

OWENS V OWENS: A MOST CURIOUS CASE

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ABSTRACT

The combination of the long Brexit delays, largely unwelcome General Election, a change of leadership and Cabinet composition in the Conservative government and finally the coronavirus has between them resulted in a long pause in expected reforming legislation which is much needed in Family Law, including the initial loss of the Divorce Dissolution and Separation Bill 2019¹, generated in 2019 by the failure of Mrs Owens' ' Supreme Court appeal in the now notorious case of *Owens v Owens*.² While this was immediately hailed by the media as justification for urgent reform of the Law of Divorce in England and Wales – on the grounds that English law was almost alone in modern liberal jurisdictions in lacking a No Fault Divorce regime, clearly this has now been overtaken by subsequent events.

While it may be factually accurate that England and Wales does *not* have such a regime for dissolution of marriage without fault and by consent (at least without satisfying the inconvenient condition of waiting for the two-year delay necessary for a decree on the basis of two years of separation and consent), and perhaps should have one for the reason stated, the failed *Owens* appeal has absolutely no jurisprudential connection with any urgency for reform of the law in order to secure such a decree at all. This is because the legal profession has been effectively obtaining divorces under the present law for over 40 years, and, notwithstanding *Owens*, has been continuing to do so since 2018, albeit with the caveat that drafting must be undertaken with extreme care to be sure to avoid a repeated debacle. Nevertheless, on account of the age of the present statute, legal, political and social theorists of course have strong arguments for a No Fault addition to the existing Matrimonial Causes Act 1973 or even for replacing the existing provisions of that statute altogether.

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¹ Later passed into law as the Divorce, Dissolution and Separation Act 2020, which received the Royal Assent on 25 June 2020 but is not yet in force.

² [2018] UKSC 41, heard in the Supreme Court on 17 May, 2018, on appeal from [2017] EWCA Civ 182, with judgment on 25 July 2018.

However this is because the present statute is itself a re-enactment and consolidation of the original Divorce Reform Act 1969 which led the post-WWII reforms creating our current Law of Divorce, so is well past its ‘sell-by date’, but *not* because it does not work in modern times. If anything, and especially with the assistance of s76 of the Serious Crime Act 2015, s 1(2)(b) of the 1973 Act works entirely consistently with present philosophy, that is, as marriage is a partnership of equals there is no place for any form of domestic abuse within it.

In fact Mrs Owens thus *could* (and arguably *should*) have obtained her divorce on the existing basis, pursuant to s 1(2)(b) of the 1973 Act, namely on that of her husband’s ‘behaviour’. Thus, as indeed hinted by Lady Hale in her paragraph 50 of the Supreme Court judgment, which she added to the agreed text set by Lord Wilson, there was clear evidence of the alleged ‘authoritarian, demeaning and humiliating conduct over a period of time’, which in law was capable of founding a decree, and there was existing case law supporting this in the case of *Livingstone-Stallard v Livingstone-Stallard*.³

Consequently in her paragraph 53 she identified what in her view was thus ‘the correct disposal ... to allow the appeal and send the case back to be tried again – which, however, could not be adopted in the particular circumstances, owing to the fact that no one, including the Appellant, Mrs Owens, wanted to go through such a trial again, not least as even her counsel, Philip Marshall QC, ‘viewed such a prospect with dread’. Thus, in her paragraph 54, Lady Hale concluded that she was ‘reluctantly persuaded that this appeal should be dismissed’ – a conclusion, however, not stopping her from including some forthright comments on the conduct of the case below, with which any analysis can only agree.

So, whatever happened in *Owens v Owens*? In the Central London Family Court, the Court of Appeal and the Supreme Court?



1. INTRODUCTION

Whether he agreed with Lady Hale or not, the then Minister of Justice and Lord Chancellor, The Rt Hon David Gauke, also took up the public demand for reform as he had already said he would when pressed to do so following the *Owens* decision in the Supreme Court. On 9 April 2019 when the government published its response to the autumn 2018 consultation, *Reform of the Legal Requirements for Divorce*, which had closed on 18 December 2018, it was announced that reform would be taken forward ‘as soon as Parliamentary time allows’. Then on 10 April 2019 the Commons Library Briefing Paper provided the expected detail, namely

³ *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47, a case on very similar ‘authoritarian, demeaning and humiliating’ facts.

retention of the present two-stage decree process of decree nisi and decree absolute – but in future to take place over a minimum timeframe of 6 months – also retaining a statement of irretrievable breakdown but with no need to allege conduct or separation as under the Facts in s 1(2) of the present Act. There was also to be provision for a joint application,⁴ but otherwise the bar on presentation of a petition within one year of the marriage was retained and defence to such a petition is to be limited to some specific legal grounds.⁵

Thus, it was thought, Mrs Owens would probably at last have her decree absolute by some time in 2020, and the long-standing lobby by such as Resolution, the Solicitors' Family Law Association, and others, including independently by Nigel Shepherd, twice elected as Resolution's National Chair, since his pressure for 'Ending the Blame Game'⁶ would at last have been successful.

In the circumstances, commentators queried whether in the circumstances it was now even worth going in to the sorry court history of the *Owens* case, to which the answer was occasionally in the affirmative, since, as identified by Lady Hale, this was clearly a miscarriage of justice where a new hearing was technically required. Moreover, there is also still a school of thought, which seems persistently to remain espoused by a sector of the population⁷ that divorce is wrong unless fault is established. Consequently some thought it might be fair to ensure that Mrs Owens was not next called upon to endure any new claim from such a quarter that she would never have obtained her decree but for the change in the law which was then soon likely to give it to her – an inaccurate and ill-informed claim, since there was actually ample evidence for her to have obtained it already, as may now be demonstrated.

