JUDICIARY OF
ENGLAND AND WALES

RULES, RULE OK!

An analysis of the exercise of judicial discretion in the Family Law sphere

Address by Mr Justice Mostyn to the Hong Kong Family Law Association

British Consulate-General, Hong Kong

25 April 2019

1. Discretion. It is a word embedded in the family lawyer's mental lexicon. What does it mean? The instinctive response of many, perhaps most, is that it means that a judge has a virtually limitless freedom to do what he or she subjectively thinks is fair. Consider the famous words of Lord Justice Ormrod in *Martin v Martin* [1978] Fam 12:

> "It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore, it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word. There is bound to be an element of uncertainty in the use of the wide discretionary powers given to the court under the Act of 1973, and no doubt there always will be, because as social circumstances change so the court will have to adapt the ways in which it exercises discretion."

2. Over the ages words to similar effect have been incanted like a mantra. For example, Chief Justice Gibbs in *Mallet v Mallet* (1984) 156 CLR 605 at 609, said that the courts "cannot put fetters on the discretionary power which the Parliament has left largely unfettered.". To like effect Lord Justice Moylan recently in *Work v Gray* [2017] EWCA Civ 270 at [81] spoke of section 25 of the Act of 1973 giving the court an "unfettered discretion". I could cite countless other examples.

3. In my address to you I will argue that this is to worship a false god. I will argue that most so-called discretionary powers are in fact nothing of the sort but are in fact commands to render a qualitative or value judgment. I will further argue that where a true discretion exists the freedom of manoeuvre, the margin of appreciation if you like, is much more limited than is generally supposed.

4. Many so-called discretionary rights are in fact non-existent. Consider the ubiquitous "discretionary charge" added to your bill by every bar and restaurant. Apart from Larry David in Curb Your Enthusiasm can you think of anyone who would ever refuse to pay that charge?

5. Traditionally the exercise of discretion has been regarded as a dangerous, almost unprincipled practice, and not something to be broadcast or perhaps even noticed. In his famous threnody on the death of Lady Cutts in 1698 Francis Atterbury, Bishop of Rochester, politician, and Jacobite conspirator, described her thus: "amongst all her discretionary Rules, the chief was, to seem to have none; and to make matters of Form give way always to Circumstances and Occasions."

6. Justice William Douglas perhaps overstated the case in *United States v. Wunderlich*, 342 U.S. 98 (1951) when he stated:

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

I would not go that far, but I understand his sentiment.

7. The first formal grant of judicial discretion by Parliament to the Court was in the Act of 1857 which invented judicial divorce. There were three areas where discretion arose: alimony, custody of children and whether a divorce should be withheld from a petitioner who had himself committed adultery. The first two areas were in fact governed by strict, unyielding rules: in the first by the question of whether the claimant wife was guilty; in the second by the rule that the father had an inalienable superior right. But the third seemed to be an untrodden desert. This threw the Judge Ordinary, Sir James Wilde (later Lord Penzance) into paroxysms of anxiety. In *Morgan v Morgan and Porter* (1869) LR 1 PD 644, PD he memorably expostulated:

> "… there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any court, still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half-formed thought. Under cover of the word "discretion" a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials so used two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, and shakes public confidence in the justice of the tribunal. I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules."

8. I ask you particularly to note the final sentence. As will be seen where a true discretion in the field of family law exists it is one which is regulated by, and subordinated to, rules.

9. With all due respect to Lord Justice Moylan I would argue that in the world of law an "unfettered discretion" actually does not exist. Justice Benjamin Cardozo explained why in 1924:

> "Complete freedom – unfettered and undirected – there never is. A thousand limitations – the product some of statute, some of precedent, some of vague tradition or of an immemorial technique – encompass and hedge us even when we think of ourselves as ranging freely and at large… Narrow at best is any freedom that is allotted to us" (The Growth of the Law: Yale University Press 1924)

10. The late Lord Bingham of Cornhill put it this way in his book "The Rule of Law" (Allen Lane, 2010) at page 51:

> "The job of the judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged."

