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Pensions

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PENSIONS

Needs vis a vis Apportionment

ONE

W v H *(divorce financial remedies)* [2020] EWFC B10,

KM v CV *(Pension Apportionment: Needs)* [2020] EWFC B22 and

RH v SV *(Pension Apportionment: Reasons)* [2020] EWFC B23

These three-case set out with clarity, the approach the courts and lawyers [and of course LIP] should take in relation to the distribution of pensions on divorce in needs cases.

These cases set out with clarity the approach of the courts – it is right to say however, that in the case of **KM v CV** and **RH v SV –** these were cases on appeal and both had somewhat rather protracted and convoluted histories and were not just appealed on matters relating to the pension – however, this is the only aspect of those cases I will deal with here.

TWO

The trial Judge, in *W v H* was His Honour Judge Hess, who is the co-chair of The Pension Advisory Group (PAG), which is a multi-disciplinary group of professionals specialising in financial remedies and pensions on divorce, supported by the Family Justice Council and the President of the Family Division

THREE

The group published a very detailed report on pensions and divorce in July 2019.

The report hopes to improve communication amongst the professionals and help address the shortfall in understanding about how they should deal with the valuation, sharing or offsetting of pension fund assets in divorce settlements.
If you have not yet read this report, let me suggest you do so immediately:

https://www.nuffieldfoundation.org/news/new-good-practice-guide-addresses-shortfall-understanding-how-treat-pensions-divorce

In ***W v H*** the Judge said that the PAG report "should be treated as being prima facie persuasive in the areas it has analysed"

FOUR

In a nutshell whilst acknowledging that there can never be a, "one size fits all" approach in ***W v H HHJ*** Hess concluded that:

- In a needs case, where the parties are nearing retirement and defined benefit schemes are involved, equal sharing of pension income is more likely to be appropriate than equal sharing of pension capital
- It may not be appropriate to exclude pension accrued prior to the marriage in needs cases
- Offsetting should be avoided where possible.

FIVE

Facts
Alas, this is a case which requires quite a detailed resume of the facts and circumstances – in order to proceed fairly swiftly with this, I have

not applied the use of slides in relation to a good deal of the background.

The history of the marriage is as follows: -

(i) The wife is aged 50. She had not been married before meeting the husband and had no children.

(ii) The husband is aged 48. The husband had been married and divorced before his relationship with the wife. There were two children from his first marriage, now in their mid-twenties.

(iii) The parties met in 1998 and started a relationship of cohabitation in 1999. They met through their mutual employment in X financial services company. The wife left her employment in 2001 when she became pregnant with her first child.

(iv) The parties married in 2005.

(v) From 2011 onwards the parties lived together at the family home in Wiltshire

(vi) The marriage broke down in 2016. The parties separated in February 2016 when the husband told the wife that he had commenced a relationship with R, a business associate of his aged in her early thirties. The husband moved out of the family home in February 2016 and has subsequently lived in rented accommodation with R. The wife has remained with the children in the family home.

(vii) The wife commenced divorce proceedings in August 2016.

(viii) Decree Nisi was ordered in November 2016.

(ix) Decree Absolute awaits the outcome of the financial remedies proceedings and is not, in itself, controversial.

The parties have three children from the marriage: -

(i) 18, 16 and 10 years of age.
(ii) All the children have remained living in the family home with the wife.

The financial remedies proceedings chronology, spread over two years, is as follows: -

(i) The wife issued Form A on 26th February 2018.

(ii) Forms E were exchanged in June 2018.

(iii) A First Appointment took place before District Judge Bloom-Davis on 15th October 2018.

(iv) An FDR took place before District Judge Bloom-Davis on 14th October 2019.

(v) Narrative statements were exchanged in January 2020 for the final hearing in February 2020.

SIX

The capital assets were limited to the family home, which had a net value of £242,000.00. Both parties had debts, including legal costs, the wife's debts amounting to £64,000.00 and the husbands amounting to £53,000.00.