1.1. The Three Hearings

A careful examination of the transcripts of the hearings at all three levels – first instance, Court of Appeal and Supreme Court – unsurprisingly confirms that, for some reason not immediately discernible, only Lady Hale had fixed on the crucial issue in the case, which should have ensured a decree: namely the 'authoritarian, demeaning and humiliating conduct over a period of time', which – quite apart from

⁴ A welcome change, since this is often the process in civil law jurisdictions, for example, Spain where the petition must be presented jointly.

⁵ Catherine Fairbairn and Cassie Barton, Commons Briefing Papers SN01409.

⁶ Nigel Shepherd, 'Ending the Blame Game: Getting No Fault Divorce Back on the Agenda' (2009) 39 *Family Law*, 122–126.

⁷ Which according to research (although never specifically identified) in the piloting of information meetings in 1996 was the cause of the defeat of the last attempt at introducing No Fault Divorce under the Family Law Act of that year. The Briefing Paper referred to in n2 above also (no doubt correctly) records the persistence of arguments against 'easier' divorce.

satisfying s1(2)(b) for divorce – would have been sufficient to obtain a non-molestation order against such a husband under the Family Law Act 1996 s 42, and this especially so since the Serious Crime Act 2015 s76 enlarged the previous definition of the domestic abuse required for such an order to include ‘coercive or controlling behaviour in an intimate relationship’ Moreover s 76 goes on to provide that a person who ‘repeatedly or continuously’ engages in such behaviour actually commits an *offence*, as well as providing the basis for a s 42 protective injunction. Thus if this sort of behaviour is in fact an *offence* it is difficult to see how it could be excused simply because the parties are married, albeit that some see that relationship as one where the spouses are supposed to put up with some ‘wear and tear’, an opinion which seemed to be shared by the judge of first instance who at his hearing and in his judgment seemed to be pointing out that some such was to be expected in a marriage. However, this surely cannot include otherwise *criminal* behaviour?

In the circumstances, despite Lady Hale’s apparently lone perspicacity, it is also hard to see the difficulty of any judge, at any level, in grasping the nature and impact of such behaviour within a marriage, especially as a contemporary matrimonial relationship is now seen as a *partnership of equals*⁸ rather than as the patriarchal institution of former times, when, for example, even Mr Livingston-Stallard in 1974 was not allowed to get away with the ‘coercive or controlling behaviour in an intimate relationship’ which at that time was not yet an offence.

However, again it seems that only Lady Hale identified the possible reason for this difficulty, which cost Mrs Owens her well-deserved decree, when she tactfully went on in her paragraph 50 to opine: ‘Those who have never experienced such humiliation may find it difficult to understand how destructive such conduct can be of the trust and confidence which should exist in any marriage’ and cited the analogy of the role of constructive desertion in employment law.

It must therefore inevitably be asked: **whatever** happened at first instance? *And* in the Court of Appeal, where the first appeal came before the experienced and creative President of the Family Division of the time (whose establishment since 2014 of the unified Family Court has involved so much modernisation which he led with sensitivity and skilful recognition of the driver of social change); and when sitting with him were two Lady Justices of Appeal, including Hallett, LJ, whose background in the impact of social change in both the legal profession⁹ and in criminal law¹⁰ should have been of assistance in the interpretation of s 1(2) of the Matrimonial Causes Act 1973 which was at the heart of the ‘behaviour’ Fact of the existing Law of Divorce and which should have delivered a decree to Mrs Owens.

⁸ Per Lady Hale, *Owens v Owens* [2018] UKSC 42, paragraph 47.

⁹ First woman Chairman of the Bar, 1998.

¹⁰ Now Baroness Hallett, until October 2019 Vice-President of the Court of Appeal, Criminal Division.

1.2. The Law: Matrimonial Causes Act 1973 s 1(2)

The relevant part of the statutory provision under s 1(2), which was relied on by Mrs Owens, reads as follows:

Section 1 Divorce on the breakdown of marriage

- (1) ...
- (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say -
 - (a) ...
 - (b) that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent; ...

That is it: plain English with no gloss from case law, although there used to be some in the pre-1969 law and in the early days after the 1969 Divorce Reform Act was consolidated into the Act of 1973.

Thus s 1(2)(b) was all Mrs Owens had to prove, since it seems it was accepted by everyone but the respondent husband that the marriage had broken down: at first instance, in the Central London Family Court, Judge Tolson expressly *found* that it had broken down¹¹ although Mr Owens and his advisers ‘energetically denied that any behaviour on his part had caused the breakdown of the marriage’ and Mr Owens himself ‘twice averred that if, which he did not accept, the marriage had broken down, the breakdown had not been the result of his behaviour’.¹²

This case is curious at every level, since it has long been accepted that large numbers of *undefended* divorces can be, and have been, granted on the basis of three or four instances of ‘behaviour’, which evidence that the Petitioner cannot reasonably be expected to live with the Respondent. Moreover, since the second half of the 1970s, which coincided with the strong influence interpreting the then new Matrimonial Causes Act 1973 of the experienced Family Judge, Ormrod LJ,¹³ it has been accepted that, in the interests of preserving post-decree family harmony and recognising the Solicitors Family Law Association’s approach to such ideals,¹⁴ the ‘mild behaviour petition’ could in appropriate circumstances be sufficient to

¹¹ *Owens v Owens* [2018] UKSC 42, paragraph 20.

