

CLARK v CLARK

[1999] 2 FLR 498

Court of Appeal

Butler-Sloss, Thorpe and Mummery LJ

6 May 1999

Financial provision – Conduct – Relationship between award and findings of misconduct

The wife married the husband when she was in her early 40s and he was nearly 80. At the time of the marriage the husband was a rich man with assets of over £3m, while the wife was in debt. Despite the wife's refusal to consummate the marriage, the husband came increasingly under her influence in the course of the 6-year marriage. Over the 6-year marriage the husband paid off the wife's debts, was persuaded to purchase various properties for her use, and eventually transferred the properties and his large share portfolio to her. The wife spent lavishly, and made a number of speculative investments which lost money. The wife oppressed the husband in various ways, requiring him at times to live in a caravan in the garden, at other times relegating him to an annexe in the large property which he had purchased as the matrimonial home, and eventually holding him a virtual prisoner in the property. At her invitation, a younger man whom she was employing in a business funded with the husband's money moved into the property as her lover. After the husband was removed from the property by his niece and nephew with the assistance of the police, he issued divorce proceedings. The wife rejected an early offer worth £537,500, described by the judge as a generous proposal; and thereafter the husband paid over £250,000 on his own and the wife's costs. The wife also rejected an open offer of £452,500, made on the first day of the trial. The final offer, on the last day of the trial, was of £352,500. Despite making very serious findings of marital, financial and litigation misconduct, the judge awarded the wife £552,500, commenting that he believed that the husband would wish to be generous, as demonstrated by his generosity during the marriage. Both the wife and the husband appealed the order.

Held – dismissing the wife's appeal and allowing the husband's appeal – the judge's clear and consistent findings on the wife's conduct could not be interfered with, but there was a divide between those findings and his award which could not be bridged. Although it was not necessary to quantify misconduct in cash, the judge should have explained clearly how his exceptional findings on the wife's conduct impacted on the wife's award. The judge should not have assumed that the husband wished the wife to have more than he was in fact offering. The judge fell into manifest error in treating the wife as generously as he did, and the award would be reduced to £175,000. The court required the wife to transfer all but £50,000 of the assets to the husband and required the husband to pay the wife a lump sum of £125,000.

Statutory provision considered

Matrimonial Causes Act 1973, s 25(2)

Cases referred to in judgment*M v M (Financial Provision: Party Incurring Excessive Costs)* [1995] 3 FCR 321, FD*Tavoulaareas v Tavoulaareas* [1998] 2 FLR 418, CA*Young v Young* [1998] 2 FLR 1131, CA*Timothy Scott QC and Lucy Stone* for the husband*Mrs Clark* appeared in person through her son, Nicholas Doveton.

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THORPE LJ: Apart from one possible casual meeting in 1975, Mr and Mrs Clark met for the first time at a Christmas party on 22 December 1991. Mrs Clark had been previously married, had one son born in 1975 and had been widowed in 1983. She was then living with her son at Romsey. Mr Clark had also been widowed, his first wife having died in 1987. He was then living in Highgate in a house which had been his

home for about 40 years. There was little else that the parties had in common. Mr Clark was born in 1913, whilst Mrs Clark was born in 1949. Mr Clark had had a successful career as an insurance broker and, although retired, continued to work actively as a consultant. Mrs Clark had not worked for some years, having developed phobias which had led her to live off capital since about 1984. Mr Clark was a rich man. Amongst other things he had about £2m on the stock exchange, about £1m on deposit and a home that was worth about £0.5m. By contrast, Mrs Clark's financial circumstances were desperate. Her home, which was worth about £170,000, was heavily mortgaged and overall her liabilities exceeded her assets. It is evident that Mrs Clark is a woman of considerable charm and physical attraction. Surviving contemporaneous correspondence shows that Mr Clark developed an unconditional and unquestioning love for her. On 17 February 1992 he purchased Thatch Cottage in Romsey for £195,000 and rapidly spent a further £85,000 on its embellishment. He agreed to a transfer into joint names. He discharged Mrs Clark's debts. Two letters that he wrote on 17 February 1992 referred to 'my thrill and privilege to have helped you see your enemies off'. One of those letters expressed his gratitude at her agreement to marry on 16 April 1992. In fact the ceremony took place on 7 April 1992. In the ancillary relief judgment under appeal, the judge found that the wife did not love the husband and that she only married him for his money. Her power to extract money from him is a thread running through the history. In relation to this first transaction, Thatch Cottage, the wife procured the husband's agreement to a transfer into her sole name. The judge accepted his evidence that he tried to stop expenditure on the property, but that the wife became very unpleasant whenever he tried.

