Future earnings:
which grey areas and unresolved arguments remain after *Waggott*, on future earning capacity as a matrimonial asset and treatment of bonuses?

Nicholas Yates QC

1 HARE COURT

[61] Mr Dyer also took the court through a number of authorities. He initially submitted that in no reported case had the sharing principle been applied to post-separation earnings. However, as was pointed out during the hearing by MacDonald J, this submission appeared to overlook **cases in which a spouse had been awarded a share of post-separation earnings other than by reference to needs or compensation: as in *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548. Further, in the present case the husband had proposed that the wife should receive a share of post-separation bonuses. However, Mr Dyer described this as a 'run-off' which was often offered on a pragmatic basis in order to achieve an agreed settlement rather than on any principled basis.**

[91] Finally, in respect of this principle, I refer again to the question asked by MacDonald J during the hearing about the small number of reported cases in which the applicant received a share of bonuses the accrual of which post-dated the parties' separation. Mr Dyer suggested that this was an example of pragmatism, namely the goal of achieving an agreed resolution. I agree that this goal should be a powerful incentive and an inducement to be pragmatic. But, the relevant question for the purposes of this appeal is that **those cases could be said to support the proposition that the sharing principle applies to post-separation earnings.**

[92] In *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790, at para [24](4**) Mr Mostyn QC** (as he then was), whilst acknowledging 'an element of arbitrariness'**, proposed that he 'would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation'**. This was because this period was 'too close to the marriage to justify categorisation as non-matrimonial'. **Charles J in *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548, did not agree with this approach, and, as set out in the headnote, awarded the wife 'declining percentages' of the husband's bonuses for the 3 years after the year of separation. The rationale for this 'could be classified as either compensation or sharing' (at para [111])**. In addition, in ***CR v CR*** **[2008] 1 FLR 323, Bodey J gave 'primary recognition to the wife's reasonable requirements' but also took into account, as a 'subsidiary factor' to needs, that 'the husband was assisted towards his high likely future earnings by (the wife's) past contributions' (at para [103]). Accordingly, 'in the pursuit of overall fairness' an additional capital sum could be awarded to 'reflect large imbalances of future earnings'.**

[96] It is not altogether easy to understand how the extent of the enhancement or benefit/advantage would be established if Mr Turner was right. As Sir James Munby P postulated during the hearing, was it being proposed that **the court would have to seek to determine what each of the parties would have been earning if there had been no marriage and then calculate the quantum of, respectively, the advantage and the disadvantage? Otherwise, how was the advantage and/or the disadvantage to be determined?** The submissions provided no clear answer, perhaps understandably because of the evidential difficulties. Whilst the evidence might provide some route to determining how an abandoned or diminished career would have been likely to develop, **I find it hard to envisage what evidence would enable a court to conclude how a spouse's career would have developed absent the marriage or to what extent it was, in fact, enhanced by the marriage.**

…

[98] Similar problems would arise if the court had to determine the extent to which an earning capacity was the product of marital endeavour. I have already referred to the difficulties mentioned by Wilson LJ in *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723 when he rejected the whole notion of the court seeking to determine, let alone evaluate, what had contributed to a spouse's earning capacity at the end of the marriage. Further, despite what I have said above (see para [32]), would this require the court, in fairness, to embark on considering whether, as can sometimes be asserted, any alleged continuing economic advantage was obtained or developed despite rather than because of the marriage? There would clearly be significant conceptual and evidential difficulties if Mr Turner was right and the court had to determine whether and, if so, the extent to which a spouse's earning capacity was the product of marital endeavour.

[139] I next deal with the compensation principle. I do not accept Mr Turner's submission that the compensation principle is to be applied not only when the applicant has sustained a financial disadvantage in his or her prospective career but also when the respondent has sustained a financial benefit**. In my view it is clear from *Miller* that compensation is for the 'disadvantage' sustained by the party who has given up a career.**

[103] The ‘steer’ provided by **s 25A is clear because of the *duty* it imposes on the court under 25A(1), when making an order of the type(s) specified, ‘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.’**

Section 25A(2) provides:

‘(2) 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.’

[123] Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723.

[124] Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Baroness Hale's observation in *Miller* that, even confined to '[i]n 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' (at para [144]) or her observation as to the effect of '[t]oo strict an adherence to equal sharing' (at para [142]).

[125] Additionally, **it would inevitably require the court to assess the extent to which the earning capacity had accrued *during* the marriage.** This would require the court to undertake the exercise to which there are the powerful objections referred to by Wilson LJ in *Jones*. Where would the court start and by reference to what factors would the court determine this issue?

[128] In my view *Miller* and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe* [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106, [2017] 2 FLR 933, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (*Charman v Charman* (*No 4*) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [66]). **An earning capacity is not property and, in the context advanced by Mr Turner, it results in the generation of property *after* the marriage.**

[130] I reject Mr Turner's more extreme argument that the wife's capital, apart from her housing need, should be preserved and should not be used in any way to meet her income needs. This again would conflict with the clean break principle to such a significant extent as to undermine the statutory 'steer' because, absent other resources, the applicant spouse would always have a claim for an additional award to meet his or her income needs.

[132] This does not mean that the manner in which the need principle is applied to the sharing award is inflexible, no more that the application of the need principle is itself inflexible. The cases referred to above (see para [115]) demonstrate the latter point. Further, as Wilson LJ observed in *Jones* (at para [27]), an earning capacity can be 'relevant to a fair distribution of the assets pursuant to the *sharing* principle'. **It can be taken into account when the court is deciding whether the capital should be amortised in full, in part or not at all and when deciding what assumed rate of return to apply.** However, to repeat what Wilson LJ said in *Jones*:

'Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the *sharing* principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it.'