11. Lord Justice Waite memorably expressed the same sentiment using a literary analogy in *Thomas v Thomas* [1995] 2 FLR 668 at 670:

> "The discretionary powers conferred on the court by the amended ss 23-25A of the Matrimonial Causes Act 1973 to redistribute the assets of spouses are almost limitless. That represents an acknowledgement by Parliament that if justice is to be achieved between spouses at divorce the court must be equipped, in a society where the forms of wealth-holding are diverse and often sophisticated, to penetrate outer forms and get to the heart of ownership. For their part, the judges who administer this jurisdiction have traditionally accepted the Shakespearean principle that 'it is excellent to have a giant's strength but tyrannous to use it like a giant'. The precise boundaries of that judicial self-restraint have never been rigidly defined – nor could they be, if the jurisdiction is to retain its flexibility."

12. It is worth reflecting on the exchange between Angelo and Isabella in Measure for Measure Act 2 Scene 2. The corrupt Angelo has resolved to put Claudio to death for breach of a disused law – the impregnation of his fiancée – and Isabella is begging for his life, but Angelo implacably rejects her plea:

> ANGELO
> I show [pity] most of all when I show justice;
> For then I pity those I do not know,
> Which a dismiss'd offence would after gall;
> And do him right that, answering one foul wrong,
> Lives not to act another. Be satisfied;
> Your brother dies to-morrow; be content
>
> ISABELLA
> So you must be the first that gives this sentence,
> And he, that suffer's. O, it is excellent
> To have a giant's strength; but it is tyrannous
> To use it like a giant.

The message is, of course, to use the words of Lord Acton, that power tends to corrupt, and absolute power corrupts absolutely. I would not say that an absolute discretion corrupts, but I would say that it is a bad thing. An absolute discretion is the same thing

as a gut reaction. In the New York Review of Books, 21 March 2019 issue, Fintan O'Toole wrote:

> "The gut is a tyrant. Intuition is both inherently unpredictable and, as a basis for public policy, inherently anti-democratic. It does not have to account for itself - any more than divine inspiration can be questioned by believers. It is not open to contradiction because it is entirely personal."

13. In this address I intend first to attempt to analyse the difference between the exercise of a discretionary power, on the one hand, and, on the other, the formation of a value judgment, or qualitative decision. Then I will look at three areas of family law where discretion supposedly reigns and seek to demonstrate that these are in fact the territory of value judgments. These are, first, those situations where the law imposes a factual threshold before the "discretion" can be exercised. Many procedural discretions have this requirement but substantively the most prominent examples are the making of a care order under section 31 of the Children Act 1989 and the so-called "defences" under Articles 13 and 12 of the Hague Convention on Child Abduction 1980. Next, I will examine the supposed discretion where the court applies the paramountcy principle under section 1 of the Children Act 1989. Then, third, I will look at the supposed discretion where the court applies the sharing principle when making an award for ancillary relief.

14. Finally, I will look at the situation where I concede that a true discretion exists namely where the court disposes of an ancillary relief claim by reference to the needs principle. But even here, I will argue, the discretion is one which is regulated by, and subordinated to, rules.

15. What is the difference, if any, between an exercise of discretion and the formation of a value judgment? There is no doubt that they are closely analogous, but they are different, and the difference matters.

16. In *Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 Sir Anthony Clarke MR stated at [16]:

> "Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

The distinction was highlighted by Lord Clarke (as he had become) in *Abela v Baadarani* [2013] UKSC 44; [2013] 1 WLR 2043 . The issue in that case was whether there was "good reason" (under CPR rule 6.15(1)) to treat as valid service the steps taken by the claimant to bring the claim form to the attention of the defendant. If there is, then the court may make an order permitting service by an alternative method or at an alternative place. At [23] he stated:

> "The judge held that there was [good reason]. In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors."