SEVEN

The court had to decide how the family home was to be addressed, was it to be sold immediately or at a later date?, and the level of maintenance both for the wife and the children because the husband had a salary of around £144,000.00 per annum. I do not deal with those matters in this lecture.

EIGHT

The pensions under consideration consisted of two schemes held by the husband (one defined benefit plan worth £2,155,475 and another defined contribution plan worth £58,653) and two schemes held by the wife (one defined benefit plan worth £138,939 and a defined contribution plan worth £13,798).

NINE

Pension orders sought:

- W sought an order providing for equality of income
- H argued for equality of capital

Whilst I have said I will focus on the pension's issues – the following is likely to assist in understanding the approach of the court in relation to pensions.

The wife sought to persuade the court that her greater cash contribution to the parties' first family home provided extra justification for her having 100% of the net equity in the family home, the only realisable asset remaining; but the judge did not find this argument persuasive - since it ignores the obvious facts that the husband contributed a great deal more than the wife in his substantial earnings over many years of marriage (as well as some early cash contributions as well) and also that the wife's initial contributions were very much mingled over time into the jointly owned family home - which is undoubtedly a matrimonial asset.

The husband sought to persuade the court that his pre-cohabitation pension accrual should be excluded in the division of pensions – for the reasons set out below the court did not I did not find that argument persuasive.

The judge said that if there was any reason for departing from equality of capital in this case it is not to be based on contributions.

The judge remarked that it was neither necessary or appropriate for him to get involved in the detailed assessment and quantification of contributions here. Rather, he regarded the needs issues here far outweighed any significance arising from the different contributions respectively made.

TEN

The judgement considers the following three key issues in relation to these pensions:

- Should the pensions be divided so as to produce equality of income or of capital values?
- when dividing pensions with an eye to achieving equality, should the court "ring fence" a percentage of the pensions if they accrued prior to the parties' marriage (including seamless pre-marital cohabitation)?
- should the court offset some of the wife's pension claims against an enhanced share of the proceeds of sale of the former matrimonial home?

ELEVEN

The judgment quotes extensively from the 2019 report of the Pension Advisory Group ('PAG') - this is hardly surprising as The President of the Family Division, has made clear that the report offers "*formal guidance to be applied when any issue regarding a pension falls to be determined in Financial Remedy proceedings".*

TWELVE

Equality of income or capital?

HHJ Hess found that the pensions should be shared so as to produce equal income in retirement. In reaching this conclusion the court noted that, whilst there are a number of scenarios where the fair solution is to divide pensions by capital value (including where they are relatively small as a proportion of the overall assets and/or where the parties are young and projections about future pension income are meaningless), there are a number of common situations where doing so will not provide a fair outcome. These include cases where the pensions are significant within the overall assets but where considerations of needs still predominate, where one or more of the pensions involved is a defined benefit scheme and/or cases where retirement is "on the horizon".

The Judge quoted a particularly persuasive passage of the PAG report (from page 31)

Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement. Where they are further from retirement, it is arguable that the number of assumptions made in an "equal income" calculation will render a

calculation less reliable…. A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly.

The Judge also endorsed similar sentiments expressed in the Family Justice Council's report "*Guidance on Financial Needs on Divorce*" (2018 edition) where it is stated: -

> *"In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the "pension freedoms" introduced by Taxation of Pensions Act 2014… as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see SJ v RA [2014] EWHC 4054 (Fam) and JL v SL [2015] EWHC 555. In small to medium money cases, however, where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a Pension Sharing Order (for example because of an external transfer from a defined benefit scheme to a Defined Contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see B v B [2012] 2 FLR 22"* (page 23).

In a nutshell – whilst, as the judge has said, each case turns on its own facts there must be merit in the argument that, given that the purpose of a pension is to provide income in retirement rather than to store capital, and given that the search for fairness most often begins and

ends with the consideration of need, an order for equality of income is likely to be the fair outcome in a significant number of cases.

