Case No: FD10D01149

Neutral Citation Number: [2012] EWHC 167 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2012

Before :

MR JUSTICE CHARLES

- -

Between :

G	**Applicant**
- and -	
G	**Respondent**

Ian Cook (instructed by **Irwin Mitchell**) for the **Applicant Wife**
Deborah Bangay QC and Dakis Hagen(instructed by **Levison Meltzer Pigott**) for the **Respondent Husband**

Hearing dates: 21 to 25 & 28 November & 15 December 2011

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Judgment

Charles J :

1. My conclusions are set out under the last heading in this judgment.

General Introduction

2. The application before me is for financial remedy under the MCA 1973. For convenience, I shall refer to the Applicant as the Wife and the Respondent as the husband. It is a case relating to a short marriage between two people now in their thirties with one child. At least potentially, it engages the needs, sharing and compensation rationales, but at one level it can be said that it ought to have been a case that could be resolved fairly easily and economically. This has not proved to be the case, even though the latest exchange of open offers show that the main remaining live issues related to:

    i) the quantification of the lump sum to be paid to the wife to meet, or go towards meeting, her housing needs, and

    ii) the quantum and period of periodical payments.

3. The sad result has been that the parties have paid a high price in emotion and costs (circa £650,000).

4. Complicating factors are, and have been, that the wife has interests under 11 family trusts and she has over the years received capital, loans and income from the trusts and gifts from her father. These interests and assets existed before and are not a product of the marriage. Disputes arose and remain concerning the information that should have been provided by the wife, the trustees and the directors of the family holding company (the shares of which are trust assets). Also, issues arise as to how the wife's trust interests, and the support she has received from her father, are to brought into account in reaching a fair overall result, applying the s. 25 exercise.

5. During the hearing arguments on costs relating to the expenditure in respect of disclosure issues were "flagged up". After I have heard those arguments, I shall consider taking up the invitation to make suggestions on a procedural approach that might in future similar cases lower the costs burdens suffered by the parties and the trustees of trusts in this case. These burdens lay behind the submission made to me on behalf of the wife that the law relating to applications for a financial remedy is not fit for purpose. However, in light of the level of costs in this case, I repeat my view that the profession and first instance judges can, and should, closely consider what modifications should be made to the preparation and presentation of such cases, to seek to ensure that the costs are not disproportionate and, for this purpose, that the issues and evidence relating to the application of the s. 25 exercise applying the needs, sharing, compensation and autonomy rationales are identified and provided at the appropriate times.

Some general background that is agreed or is realistically indisputable.

6. The wife is now 33 and the husband is 38. They met in 2003, they became engaged and began living together in April 2004. They married in early June 2005. The

petition is dated 24 February 2010 and they are now divorced. After the breakdown of the marriage, they continued to live in the same house until the summer of 2010.

7. They have one child, a boy, who was born in August 2007. There have been Children Act proceedings which were settled at (or shortly after) the conciliation appointment. As a result, by consent a shared residence order, containing a regime as to the time that the child should be in his two homes, was made. As a result of that, the wife is directly responsible for the care of the child for significantly longer periods of time than the husband, but his time with his son is significantly longer than that first offered. The husband moved out of the matrimonial home when the Children Act proceedings were concluded. The Children Act proceedings and that co-habitation must have added to the upset of both parties and the antagonism that exists between them.

8. The longer periods of time that the child spends at the home of his mother reflects the point that she gave up work, and so was his main day to day carer during the marriage. But the shared residence order is a proper recognition and reflection of the point that this child's welfare is likely to be best promoted by him having two homes and a continuing and developing close relationship with both his parents.

9. During the wife's pregnancy, the father was diagnosed with a genetic medical condition which can be passed on to his children. This condition can have serious clinical effects. The child of the family is not demonstrating any of these at the moment but there is a risk that he might do so in the future. The parties were keen to have more children but recognised that, unless the risks of any child they may have suffering from the same condition could be reduced, this would involve them taking significant risks that could impact not only their lives, but also, those of their present child and any other child they may have. The common theme of their evidence was that both parties would have very much liked to have more children but that they recognised that, absent the reduction of those risks, this was not a sensible option.

10. In line with their strong wish to have more children, they sought extensive advice and the husband and his family underwent a number of tests and examinations to see if a modified IVF solution would be available to them. This can be available to some sufferers of the same genetic medical condition. The wife also carried out research on the internet and contacted, amongst others, doctors in America. Sadly, by the time that their relationship was on the rocks the position was that a solution that would reduce the risks had not been found.

11. If their relationship had not foundered it is clear that they would have continued their researches and efforts to reduce the risks of them having another child and thereby fulfil their wish to have more children.

12. The worry that the child has inherited the genetic condition, and so might develop clinical symptoms that could be very serious, is one that the parents share. It is of course hoped that, and there is a good prospect that, the child has not inherited the genetic problem and that, if he has, the clinical symptoms will not be severe.