The wedding day was not auspicious. The wife left at the start of the small reception. When she returned later she did not permit the consummation of the marriage. The next day she left and did not thereafter permit cohabitation. On 19 June 1992 the husband presented a nullity petition, which was subsequently dismissed by consent on 5 October 1992. Although that reconciliation did not herald cohabitation, it did signal a good deal of expenditure. The husband spent £146,000 redeeming the mortgage on the wife's own home. At his wife's prompting he purchased three London flats. It was his understanding that one of them would be for their use. At about the same time the wife's home was sold. Although the husband received almost all the proceeds of sale, they fell short of what the husband had paid to settle the wife's debts to the extent of approximately £30,000. For the following 18 months the wife lived at Thatch Cottage refusing to join the husband in Highgate, even when he was unwell. She barely tolerated his weekend visits to Thatch Cottage. Only once did she admit him to her bedroom. The marriage was in fact never consummated. Before long she relegated him to a caravan in the garden. Although the wife had persuaded the husband to purchase one of the London flats on the fantasy that it was to be their love nest, the judge found that she had never had any intention of

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staying there and had deliberately misled the husband. Not only did the wife decline cohabitation but she refused to acknowledge the existence of the marriage, even to their employees in the house, because, as the judge found, she was ashamed of being married to someone so much older than herself. However, her control of the situation enabled her to persuade the husband to spend nearly £117,000 on the renovation of a boat which she had owned before marriage. This the judge found to be wasted expenditure since the boat in its improved state was worth only £35,000.

In July 1994 the wife induced the husband to purchase another property in Romsey, named Wellow Park. The wife's wilful insistence on immediate acquisition led the vendor to up the price from £650,000 to £720,000. Of the husband's reluctant consent to this purchase, the judge found:

'It is clear to me that the wife's consistent demands and her vituperative behaviour if she did not get her own way were wearing the husband down.'

On the day following completion the wife induced the husband to spend £28,500 on the purchase of a shop at Winchester Street in Romsey which she said would be business premises for her son, then a 19-year-old student. To partly finance these acquisitions, the husband sold his Highgate home and the wife arranged for him to stay at a geriatric nursing home. Meanwhile, she embarked on substantial expenditure on Wellow Park despite her assurances prior to purchase that it did not need money spending on it. The extent of that expenditure was assessed by the judge at £100,000. The wife's immediate object was to divide the property into two unequal parts. She intended the husband to live in the smaller part which was separated from her part of the house by connecting doors on the ground floor and first floor, with locks only on her side. Having inspected this division, the judge described the husband's part as 'small, dark and depressing'. The judge's estimation was as follows:

'In my view the reality is that she did not want to live with her husband and she took every step she could to try to ensure that she did not.'

The husband arrived at this annexe with no forewarning of its existence or the wife's plans for him. The judge thus described her plan:

'What the wife in fact wanted, in my judgment, was to live wholly apart. She wanted as little to do with the husband as possible. She did wish, however, to have the use of his money.'

After only 2 weeks the husband left, excluded the wife from his will and petitioned for divorce on the grounds of her conduct. Contested proceedings developed until a reconciliation in June 1995, as a result of which the proceedings were dismissed by consent and the husband reinstated the wife in his will. The inducement to the husband to reconcile was the wife's promise that they would thereafter live together in the main part of Wellow Park. Despite the history the husband still loved the wife. On arrival at Wellow Park he was permitted to share the principal accommodation for about a year until he was again banished to the annexe. During that year, in

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return for the wife's promise to look after him for the rest of his life at Wellow Park, the husband was induced to transfer to the wife, first half his share portfolio and later the remaining half. He was also coerced into transferring into the wife's sole name both Wellow Park and two London flats. At the same time the wife purchased a racehorse inaptly named 'Lucky Lover'. On a number of occasions she went to see the horse run. On other occasions she went to Royal Ascot. These excursions suggest, superficially at least, that her capacity to venture from her house is influenced by her will as well as restricted by her disability.

After the husband's eviction to the annexe the judge described the husband thus:

'Thereafter the husband became an increasingly sad and sorry figure. He had in my judgment fallen completely under the dominance of the wife.'