THIRTEEN

Should the court exclude the pre-marital elements of the pensions

The H argued that a part of his pension was pre-marital and so should be excluded leaving 58% to be included - this had a dramatic effect on the pension income available for division

The second question considered by the court was whether to exclude a proportion of a spouse's pension when earned before the marriage/cohabitation. In this case the husband argued that a part of his pension was pre-marital and so should be excluded leaving 58% to be included, which had a dramatic effect on the pension income available for division.

FOURTEEN

The Judge did not agree saying, "in my view this approach carries with it significant risks of unfairness as the mathematics of the present case undoubtedly would illustrate".

The Judge drew attention to Pg. 22 of the PAG report: -

> *"an important initial question is whether pensions should be handled any differently according to whether the case is governed by the needs principle (where, broadly speaking, the assets do not exceed the parties' needs), or the sharing principle (where, broadly speaking, the assets do exceed needs). The vast majority of cases - including cases involving low £millions - will be needs-based. Given the Lifetime Allowance, even a 'big' pension case will usually be a needs-case - it is non-pension assets that will generally take a case out of the needs bracket…One central issue is when regard may be had to*

> *the timing and source of pension savings. It is important to appreciate that in needs-based cases, just as is the case with non-pension assets, the timing and source of the pension saving is not necessarily relevant - that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met"* (page 22).

He observed the main means of meeting post-retirement income for both parties came from the husband's DB pension and "it is difficult to see that excluding any portion of the pension has justification" and he went onto refer to the House of Lords case of ***White -v- White*** **(2000) UKHL54** - In the words of Lord Nicholl

> **"*in the ordinary course, this factor".* i.e., the factor that the property concerned is non-matrimonial…*"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".***

The court also referred to the Lifetime Allowance introduced to limit pension tax advantages; the allowance is currently £1,055,000. Effectively that means in the overwhelming majority of cases the value of pension funds is likely to place them in the category of needs cases. – I make mention of this later.

FIFTEEN

Excluding part of a pension is both difficult and unfair where it is a defined benefit pension scheme based on a final salary. The pension will accrue significantly more value in later years when the pension member has reached a higher salary level

SIXTEEN

Offsetting

Whilst accepting that many litigants choose to engage in offsetting, the judge noted the potential for unfairness where one party is left with non-realisable assets and the other with the liquid capital. He acknowledged that the orthodox view is, a pension should be dealt with separately from other capital assets and the PAG report endorse this, stating the parties should "if possible, deal with each asset class in isolation and avoid offsetting". HHJ Hess expressed his concern that, "it is undoubtedly the case, however, that many litigants choose to blur the difference between the categories and engage, to a greater or lesser extent, in an offsetting exercise. It needs to be borne in mind, however, that mixing categories of assets runs the risk of unfairness in that the valuation issues become very difficult, and absent agreement, it may be unfair anyway to burden one party with non-realisable assets while the other party has access to realisable assets" In this case the husband would receive his share of the family home but it was deferred to enable the children to have a home as well as the wife

SEVENTEEN

It is worth noting that the PAG report's comments in relation to offsetting are particularly significant not least because it notes that the "overwhelming majority" of negligence claims made against family lawyers is in relation to pensions involving offsetting. In short, an expert's (or PODE as they are now known) report should be a prerequisite in any case where offsetting is to be carried out.

EIGHTEEN

KM v CV [2020] EWFC B22

This case has a protracted litigation history and quite a detailed resume of this is necessary – in order to proceed fairly swiftly with this, I have not applied the use of slides in relation to a good deal of the background. I remind you though – more than happy to send out a full text of the lecture if requested.

NINETEEN

This was an Appeal by the H against the decision of District Judge Thomas, made in Financial Remedy proceedings on the 8th February 2019. The Appeal was heard on the 7th February 2020, the J having given leave to appeal on limited grounds on the 11th October 2019.

The Background

The parties started a relationship in 1988. They had a son, C, who was born in 1993 and is now 27 years old. They were married on the 26th August 2008. They separated in 2011, and the Husband remained in the matrimonial home. Decree nisi was pronounced on the 20th December 2016.

