UNREASONABLE BEHAVIOUR IN THE MODERN DIVORCE
IT'S ALL YOUR FAULT

OWENS V OWENS ([2017] EWCA Civ 182)

1. On 24th March 2017, the Court of Appeal unanimously dismissed the wife's appeal in **Owens v Owens ([2017] EWCA Civ 182)**. The tribunal consisted of: Sir James Munby P (who gave the leading judgment); Hallett LJ and Macur LJ. The effect of the Court's judgment was to deprive Mrs Owens of a divorce from her husband based on her allegations of his unreasonable behaviour. On 8th August 2017, The Supreme Court granted permission to appeal[1].

2. The leading judgment of the Court of Appeal reveals that the jurisprudence pertaining to the test for *unreasonably behaviour* as a ground of divorce has remained largely consistent for over 4 decades. However it provided the President with an opportunity to comment on the fitness for purpose of the current statute law. The case has generated both academic and media discussion about the need for a no fault divorce in England and Wales.

Relevant Dates

3. At the time of the hearing before the Court of Appeal: Mr Owens (H) was aged 77 and Mrs Owens (W) was aged 66. They were married in January 1978 and had 2 (adult) children. The parties separated in February 2015 when W left the family home; by that time, the Owens had been married for c.38 years.

4. W filed her relevant petition on 6th May 2015, seeking a divorce under **section 1(2)(b) of the Matrimonial causes Act 1973** on the grounds that:
   - The marriage had broken down irretrievably; and
   - H had behaved in such a way that W could not reasonably be expected to live with him. At that stage, W relied on 5 grounds of generalised unreasonable behaviour.

[1] Baroness Hale: Lords Wilson and Hughes [UKSC 2017/0077]

5. H filed an acknowledgement of service indicating an intention to defend. W was subsequently granted permission to amend her Petition so as further to particularise 2 of her grounds of unreasonable behaviour[2] into 27 individual allegations.

6. The Petition was heard by HHJ Tolson QC at the Central Family Court on 15th January 2016. Following a day's Trial, the Learned Judge found that: although the marriage had irretrievably broken down, it was not on account of H's unreasonable behaviour. He therefore dismissed the Petition.

7. W appealed to the Court of Appeal and was granted permission by the President.

The Facts of the Case

8. The full extent of W's allegations is not readily apparent from the Court of Appeal's judgment. This feature has its origin in the manner in which HHJ Tolson dealt with W's extensive allegations over a short 1 day Trial. Essentially, the Trial Judge selected a few of the particulars of unreasonable behaviour for scrutiny to *give the overall flavour or complexion of the case* rather than examining them all. In that context, W's 'top 4' allegations are referred to in the Judgment[3]. They were:

   8.1. On returning from a holiday via Cancun Airport in November 2014, H had suggested a present for the parties' housekeeper. W could not locate it in the airport shop so purchased an alternative. H publicly remonstrated with W on the airport concourse, asking her; 'why did you not buy what I told you to?' He then persisted with his criticism during boarding

   8.2. In August 2014, the parties were dining with a friend in a restaurant. H made some hurtful remarks to W during the meal and criticized her for speaking to the waiter;

[2] Ground 3: 'The Respondent suffers from mood swings which caused frequent arguments between the parties which were very distressing and hurtful for the Petitioner ….'
Ground 4: 'The Respondent has been unpleasant and disparaging about the Petitioner both to her and to their family and friends. He speaks to her and about her in an unfortunate and critical and undermining manner. The Petitioner has felt upset and/or embarrassed by the Respondents behaviour towards her as well as in front of family and friends'.

[3] §12 to19.

8.3. On a visit to a local pub for supper in May 2014, H demonstrated an obvious reluctance to be with W. He sat with his head in his hands and his eyes closed; and

8.4. In February 2014, H criticized W for leaving cardboard lying in the yard at home. This criticism was leveled at W in front of the parties' housekeeper.

9. H's response to these allegations was essentially that: he accepted the events occurred but that W's account was exaggerated or misconstrued.

10. W's 27 allegations were alleged over a timeframe of 2 years between 15th January 2013 to 18th January 2015. For a period between November 2012 and August 2013, W had conducted an extra-marital affair; H discovered this after it had ended and confronted W about it in November 2013. It had been part of W's case that H had persisted in his references to the affair and that these references were inappropriate. The 2 referred to in the judgment were[4]:

10.1. In January 2013, W was staying alone at the parties' French home. During a telephone call between H (in the UK) & W, H asked W whether he should open some of her mail. W told H not to bother. He said: *'This is the difference between you and I: I have nothing to hide'.* This conversation occurred when W was conducting her affair. During his judgment, HHJ Tolson referred to H's response as *fair enough.*

10.2. After the affair had been revealed, W was visiting a picture framers. H had criticized W for taking a long time on her trip and commented: '*he must have been an interesting framer'.* HHJ Tolson recorded that this comment was made 6 months after the affair had ended and an objective observer would *scarcely criticize* H for his remark.