13. It is plain that there is now considerable animosity between the parties and their respective families. Both parties are highly intelligent and talented, as are the two members of the wife's family (her father and one of her sisters) who gave oral

evidence, but the calm, persuasive, pleasant and urbane way in which they all gave their evidence did not disguise the fact that considerable antagonism lurks just below the surface. However, to their credit it was common ground that the child has been shielded from a great deal of the damage that can flow from such a situation.

14. The husband's mother lives nearby and helps the husband in his care of his son. The wife is clearly very close to her parents and her two sisters. Her parents and one of her sisters live nearby, and one sister is at present in America (and she has studied and lived there in the past). The wife's mother helps in the care of her grandchild. The wife, her parents and siblings are a close knit and mutually supportive and loving family who cherish their privacy.

15. Both of the parties graduated from Cambridge University, but at different times.

16. When the parties met the husband was working for a firm in the field of head hunting and earlier he had become the youngest ever partner in a well known firm in that field. He moved on to a new firm of which he was not a partner, and from which he was dismissed in 2005. But he was not out of work for long and, later in 2005, he started working in the same field for a firm of which he is now a full partner. He has been and remains successful and a high earner. His earnings are divided between a fixed profit share that is paid monthly and an additional share of the profits voted by a majority of the partners each year. The additional profit share is paid during the year after it is earned but he is taxed on an earnings basis. In the last four years (i.e. since 2007/8) his net income shown in his tax returns has in round figures been £458,000, £407,000, £350,000 and £330,000. Sensibly, the wife has not pursued issues relating to (a) discrepancies between the husband's tax returns and other information provided, and (b) a more precise estimation of his future income which for next year the husband put at the same, or a slightly higher level than this year, because it is clear that the level of income shown by his tax returns makes the level of financial remedy she seeks affordable on the basis that over the years the husband will be able to build up considerable savings.

17. It has been the prudent practice of the husband throughout the marriage to make provision for tax by setting aside sums from the regular payments of his fixed profit share and from the payments of the additional profit share. By this method he has created an account as a reserve to meet his tax.

18. The wife graduated in 1999 with a degree in history and went to Bar school. She then worked for Goldman Sachs for two years (2000 /2002) as a junior analyst in their legal and compliance department. She did not enjoy that work and returned to pursuing a long term wish to be a barrister specialising in criminal law. She was called in 2003, and was taken on as tenant in well known criminal law chambers in October 2004. She worked as a barrister until she left to have her son. During that time, she had secondments to the extradition department of the CPS, and in the last few months to the SFO. The latter being prompted by the difficulties she had in the early parts of her pregnancy (e.g. being sick on the way to court). So, she is very well educated and has had 5 years of experience divided between working for large organisations and at the Bar. She has now been away from full time work since mid 2007 (around 4 years), but from April 2009 (when her son was about 20 months old) she started working as an independent member of the Parole Board. She ceased doing this during these proceedings. She is now at the very early stages of setting up a 50/50

partnership business with a semi-retired lawyer offering assistance to persons going through a divorce.

19. *The family holding company.* The wife's father is one of the two directors of a private family holding company. The other director is his brother, who was a partner in the solicitors who act for the company and the family trusts. The main business activity of the group is property investment and development.

20. The main trading company was a public company but, in the second half of 2004 (and so after the parties became engaged), it was bought by the family holding company. As a result of this buy back the wife received loan notes in consideration for her transfer of her 5,000 shares in the trading public company, which had been gifted to her by her father. Interest was paid on these loan notes and they were redeemed in 2008.

21. The wife's father can be justly proud of the business success of the family company (and thus his own business success). It was unsurprisingly quite clear from his oral evidence that one of his consuming interests is his business life, and that he intends to carry on working as long as he is enjoying it, and so well beyond normal retirement age. To my mind, the evidence shows that his family, and his brother's family, were aware that running the family business was a central part of the life of the wife's father, of the general nature of that business, that it is a family business and that it is successful and valuable. It would be incredible if this was not the case, and the contrary was not suggested. I only mention the point because there was a dispute concerning the extent of the wife's knowledge of her direct interests in, and through the trusts in, that family company and the existence of that company must have been a background feature of her life.

22. *The wife's assets derived from the wife's shares in the main subsidiary.* The wife had a dividend and deposit account in her name at Smith and Williamson. Following redemption of the loan notes in May 2008, the proceeds (£264,375) were held in the wife's deposit account at Smith and Williamson and, later in October 2009, that capital (with accrued interest and other moneys including a transfer of about £6,000, from and it seems closing her dividend account in October 2008) – total circa £291,000, were transferred to an account in her name opened at Barclays on the instructions of her father.

23. Before the loan notes were repaid the wife received dividend / interest at the rate of £1,400 month on them and after they were repaid she continued to receive payments of £1,500 a month which were paid on the instructions of her father from the account he caused to be opened in her name at Barclays into another account of hers at Barclays; these payments are described in some of the statements as "allowence" (stet).