¹² *ibid*, paragraph 40.

¹³ Jaqueline Burgoyne, Roger Ormrod, Martin Richards, *Divorce Matters*, Pelican, 1987.

¹⁴ The SFLA, more recently using the business name ‘Resolution’ by which it is now known, was founded in 1982 to mark this change of approach to ‘behaviour’ from the

evidence the right to a decree without unduly antagonising the other party or inspiring an urge to defend such a petition. This was done by utilising, as he put it, perhaps ‘the first, the worst and the last’ of the incidents complained of, perhaps also including one that was ‘witnessed’. Following this 1970s shift of emphasis, it has also long been accepted that the test to establish such behaviour is partly objective – what would a reasonable person think of the conduct in question¹⁵; and partly subjective, looking at ‘*this* husband and *this* wife’.¹⁶

1.3. Interpretation of the Matrimonial Causes Act 1973 s1 (2)(b)

In theory, the tests should be no different when a suit is defended, because in that case it simply becomes a question of the burden of proof, the petitioner must proactively prove his or her case and the judge must choose whom to believe when the Respondent tells a different story from the Petitioner; indeed this testing of the case is the very purpose of the hearing in a defended suit – whereas an undefended case would proceed only on the evidence in the papers submitted to the court. Thus if the Respondent does *not* successfully challenge the Petitioner’s case in some way, the decree will be granted, provided the behaviour complained of could (i) objectively be sufficient to qualify for a decree on the Fact of behaviour, that is, not be totally trivial, but without further gloss, and (ii) as a matter of fact satisfy the hybrid objective and subjective test which has emerged from case law in the years since 1973. This, of course, raises the question of what is ‘totally trivial’, or as the judge of first instance in this case chose to call it, ‘at best flimsy’ or such as ‘scarcely merited “criticism”’,¹⁷ which (whatever else it might or might not include in the eyes of a particular judge) surely cannot correctly describe conduct

pre-Divorce Reform Act 1969 law, based on ‘cruelty’, together with the alternatives of adultery or desertion which have continued to exist in the reformed law.

¹⁵ Joseph Jackson, CF Turner and Margaret Booth (eds), *Rayden on Divorce* (12th edn, Butterworths 1974) Vol 1, 216 on the basis of which the Court of Appeal judgment in *Owens v Owens* [2017] EWCA Civ 182, 24 March 2017, at paragraph 30, quoted Cairns LJ in *O’Neill v O’Neill* [1975] 1 WLR 1118, at 1121; or what would a jury think, on which the Court of Appeal in their judgment of 24 March 2017 refers at paragraph 29 to Dunn LJ (another experienced Family Judge of the early post 1969–1973 interpretative era of the new statutes) in *Livingstone-Stallard v Livingstone-Stallard*, n2 above.

¹⁶ *Livingstone-Stallard v Livingstone-Stallard*, n2 above; and *Balraj v Balraj* (1980) 11 Fam Law 110, *per* Cumming-Bruce LJ, ‘there is of course a subjective element in the totality of the facts that are relevant’: see the Court of Appeal judgment in *Owens v Owens*, [2017] EWCA Civ 182, at paragraph 32.

¹⁷ *Owens v Owens*, [2018] UKSC42, paragraph 20.

expressly prohibited by a statute which is also specifically entitled a *Serious Crime Act* and containing provisions dealing with such issues.

2. THE FIRST INSTANCE HEARING IN THE CENTRAL LONDON FAMILY COURT

When the case was initially before the judge of first instance, HH Judge Tolson QC, at the oral hearing¹⁸ (which, as explained, was necessary since the case was defended by the Respondent or the decree nisi would have been certified at a lower level of the court judiciary) there was apparently independent evidence available, though not called, of one of the most disagreeable incidents relied upon by the Petitioner, and which is referred to in the Court of Appeal judgment¹⁹ as ‘the restaurant incident’. About this, it was pleaded in the petition that the Respondent had ‘made stinging remarks about the Petitioner which made her and [their fellow diner] F²⁰ feel visibly uneasy’.

It seems that the upshot of this incident, which might almost alone have won a decree, was that the Respondent could not even leave his public disparagement of the Petitioner there but, as the Petition alleged, he next

snapped at the Petitioner when, after speaking to a waiter about the food, she then asked what point the conversation had reached, the Respondent then in turn commenting “you missed out by thinking it necessary to talk to the waiter”, upsetting and embarrassing the Petitioner in front of F. F rushed to the Petitioner’s defence as he clearly agreed that the respondent’s critical remarks were unjustified.

Accordingly it is hard to see how the judge could have accepted the Respondent’s excuse (found in his Answer to the Petition) which sought to explain away his behaviour on this occasion by claiming that it was the Petitioner who was at fault, and not he, on the grounds that she was rude in ‘calling over and engaging with the waiter while F was talking to the two of them’, especially as the Respondent’s next comment – that he had ‘sought to engage her attention to indicate that F was in the course of speaking to them’ – simply does not ring true.

¹⁸ 15 January 2016.

¹⁹ [2017] EWCA Civ 182, paragraph 12, in which the Respondent persisted in loudly berating his wife within the hearing of ‘numerous strangers’ and ‘would not let the matter drop’.

