independently on its face of any contribution by the wife. Further, Mrs Miller had here no right to, and could not have been given, any part of Mr Miller's New Star shareholding in relation to which Mr Miller carried the risk. Mrs Miller has at all times been living in the house, which has now been formally transferred to her. Her only further claim was to a sum of money, assessed by the judge at £2.7 million (which Mr Miller paid in two instalments in May and June 2005). Mr Miller cannot easily be said in this case to have been holding on to any asset which should have been Mrs Miller's, or to owe anything other than money. Assuming that the focus is on assets acquired during the marriage, rather than on the husband's overall means, it seems to me therefore natural in this case to look at the period until separation.

175. Seventhly, so far as concerns the resolution of this appeal, Mr Miller was a very wealthy man both before and at the end of the marriage. Leaving on one side the New Star shares, he had brought into the marriage in July 2000 assets of £16.7 million and he had at the time of separation in April 2003 assets of £17 million and at the time of trial assets of £17.7 million. The New Star shares had been promised to Mr Miller by Mr Duffield under the gentleman's agreement of May 2000, whereby Mr Miller would, if he could, move from Jupiter and would join, and receive shares, in a new company - New Star - which Mr Duffield in fact established in June 2000. The realisation of this gentleman's agreement depended on Mr Duffield arranging for Commerzbank to release Mr Miller. Mr Duffield was able to arrange this on 22nd November 2000, and Mr Miller was allotted 200,000 shares for £200,000 on 31st January 2001.

176. Of the 200,000 shares, 75,000 were subject to an option agreement, and Mr Miller was subject to restrictions precluding him

from realising any immediate value in respect of any of them. He was also subject to "share leaver" arrangements, whereby he could, in certain circumstances (e.g. dismissal for cause), be obliged to dispose of all 200,000 shares at par, i.e. for £200,000. . On a number of occasions after January 2001, New Star raised money by issuing further shares, subject to differing rights or restrictions (the effect of which was not explored before the House), at prices varying from £80 for E shares in March 2001, to £150 for G shares in December 2001, to £80 for A shares in September 2003 and £90 in October 2003. Monies so raised were used to expand the business and to acquire the rights to manage further funds. Funds under management increased from £300 million in January 2000 to £8.5 billion at trial in October 2004, gross annual income grew from £17.58 million to £83.5 million, and annual income before interest, tax, depreciation and amortisation was minus £8.8 million in New Star's initial trading period but had become a positive £23.77 million by trial.

177. The experts put before the judge widely varying figures for the value of Mr Miller's shares at trial, ranging from £12.35 million to £18.11 million on a notional sale between willing vendor and purchaser, in each case *after* allowing a discount to reflect the possibility that Mr Miller's employment might be terminated in circumstances requiring him to dispose of the shares at par. At the end of the day, all that the judge was confident enough to say was that there was "a good likelihood that at some stage the potential of his shares will be unleashed" (paragraph 41) and, more specifically, that unless Mr Miller was unlucky enough to trigger an obligation to sell his shares at par, he was "likely to receive £6M gross upon the exercise by the end of December 2006 of the option he was required to enter into to sell 75,000 of his shares for £80 each" (paragraph 63).

178. In the event Singer J concluded simply that Mrs Miller should, for as long as she might wish, have the opportunity to continue to live in the former matrimonial home, the value of which was £2.3 million, and that in addition Mr Miller should transfer to her the sum of £2.7 million, which should generate a net annual income of about £98,000 p.a., making her "able to live to a very tolerable standard in that house". He concluded his judgment by saying in paragraph 73:

> "A global award equivalent to £5M (plus the furniture and chattels which have been agreed) seems to me a fair outcome irrespective of whatever value H in due course may achieve for the New Star shares".

179. As I have already indicated, the reasoning which led to this conclusion cannot be sustained, so that the House must reconsider the appropriateness of the judge's award afresh.

180. The relevance of the value of the New Star shares at the date of trial is in the context of this case also open to question (cf my sixth point above). But even at the date of separation in April 2003, the 125,000 shares not subject to any option must have had a sterling value running into eight figures. Against this could be set the value of the contribution that Mr Miller brought into this short marriage, in the form of the Jupiter funds which he took to New Star and real prospects under the gentleman's agreement of acquiring, as he did, valuable shares in New Star (the fifth point above).

181. Within three months of the Court of Appeal's judgment, New Star was floated on the Alternative Investment Market in a transaction which Mrs Miller maintains would on any view enable a value to be attached to Mr Miller's shareholdings (by then converted from 200,000 into 20 million shares, by a one for 100 share substitution). Within three months of the hearing before the House, your Lordships are told, Mr Miller (under commercial pressure by reason of alleged investment under-performance) has had to agree to revise his share arrangements so that in respect of either 6.05 million or 6.55 million shares (depending on further investment performance) he will now not receive more than his money back (i.e. 1p per share). But, at the same time, the stringency of the "share leaver" arrangements to which he was subject has been somewhat relaxed; and the value of each share has, we are told, continued to climb. For my part, I do not think that these developments can or should affect the outcome of this appeal. They do not bear on what I have called the matrimonial *acquest*. They do not do anything to alter the conclusion that the amount now awarded to Mrs Miller will, however substantial in itself, have no major impact on Mr Miller's very substantial wealth or life.

182. Taking into account all the above observations, I might by myself have arrived at an award in Mrs Miller's favour of less than £5 million, but I shall not carry my doubts on this aspect to the length of dissent in the case of *Miller v. Miller*. In the case of *McFarlane v. McFarlane*, I have nothing to add to what is said by my noble and learned friends, Lord Nicholls and Baroness Hale, with which I agree.