Evaluation of the facts is the meat and drink of judging. It is what we do. It is not a process of exercising discretion. It is how we reach a just decision. Famously in in *Biogen Inc. v Medeva Ltd.* [1997] RPC 1 Lord Hoffmann stated:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*) of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

17. I do not dispute that the processes are closely analogous. In *Les Laboratoires Servier & Anor v Apotex Inc & Ors* [2014] UKSC 55 [2015] 1 AC 430, a case about the doctrine of illegality, Lord Sumption, when explaining that the doctrine was a rule of law, at [14] treated the formation of a value judgment as being discretionary "in nature". He said:

> "Under this "public conscience" test, the application of the illegality defence was not discretionary in law. But it was clearly discretionary in nature. In substance it called for a value judgment about the significance of the illegality and the injustice of barring the claimant's claim on account of it."

Similarly, in his speech to the Family Law Bar Association in September 1982 ("What's in a word, or a phrase?") Lord Justice Ormrod plainly thought that the two processes were virtually synonymous. He said:

> "The traditional difficulty about qualitative or value judgments is the long held and tenaciously maintained theory that the judge's task was to make objective decisions and not to get involved in value judgments. They were able to maintain this position for a very long time, thanks largely to the jury, to whom all value judgments were referred. But Parliament, to an ever-increasing extent, has insisted upon giving the judge's discretionary powers and so thrusting value judgments upon them… In this division, with the legislation of 1969 and 1970, we have reached the stage where practically every decision we make is a value judgment, so we are accustomed to it. …. The truth is, and we ought to face it, whether we like it or not, that judges, to an ever-increasing extent, are expected to make value judgments, and the distinction between so-called matters of discretion and so-called objective decisions is disappearing fast. Parliament and the public contract in a dilemma: they dislike rigidity in the law but demand objectivity; they insist on flexibility but at the same time demand certainty. One cannot win, but one can do one's best to be wise."

18. I have recently attempted to explain the difference (bravely you might think) in *Cowan v Foreman & Ors* [2019] EWHC 349 (Fam) at [41]:

> "In my judgment the difference is explained by reference to the legitimate scope of individual judicial subjectivity under the two processes. Once the facts are established the judge's personal views about rightness and wrongness are far more tightly confined where the process is evaluative rather than discretionary."

Put in statistical language one would expect the standard deviation from the mean to be a smaller amount under an evaluative process than under a discretionary one. In legal

terms it means that there is more scope for falling into error, and thus of appellate interference, where the process is evaluative rather than discretionary. There is extensive jurisprudence as to the standard of appellate review for different classes of decision – whether it is of concrete fact, or evaluation of facts, or the result of discretion – but time does not permit me to analyse it here.

19. I would however go further. In *WM v HM* [2017] EWFC 25 I had to determine a fair figure for the historic value of an asset. At [12] I said:

> "It involves weighing the evidence and then forming a value judgment. It is to be distinguished from picking a result from a range of choices none of which can be said to be right or wrong. Plainly, to decide whether periodical payments should be £15,000, or £20,000 or £25,000 annually will be a pure exercise of discretion. When the court determines future facts, i.e. makes predictions about the future, the exercise is evaluative, even if it is based on findings about past facts. Thus, the question whether a child is likely to suffer significant harm for the purposes of section 31(2) Children Act 1989 is an evaluation: see *Re B (A Child)* [2013] UKSC 33 [2013] 1 WLR 1911 at [44], [57] and [199]. Equivalently, to determine whether a party has a future earning capacity is an evaluative exercise. Determination of past facts may also have a significant evaluative component. For example, what a husband actually did by way of contribution is a simple matter of fact; whether it amounted to something special justifying a departure from equality is a value judgment: see *Work v Gray* [2017] EWCA Civ 270 at [105]. In the very recent case of *Ilott v The Blue Cross & Ors* [2017] UKSC 17, the Supreme Court has explained that whether a will (or the laws of intestacy) made "reasonable financial provision" for a claimant under the Inheritance (Provision for Family and Dependants) Act 1975 is an evaluative rather than a discretionary determination."