²⁰ F was the male friend of the couple whom the Petitioner had invited to dine with them in the restaurant.

In the first place, that was hardly the way in which, rather more courteously, to achieve his apparently stated objective: if indeed that *was* his objective rather than simply to have the last word. The Respondent's final comment that 'any embarrassment that may have been caused by the Petitioner was of her own making' does not accord at all with the fact that the couple's guest, F, 'rushed to the Petitioner's defence'.

It is difficult to understand the apparent disregard by the judge of the Respondent's unpleasant behaviour in this particular incident when he dismissed her Petition on the basis that she had 'failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973 that her husband had "behaved in such a way that [she] cannot reasonably be expected to live with [him]"'. Unlike the first incident of 'behaviour' pleaded on behalf of the Petitioner, which is referred to as 'the airport incident' this public chastisement of the wife²¹, in front of their friend (and anyone else who might have been listening in the restaurant) was *witnessed*, and thus in logic could not simply be airbrushed out as the Respondent claimed, since the way in which he spoke to her was not only a completely unacceptable manner in which a husband might be expected to address his wife in public, but also an entirely inappropriate, controlling and abusive way in which to speak to anyone in modern times in which verbal as much as physical abuse is not tolerated. While the judge apparently accepted²² that the husband was 'somewhat old-school', and that he could also find that the wife was 'more sensitive than most wives',²³ it does not seem essential to be unduly sensitive for a wife to take issue with being spoken to in public in the manner referred to, since not only is contemporary marriage regarded as a partnership, but controlling and coercive behaviour is now formally articulated within the canon of domestic abuse²⁴; and such behaviour is alleged by the Petitioner on the part of the Respondent in other paragraphs of her Petition, such as in the case of 'the airport incident where the Court of Appeal noted'²⁵ that the Petition pleads that he 'was visibly chastising her in front of numerous strangers'.

In the circumstances that the judge of first instance was clearly familiar with the authorities, including such cases as *Livingstone-Stallard v Livingstone-Stallard*,²⁶ the facts of which had some obvious similarities with the Owens'

²¹ Paragraph 12 of the Court of Appeal judgment.

²² Paragraph 49 of the Court of Appeal judgment, quoting the third section of Judge Tolson's judgment.

²³ *ibid.*

²⁴ Serious Crime Act 2015 s.76.

²⁵ n8.

²⁶ n2.

situation, it is odd that instead of distinguishing that case Judge Tolson instead relied on sweeping generalisations to categorise his view of the Petition as ‘hopeless’ (his judgment paragraph 2), ‘anodyne’ (paragraph 7), ‘scraping the barrel’ (paragraph 13), that it ‘lacked beef’ (paragraph 7) and was ‘at best flimsy’ (paragraph 12). He added that the wife had ‘exaggerated the context and seriousness of the allegations to a significant extent’, commenting that ‘they are all at most minor altercations of the kind to be expected in a marriage’ and that ‘some are not even that’.²⁷ This is surely a breathtaking comment if it was seriously meant to express a norm in relation to contemporary marriage. Clearly marriages have ups and downs but regular and persistent public criticism of a wife by a husband, as though she were some kind of ignorant inferior, or a rebellious teenager in need of correction, surely is not a normal feature of the contemporary marriage partnership.

Similarly the judge dismisses the wife’s case as a bundle despite expressly referring to her ‘increased sensitivity to the husband’s old-school controlling behaviour, which it seems’²⁸ in his view did not amount to ‘a consistent and persistent course of conduct’ but were ‘isolated incidents consisting of minor disputes’. Nevertheless, even taken at their lowest, these incidents could not fail to indicate a noxious atmosphere in the marriage, especially when the accumulation of minor incidents of significantly less nastiness was what had obtained a decree for Mrs Livingstone-Stallard in 1974; moreover the Livingstone-Stallard divorce had occurred at a time at which the judiciary faced the greater task of adjusting to the change of approach from the significantly different pre-1969 law, based on the entirely different concept of cruelty rather than the behaviour Fact introduced in the Divorce Reform Act 1969 and consolidated into the 1973 Act which is the one still in force; and also before the subsequent social change which had then transformed the contemporary marriage from an unequal relationship still dominated by the husband to the equal partnership which is the norm today.

In short it is not easy to see – as he did not compare the two cases, and declined the Petitioner’s request for more detailed reasons – why Judge Tolson took the view he did: unless it was simply that he believed the Respondent’s constantly exculpatory explanations for his critical and controlling conduct because he considered that such boorish behaviour was only normal because Mrs Owens had been engaging in an affair, of which there is some evidence when he refers to ‘the batch of allegations which can be categorised as “the husband’s reaction to the affair”’.²⁹

²⁷ Paragraph 46 of the Court of Appeal judgment.

²⁸ Paragraph 49 of the Court of Appeal judgment.

²⁹ Paragraphs 47 and 48 of the Court of Appeal judgment.

3. THE COURT OF APPEAL HEARING

It seems possible from the first page of their judgment³⁰ that the Court of Appeal approached the case on the basis that they might have been able to find an error in the first instance refusal of the decree sought, so that that ‘the judge was “wrong” – in which case we can interfere’ but they then seem very quickly to have decided that the real question was ‘whether, in 2017, the law is in a remotely satisfactory condition’. They refer, in line 2 of their first paragraph, to the fact that Judge Tolson QC had ‘correctly, found as a fact that the marriage had broken down’, and also ‘found that “the wife cannot go on living with the husband” and continued: “He claims to believe that she can, indeed she will, but in this in my judgment he is deluding himself”’. They then move on to say, as though this is surprising, ‘Yet the judge dismissed her petition’.