W - 49, worked a as police officer

H - 59, did not work due to a number of mental health difficulties with his income solely from state benefits.

When the parties separated in 2011, the wife's pension had a CEV of £43,000. However, there had been a long period of separation and by December 2017, this had grown to £131,544.

History of the litigation

The history of the financial remedy proceedings is complicated. It seems that on the 5th December 2017, before DDJ Rahman, it was agreed that the home would be sold, the wife's mother repaid £20,000 and the remaining equity divided equally, but listed for a final hearing before DDJ Pithouse on the 26th June 2018. The Husband did not attend on the 26th June and an order was made striking out his application for a pension sharing order and for sale of the home. On the 16th August 2018 HHJ Backhouse set aside the June order.

This history figured in the hearing before DJ Thomas on the 11th February 2019. He dealt first with the Husband's application for an adjournment and refused it. He then dealt with the Agreement made before DDJ Rahman in relation to the home, and refused to vary it, so that the only issue before the court was whether or not to make a pension sharing order.

The hearing was obviously not easy – in the vernacular, it was a mess and alas, all too frequent these days where there are litigants in person. There was no trial

bundle; it was difficult to locate relevant documents; statements were not signed; authorities were provided by email during the hearing and were not provide to the husband; DJ Thomas considered adjourning the hearing as a result, but concluded that he was able to come to a fair and just conclusion.

TWENTY

In the first instance, the Judge held that the correct date of the pension was the value at the point of separation in 2011 and an equal division would give the husband £21,500 from the wife's pension. The Judge further held the husband had caused the mortgage arrears and these arrears extinguished his share of the wife's pension, and so no pension share should be made.

The husband appealed this**,** suggesting the up-to-date pension CEV should be used and that the wife's pension was a matrimonial asset because it was in existence when the parties married. The appeal was also based on the grounds that the Judge's approach in disregarding

the wife's pension accumulated since 2011 may apply in high value cases (where there are sufficient other resources to meet the party's needs) but this was a 'needs case', and he would be unable to provide for himself or meet his needs in retirement if the entirety of the wife's pension was not taken into account.

The Issues

The Appellant's Notice raised two issues, the payment of £20,000 to the wife's mother from the sale of the home and the lack of a pension sharing order. On the 11th October 2019 the court refused to grant permission is respect of the £20,000, which had been agreed before DDJ Rahman. but did give leave, limited to two grounds, namely:

1. Whether the Husband in fact made contributions to the mortgage of about £11,000 in cash to the Wife's account as shown by bank statements which were before the court but not considered, and whether this would make any difference;

2. Whether the Learned Judge used the right approach to the valuation of the Wife's pension, and whether it would have made any difference in the light of the parties' respective needs and contributions.

At the appeal itself – the court held that the issue in relation to the £20,000 was without merit – leaving only the pension issue.

TWENTY-ONE

The Wife's Position

The Wife supported the Judge's decision. She asserted that

- the post separation 'pot' should fall outside the ambit of 'matrimonial assets';
- that of her service of 15 years, only 7 of which were pre and during the marriage.

- Any increase in the value of the assets is quite different from 'passive growth'.
- her contributions post separation significantly outweigh the Husband's interest in the pensions fund.
- Her own needs are significant;
- she does not have any prospect of owning a property,
- she has debts which are the subject of a debt management plan and will need all the income from what is a modest pension to meet her future needs in retirement.

TWENTY-TWO

The Decision – EXTRACT FROM THE JUDGEMENT

26 This is clearly a case about needs. The husband is on benefits, and on the evidence vulnerable. The wife, too, claims needs, as she does not have secure housing and has debts and mental health issues, albeit they do not prevent her from working. While contributions must be considered, the judge appears to have discounted all other factors in the s25 exercise in favour of the contributions point.

28. In short, the Judge appears to have been led into error by an over emphasis on the non-matrimonial accrual of part of the pension and of contributions over needs.