Of course by virtue of the transfers which she had induced the wife was free of the husband's financial control. She bought a shop at Cornmarket Street in Romsey which in May 1997 she opened as an ice-cream shop, installing as manager a man 15 years younger than herself with whom she had commenced a sexual relationship. She also shared her part of Wellow Park with him. As well as the shop, the wife spent £38,500 on a second-hand Bentley motor car. She told the husband, as the judge found, that she had given herself a little present for putting up with 5 years marriage to him.

In all these circumstances, it is perhaps not surprising that there is evidence of the husband's senile confusion by 1995. The judge found that any confusion or senility or

loss of zest that the husband suffered stemmed from the wife's treatment of him. By spring 1997 the husband was in a pitiful state, thus described by the judge:

'In about April 1997, the wife took away from the husband his telephone and his buzzer, which was the electrical device to enable the husband to open the front gate of Wellow Park. The front gate is the only means of entry to the property. By that time he had become virtually a prisoner in the house. He had little of his money left. He was required to live separately in the flat. The wife was hostile and abusive to him, and she humiliated him by, for example, requiring him to confess his so-called misdeeds to her son Nicholas. It is true that he occasionally went out to do shopping for her. But his social life had gone, most of his money had gone and he had little contact with his family and friends. His phone calls were intercepted. His post was intercepted. Life for him was no longer worth living.'

In such circumstances, it is hardly surprising that the husband attempted suicide by an overdose of his sleeping pills on 20 May 1997. He was admitted to hospital and assessed by Dr Mathews. Her medical notes were before the judge and they have since been elevated into a written report. Her opinion, 2 days after the attempt, was that he should be admitted to a psychiatric hospital for fuller psychiatric assessment to inform future management. On the following day, the husband was transferred to a private nursing home and the judge accepted that it was to the wife's credit that she did not seek his detention for assessment under s 2 of the Mental Health Act.

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When first admitted to hospital the wife visited him on two occasions and was kind. After about a month in hospital he was discharged in good spirits and calm. Such was the wife's power that, despite all he had suffered, the husband was looking forward to returning to her. However, as the judge found, 'the wife's behaviour towards him continued as before. Indeed, it was worse'.

In August 1997 the wife purchased another commercial property at Middlebridge Street in Romsey for £170,000. Her intention was that it should operate as a guest house. But it has yet to open for business. Shortly thereafter, she again reduced the husband to the status of prisoner in her home by removing his telephone and gate buzzer. However, on 5 September 1997 the husband's niece and nephew removed him from Wellow Park with the assistance of the police. A petition for divorce was filed almost immediately and ancillary relief proceedings got under way. Thus ended one of the most extraordinary marital histories that I have ever encountered.

On 10 March 1998, just after the first appointment, the husband's solicitors made an open offer. In the circumstances it was an extremely generous one. He offered the wife the four properties in Romsey other than Wellow Park together with the Bentley, the boat and £10,000 in cash. The package was worth to the wife £537,500 after deducting debts of £75,000. Since the husband had already incurred costs of £55,000 he was effectively offering £592,500 for finality. The wife rejected this generous proposal. The judge found that the case could not have been settled unless the husband had capitulated to whatever the wife demanded. Between the date of the rejection of that generous offer and the conclusion of the contested hearing, the husband paid out approximately £250,000, £140,000 to his solicitors and £110,000 to the wife's solicitors. However, at least in her favour in April 1998 the wife re-conveyed to the husband the share portfolio and two London flats. Then in July 1998 Thatch Cottage was sold to produce nearly £268,000 to finance this heavy legal expenditure.

The ancillary relief trial took place over 8 days commencing 9 November 1998. Both parties were represented by leading and junior counsel. The judge was Mr Hayward-Smith QC sitting as a deputy. The first issue was whether the wife was fit to attend court. A summons had been issued by her solicitors for the hearing to take place at Wellow Park. She relied on the reports of two experts, Dr Meehan and Dr Davys. The husband relied on the evidence of Dr Brener, who had been instructed on his behalf to

assess the wife's mental and psychological state. Having heard oral evidence from all three experts the judge accepted the evidence of Dr Brener that the wife was fit to attend court. Nevertheless the judge agreed to take the wife's evidence at her home and she did not herself attend that part of the case heard in London.