While it was early established that both the necessary Fact under s 1(2) and irretrievable breakdown must be evidenced, yet they apparently devoted no scrutiny to the fact that this ‘delusion’ of Mr Owens’ might have spoken for itself in the face of the fact that everyone but he could see that the marriage had broken down! Indeed Mr Owens’ entire behaviour as recorded in all transcripts and judgments in the case is strongly reminiscent of the case of *Hajimilitis (Tsavliris) v Tsavliris*,³¹ a case before the Recorder Alison Ball QC, and a very good example of the Respondent’s proving the case for the Petitioner simply by behaving so badly and unreasonably in the hearing that the judge could conclude that he had single-handedly established the Petitioner’s case! The Court of Appeal made no comment on that specific case, but merely listed it amongst the authorities to which they had been referred, of which they noted it was the most recent in that group, in which the list included the Livingstone-Stallards,³² *Ash v Ash*,³³ *Stevens v Stevens*,³⁴ *O’Neill v O’Neill*,³⁵ *Balraj v Balraj*,³⁶ *Buffery v Buffery*³⁷ and *Butterworth*

³⁰ [2017] EWCA Civ 182, paragraph 1.

³¹ [2003]1 FLR 181.

³² n2 above, per Dunn J, and paragraphs 27 to 34 for the remaining cases.

³³ [1972] Fam 135, per Bagnall J (although his conclusion that like can be required to live with like e.g. alcoholic with alcoholic, is no longer considered good law, see e.g. *per* Lord Wilson, *Owens v Owens* [2018] UKSC 41, at paragraph 33, ‘each spouse would now be entitled to a decree’).

³⁴ [1979] 1 WLR 885, per Sheldon J, in which he confirms that the behaviour need not be the cause of the marriage breakdown.

³⁵ [1975] 1 WLR 885, per Cairns LJ, CA.

³⁶ n14 above.

³⁷ [1988] 2 FLR 365, CA.

v Butterworth.³⁸ It was possibly this last case of which the Court might perhaps have made more in their judgment. First that was a case in which two particularly able, and always practical and sensible, judges (Brooke and Balcombe LJ) agreed with Dunn LJ in *Livingstone-Stallard v Livingstone-Stallard* when Dunn LJ had said:

Coming back to my analogy of a direction to a jury, I ask myself the question: Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?

It seems that the Court of Appeal missed the opportunity at this point to explore whether – and probably to find that – the judge at first instance had been ‘wrong’ in dismissing the petition after hearing evidence of the cumulative effect of the four instances of the ‘airport’, ‘restaurant’, ‘pub’ and ‘housekeeper’ incidents³⁹ on which the first instance hearing concentrated. These were probably especially important in arriving at a conclusion that the wife *had* proved her petition and that she should have been given her decree nisi, since there is also ample support in paragraphs 46 to 48 of the Court of Appeal judgment that in that court they were aware of the fact that Judge Tolson was treating the husband’s behaviour as *provoked* by the wife’s affair, and not therefore finding anything wrong even his most unpleasant comments, or that it was unreasonable for the wife to have to endure and tolerate them.

The judge even made a point of reiterating this in the parts of his reserved judgment which the Court of Appeal quotes in their paragraphs 47 and 48. In paragraph 47 they repeat the judge’s comment: ‘The wife did have something to hide and she had hidden it. I interrupted the cross-examination of the wife (which was perhaps inevitably hitting the mark) to ask her whether or not she could see that such a reaction by the husband might in context to be said to be “fair enough”. I suspect that she did see this.’ In paragraph 48 of the Court of Appeal judgment they quote the judge’s unsympathetic remarks to the wife (in respect of the husband’s sarcastic comments to the wife that she had prolonged her visit to a picture framer that ‘he must have been an interesting framer’). In this context he is clearly deserting the usual judicial impartiality and taking the husband’s side when he says ‘the objective observer can scarcely criticise the husband, especially as the remark was made only 6 months after the husband first knew of the affair

³⁸ [1997] 2 FLR 336, CA.

³⁹ Paragraphs 12 to 19 of the Court of Appeal judgment, quoting Judge Tolson’s reserved judgment of 26 January 2016 and the responses provided by the Respondent.

and less than 4 months after he had first taxed her with it'. It is worth noting that, when the case gets to the Supreme Court, Lord Wilson virtually instantly confirms that the affair is irrelevant to the wife's right to petition under s 1(2)(b).

However, these comments of Judge Tolson's also ignore the established approach to adultery which has subsisted since before the Divorce Reform Act 1969,⁴⁰ namely that adultery is usually a *symptom* rather than a *cause* of marriage breakdown and, unlike the pre-1969 law, that the law under the 1973 Act does not require either a link between the marriage breakdown and the behaviour relied on nor a discretion statement where a spouse who brings a petition but has committed adultery him- or herself must declare this to the court. While unfortunately there was no evidence before the Central London Family Court of the husband's behaviour before 2012, when it is accepted that the affair had begun, there would still appear to be a chicken and egg situation here, since if the husband was as uniformly nasty before 2012 as he clearly was afterwards, all the blame cannot be laid on the wife for having an affair. Her petition claims in its paragraph 2⁴¹ that the husband provided her with no 'love, attention or affection and was not supportive of her role as a homemaker and mother which has made the Petitioner feel unappreciated' – as has been seen in the airport and restaurant incidents, about which the best the judge could say was that her account was 'exaggerated'.