TWENTY-THREE

29. The lack of a report from a Pension on Divorce Expert (PODE) did not make the Judge's task easy. I can see the difficulty in obtaining such a report, given the parties' lack of funds to afford one. Nonetheless, the Report recommends that where there are public sector pensions with a value of over £100,000 a Report should be obtained. Police pensions are

particularly affected as the length of service and benefits are generous, and the issue will be what pension is likely to be generated on retirement.

30. There is also the difficulty of estimating future needs when the Husband is and will be in receipt of State benefits needs. At Part 11.19 of the PAG report, dealing with the interplay with state pensions and needs, the report advises:

"Lawyers who are advising in lower income cases need to be aware of the potential interaction any pension sharing order or pension offsetting with eligibility for means testing both before and after state pension age in case this is material to the case, and to take specialist advice if this is likely to be an issue for one or both parties".

This is exactly the issue in this case, as it is the Husband's case that he will suffer a loss of income on retirement which would be countered by a modest pension income, and without losing means tested benefits. I note that the Skeleton Argument on his behalf says that based on £137,000 with an annuity of 3% representing 30% of the pension pot he would receive £79 per week which would ensure that his income is maintained at the current level. I have no way of knowing at this stage whether these assumptions are correct, or what effect they would have on her income in retirement.

TWENTY-FOUR

31. The correct approach must be to conduct a comparative analysis of the parties' respective income and needs in retirement, taking into account all the s25 criteria, including health, needs and contributions, and the extent to which the Wife's pension should be apportioned.
Only then can a fair decision be reached.

32. It would be excessive to hold a complete rehearing, and the Judges factual findings are not the issue. After handing down this Judgment, I will hold a Directions hearing at which I will consider what steps should be taken to obtain the necessary information, and how, and before whom the matter should be decided.

TWENTY-FIVE

RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

Is an appeal from a decision of DDJ Roffey – the appeal heard by HHJ Richard Robinson This case has a protracted litigation history and quite a detailed resume of this is necessary – in order to proceed fairly swiftly with this, I have not applied the use of slides in relation to a good deal of the background.

TWENTY-SIX

The Background

The parties started to live together in July 2004 and were married on the 9th December 2005. They had one child, A, who was 14 at the time of the hearing. She lives with her mother and has contact with her father.
They separated in October 2017 and the wife petitioned for divorce; decree nisi was pronounced on the 30th October 2018. Decree absolute was made on the 27th August 2019.

The final hearing before DDJ Roffey took place on the 16th and 17th July 2019 and he finalised his Order on the 27th August 2019.

The Judge's findings of fact are set out in the Judgment. The husband is 58, a commercial adviser with a large company. He has a gross annual income of £109,730 and a location allowance of £1,500, with share dividends giving a net monthly income of £6,235. The wife is 53, and has not worked for 15 years, having stayed at home to look after A. She retains a practicing certificate as a solicitor. She is still living in the former matrimonial home. She receives tax credits and child benefits of £4,100 a year together with maintenance from the Husband.

TWENTY-SEVEN

The matrimonial home is worth £410,000, the mortgage having been paid off. The Husband has a new property worth £26,550 and accounts with £81,807, but debts of £2,966. The husband's pension fund was valued at £1,462,290 as at April 2019. There was a Report on Pension Sharing and Valuation of Pension Rights on Divorce dated 20th November 2018 and an addendum dated 22md November 2018.

TWENTY-EIGHT

The Order

The Order transferred the former matrimonial home to the Wife subject to a charge of £102,500 or 25% of the gross value of the property, whichever was the less, not to be enforceable before A reaches 21 or ceases full time education, or the wife's remarriage or cohabitation. There was an order for periodical payments of £1,500 a month (less CMS payments) until August 2020 and at 5p a year until 1st July 2021 whereupon her claims for periodical payments are dismissed. There was a bar against an application for extension of this term. The husband would still be liable for A under the CMS and was ordered to pay for her extramural activities. There was also a pension sharing order for 25.8 per cent of the Husband's Pension Plan.