The wife's case was that she was an astute businesswoman and a caring wife. She asserted that her husband was prematurely senile and difficult. Despite the tribulation that he put upon her and despite her phobic conditions, she had given him devoted care and had managed his financial affairs to increase his overall worth by at least £1m. The husband's case was that the wife was a wicked woman who had abused his generosity and lost him £1m by extravagance or mismanagement. However, on the first day of the hearing he still offered her assets worth £452,500, which after allowing for debts of £130,000 and unpaid costs of £47,000 would have left the wife with approximately £275,000. Because of the incidence of costs the total

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price of the package to the husband would have been almost £700,000. On the final day the husband reduced his proposal by £100,000, so that the net value to the wife reduced to about £175,000 and the gross cost to the husband would have reduced to about £630,000. It was against that background of open offers, both of which she refused, that the judge wrote his judgment which he delivered 2 days after the close of submissions on 20 November 1998. As the passages which I have already cited foreshadow, he found for the husband on almost every issue. Of the husband he said:

'He is fit, active and healthy. If he will permit me to say so, he looks much younger than his 85 years. His mind is clear. He gave evidence before me at some length. I found him completely honest. He thought carefully before giving his answers and he was anxious to be truthful.'

Later he said that the husband was an impressive witness and far from being senile. Of the wife he said that she could have come to London if she had wanted to. In giving evidence she 'was in complete control, and clearly had her own agenda as to what she wanted to say'. He held that she exaggerated her problems when it suited her to do so, that she was manipulative and that there was not a word of truth in any of the allegations which she raised against her husband. He found her guilty of undue influence in the following passage:

'I think the wife did have the husband in her power, and that she was exercising undue influence over him. The facts of this case bear no other reasonable interpretation. His actions in transferring everything to her were wholly out of character. It is true that he wanted to be generous to her, and there are numerous examples of that. But I do not believe that he was acting out of generosity when he gave her most of what he had. I think he was acting under her influence.'

The judge summarised the financial positions of the parties as they were before him. The husband's assets, consisting of shares and the two London flats, were worth £3.2m gross or £2.5m net of capital gains tax. The wife's assets, consisting of Wellow Park, the three commercial properties in Romsey, one London flat, the boat and the Bentley, amounted to nearly £1.2m but, net of capital gains tax and debts, £1,053,000. The husband at that date still owed £61,000 to his solicitors and the wife £47,000 to hers.

Having so assessed the resources, the judge turned to other s 25 factors. Of the marriage he said:

'I treat this as a short marriage which should be measured in months rather than years. It was never a proper marriage and I do not mean only in the physical sense.'

Turning to contribution he said that the husband's had been enormous. By contrast he held that the wife's financial contribution had been largely negative. Having reviewed the various transactions he said:

'I cannot find the husband's estimate of £1m lost proved on the evidence, but I do find that the loss to him is probably not far short of that figure.'

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Of her other contribution the judge was equally clear:

'She has also made a negative contribution in the sense of caring for the husband. She protests vigorously that she worked night and day in caring for him. I disagree. I have no doubt that it was her behaviour that led him to attempt suicide.'

Of the wife's conduct the judge was equally damning. He said:

'This is a wife who, in my judgment, clearly married the husband for his money. She managed to persuade him to transfer most of his assets to her. She reduced him to attempt suicide, and when he returned home thinking that she would be nice to him, he found that she had installed a lover whom she openly associated with in the home. She was then even more unpleasant to the husband than she had been before his suicide attempt.'

Although he agreed that he could not ignore the medical evidence of the wife's conditions, he said:

'Agoraphobia, blood phobia and pre-menstrual tension cannot, in my judgment, possibly justify her behaviour.'

Finally the judge moved to determine his order. He said:

'However much the wife can be criticised, it would be harsh in the extreme to leave her with nothing. The husband himself recognises that.'

He then referred to the offer of 10 March 1998 and the two offers made during the trial. He then announced that the wife should receive an additional £100,000 over the £452,500 offered on the first day of trial. Thus she would receive assets and cash to the extent of £552,500 which would be worth almost £375,000 net in her hands after deducting her liabilities. The cost to the husband of that package would be approximately £827,000.

What was the judge's rationale for awarding the wife more than the husband's offer in the light of his findings? His explanation lies in a single paragraph:

'The order I propose to make may look high in view of the findings I have made about the wife. But it was always the husband's intention to be generous to her, even at times when the marriage was particularly unhappy. For example, in January 1995, after he left the wife, he made a will in which he made it clear that she should retain Wellow Park, the flat at Crown Lodge and Flat 3 Hans Crescent, as well as retaining a half interest in Thatch Cottage. I do not believe that the husband would want to see her homeless and saddled with debts. What I seek to achieve is that, despite the findings that I have made, she should leave this court with enough to have a home and an income, a little additional capital and no debts. I think that is consistent with what the husband, in his heart of hearts, would really want. It is more than the husband has offered, but it is of course very much less than the wife seeks.'