Since the judge apparently did not dispute the facts that these incidents had happened, also conceded that the marriage had broken down and the husband was deluding himself if he thought otherwise, and that 'the individual circumstances of the spouses and the marriage' must also be considered, it is odd that in applying Dunn J's 'right thinking person' test he did not conclude that the petitioner had established her case. This must be especially so given that in their paragraph 45 the Court of Appeal records that the judge had emphasised Dunn J's *Livingstone-Stallard* wording⁴² by italicising it, and their judgment had added in the same paragraph: 'Judge Tolson recognised that he had to take into account "the whole of the circumstances"'. Except that he did not. He has emphasised Mrs Owens' affair, as recorded in the Court of Appeal's paragraphs 47 and 48, but not asked himself what role the husband's personality and behaviour might have played in her seeking such an affair, especially when paragraph 2 of her petition records no

⁴⁰ In fact since the Report of the Archbishop's Group on Divorce Reform *Putting Asunder*, 1966, and the Law Commission Report *The Field of Choice*, 1966.

⁴¹ As quoted in paragraph 4 of the Court of Appeal judgment.

⁴² 'Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties'.

‘love, attention or affection’ and that he is ‘unsupportive’ of her domestic role so that she feels ‘unappreciated’.

4. THE COURT OF APPEAL’S REASONS FOR NOT INTERFERING

The judgment records that ‘it is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there is none.... To adopt Lord Hoffman’s phrase, the court must be wary of becoming “embroiled in narrow textual analysis”’. Of course it must not. But the missing link here is the way in which the Respondent treated the Petitioner in this case, and the way he persistently spoke to her in the presence of third parties surely cannot be justified by the fact that she had had an affair – after, according to her, recent *years* of no ‘love, attention or affection’ from her husband, the Respondent, which it seems was actually *not* taken into account in ‘all the circumstances’.

Moreover the judge himself records, and the Court of Appeal repeats (their paragraph 49), his own words in which he refers to the airport, restaurant and pub incidents as ‘merely examples of events in a marriage which scarcely attract criticism of one party over the other’ yet the wife’s counsel has made a submission to him on ‘the wife’s increased sensitivity to the husband’s old school controlling behaviour’ which is the very conduct which s 76 of the Serious Crime Act 2015 had only 2 years previously, and after a sustained campaign to include such psychological harm in protective legislation, statutorily designated as domestic abuse – which no wife is obliged to endure, since it entitles any such victim to seek the protection of an injunction, yet in the Supreme Court, Lady Hale (a judge with a background in Family Law and Equality & Diversity) notices immediately in her paragraph 50 of their judgment in 2018 that the behaviour is controlling and coercive. It must be asked: Did no member of the Court of Appeal in 2017 recall this statute, when the court included the President of the Family Division who presides over the Family Court where such injunctions are regularly sought and granted and the Deputy President of the Court of Appeal, Criminal Division?

The judgment of the Court of Appeal does then pause momentarily while the President considers the fact that nowhere in his judgment does Judge Tolson make an explicit reference to the cumulative effect of a series of more minor incidents, which was precisely what was addressed in *Livingstone-Stallard v Livingstone-Stallard*.⁴³ To refute this the Court relies on the judge’s reference ‘in his self-direction’ to ‘the whole of the circumstances’ and the fact that he simply did not

⁴³ n2 above.

believe Mrs Owens, criticised ‘the wife’s case generally’ and considered that she was ‘cherry picking’.⁴⁴ It seems that the Court of Appeal might have been wrong in their instant conclusion here, and right to stop and think about this issue at the particular point in their judgment.

The remainder of the judgment focusses on much of the history of the law of divorce and the desirability of a No Fault Divorce law which the Court of Appeal had clearly thought the important issue in connection with the case; also on the inapplicability of Article 8 of the Convention on Human Rights (respect for family life) and of Article 12 (right to marry) to any right to *divorce*, and on the conclusions of Hallett and Macur LJ that they concurred in dismissal of the appeal, albeit as Hallett LJ says ‘with no enthusiasm whatever’.⁴⁵

However it is also odd that the mention in paragraph 89, as part of the President’s review of the development of Family Law and in particular the Law of Divorce, of the quotation from Sir James Hannen in the 1911 case of *Pretty v Pretty (The King’s Proctor Shewing Cause)*⁴⁶ did not stir a memory on the part of one or both of the two Lady Justices of Lady Hale’s 2001 article ‘Why Should We Want More Women Judges?’,⁴⁷ in particular when the President included in the Court’s judgment in which they were to concur what had been said in that 1911 case that ‘habits of thought and feminine weaknesses are different from those of men’; in other words precisely Lady Hale’s point, both when she wrote the 2001 article and when the *Owens* case finally reached the Supreme Court in 2018, when she immediately fastened onto the crucial equality and diversity issues which identified the golden threads in its previous litigation history. However Hallett LJ did comment on the impact of conduct which might, in a happy marriage, not have had the same impact as might be felt in an unhappy one, the very point that was made later in the Supreme Court by Baroness Hale⁴⁸ but she took this no further, as she might have done at that time, when referring to the employment law analogy later developed by Lady Hale.

⁴⁴ Court of Appeal judgment paragraph 72.

⁴⁵ Court of Appeal judgment paragraph 99.