There is thus an essential difference between the two processes. In a true discretionary situation, the court makes its pick from a range of choices none of which can be said to be exclusively right and none of which can be said to be wrong. In an evaluation the court is subjectively weighing concrete ("primary") facts to determine the right result. If the required decision is a binary choice – a yes/no question – then, I would argue, the exercise is surely evaluative.

20. It is important to remember that in most fields of law the task of a court is to determine whether a legal standard is passed or met. Such a legal standard is an abstraction or construct. It is not just a tangible thing, or an identifiable event. It is not a matter of primary fact. Thus, in the law of tort the law is routinely concerned with the concept of negligence. In criminal and regulatory law, the question in many cases is whether someone has been dishonest. In family law about children the court routinely has to decide what is in a child's best interests or whether that child has suffered or is at risk of suffering significant or grave harm. In money proceedings the court has to determine what does or does not amount to matrimonial property, and sometimes has to determine if someone has made a special contribution. Whenever the court has to make such a finding it forms a value judgment. It is not exercising a discretion.

21. Let us look at those situations where the law imposes a factual threshold before a "discretion" can be exercised. In *Re LC (Children)* [2014] 1 AC 1038 Lord Wilson considered rule 16.2 of the Family Procedure Rules 2010 which provides that the court may make a child a party to proceedings if it considers it is in the best interests of the child to do so. At [45] he stated:

> "If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens upon a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion."

I would argue that this sort of discretion is not merely occasionally found in procedural rules. Rather, this sort of discretion is regularly found in substantive law.

22. Consider, first, section 31(2) of the Children Act 1989. As is well-known, this provides that a court may only make a care order or supervision order if it is satisfied that the child concerned is suffering, or is likely to suffer, significant harm. Thus, there are two stages. The first is the familiar threshold. Is child concerned suffering, or likely to suffer, significant harm? If, and only if, this is proved may the court make a care or supervision order.

23. There is nothing discretionary about Stage 1. It is unquestionably value-judgmental. In *Re B (a Child)* [2013] UKSC 33, [2013] 1 WLR 1911 the Supreme Court could not have been clearer. See Lord Wilson at [44], Lord Neuberger at [57], and Lady Hale at [199]. But what of Stage 2? The court "may" make a care or supervision order. At [199] Lady Hale continued:

> "[then] is the decision what order, if any, should be made. That is, on the face of it, a discretion. But it is a discretion in which the requirements, not only of the Children Act 1989, but also of proportionality under the Human Rights Act 1998, must be observed."

24. The reference to the requirements of the Children Act 1989 is a reference to the principle in section 1(1) that the child's welfare shall be the court's paramount consideration and to the checklist of factors to be taken into account in its application in section 1(3). I will later seek to show that this unquestionably calls for a value judgment. The reference to proportionality under the Human Rights Act 1998 is also without doubt calls for a qualitative decision. If it is proposed to sever the relationship between parent and child the human rights test is very strict: it will only be allowed in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do.

25. Plainly, the judicial exercise in Stage 1 and Stage 2 has nothing to do with exercising a true discretion. Stage 1 involves finding primary facts and then forming a judgment as to whether those facts lead to a conclusion that the child is suffering, or is likely to suffer, significant harm. If the answer is yes, then the threshold conclusion will likely drive the resultant Stage 2 qualitative decision. How could it be otherwise? I have looked without success for a case where the court answers yes at Stage 1 but then does not make either a care or supervision order under Stage 2. To be sure, Stage 2 gives a choice between a care and supervision order, but that is not a discretionary choice, for the reasons I have given.

26. I now turn to the 1980 Hague Convention on the Civil Aspects of Child Abduction.

27. Article 12(1) provides that where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than

one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

28. There are exceptions to this absolute rule, which include the following so-called discretionary defences:

    a. First, Article 12(2) states that the judicial or administrative authority of the requested State ("the authority"), even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. This exception has been held (in England and Wales, but not Hong Kong) to give rise to a discretion to order a return even if the fact of settlement has been proved.

    b. Second, Article 13(1)(b) provides that notwithstanding the provisions of Article 12, the authority is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

    c. Third, Article 13(2) provides that the authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

29. Although these powers are said to give rise to a discretion, in my respectful opinion they do nothing of the sort. In each instance the court has to form a value judgment. Is there a good reason to order a return notwithstanding that a year has elapsed since the removal/retention and the child is settled in his or her new environment? Is there a good reason to order a return notwithstanding that there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation? Is there a good reason to order a return notwithstanding that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views?

