

# Towards a clean break

*Camilla Thornton considers the approach to earning capacity and the application of the sharing principle post-Waggott*



Camilla Thornton  
is a partner at  
Russell-Cooke LLP

**'The sharing of an income stream is unprincipled and periodical payments should only be ordered to meet needs and rarely compensation.'**

**O**'Dwyer v O'Dwyer [2019] is the first reported case to specifically apply the principles laid out by the Court of Appeal in *Waggott v Waggott* [2018], ie that an earning capacity is not a matrimonial asset to which the sharing principle applies, that it may be fair for a spouse to look to their sharing award to meet their future income needs and that compensation is limited to the 'disadvantage' sustained by the party who has given up a career.

The case was heard by Francis J, on appeal from an order made by HHJ O'Dwyer (the case took his name to preserve anonymity for the parties). HHJ O'Dwyer had given his judgment prior to the Court of Appeal's decision in *Waggott*.

## Facts

The parties were married in March 1988 and had four grown-up children. The husband was aged 62 and the wife, an American citizen, was aged 60. They had separated in March 2016 when the wife had returned to live in the US.

The parties' assets comprised a McDonald's franchise which had been run by the husband for many years, operated partly through a limited company and partly as a sole proprietorship. There were a number of properties in the UK and the US and some miscellaneous bank accounts. The total assets were agreed at £5,865,470, including the business which was valued at £2,932,739 net. The assets had been divided equally in accordance with the sharing principle such that the husband and the wife each received just less than £3m, with the husband retaining the business.

The subject of the appeal, which was brought by the husband, was

the periodical payments order in favour of the wife which provided her with £150,000 pa on the usual terms as to death, remarriage or further order until the husband's 66th birthday, when there would be a bar against an extension of the order under s28(1)(A), Matrimonial Causes Act 1973 (MCA 1973).

## The husband's position

The husband contended that following *Waggott*, the sharing of an income stream is unprincipled and periodical payments should only be ordered to meet needs and rarely compensation. Francis J agreed and found that HHJ O'Dwyer had determined the wife's periodical payments by reference primarily to the sharing principle when he had said (see para 17 of the judgment):

... as a result of the joint enterprise of the parties the reality is that the business has been producing and will produce an income of approaching £1 million per year...

and that:

Why after divorce should only [the husband] continue to live well upon it when clearly it is the product of matrimonial endeavour?

HHJ O'Dwyer had added that:

... it is clear that the business itself produces these incomes... I identify that they are matrimonial property. I identify that their value is not only the capital value at this point but also the income that they will produce over the coming years.

Francis J rejected this approach, highlighting (at para 18) that:

There has for some years been debate as to whether part of Baroness Hale's speech in [*Miller v Miller; McFarlane v McFarlane* [2006]] suggested that an earning capacity could be a matrimonial asset subject to a sharing claim. The preponderance of authority has been significantly against such an outcome. Any remaining doubts as to whether an income stream is an asset which can be shared, save for the purposes of paying for needs or compensation, was clearly dispelled by the judgment of the Court of Appeal in *Waggott*.

Francis J added (at para 22) that it is now settled law that income cannot be shared and:

... [a]n award of periodical payments (absent rare compensation cases) must be based on properly analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted.

### The wife's position

Counsel for the wife put forward a number of counter-arguments, but none found favour with the judge. In particular, the wife sought to distinguish the decision in *Waggott*, for a number of reasons, the first being that it related to a 12-year marriage, whereas this marriage was one of 30 years. Francis J disagreed, saying (at para 23):

I reject that submission as being plainly wrong and inconsistent with the clear analysis of the law by Moylan LJ in *Waggott*. It is not possible to discern from any part of Moylan LJ's clear judgment that an earning capacity in a long marriage is to be treated differently from one in a short or medium length marriage.

Further, the wife argued that *Waggott* could be distinguished because the income in *O'Dwyer* was paid out of profit from a family partnership built up over the term of the marriage, but again this was rejected by Francis J, who said (at para 24) that this argument in reality formed part of the previous point and that:

The clear enunciation of the law, and the reasons for it, do not permit the sharing of an income for sharing's sake in the circumstances of the instant case. The court has a statutory duty to secure a clean break if this can be done. This is one of the principal reasons why the

---

*It is the judge's task to first assess reasonable needs and then whether the capital provided is sufficient.*

---

parties had the business valued. As at the date of the lump sum payment, the wife received half of the agreed value of the business.

In addition, it was argued for the wife that the income stream in *O'Dwyer* came from the fixed-term profits of a partnership and not from an earning capacity, in relation to which Francis J acknowledged that HHJ O'Dwyer could have awarded the wife a capital sum in respect of her half of the business, together with a balancing payment in the event that the business sold for a substantially different amount than the agreed value, but adding (at para 25) that:

It will be a rare case when it is appropriate to do this, having regard to the statutory steer towards a clean break. Alternatively, in rare cases the judge can adjourn the lump sum claims if it is thought appropriate to do so, for example when ascertaining value is extremely difficult. In my judgment the judge was correct to decide that he needed to resolve the case now.

What Francis J found 'incomprehensible' was HHJ O'Dwyer's reference to the income stream from the business as 'matrimonial property', and his conclusion that 'this approach also leads to a true determination of the reasonable needs of the wife'. In Francis J's judgment there was a disconnect between the income stream and the reasonable needs of the wife, and it is the judge's task to first assess reasonable needs and

then whether the capital provided is sufficient (para 26), and that:

Only if [the judge] found that the capital remaining in the wife's hands, after providing for her reasonable housing and other assessed capital needs, was insufficient to provide for her income

needs could he then go on to consider an award of periodical payments. If he reached this stage, the judge would then have a broad discretion both as to the assessment of need and as to the issue of amortisation.