⁴⁶ [1911] P 83 at 87.

⁴⁷ Brenda Hale, (2001) *Public Law*, 489–504; further feminist writing has also elaborated on this article in which Lady Hale comments that women’s wider perspectives on the issues in some cases (gained through their life experience) may also note threads in a case which male judges might miss owing to their own different lives, see, for example, Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2007).

⁴⁸ Court of Appeal judgment paragraph 100.

5. OWENS V OWENS IN THE SUPREME COURT

At least the Supreme Court had the benefit of the presence of three Family Lawyers also with gender balance (an academic with practice and extensive judicial experience, Baroness Hale of Richmond, and two former practitioners also with extensive Family Law and other judicial experience, Lord Wilson and Lady Black). Lord Mance and Lord Hodge, both experienced generalists, made up the remainder of the Bench of five.

Lord Wilson wrote the judgment of the court and immediately recorded in it⁴⁹ that HH Judge Tolson QC had received no evidence of the state of the Owens' marriage before 2013, which would clearly have been of significant help in obtaining the decree sought, and it is not easy to see why it was not sought either by Mrs Owens' counsel or by the judge of first instance, who, as already noted above, found that the marriage had broken down and that Mr Owens was deluding himself if he thought otherwise. Lord Wilson also accepted that the affair in no way inhibited Mrs Owens' ability to petition⁵⁰ and the appropriateness of the 'anodyne' terms of the petition⁵¹ in accordance with practice, which as every practitioner knows is encouraged by the Law Society Protocol and the Resolution Code of Practice.

The Recorder, who initially conducted the case management hearing at the Central London Family Court, had directed short witness statements from the parties⁵² to stand as their evidence in chief, and for some reason directed that no witnesses should be called except the parties themselves. It seems that, through her counsel, Mrs Owens agreed to that, although it would have been useful to have included the evidence both of F, the parties' male friend who features in the restaurant incident already described above, and of others who might have detailed the disparaging comments made in front of third parties. This apparent restriction of evidence, together with the short hearing time which Mrs Owens also agreed to, is recorded by Lord Wilson as odd, on which he asks the question as to why Mrs Owens' experienced advisers had allowed any of this, and answers it himself – the problem is the shortage of time in the Family Court, the settlement orientation of contemporary divorce as recently researched by Trinder and Sefton for the Nuffield Foundation in *No Contest: Defended Divorce in England and Wales*⁵³, and 'the expectations ... that even when defended to the bitter end, almost every petition under the subsection will succeed... almost certainly culminating in the

⁴⁹ Paragraph 5, Supreme Court judgment.

⁵⁰ Paragraph 8, *ibid.*

⁵¹ Paragraph 10, *ibid.*

⁵² Paragraph 12, *ibid.*

⁵³ E J Trinder and M Sefton, www.nuffieldfoundation.org, 2018.

pronouncement of a decree'.⁵⁴ His paragraph 17 sets out the court's approach to defended divorce, which he indicates is standard, and he records that Trinder and Sefton discovered no other instance of a Respondent succeeding in a defended divorce other than Mr Owens himself.

Lord Wilson's paragraph 18 sets out Mr Owens' approach which it is clear to see did not fit at all with that of the courts as just described by Lord Wilson. He did admit some of the alleged examples of his behaviour but sought to put them in a different context, said some were exaggerated and that he could not remember others, but actually denied very few as such.

Lord Wilson confirmed in his paragraphs 18 and 19 that Mrs Owens had duly amended her petition after the case management hearing, and at the substantive hearing, 10 days before the judge's reserved judgment, she had ended up including 27 examples of the Respondent's behaviour but, at the judge's invitation, her counsel elected to focus on only four – the four airport, restaurant, pub and housekeeper examples already mentioned above; so apart from her confirmation of the veracity of her witness statement the judge received no evidence of what had occurred in the marriage before 2013, although she did at one point state to the Respondent husband's counsel that her husband 'had been making hurtful and disparaging remarks to her long before 2012'.

In his paragraph 20 Lord Wilson summarises the judge's 'short judgment written on six pages', pointing out that the judge 'announced at the outset that the petition was hopeless', although he conceded that 'Mr Owens was "somewhat old-school" and 'Mrs Owens was more sensitive than most wives'. Lord Wilson identified the somewhat overly dismissive nature of the judge's initial list of deficiencies in Mrs Owens' case, said three of the items on which her counsel had focused at his invitation were 'isolated incidents' (and did not even mention the fourth), added that these three examples 'scarcely merited criticism of Mr Owens, and much the same could be said of the other 24 examples'. In his paragraphs 21 to 28 Lord Wilson then reviewed the relevant law, indicating that the Supreme Court 'like the appellate committee of the House of Lords that preceded it' had never 'had occasion to consider what the law requires a petitioner to establish' in a behaviour case, so that the courts relied on the cases on s 1(2) to 'illumine' their effect. To the cases already considered below he added *Pheasant v Pheasant*⁵⁵ and *Thurlow v Thurlow*,⁵⁶ explaining their impact on the facts, and the impact of changing social norms, such as that of the contemporary view of marriage as a partnership,

⁵⁴ Paragraphs 16 and 17 of the Supreme Court judgment. The subsection referred to is s1(2)(b) of the 1973 Act.

⁵⁵ [1972]Fam 202.