30. The leading text book Clarke Hall and Morrison at para 469 says "it will be extremely difficult to justify a return where an Art 13(1)(b) exception is established, nor will it be easy to do so in Art 12(2) settlement cases". I would go further and say that it is virtually impossible in the second instance (harm) and extremely difficult in the first (settlement) and third (objections). Indeed, I have not found a single case where a return has been ordered in the face of a finding of risk of harm or intolerability. Only one case is reported where a return has been ordered notwithstanding settlement (*F v M and N* [2008] EWHC 1526 (Fam) [2008] 2 FLR 1270) and only a handful of cases are to be found where a return has been ordered notwithstanding a child's objections (*AVH v SI* [2014] EWHC 2938 (Fam), [2015] 2 FLR 269, *FK and ML v A* [2016] EWHC 517 (Fam), [2016] Fam Law 659, *H v K* [2017] EWHC 1141(Fam), [2018] 1FLR 700). This tiny incidence is because, again, the so-called discretion is more theoretical than real, and the threshold, qualitative, conclusion drives the resultant decision.

31. In my respectful opinion we should all stop talking about articles 12 and 13 giving rise to a "discretion". This is seriously to mis-describe the exercise. Rather, we should recognise that each exception contains a threshold which requires a careful value judgment. Once that value judgment is made it will almost invariably drive the resultant decision. If an order for return is made notwithstanding that the threshold in question has been proved, then there will need to be a very careful value judgment explaining why the threshold conclusion does not prevail.

32. I now turn to the application of the paramountcy principle in a private law case. Traditionally, this has been regarded as an exercise of discretion. In *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 at 649 Lord Fraser stated that the case involved a review of a decision of a judge in the exercise of his discretion involving the welfare of children. At 650 he said:

> "The Jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory."

33. In *B v B* at [38] Lord Wilson said that the classification of the exercise being one of discretion is "hard-wired into the mind-set of family lawyers in England and Wales". However, he referred to an interesting decision of the Supreme Court of New Zealand where a different, and I suggest correct, view, was taken: *Kacem v Bashir* [2011] 2 NZLR 1. That was a relocation case to be decided, of course, by reference to the paramountcy principle. Under New Zealand law the gateway for an appeal against the exercise of discretion is very narrow; otherwise a general appellate review lay as of right. Therefore, the classification of the exercise importantly governed appeal rights.

34. At [32] Blanchard, Tipping and McGrath JJ held, importantly:

> "But, for present purposes, the important point arising from *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court."

35. In my opinion this reasoning is unassailable. The court was faced with a binary question. Would relocation be in the child's best interests? Yes or no? Answering that question required making factual findings and forming a value judgment. It was categorically not an exercise of making a pick in a range of imperfect choices.

36. This view had been prefigured by Lord Hoffmann in *Piglowska v Piglowski* [1999] UKHL 27, [1999] 1 WLR 1360. He referred to *G v G* and noted that Lord Fraser had approved and adopted the well-known statement of principle by Lord Justice Asquith in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343, 345, which concerned an order for maintenance for a divorced wife:

> "It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

37. Lord Hoffmann plainly saw a clear difference between making an award of spousal maintenance and deciding what was in the best interests of a child, for after having cited that passage he went on:

> "This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts."

And then he proceeded to quote his famous dictum in *Biogen Inc. v Medeva Ltd.*

38. It is clear (at least to me) that Lord Hoffmann did not see a binary welfare decision as involving an exercise of discretion. Rather, he saw it as an evaluation of the primary facts.

39. In my opinion we should abandon the classification of binary welfare decisions as being one of the exercise of judicial discretion. I would accept that non-binary decisions, such as quantum of contact, might be capable of being thus classified.