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On 24 February 1999 the wife appeared in person and the husband by leading counsel on cross-applications to this court for leave to appeal. The wife's case was that she had an overwhelming psychological need to retain Wellow Park and that the two experts who had testified on her behalf considered that there was a significant risk that she might commit suicide if she were obliged to leave Wellow Park. Therefore the judge's order should be varied to give her that property as well as all else that the judge had ordered. Mr Scott QC, although critical of the judge's reasoning for rejecting his client's open offer, made it plain that he would only seek to appeal if compelled by the wife to an appellate hearing. If the wife's application were refused or withdrawn his client would not seek leave. The court decided that the whole case should be admitted to appellate review and granted leave to both parties.

At the hearing of the appeal the wife was conveyed to and from court by a Harley Street ambulance service. The court permitted her to be represented by her son, Mr Nicholas Doveton, as though he were professionally qualified. Although the constraints on the wife funding representation are obvious it is regrettable that she involved him so directly in the litigation. I would wish to record how creditably he carried out an impossible task with conspicuous self-control and attention both to his mother's expectations and the boundaries set by the court.

By a summons of 1 March 1999 the wife sought to admit fresh evidence consisting of a report from Dr Lowenstein, a clinical psychologist, a statement from Detective Constable Shirley and her own affidavit. By a later summons she sought to introduce reports from Dr Mathews and Dr Fraser Anderson. It was agreed at the outset that all this additional evidence would be received by the court *de bene esse* and that any ruling on its admissibility would be deferred to final judgment. I will therefore deal straightaway with this additional evidence. The affidavit from Dr Lowenstein hardly meets any test for the admission of fresh evidence. He is a clinical psychologist who prepared a written report on the wife having spent several hours in her company on 8 February 1999. In a neat way this manoeuvre illustrates the extent to which the wife inhabits a world bounded by her egocentric and manipulative will unconstrained by any objective reality. Dr Lowenstein gave the opinion that he did because Mrs Clark restricted him to her version of events, omitting to inform the psychologist that that version had been comprehensively rejected in High Court proceedings. The statement from the detective constable has greater validity in that it contradicts assertions made by the husband in letters to his solicitors in April and June 1995 to the effect that the detective constable had been obstructed by the wife in investigating a report from the husband of the theft of a picture from Wellow Park. There is perhaps just sufficient justification to permit the admission of that evidence for further investigation. As to the reports from Dr Anderson and Dr Mathews, in my opinion they fail to meet any test of admissibility. Dr Mathews' undated report, but written in April 1999, only contains what was before the judge in her manuscript medical notes. The report from Dr Fraser Anderson simply relates to the husband's condition in May 1997. It is dated 23 November 1998 and it is admitted that it was requested prior to judgment. There is nothing within it which would in any way have expanded the judge's knowledge or affected his conclusions. Consequently I would admit the statement from the detective constable and reject the three medical

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reports. I would add that even if admitted their contents would not have assisted her case.

I turn therefore to Mr Doveton's submissions in support of the wife's appeal. He would wish to reopen all the judge's fundamental findings as to credit, personality and merits. This submission rests on two foundations. First, he points to the medical evidence which shows that in 1995 the husband was suffering from some senile confusion and in 1997 was assessed by Dr Mathews as in need of profound inpatient assessment of his mental and psychological state. The short answer to that is that the

trial judge had that evidence well in mind. He contrasted it with the alert and lively figure whom he observed over the course of an 8-day trial. He concluded that the husband's state in 1995 and 1997 was the product of the wife's conduct. It was clearly open to the judge to reach that conclusion and there can be no going behind it. The second point is that the fresh evidence demonstrates that the statements made by the husband in his letters to his solicitors in 1995 are contradicted by the statement obtained from the detective constable. Therefore, says Mr Doveton, the husband is a proven liar and his whole testimony must be re-evaluated. The non sequitur is obvious. When he wrote as he did the husband may well have been mistaken or confused. Abundant other evidence demonstrates that he was at a low ebb in 1995. Furthermore, Mr Scott tells us that he was cross-examined in relation to the report of theft and conceded that he had been overhasty.