11. Presented with these selected allegations of unreasonable behaviour, HHJ Tolson concluded that: although it was evident the marriage had irretrievably broken down, W had failed to prove her case of unreasonably behaviour. The President summarised the Trial Judge's views at paragraph 42:

[4] §47 and 48.

'*It is plain from his judgment that Judge Tolson was unimpressed by the wife's petition. He variously described it as "hopeless" (judgment, paragraph 2), "anodyne" (paragraph 7), and "scraping the barrel" (paragraph 13). He said it "lacked beef because there was none" (paragraph 7). He described paragraphs 3 and 4 as "the only 2 grounds which … might in context have provided grounds for divorce." He said the allegations "are at best flimsy" (paragraph 12)'.*

12. W appealed against the Trial Judge's dismissal of her Petition on the following grounds:

12.1. W's main contention was that HHJ Tolson had adopted a flawed process in his judgment by: failing to make core findings of fact; failing to properly assess W's *subjective characteristics;* failing to assess the cumulative effect of H's behaviour on W; and failing to apply the law to the facts; while

12.2. Her subsidiary argument was that her rights under the ECHR were engaged and that the old authorities pertaining to *unreasonable behaviour* should be reviewed in line with current social norms and were inconsistent with W's rights under Articles 8 and 12 of ECHR.

The Law: W's Main Argument.

Section 1 of the Matrimonial Causes Act 1973 provides that:

(*1*) *Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.*

(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 reasonably be expected to live with the Respondent.
(c) …
(d) …
(e) …

(3) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the Respondent.

(4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to section 5 below, grant a decree of divorce

13. In interpreting how the Court should approach the term '*reasonably be expected to live with ...'* the President reviewed the following cases from 1972 to date [§28-34]:

13.1. In the High Court: ***Ash v Ash*** **[1972] Fam 135,** ***Livingstone-Stallard v Livingstone-Stallard*** **[1974] Fam 47** and ***Stevens v Stevens*** **[1979] 1 WLR 885**; and

13.2. In the Court of Appeal: ***O'Neill v O'Neill*** **[1975] 1 WLR 1118,** ***Balraj v Balraj*** **(1980) 11 Fam Law 110**, ***Buffery v Buffery*** **[1988] 2 FLR 365** and ***Butterworth v Butterworth*** **[1997] 2 FLR 336**.

14. The President concluded that in the light of the authorities, the law was correctly set out in the current edition of ***Rayden & Jackson on Relationship Breakdown, Finances and Children*** **paras 6.82-6.85**:

"6.82 The words reasonably be expected in the statute prima facie suggest an objective test. Nevertheless, in considering what is reasonable, the court (in accordance with its duty to inquire, so far as it reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it in assessing what is reasonable.

6.83 Allowance will be made for the sensitive as well as for the thick-skinned and the conduct must be judged up to a point by reference to the victims capacity for endurance, and in assessing the reasonableness of the respondents behaviour the court would consider to what extent the respondent knew or ought reasonably to have known of that capacity.

6.84 The approach has been summarised obiter in Balraj v Balraj ((1980) 11 Fam Law 110):

(i) The court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the petitioner or applicant to live with him;

(ii) In order to decide that, it is necessary to make findings of fact as to what the respondent actually did, and findings of fact as to the impact of that conduct on the petitioner or applicant;

(iii) There is, of course, a subjective element in the totality of the facts that are relevant to the solution, but when that subjective element has been evaluated, at the end of the day the question

falls to be determined on an objective test.

6.85 It has been said that the correct test to be applied is whether a right-thinking person, looking at the particular husband and wife or civil partners, would ask whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned.

…

6.86 Any and all behaviour may be taken into account: the court will have regard to the whole history of the relationship.

…

6.88 The court will have regard to the cumulative effect of behaviour. Conduct may therefore consist of a number of acts each of which are apparently reasonable in isolation, but which taken together are such that the petitioner or applicant cannot reasonably be expected to live with the respondent."

15. In its forensic approach to the evidence the Court should therefore adopt 2 steps (§37):

> *' … the court has to evaluate what is proved to have happened (i) in the context of this marriage, (ii) looking at this wife and this husband, (iii) in the light of all the circumstances and (iv) having regard to the cumulative effect of all the respondents conduct. The court then has to ask itself the statutory question: given all this, has the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent?'*

16. In addressing the 1st step, the President concluded that if the marriage is unhappy, a particular piece of conduct may have more impact and be less reasonable than exactly the same conduct of the marriage is happy (§37).