TWENTY-NINE

The Appeal

The Appellant's Notice was lodged on the 12th September 2019. It raised a number of grounds. The court consider the notice on the 25th October 2019 - the judge held:

(1) With respect to the order for a change back on the matrimonial home, I see no grounds for interfering with the decision. The property was valued at £410,000 and the judge found that that when the charge was triggered the wife would be able to purchase a new property with her share of the proceeds and without a mortgage by downsizing. In those circumstances it would be unfair to deprive the Husband of all share in the main matrimonial asset.

(2) I do however consider that there may be an arguable caser in respect of the pension share. The pension calculations were complex and uncertain, but I recognise the point that the Judge needed to consider the sufficiency of this pension share as against the parties needs and was not limited to the mathematical calculations relating to the portion of the value acquired during cohabitation, when needs were in issue.

(3) With regard to the s28(1)(a) bar, I do consider that there is an arguable case, particularly as it was take effect while the child of the family was still at school.

Accordingly, I am now only concerned with these two issues.

THIRTY

7. Of these, the pension argument is the more significant. In the first instance Judgement at page 13, the Judge explains his decision as follows:

> *"I propose to make a pension sharing order in favour of the wife to the extent of 25.8% of the husband's occupational pension fund to provide equality of the CETV vales calculated by reference to the period July 2003 to November 2008. Such an order would*

enable the wife to receive a pension of between £13,780 and £14,730 if she does not draw down on her retirement cash sum. This would be on top of her basic state pension which would be maximised if she continued to contribute until her retirement. I consider this to be a fair and reasonable approach to take to the division of her pension"

THIRTY-ONE

Judgement

12. The approach to pension sharing has been the subject of the recent important Report of the Pensions Advisory Group published in July 2019. The issue of Pension Apportionment was considered and the conclusions set out at Part 4. This contrasts the treatment of pensions in needs-based cases and those to which the sharing principle applies. At 4.3 the Report says (my emphasis):

*"It is important to appreciate that in **needs-based cases**, just as is the case with no pension assets, **the timing and source of the pensions savings is not necessarily** relevant - that is to say a pension holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were acquired prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met*

*"By contract, in a sharing case, the question whether all or some of the pension assets are to be treated as 'non-matrimonial property' and so not ordinarily to be distributed pursuant to the sharing principle is a **live** one".*

THIRTY-TWO

13. The difference between the treatment of pension assets created on either before or after cohabitation as non-matrimonial assets and the relevance of contribution under s25 (2) (f), may be difficult to judge in practice in needs-based cases. As a general rule, courts assume that **contribution-based arguments are of less weight when**

needs take precedence, and assets which are strictly non-matrimonial can be taken into account.

THIRTY-THREE

16. I do not consider that there is anything inherently wrong with aggregating the value of capital and pension assets for the purpose of comparison, providing that it is recognised that this is not a comparison of equal values. Provided that it is recognised that the orchard provides different types of fruit it is not wrong to look at the division of the total crop. The continuing income position must also be considered in assessing fairness.

THIRTY-FOUR

18. It may be possible to question his needs analysis, but it is plain that the Judge did consider the balance, giving the Wife a higher proportion of the capital and the Husband a greater share of the pension assets. It is more important that he did conduct this analysis than whether the source of the pension was determinative.

What in effect the judge determined - as long as needs had been assessed adequately by the court, then a decision which provided for ring fencing, and/or offsetting was not of itself wrong. The central point of the case is – needs trumps all, but if needs are considered and the order meets those needs – then consideration as to accrual and comparison of, or aggregation of, liquid assets with pension assets, is permissible. Because needs had been properly assessed – then he could see no grounds for interfering with the decision.