Mr Doveton's second principal submission is that the judge has not properly assessed the wife's needs. The expert witnesses with the profounder knowledge of her case both emphasised that, suffering as she does from phobic states, Wellow Park was essential to her sense of security. Were she driven from Wellow Park both experts warned of a very significant risk of suicide. At Wellow Park she is surrounded by a menagerie of animals: horse, donkeys, goats, pigs, dogs, and cats. Then she has her chicken, ducks, geese and peacocks. It would be inhuman and barbaric to leave her as the judge left her and yet more so to subject her to the cruel exit for which the husband now contends.

Mr Scott's submissions are summarised in his skeleton argument as follows:

- (1) The judge failed to explain the basis of his order in any intelligible way.
- (2) He appears to have disregarded the wife's conduct despite finding that it would be inequitable to do so. If he did take it into account, he did not explain how.
- (3) He took the wife's health problems into account as enhancing her claim without explaining either the nature or the extent of their relevance.
- (4) He took the husband's generosity during the marriage into account as enhancing the wife's claims when it was unfair to do so in the light of his finds about the wife's behaviour. There was no explanation of how this factor was brought into the balance.
- (5) He took into account his perception of the husband's true wishes which had no proper basis and which either ignored or confused the effect of the husband's proposals.

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- (6) He failed to take into account Mrs Clark's misconduct of the litigation by failing to accept a generous offer, thereby causing huge costs to be incurred by both parties and paid by the husband.

Before expressing my conclusions I do want to emphasise that this was a highly unusual ancillary relief case. For of the criteria in s 25(2) of the Matrimonial Causes Act 1973 the predominate one was conduct. There was very little dispute as to what assets were owned by the parties or as to the value of those assets. Equally the liabilities were clear. The task required of the judge was to assess the motives, the intentions and the conduct of the husband and the wife over the relatively brief period of their relationship between February 1992 and September 1997 in the light of the allegations that each raised against the other. The task was not dissimilar to the task that confronted the High Court judge in trying cross-cruelty petitions prior to the Divorce Reform Act 1969. It seems to me that the judge performed this function with commendable thoroughness. He made clear and consistent findings on the integrity and personality of the parties as well as on the relevant events in their relationship. Equally clear were his findings on the issues raised by their conflicting cases. None of those matters can be reopened in this court. Nothing in either appeal or cross-appeal justifies any correction

or review of the judge's findings of fact and credit. The ambit of these appeals is thus very circumscribed.

In determining the wife's appeal I can be brief. Its foundation is that her needs, disabled as she is by phobias, entitle her to retain Wellow Park outright in her sole ownership. First, as to the extent of her disability, the judge rejected the evidence of Dr Davys and Dr Meehan and accepted the evidence of Dr Brener. Dr Brener said:

'I am sure she will be upset if she has to leave her accommodation, and there is always a risk that she might make a gesture to harm herself, but I would not put it as exceptionally large.'

Dr Brener put the risk of suicide at 10–20%. The judge's finding on this issue is clear and in the absence of fresh evidence, credible and admissible, it is not for this court to carry out its own assessment. We admitted the evidence of Dr Lowenstein de bene esse in part to examine whether there was a need for reassessment. In my judgment there is none. Secondly, the wife's phobias have not prevented her from making two major moves during the marriage. Thirdly, were we to set aside the judge's order for the transfer of Wellow Park to the husband the effect would be to double the judge's award so that the wife would be left with approximately £1.1m, which, despite all the judge's findings, she continues to claim to have earned during her management of the husband's affairs. Perhaps nothing in this litigation more clearly illustrates how blinkered are the wife's perceptions and how far removed from reality. Her appeal is, and in my opinion always was, hopeless. It has had the further consequence of attracting a cross-appeal, which I will demonstrate to be well-founded and which would not otherwise have been advanced. Finally, she has brought into the public domain a very discreditable chapter which would otherwise have been concealed by the confidentiality attaching to hearings in private within the Family Division. Judicial estimations of fair outcome reflecting gross misconduct should not

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be too refined or rarefied. What would the ordinary right-thinking man or woman make of a judicial award of over £1m to a wife guilty of this degree of misconduct?

Turning now to the husband's cross-appeal, I do have considerable difficulty in perceiving or following the judge's journey from his findings to his adjudication. In my opinion Mr Scott's criticism of his single paragraph of rationale is well-founded. I do not think that it is for the judge to surmise that a respondent's true position is other than that advanced by his very experienced litigation team. Any heartfelt generosity beyond that point must be left to voluntary expression that should not be imposed. After all, there was nothing ungenerous or irrational about his stance throughout the litigation. The scaled reductions in his open offers only reflected the impact of other liabilities on the overall cost to him of severing the financial relationship.