17. Furthermore, the law required the Court to look at matters from the perspective of 2017. As he put it at paragraph 41:

> 'When [The 1973 Act] uses the words "cannot reasonably be expected", that objective test has to be addressed by reference to the standards of the reasonable man or woman on the Clapham omnibus: not the man on the horse-drawn omnibus in Victorian times which Lord Bowen would have had in mind (see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49, [2014] PTSR 1081, para 2), not the man or woman on the Routemaster clutching their paper bus ticket on the day in October

1969 when the 1969 Act received the Royal Assent, but the man or woman on the Boris Bus with their Oyster Card in 2017.

18. Having reviewed the evidence, the President concluded that the Trial Judge had not adopted a flawed process (§60-74). He had: (1) made core findings of fact; (2) properly assessed W's subjective characteristics; (3) properly assessed the cumulative effect of H's behaviour on W; and (4) correctly applied the law to the facts.

19. The Court did not accept W's criticism that HHJ Tolson's was wrong to limit a few of the particulars of unreasonable behaviour for scrutiny rather than examining them all. The President concluded that an individual finding on all of the grounds alleged: '… *may have been acceptable and required in 1973 but things had moved on since then* [§60]'. The Court was now required to have regard to the overriding objective and the need to deal with cases justly which included (**FPR 1.1 (2)**):

(a) '*Ensuring that it is dealt with expeditiously and fairly;*
(b) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
(c) …
(d) Saving expense; and
(e) Allotting to it an appropriate share of the courts resources, while taking into account the need to allot resources to other cases'.

20. In addition, FPR rule 1.1 was supplemented by FPR rule 22.1, which conferred on the court extensive powers to control the evidence, including, by rule 22.1(2), the power to exclude admissible evidence.

<u>The Appellant's Subsidiary (European) Argument</u>

21. In relation to W's engagement of Articles 8[5] and 12[6] of the ECHR, the President recorded that [§77]:

21.1. The European Convention provided no right to be divorced;

21.2. It therefore did not provide a right to a *favourable outcome* in domestic proceedings seeking a divorce; and

[5] Article 8(1) 'Everyone has the right to respect for his private and family life, his home and his correspondence'.
[6] Article 12: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

21.3. Consequently, there were no grounds for appeal in engaging the ECHR.

22. The Court agreed with H that the following 2 cases were determinative of the issues.

23. In ***Johnston v Ireland*** **(1986) 9 EHRR 203**[7], the applicant brought a number of complaints before the European Court of Human Rights. These included a contention that the Irish constitution's prohibition on divorce was contrary to, *inter alia*, Articles 8 and 12 of the ECHR. In allowing other elements of the applicant's challenge, the Strasbourg Court found that the prohibition did not itself offended the Convention. The President cited from §52 of the judgment as follows:

> *'[52] The Court agrees with the Commission that the ordinary meaning of the words right to marry is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to national laws; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12'.*

24. ***Johnson*** was recently referred in ***Babiarz v Poland (Application no. 1955/10)*****, 10 January 2017**.

> '[56] In the Courts view, *if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, a fortiori, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce* (emphasis added)."

<u>The Practical Consequences of the Appeal</u>

25. The President concluded his judgment by providing a commentary on the practical consequences of rejecting W's appeal. He began by recording that [§84]: *'... Parliament has decreed that it is not a ground for divorce that you find yourself in a*

[7] H was married in 1952 and had three children from this marriage. He and W agreed to separate in 1965 and subsequently concluded a formal separation agreement. Since 1971 he had lived with W-J and had a daughter by her in 1978. H was unable to seek a divorce in Ireland to enable him to marry W-J because of the prohibition of divorce contained in the Irish Constitution.

wretchedly unhappy marriage, though some people may say it should be'. In substantially revealing his own view on the merits of the persisting *fault-based* ground for an immediate divorce, he engaged 3 principal arguments.

26. Firstly: in the 48 years since the **Divorce Reform Act 1969** (being the precursor to the **Matrimonial Causes Act 1973**), there had been *enormous social change*. During that period, the case law had moved (albeit slowly) to respond to those changes with, by example: the death of the doctrines of unity between husband and wife[8] and a husband's immunity from prosecution for rape[9]; as well as the principal of marital equality[10] [§86-89].