⁵⁶ [1976] Fam 32.

which was not the case at the time of the passage of the 1973 Act, for which he relied, *inter alia*, on *Priday v Priday*,⁵⁷ at the same time explaining that the behaviour in question did not have to be itself ‘unreasonable’ since such an interpretation was wrong, in that the sub-section refers to the unreasonableness of an expectation of continued life between the parties, not to the conduct causing this conclusion.

In his paragraph 38 Lord Wilson therefore refers disapprovingly to the five occasions on which Judge Tolson QC refers to ‘unreasonable behaviour’, which caused Lord Wilson to ask himself whether the judge was looking for ‘behaviour objectively worse than the law requires’? – such as in his search for ‘beef’ in Mrs Owens’ allegations: was he there looking for behaviour for which he might *blame* Mr Owens? (contrary to the facts and decision in *Thurlow*?⁵⁸) or for *gravity* (contrary to the decision that this was not required in *Buffery*?⁵⁹) although he noted that the judge *had* given himself the correct self-direction as in *Livingstone-Stallard*.⁶⁰

Moving on to the Court of Appeal Lord Wilson also noted that Lady Justice Hallett had picked up the same point as later elaborated by Lady Hale in her paragraph 50 of the Supreme Court judgment, to the effect that remarks which might not be taken amiss in a happy relationship can have a completely different impact in an unhappy one. Lord Wilson’s paragraph 41, however, concludes that Judge Tolson’s own conclusion that he found ‘no behaviour such that the wife cannot reasonably be expected to live with the husband’ and ‘the fact that she does not live with the husband has other causes’ meant that the judge might have been in error: but that Mrs Owens’ counsel never argued this before the Court of Appeal, they did not see fit to raise it of their own motion, ‘and that even after it was raised at the hearing in this court Mr Marshall [her counsel] did not squarely rely on it’. Lord Wilson continues in his paragraph 42:

There is no doubt that the appeal of Mrs Owens generates uneasy feelings: an uneasy feeling that the procedure now conventionally adopted for the almost summary despatch of a defended suit for divorce which was said to depend on a remorseless course of authoritarian conduct and which was acknowledged to appear unconvincing if analysed in terms of a few individual incidents; an uneasy feeling that the judge’s finding that the three incidents that he analysed were isolated in circumstances in which he had not received oral evidence of so many other pleaded incidents; and an uneasy feeling that Mrs Owens had

⁵⁷ [1970] 3 ALL ER 554, disapproving the comment of Cumming-Bruce J at page 557 on the non-culpability of forced intercourse in a case where the intention was therapeutic.

⁵⁸ n53.

⁵⁹ n36.

⁶⁰ n2.

significantly exaggerated her entire case in circumstances in which Mr Owens had not disputed much of what she said.

At paragraph 46 Lady Hale took up her own perspective, stating (unlike Judge Tolson QC who said it was ‘not hard to decide’) ‘I have found this a very troubling case’ but instantly asserting that it was ‘not for us to change the law ... our role is only to interpret and apply the law that Parliament has given us.... Lord Wilson has explained very clearly what that law requires’.

She went on in paragraph 48: ‘I have several misgivings about the trial judge’s judgment in this case.’ Her first misgiving is his repeated incorrect use of the term ‘unreasonable behaviour ... a deeply misleading shorthand for a very different concept. In particular it can lead to a search for “blame” which is not required’.

Her second misgiving, set out in her paragraph 49, is that ‘the judge appears ... to have thought that the behaviour complained of had to be the cause of the breakdown of the marriage. That is simply not the law’.

Her third, in her paragraph 50, she says ‘is the most troubling of all. This was a case which depended upon the cumulative effect of a great many small incidents said to be of authoritarian, demeaning and humiliating conduct over a period of time...’. She then refers to the analogy with constructive dismissal in employment law already mentioned, and quotes Langstaff J, President of the Employment Appeal Tribunal in *Ukegheson v London Borough of Haringey*.⁶¹

‘The meaning that correspondence or observations have when they are directed from one person to another may often depend on the extent of the relationship between the two...’ and he goes on, in summary and in effect to say that looking at incidents in isolation does not tell the whole story.

She adds at her paragraph 54, as there seems no option to return the case for rehearing since no one wants that, ‘I am therefore reluctantly persuaded that this appeal should be dismissed’.

6. CONCLUSION

While until the national emergency of the coronavirus crisis is past and the process through the post-transition period to the completion of the Brexit experience is concluded, so that the EU impact on English Family Law is completely over,⁶² there may now be no particular urgency for the wide programme of Family Law

⁶¹ UKEAT/0312/14/RN at paragraphs 30–31.

⁶² Probably now unlikely to be effected before 2021 since the government will naturally have many more pressing priorities before December 2020.

reform that is clearly required when time permits, since it is clear that immediate divorce is still available under s 1(2)(b) of the 1973 Act as before.

However, in due course the formal No Fault pathway now enacted in the 2020 **ststute** will clearly need to be brought into force so as to bring English law into line with most other modern liberal democracies, not only in respect of No Fault Divorce but for reform also of Financial Provision⁶³ following Divorce, Dissolution and Annulment respectively of the various adult intimate relationships for which legislation has now provided in the variety of statutes passed in this respect between 2004 and 2013.

⁶³ Not least as upon finally leaving the EU in December 2020 (or in 2021 if delayed by other post-pandemic priorities) the United Kingdom will no longer be subject, amongst other provisions, to the EU Maintenance Directive, nor to present provisions on divorce jurisdiction including the race to file first in England and Wales or in another jurisdiction within the EU.