But perhaps a more serious flaw lies in the absence of clear explanation as to how his findings on conduct, which after all was what the case was all about, impacted on the wife's award.

There does seem to me to be a divide between the judge's findings and his award which I cannot bridge. Reading the judgment as a whole, I have the clearest impression that the judge faltered in progressing from his findings to his conclusions. It seems to me that he shrank from confining the wife to an award which his findings compelled. Those findings are so clear and so exceptional as to throw a question mark over any award above that which the husband offered. For the judge had condemned the wife for not only marital misconduct but also financial misconduct during cohabitation and litigation misconduct thereafter. As to her marital misconduct, I have already highlighted the crucial passages in the judgment. As to financial misconduct during the marriage, I have already recited the finding that the wife wasted approaching £1m of the husband's money, not by a day-to-day extravagance, but by misguided investment choices. Finally, as I have already demonstrated, her unreasonable refusal of the offer

of 10 March 1998 wasted approximately £250,000 thereafter spent on the lawyers.

In *Tavoulaareas v Tavoulaareas* [1998] 2 FLR 418 I endeavoured to distinguish between marital misconduct and litigation misconduct, which ordinarily attract different consequences. In *Tavoulaareas* I considered the proper approach in applying s 25(2)(g) of the Act both to marital misconduct and to litigation misconduct from 426E–427D. In the more recent case of *Young v Young* [1998] 2 FLR 1131, I summarised my opinion at 1140A saying:

'As I have endeavoured to state in previous decisions at first instance and in this court, see *Tavoulaareas v Tavoulaareas*, a clear distinction must ordinarily be drawn between marital misconduct which affects the quantification of orders and litigation misconduct which should be penalised in costs and not in the quantification of orders. Only in the rarest cases will the litigation misconduct have so squandered assets as to require reflection in quantification (as an example see *M v M (Financial Provision: Party Incurring Excessive Costs)* [1995] 3 FCR 321). Of course there will also be cases in which the court discerns both marital misconduct and litigation misconduct. In those cases it is open to the court to reflect the marital misconduct in the quantification of orders and the litigation misconduct with costs penalty.'

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Here the wife's litigation misconduct cost the husband approximately £250,000. His solicitor and own client costs throughout were just less than £200,000. Therefore this was as a matter of classification one of those rare cases where the litigation misconduct could not be the subject of full compensation to the victim simply by the adjustment of orders that would otherwise have been made for costs. Ancillary relief procedures are currently undergoing complete reform. Case management by the judges will help to curb litigation misconduct. But if costs are wasted it will be easier to quantify the waste. That gives the court the opportunity to ensure that the litigant responsible bears the cost of waste in full. Unless there are exceptional mitigating circumstances, that should be the objective of the court's order. In my opinion the judge was right to proceed on the basis that he would make no order for costs either way in the light of the reality that the husband had effectively funded both sides. It was obviously sensible to reflect both the marital misconduct and the litigation misconduct in quantifying the wife's award. Otherwise the husband would in effect be funding the wife partly in order to meet costs orders in his own favour.

But the ultimate question is whether the judge sufficiently reflected the marital and litigation misconduct in ordering the husband to pay the wife a lump sum of £200,000 over and above his final offer. It would be hard to conceive graver marital misconduct. The history as the judge found it is as baleful as any to be found in the family law reports. Indeed, material as extreme as this would more probably be found in a probate report of a successful challenge to a grant of probate on the grounds of undue influence. Nevertheless the judge said that it would be harsh in the extreme to leave the wife with nothing.

Even allowing for the wife's phobias, I do not consider that on the quite extraordinary facts of this case to have left the wife with nothing would have exceeded the wide ambit of judicial discretion. For in addition to all the wife's misconduct there is the fact that at the outset of the relationship the wife not only brought in nothing but required bailing out of debt to the extent of £30,000. The only conclusion to which I can come is that the judge fell into manifest error in treating the wife as generously as he did. His principal errors were in failing to reflect the full rigour of his findings in quantifying the wife's award and in assuming that the husband would, in his heart of hearts, welcome the order.