27. Secondly: in the light of the contemporary Court Forms, there is already essentially a system of divorce by consent. Quite aside of the *2 years + consent* ground allowed by **section 1(2)(d) of the MCA 1973,** the Court process allows for a *consensual and collusive manipulation* of the procedure for divorce under **section 1(2)(b)** (the *unreasonable behaviour* ground)**.** This arises in circumstances where the current Acknowledgement of Service of the Petition Form poses the question: 'DO YOU INTEND TO DEFEND THE CASE?' If the Respondent answers: 'NO', then pursuant to **FPR 7.20(2),** the Court has to decide whether *the applicant is entitled to a decree.* Under the special procedure thereby engaged, the Court has simply to ask the question: '*assuming the facts alleged are true, does what is pleaded amount to unreasonable behaviour within the meaning of section 1(2)(b)?* This means that many successful Petitions are anodyne in the extreme [§93]. Indeed such a process is encouraged the Law Society's Family Law Protocol and Resolution's 2016 Guide to Good Practice on Correspondence.

28. Finally, the President cited recent data so as to highlight how few divorce petitions were now defended. In the year to January 2017, there were 113,996 Petitions for Divorce. Of those, only 760 (0.67%) were defended by Answer. Although there is no empirical data, he assessed the number that went to a contested hearing at 0.015% (being 'a mere handful') [§98]

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[8] Midland bank Trust Co Ltd v Green (no.3) ([1982] Ch 529)
[9] R v R ((Rape: Marital Exemption) ([1992] 1 AC 599)
[10] White v White ([2001] 1 AC 596)

29. The President concluded his judgment by returning to the legal historian Stephen Cretney who in his work, Family Law in the Twentieth Century: A History 2003 posed the question in these terms: '*behind this debate about a no fault divorce there lurks, at a conceptual level, a profoundly important point of principle and public policy:* ***ought the decision whether or not a marriage should be dissolved to be one for the parties which the State is not in a position to question****?*

30. One may properly infer that at least 2 members of the Court of Appeal (as comprised in *Owens*) felt that it should. Lady Justice Hallett gave a short but pithy judgment after the President. Her paragraph 99 might properly have expressed the sentiment of the Court when she said:

> *With no enthusiasm whatsoever, I have reached the same conclusion on this appeal as my Lord, the President, for the reasons that he gives. It was the trial judges duty, and ours, to apply the law as laid down by Parliament. We cannot ignore the clear words of the statute on the basis we dislike the consequence of applying them. It is for Parliament to decide whether to amend section 1 and to introduce "no fault" divorce on demand; it is not for the judges to usurp their function. Furthermore, this court cannot overturn a decision of a trial judge who has applied the law correctly, made clear findings of fact that were open to him and provided adequate reasons, simply on the basis we dislike the consequence of his decision.*

<u>The Growing Movement for Reform</u>

31. The Exeter-based academic, Prof. Liz Trinder, is chairing a project to report on how the current fault-based divorce ground operates in practice and explore reform[11]. In a paper delivered to the FLBA on 6th May 2017, Prof. Trinder identified 3 specific findings in relation to the current system:

    31.1. *Taking the Petitioner's Allegations at Face Value.* Despite the statutory mandate imposed on the Court to '*inquire, so far as it reasonably can, into the facts alleged*'[12], the almost universal practice amongst the DJs and LAs interviewed was simply to satisfy themselves that the basis ingredients of one of the 5 statutory grounds had been pleaded on the Petition. There was no

[11] Finding Fault (see findingfault.org.uk) funded by the Nuffield Foundation. Final report due in September/October 2017

[12] section 1(3) MCA 1973.

investigation into whether: the fact was true and/or whether the fact was causative of the breakdown. Having researched 550 current and historic divorce files, the research team failed to identify any case in which a petition had been rejected on such substantive grounds;

31.2. This practice occurred even where the Respondent indicated an intention to defend and/or wrote in emphatic terms denying the contents of the Petition. In discussions with DJs and LAs, the team recorded that the Court simply ignored these pleas; only taking the information into account if the Respondent filed an answer;

31.3. *Respondents and the Sense of Injustice.* The team found that: (1) in cases where Respondents did challenge allegations, it was in the overwhelming majority of cases a challenge to the particulars rather than *irretrievable breakdown* in principle; and (2) the perception that the court was endorsing the Petitioner's account without the benefit of hearing from the Respondent generated a significant sense of injustice. As one Respondent put it eloquently:

> *It doesn't need to be true, it doesn't need to be fair, it doesn't need to be just, it doesn't need to be anything that stands up to rigour. In which case it serves no purpose other than in my case to cause upset. And I would much prefer that she actually be forced to substantiate the claims rather than just wildly vomit bile onto a page and click submit".* [Wikivorce interview WK22-T1]

31.4. *Systemic Discouragement of Defence*

32. The consequence of this state of affairs is arguably that there is systemic collusion to evade the true requirements of the Act.

HAMISH DUNLOP

3PB

10th August 2017.