40. I now turn to the arena of ancillary relief.

41. It is well known that since the epoch-making cases of *White v White* [2001] 1 AC 596 and *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 an ancillary relief case will be determined by reference to the principles of sharing, needs and compensation. The last of these has the status of a unicorn, much discussed and described but never actually seen. It is the first two principles that are invariably in play.

42. The way in which the court should approach its task has been definitively summarised by Lord Wilson in *Scatliffe v Scatliffe (British Virgin Islands)* [2016] UKPC 36, [2017] 1 AC 93 at [25], where he stated:

> "(vii) As was recognised in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, at paras 65 and 66, it was decided in the *White* and *Miller* cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle. In the *Miller* case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non-matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the *White* case at p 610 that,

> irrespective of whether it fell to be *shared*, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's *needs*.
>
> (viii) In *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306, it was noted at para 22 that, notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need.
>
> (ix) Indeed, four years later, in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J suggested at para 22 that the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard.
>
> (x) So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the *Miller* case at paras 137 to 144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other."

43. Thus, the place to start is the sharing of the matrimonial property. Sometimes this means that the court has to value a piece of property, typically a business, at the start of the relationship, as well as at its end, in order to measure what has accrued during the marriage and which therefore should be equally shared.

44. In my opinion the exercise is exclusively one of evaluation and there is nothing discretionary about it. I said as much in *WM v HM* [2017] EWFC 25 at [12]. But in the appeal from that decision – *Martin v Martin* [2018] EWCA Civ 2866 – Lord Justice Moylan at [115] was of the view that it was "partly discretionary". He justified this by harking back to his earlier decision in *Hart v Hart* [2017] EWCA Civ 1306, [2018] 2 WLR 509 where he said at [85]:

> "It is, perhaps, worth reflecting that the concept of property being either matrimonial or non-matrimonial property is a legal construct. Moreover, it is a construct which is not always capable of clear identification. An asset can, of course, be entirely the former, as in many cases, or entirely the latter, as in *K v L*. However, it is also worth repeating that an asset can be comprise both, in the sense that it can be partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage. I have added the word "reflective" because "reflect" was used by Lord Nicholls in *Miller* (paragraph 73) and "reflective" was used by Wilson LJ in *Jones* (paragraph 33). When property is a combination, it can be artificial even to seek to identify a sharp division because the weight to be given to each type of contribution will not be susceptible of clear reflection in the asset's value. The exercise is more of an art than a science."

45. I have to say, respectfully, that I do not agree with this logic. A process that evaluates primary facts to decide if a legal standard is, or is not, met, is, as Lord Hoffmann explained, to a degree a subjective exercise – it might well be described as being more of an art than a science. Take a trial of whether someone has been guilty of dishonesty. Dishonesty is a legal construct, not always capable of clear identification. We now know that this is to be "objectively" judged (*Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, [2018] AC 391). First the court has to determine what was the accused's state of mind. This is a matter of fact: see *Edgington v Fitzmaurice*

(1885) 29 ChD 459 at p 483, where Lord Justice Bowen memorably said in that: "the state of a man's mind is as much a fact as the state of his digestion" (parting company with Chief Justice Bryan who in 1477 observed that "the Devil himself knoweth not the thought of man" (YB 17 E4 Pasch fo 2 pl 2)). Of course, no primary or direct evidence can tell you the state of someone's mind. You cannot see or touch a thought. It is a process of evaluation of the primary facts. In *Basson v General Medical Council* [2018] EWHC 505 (Admin) the question on appeal was whether a doctor had rightly been found by the disciplinary tribunal to have touched a patient with a sexual motive. At [17] I said:

> "…the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence."

46. Once the accused's actual state of mind as to knowledge or belief as to facts is established then, per Lord Hughes in *Ivey* at [74]:

> "… the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people".

And as Lord Radcliffe observed in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728:

> "The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself."

Of course, when acting as the spokesman for ordinary decent people the court's process is entirely evaluative.