Mr Scott has also submitted that in every case the judge should make a clear finding of what he would have awarded the wife assuming no discount for misconduct. Then the judge should quantify the misconduct in cash. Finally he should deduct the second total from the first to arrive at a patent result. I would reject that submission. The

statute defines the judicial task and I am against further elaboration or overlay. There may be cases in which such an exercise would be appropriate in the judgment. There will certainly be cases where it will not. There may be cases in which a judge may adopt such an exercise whilst feeling his way towards a result. It is, of course, incumbent upon a judge to explain his conclusions, but it is fortunately not incumbent upon him to reveal all the thought processes through which he passed on his route to conclusion.

Since Mr Scott has demonstrated judicial error, it is for this court to exercise its discretion accepting all the judge's findings as to the history and as to the parties. A difficulty is created by the fact that the husband has not

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sought a stay of the judge's order, no doubt because he did not wish himself to appeal unless driven to do so. Accordingly, between the date of judgment below and the date of this appeal the husband has discharged further liabilities on the wife's behalf, namely the CGT liability amounting to £118,638 unnecessarily incurred by the wife as a result of portfolio transfers and her legal costs in the sum of £59,165. These payments, totalling £177,803, effectively leave only £22,197 of the lump sum order unpaid. Mr Scott's submission is that we should reduce the lump sum to zero and require the wife to repay to the husband that sum of £177,803. That would leave the wife with assets totalling nearly £175,000 and fix the final cost to the husband at approximately £670,000, he having spent an extra £41,500 with his solicitors since judgment below either on this appeal or enforcement applications. Mr Scott would have accepted an assessment of his appeal costs at about £20,000, but would have foregone those costs if the court acceded to his application for the repayment of £177,803.

I am of the opinion that Mr Scott's submission, although perfectly rational, is impracticable. An order of this court requiring the wife to repay such a substantial sum would be to create fertile opportunities for continuing litigation which would rob the husband of the finality he seeks. Further, none of the properties which the judge left with the wife is suitable to meet her primary requirement for a home. Middlebridge Street, worth £200,000, is the potential guest house. As I understand, it is not currently fit for occupation. Cornmarket Street is the ice-cream shop, but if the wife wishes to trade she could either rent shop premises or perhaps trade from Winchester Street. Winchester Street was let but is now vacant. The wife conveyed a half-share to her son and accordingly was perhaps fortunate to have only half its value brought into account, namely £9000, when it cost £28,000 of the husband's money. The remaining realisable assets are the Bentley and the boat, brought in respectively at £38,500 and £35,000. If the wife were left with this medley of assets, any objective advice would be to sell all in order first to buy a home and then to devote any surplus to meeting some other priority need. However, the wife is ill-placed to meet the risks of sale, the delays of sale and the costs of sale. The husband by contrast is very well placed to meet risks, delays and costs. I would therefore order the transfer to the husband of both Middlebridge Street and Cornmarket Street, an order that can be executed by a district judge of the court if necessary. I would also ensure that in the interim the wife is restrained from charging or further charging either property. I understand that she has already borrowed £30,000 against one or other. Insofar as the transfers are effected subject to charge, the cost to the husband of paying off the charge must be allowed against such lump sum as this court orders in substitution. So the final question is what should be the lump sum order, given that the wife will retain Winchester Street, the Bentley and the boat? There would be much justification for awarding the wife less, and substantially less, than the husband proposes. The court is not bound by such concessions and cases in which the court ultimately awards less than the respondent has offered are not unknown. However, in all the circumstances I adopt the figure of £175,000, which in round terms is what the husband proposes. I would take a realistic, perhaps even a generous, view of the net realisable worth of Winchester Street, the Bentley and the boat. For the purposes of this judgment I would assess their net

realisable value at not more than £50,000

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in total. I would accordingly deduct £50,000 from £175,000 and order the husband to pay the wife a lump sum of £125,000 upon completion of the transfers of Middlebridge Street and Cornmarket Street. That figure of £125,000 will be reduced £1 for £1 by the extent of any charge on either property. I only add that my award reflects the additional costs burden that the appeal has imposed on the husband and assumes no order for costs in the appeal.

For all those reasons I would dismiss the wife's appeal, allow the husband's cross-appeal, and substitute for the order below an order reflecting the terms of this judgment.

MUMMERY LJ: I agree.

BUTLER-SLOSS LJ: I also agree.

Appeal dismissed. Cross-appeal allowed. Substituted order accordingly.

Solicitors: *Levison Meltzer Pigott* for the husband

PHILIPPA JOHNSON
Barrister