The wife also submitted that she would be suffering a considerable relationship-generated disadvantage if the income was not shared. However, this was rejected by Francis J as a compensation claim had not been made by the wife.

The wife further sought to distinguish *Waggott* on the basis that in that case the wife had received a share of the husband's bonuses as a recognition that they related to 'matrimonial enterprise'. This was also rejected by Francis J (at para 28) on the basis that:

If a bonus is earned during the marriage but not paid out until after the marriage has ended then there is every reason to treat it as matrimonial property in the true sense. Sharing bonuses that were generated or earned after the marriage ended would usually be possible only by reference to the principles of needs and compensation... the instant case is not a compensation case and there are almost no examples of successful compensation claims in the reported cases.

An additional point made by the wife was that the age of the husband (61) and the proximity of the sale of the business (four years) distinguished this case from *Waggott*, where the husband was only 53. Francis J disagreed and said the wife's counsel was confusing income and capital and that the capital value of the business had been shared by the

payment of the lump sum (para 29). He added that:

Moylan LJ could not have been clearer [in *Waggott*] that future income is not an asset to be shared. I do not find

setting out general guidance rather than dealing with facts very specific to that case', and that in his view the 'judge was plainly wrong to identify the income stream of the business as matrimonial property' (para 33).

*The judge at first instance had not undertaken a proper analysis of what the wife actually needed and instead had arrived at a figure by reference to the sharing principle, which he then sought to justify by reference to needs.*

it possible to read into Moylan LJ's judgment that a distinction can in some way be made between a man of 53 and a man of 61 or, more properly put, I cannot accept from the judgment that age is of itself material to the principle that the judge was discussing.

The wife also said that the section 28(1)(A), MCA 1973 bar distinguished the case from *Waggott*, in which the court had failed to consider properly the clean break principle. Francis J acknowledged the statutory bar, but said that he could not read into the judgment in *Waggott* that even a short period of sharing income would be justified 'other than by reference to the doctrines of need and compensation' (para 30).

In *Waggott*, the court found that the wife's capital should not be preserved, whereas in *O'Dwyer* the judge had found that the wife's capital should only be preserved during the five-year maintenance term, during which time the family business would continue to produce £1m pa of profits. Again, Francis J disagreed with the wife's position, saying (at para 31):

The fact is that in the instant case the parties had agreed the value of the business as at the date of the hearing. The parties agreed that the husband would continue to operate the franchise as he always had.

The wife's final point was that *Waggott* was a very different case and that HHJ O'Dwyer's judgment was in line with *Waggott* and within the ambit of his discretion. However, Francis J again disagreed, saying that in *Waggott*, the Court of Appeal 'was purposefully

## Outcome

Having dealt with the submissions, Francis J gave judgment on the facts. He acknowledged that it might seem unfair to the wife that she should have to start living on her capital straight away (whether or not amortised) but 'that, it seems to me, is the inevitable and direct consequence of the fact that an earning capacity is not subject to the sharing principle' (para 35).

He found fault with the way in which HHJ O'Dwyer had assessed the wife's income needs, because he had not undertaken a proper analysis of what the wife actually needed and instead had arrived at a figure by reference to the sharing principle, which he then sought to justify by reference to needs, and that while the judge had been 'absolutely entitled to be generous to the wife in terms of assessment of her maintenance requirement', by reason of the fact that the husband would be enjoying a substantial income, he was not entitled to 'simply to take a round number without reference to any arithmetic' (para 36), in particular without reference to the recipient's needs, the income that the recipient's capital would generate and whether or not the recipient's capital should be amortised and, if so, the date from which the recipient's capital should be amortised. Francis J said that the starting point was to establish how much capital the wife would be left with after she had purchased a house for herself.

Francis J said it was not his role to tinker with the figures and so he would use those adopted by HHJ O'Dwyer, the result of which was that after meeting her rehousing and other immediate costs, the wife

would have capital of £1,732,739. He said it was necessary to attribute an income to that figure and that he would adopt the *Duxbury* basis of a return of 3.75%, which equated to an income of £64,978 pa (or £52,000 pa once an allowance had been made for the tax she would have to pay in the US). In the alternative, her capital would produce £100,000 pa on an amortised basis.

As for income return or amortisation, the judge said that this question was case specific, but that in a big-money case after a long marriage with equal contributions, if the economically stronger party has a very substantial income, 'it is fair to determine that the economically weaker should not have to amortise their capital for a period of time' (para 41). Further, the judge said that this was consistent with *Waggott* in which Moylan J had made it clear there should be flexibility, which left a substantial element of discretion in relation to this issue.

Accordingly, Francis J decided that the wife should not have to amortise her capital for the remaining years of the husband's employment which he felt struck the correct balance between not sharing income and applying his discretion in the wife's favour in relation to amortisation (para 41). He went on to find the wife's annual income needs were £120,000 pa, against which she could apply her net return from capital of £52,000 pa, and ordered that the husband meet the shortfall of £68,000 pa by way of periodical payments on the same terms as the original order.

## Conclusion

This is another example of a High Court judge seeking to clarify the law by adopting a more formulaic approach and of the trend towards requiring individuals to assume greater individual responsibility for their own financial independence upon divorce. ■

*Miller v Miller;*  
*McFarlane v McFarlane*  
[2006] UKHL 24  
*O'Dwyer v O'Dwyer*  
[2019] EWHC 1838 (Fam)  
*Waggott v Waggott*  
[2018] EWCA Civ 727