47. Thus, in my opinion it is a fallacy to say that merely because the court is grappling with a legal construct or standard and is determining whether that standard is or is not met, and because the process is more intuitive and subjective than scientific and objective, that what the court is doing is exercising a discretion.

48. By contrast, the assessment of needs is a discretionary exercise, although one that is hedged about with numerous restraints. In a number of recent cases the relevant factors have been spelt out. See, for example, *Juffali v. Juffali* [2016] EWHC 1684 (Fam) at [79], *FF v. KF* [2017] EWHC 1098 (Fam) at [18], and *Hammoud v Zawawi* [2019] EWHC 839 (Fam) at [58] – [60].

49. The principles derived from the cases may be expressed thus:
    a. Save in a situation of real hardship, the 'needs' must be causally related to the marriage.
    b. The first consideration in any assessment of such needs must be the welfare of any minor child or children of the family.
    c. After that, the principal factors which are likely to impact on the court's assessment of needs are (i) the length of the marriage; (ii) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).

d. There is an inter-relationship between the level at which future needs will be assessed and the period during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will not assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.
e. In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case: the provision should enable a gentle transition from the marital standard of living to the standard that she could expect as a self-sufficient woman.

50. This is not an "unfettered" or even a broad discretion. It is fettered and narrow. It is a discretion which is regulated by, and subordinated to, rules. You will hear tomorrow how the court exercises its powers on an application for spousal maintenance. Suffice to say that the scope of discretion is now highly restricted: it is a rules-based strict needs exercise.

51. We also know that where a court is capitalising a periodic income need it will almost always use the Duxbury algorithm: *Pearce v Pearce* [2003] 2 FLR 1144 at [38] -[39]; *Vaughan v Vaughan* [2010] 2 FLR 242 at [37]; *Tattersall v Tattersall* [2018] EWCA Civ 1978 at [42]. In *Vaughan* Lord Justice Wilson, as he then was, memorably stated: "At all events the court has, thank goodness, only a narrow discretion to arrive at a capital sum otherwise than by application of Duxbury formula and it should exercise it in order only to reflect special factors". Plainly, that is a discretion regulated by, and subordinated to, rules.

52. We can therefore see that most so-called discretionary situations are not in fact discretionary but require instead the formation of value judgments. As I have sought to explain such a process is fundamentally rules-based. In those situations where a true discretion is to be exercised, again, the process is always subordinated to clear rules and guidelines.

53. In the realm of discretion why do rules matter? The answer is simple. It is so that like cases are treated alike, and so that lawyers can confidently predict the result of a case in order to give good advice about settlement.

54. In *Ward v James* [1966] 1 QB 273 at 295 Lord Denning MR stated:

> "The cases all show that, when a statute gives discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless, the courts can lay down the considerations which should be borne in mind in exercising the discretion, and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised, and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process."

55. Deane J put it this way in the High Court of Australia in *Mallet v Mallet* (1984) 156 CLR 605 at p 641:

> "It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just

and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" of "a codeless myriad of precedent" and "a wilderness of single instances" of which Lord Tennyson wrote in his poem "Aylmers Field"'

What the poet laurate wrote was this:

So Leolin went; and as we task ourselves
To learn a language known but smatteringly
In phrases here and there at random, toil'd
Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro' which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

Poor Leolin. Sometimes when I read judgments from the Court of Appeal, I know how he must have felt.

56. Staying with the High Court of Australia I cite Brennan J in *Norbis v Norbis* (1986) 161 CLR 513 at 538:

> "The only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so -- guidelines which are not rules of universal application, but which are generally productive of just and equitable orders."

57. To similar effect in *Miller* at [6] Lord Nicholls stated:

> "...an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach."

58. Likewise, in *DD v LKW* (FACV 16/2008) Ribeiro PJ stated at [49]:

> "While recognizing that some uncertainty is inescapable, it is nevertheless desirable that the appellate courts should attempt to provide guidance with a view to encouraging consistency and predictability".