THIRTY-FIVE

19. An appellate court will only interfere with a decision of a lower court if it was wrong or unjust because of a serious procedural or other irregularity. Despite my concerns about the apparent ring fencing of the pension pot, I have concluded that the Judge was entitled to reach the conclusions that he did on the evidence that he heard, and that there are no sufficient reasons to interfere with his decision. Accordingly, this aspect of the Appeal is dismissed.

THIRTY-SIX

LTA – LIFE TIME ALLOWANCE - this is complex and it is not my intention to deal with this in any depth. My main aim is to flag it up as an issue and to impress upon everyone that this is any important aspect of many cases these days.

The LTA is a limit upon the total tax-advantage pension benefits that an individual may accrue, and is at present £1,073,100 (in the financial year ending April 2021, with adjustments made on an annual basis). Issues pertaining to the LTA may arise when parties with large pensions divorce. While in many cases the divorce may lead to a more efficient use of LTAs overall – in particular, where one party has significant pension benefits and the other only minimal – the LTA may be a source of pitfalls for practitioners and their clients.

THIRTY-SEVEN

W v H, where Judge Hess noted (para [63] (ii)):

> It has been suggested by Mr Galbraith from Mathieson Consulting Limited, the PODE instructed in this case, in his report . . . that (for reasons convincingly explained in detail by him which have been accepted by both parties, and which include a proper consideration of the Lifetime Allowance and Fixed Protection issues arising here) the appropriate equalisation age on the facts of this case is 60 (rather than the normal 65 or 67). I propose to adopt this recommendation.'

THIRTY-EIGHT

> The reference to Lifetime Allowance issues is apposite to the present case. Introduced as a matter of government policy to restrict the use of the tax advantages of pension funds, the Lifetime Allowance was significantly reduced in April 2016 (from £1,800,000 to £1,000,000) and currently stands at £1,055,000. The effect of this change is that there are tax disadvantages for individuals using pension funds once their value reaches this figure. There are a number of historic fixed protection regimes which have, for some, have ameliorated the effect of these changes (indeed the husband in the present case opted into the 2014 fixed protection scheme), but the overall effect in most of these cases is to limit the attractiveness of pensions above the Lifetime Allowance levels such that, as PAG has noted, it is quite unlikely that pension funds will themselves take the case outside the category of a needs case. It may be that other assets will

perform that task, but where (as in the present case) the pension funds are the major asset, the case is more likely to fit within the 'needs case' category.

THIRTY-NINE

Further, in many cases, and the present case is a good example, the straight-line methodology of calculation, though simpler and easier to apply in practice, conceals an unfairness in that the value of a defined benefit pension scheme based on final salary does not accrue on a straight-line basis, especially if the member spouse concerned starts work as a lowly paid junior employee and rises to a highly paid director level many years later. The pension will accrue much more value in its later years when the member spouse has reached the high salary level and this is likely to be, as it is in the present case, firmly during the marriage. Thus, where an apportionment is to be made, the straight-line methodology of apportionment may well not be fair and some caution needs to be exercised before using it if other fairer methodologies are available. Other methodologies include inviting the PODE to make a notional calculation of the current CE on the basis that the member spouse's earnings rose only with inflation in the post-marriage period - I note the PODE was not invited to make these calculations in the present case.

FORTY

Conclusion

There is no major amendment to the law here – but these cases have provided useful clarification on the interpretation of the PAG Report. They can be cited as helpful precedents when trying to convince a Judge of the following arguments:

- The court should seek to equalise income rather than capital values when determining pension division
- The most likely date for pension calculations is the date of trial - not the date of separation
- Ring fencing of Pension values accumulated outside of the marriage should only occur where the parties' needs are already met. Where there is a need, the entirety of pension assets can be taken into consideration and divided.

- Needs trumps any argument as to contribution of the parties
- Capital and pension assets should be regarded as different and divided separately. Offsetting can still be applied if it's recognised that these are different types of assets should not be matched in a pound for pound manner
- It is very likely now that when dealing with pensions on divorce, the parties will need to jointly instruct a PODE to provide a pension report and to calculate the Pension Sharing Order to equalise incomes.