CR v CR [2008] 1 FLR 323, at para [101]: Bodey J applied a 5% annual gross return, when calculating the sum required to meet the wife's income needs (rather than a conventional *Duxbury*). He also acknowledged that this might require the wife 'to spend through some of her' capital award in order to meet her needs.

B v B (Ancillary Relief: Post-Separation Income) [2010] EWHC 193 (Fam), [2010] 2 FLR 1214: I calculated the sum required to meet the wife's income needs by reference to an assumed 2% net rate of return.

Z v A (Financial Remedy after Overseas Divorce) [2012] EWHC 1434 (Fam), [2014] 2 FLR 109, at para [43]: Coleridge J did not consider '[c]omplete amortisation' of the wife's own assets fair when determining the award required to meet the wife's needs. He applied a 3% net return to the wife's assets. The balance required to meet the wife's income needs was not calculated solely by reference to *Duxbury* but in part by reference to a fixed term of 10 years (at para [44]).

AR v AR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam), [2012] 2 FLR 1 (at para [100]): I awarded the wife a sum (£3.2m) which was greater than the 'simple *Duxbury* sum' (£2.5m) required to meet her income needs in part to provide her with 'an additional measure of financial security'.

Another example of a non-amortised calculation and award is *B v S (Financial Remedy*: *Marital Property Regime)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502, at para [87].

There are, of course, a number of other cases in which a conventional *Duxbury* lump sum has been awarded, such as *BD v FD (Financial Remedies*: *Needs)* [2016] EWHC 594 (Fam), [2017] 1 FLR 1420.

[134] I would also agree with his observation that **it is 'impossible to be categorical about what the law expects in this area'. Given the range of options from full amortisation to an assumed rate of return and the range of potential circumstances (including all the s 25 factors) it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases. In some cases, it will clearly be fair for that part of the sharing award available to meet income needs to be fully amortised, for example, because neither party has any resources other than those being shared. In other cases, the court might take the view that the applicant should have a greater level of security than that provided by an amortised sum because of the respondent's earnings and apply only an assumed rate of return.** To repeat, when determining this issue, the court will need to have regard to all the relevant circumstances, to the clean break principle and, as appropriate, the issue of undue hardship.

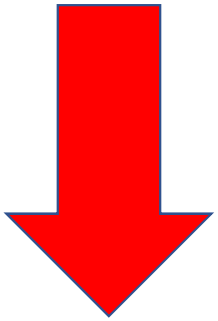
[138] As to the specific issue raised in this case, namely whether it is fair for an applicant spouse to be required to use their sharing award to meet their income needs when the other spouse will meet their needs from earned income, the answer is that the latter factor will be relevant to the court's determination of the former issue.

[136] There are, however, clearly advantages – both in terms of providing clarity and of consistency – if the *Duxbury* model and the assumptions within it were to be used at least as a starting point. I note that in *H v H* there was 'an assumption in the parties' calculations that 3.75% was an appropriate rate of return for the judge to apply' (at para [25]). As I have concluded as set out above, the manner by which the court assesses an award by application of the need principle and the manner by which it assesses whether a sharing award is sufficient to meet needs must be consistent. Given the consequential correlation between needs and sharing, using the same model would remove a potential element of inconsistency between the two which might result in different outcomes depending on whether the court started with a needs based award or vice versa.

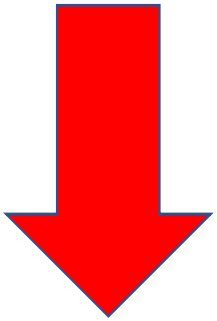
[146] The judge determined whether to impose a term maintenance order by reference *only* to whether the wife would be able to earn the shortfall between her income needs and the amount generated by her free capital (see para [25] above). He decided that, by this measure, she could not adjust without undue hardship. For the reasons set out above this was too narrow an approach. **The judge should have addressed the issue more broadly including by considering whether it would be fair for the wife to deploy part of her capital to meet her income needs.** This broader consideration was required both so as properly to address the question of undue hardship and also so as to give proper weight to the clean break principle.

[149] In this case, although not, I think, expressly articulated in the judgment, it is clear that the judge considered that the wife's income need would continue at this level for life. In any event, I do not consider that it would be appropriate for this court to determine this issue by reference to any lesser amount. **The question, therefore, is how would the wife be required to deploy her free capital in the absence of continuing periodical payments and, in the circumstances of this case, would it be fair for her to have to use it in this way.**

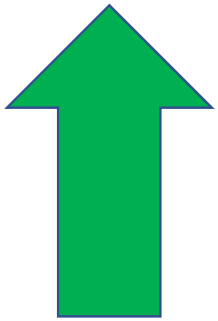
Run-Off cases



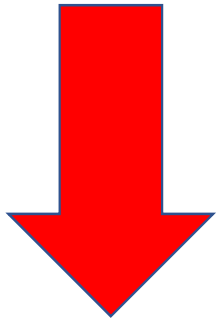
Compensation



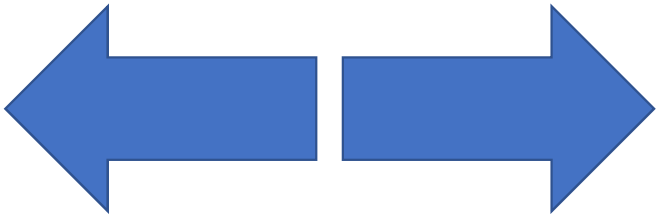
Clean Break



Sharing Income



Level of amortisation



Rate of return /*Duxbury*