59. These are I suggest the clearest statements in favour of discretion, where it exists, being regulated by, and subordinated to, rules. I think Lord Penzance would have been less anxious had he known what was coming.

60. However, there remain those wedded to the unfettered school. I have mentioned above the clear rules that apply where the sharing principle is being applied – the two-stage process of identifying the scale of the matrimonial property, followed by its division, almost invariably by two. In *FZ v SZ* [2010] EWHC 1630 (Fam) at [143] I said:

> "Some argue that this dictum stipulates that the two-stage process should be telescoped into one. I find it difficult to accept that this is what the Court of Appeal intended. A telescoped approach runs the risk of insufficient logical rigour being applied to the identification and treatment of the two very different categories. It runs the risk of palm-tree justice being applied. It is so easy to say – *"well there is a good deal of non-matrimonial property here so I will reduce the claimant's share to 40%"*, but that approach simply does not tell anyone

what weight is being given to that factor. There is also the point that Paragraph 66 of *Charman* by its terms requires an identification and quantification of the non-matrimonial property in order to inform the percentage share. What is the point of all this work if it is then to put to one side in favour of a percentage based on "feel"?

61. This provoked what might be politely described as a slap-down from Cheung JA in *AVT v VNT* (CACV 234/2014) at [6.9]:

> "Personally I do not find the argument in the English cases about which is the preferred approach helpful. More importantly the Court of Final Appeal has already given guidelines on how non-matrimonial property should be dealt with under the sharing principle in a short marriage which I will deal with in the following paragraphs. Hence the starting point of excluding the matrimonial property from consideration will be contrary to the Court of Final Appeal judgment which this Court must follow. But for the purpose of discussion, my view is that the second approach which may eventually include the non-matrimonial assets should not be regarded as the touchstone to the solution of the problem. Words such as 'insufficient logical rigour' or 'risk of palm-tree justice' used by the proponents of the second approach to criticise the first approach are really, with respect, not helpful at all. This is after all a discretionary relief to be exercised by reference to well defined perimeters and established principles. Further, under the second approach the determination of how much of the non-matrimonial property is to be included is very much a discretionary decision as well."

62. Similarly, in *Hart* at [97], Lord Justice Moylan stated:

> "Finally, I would repeat that fairness has a broad horizon. I recognise, of course, the need for clear guidance and principles when the court is given a discretion as wide as that contained in section 25 of the 1973 Act. Such clarity not only assists judges when determining financial claims but also enables those seeking to resolve the consequences of their separation and divorce, as it has been described, "to bargain in the shadow of the law": *Matrimonial Property, Needs and Agreements* 2014 (Law Com No 343) paragraph 3.6. However, this should not lead to the imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome."

63. This has received support from Lady Justice King in *Versteegh v Versteegh* [2018] EWCA Civ 1050 at [88] - [89] where she labelled the techniques respectively the "arithmetical" and "impressionistic" approaches.

64. The dispute continues, and I remain unrepentant. It is, I emphasise, only a minor dispute and probably does not lead to much difference in terms of outcome. It is not to be regarded as the family law equivalent of the dispute between the blue and green street-gang factions that wracked Byzantium during the reign of Justinian in the 6th century. You will recall that, bafflingly, the dispute was mainly about theology with the greens supporting monophysitism; the blues, orthodoxy. So violent became the dispute that swathes of Constantinople, including Hagia Sophia, were utterly laid waste. However, in terms of Christian dogma, orthodoxy prevailed and monophysitism, denounced as heretical, faded into history.

65. I would like to think that the arithmetical approach is wearing a blue tunic.

66. I would conclude with this observation. The debate is reminiscent of the old trope that equity is as long as the Chancellor's foot. An early expression was John Selden's Table Talk in 1689:

> "Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience."

Yet equity's roguish traits were soon tamed by ever-more elaborate rules, so that by 1818 the great Lord Eldon LC was able to say in *Gee v Pritchard and Anderson* (1818) 2 Swanston 402:

> "Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot."

I would like to think that discretion's roguish traits have been similarly tamed by clear rules.

67. Thank you for listening to me.