24. *The shareholdings of the trusts.* The wife is a beneficiary under a number of trusts, which together with her parents, her uncle and his wife and other trusts own the family holding company. The following shareholdings are the most relevant ones:

    i) 20,500 shares (12.7%) owned by the wife's father (15,800) and his wife (4,250),

ii) 20,500 shares (12.7%) owned by the wife's paternal uncle (15,800) and his wife (4,250),

iii) 48,951 (31%) held by the trustees of a settlement made by the wife's father in 1983 (the 1983 settlement), and

iv) 48,951 (31%) held by the trustees of a bare trust in favour of the children of the wife's paternal uncle.

So, it is apparent that those two trust holdings would control the company in general meeting, that the two directors (and their wives) together with one of the trusts would control the company in general meeting and that, if the directors were to disagree, each would need more than the support of his wife and one of the trusts to control the company in general meeting.

25. The main trusts of the 1983 settlement are that the trust fund is held for the wife and her two sisters in equal shares for life, with a power to pay capital to the life tenant and, subject thereto, for the children of the life tenant. It is clear that the 1983 settlement is a trust primarily for the benefit of the wife and her two sisters and, as her father told me, he looked at that trust fund – "as his children's money that will eventually come to them". I acknowledge that, if it did not come to them through an exercise of the power over capital, it would go to their children (or accrue to the other shares) and so it might "come to the children" by vesting in their children on their death.

26. Those interests under the 1983 settlement and the absolute interests of the children of the wife's uncle mean that, although the wife's father and his brother, as the board, control the day to day affairs of the family holding company, ultimate control of it lies with the next generation in general meeting, provided that they all or most of them, agree. As to that, I acknowledge that the wife and her sisters do not have absolute interests under the 1983 settlement, but their life interests coupled with the power to pay them, and only them, capital together with the obvious and accepted purpose of that trust, render it very unlikely that the trustees would not follow, or not take very significant account of, their views on the basis that they were at odds with the interests of their children, or on any other basis.

27. The family holding company does not have a history of declaring and paying regular dividends, albeit that from time to time, it has done so over the years. The amount of its distributable profits was not identified but it was accepted that they exceeded the cash in the company as at June 2010 (£10 million - although around £3m of that was held for tenants and others). That cash has since been significantly reduced by expenditure on new projects and I understand stands at about £3m, if the cash representing moneys held for tenants and others is left out of account.

28. The future payment of dividend depends on the dividend policy and decisions which are set and made from time to time by the board, subject to the ability of a majority of the shareholders (and thus effectively the children of the directors) to control the company and, if they think it appropriate, to remove the directors in general meeting.

29. The accounts of the holding company show that the group has been consistently profitable and has a healthy and robust balance sheet. The net assets of the group, on

a consolidated basis as at June 2010 and 2009, were £32,266,000 and £32,242,000 respectively (plus negative goodwill of £17,582,000 arising on consolidation) and, as at 30 June 2010, the group's gearing ratio on a consolidated basis (defined as net debt expressed as a percentage of shareholder's funds plus net debt), ignoring the negative goodwill, was 40.7% (2009 – 44.3%).

30. The directors' report for the year to 30 June 2010, records that the interest payable on the term loan from its bank is fully covered by a spread of good quality investment properties, that the covenants applicable to the loan are being comfortably met and that the directors believe that subject to unforeseen circumstances, both the interest payable and the covenants will continue to be complied with. That loan is for £50 million and its term expires in 2016. The directors are naturally conscious of the need to refinance this loan at, and preferably before, its expiry. A number of high yielding leases end at around the time that this loan needs refinancing, and naturally the directors are very alert to this and are seeking to re-negotiate the leases. This timing problem relating to the term of the loan was, as the wife's father confirmed to me, known both at the time the loan was taken out and when the accounts to June 2010 were signed, and so, in the terms of the Director's report therein, it is not an unforeseen circumstance. Also, understandably the directors are aware that in 2013/14 a number of other property companies will be refinancing 5 year loans taken out as a result of the credit crunch, and so the board wish to build up cash reserves to reduce both the amount of refinancing required by, at the latest, 2016 and the problems concerning refinancing. However, and understandably, this reason for building up cash reserves has not prevented the recent significant reduction in them to take advantage of what the directors believe to be good market opportunities. Such application of the available cash, on good business opportunities, is in accordance with another stated reason for its conservation in the company over the last 6 years, rather than its use to fund dividends.

31. The wife's father has no significant pension arrangements. Although, he convincingly explained that he intended to carry on working and, when so doing, with justifiable annoyance refuted allegations that his health would not permit him to do this, he is now in his 60s, and as and when he stops working, and so earning a substantial salary, his primary income source would be dividends on his and his wife's shares in the family holding company and, as he explained, capital generated by down sizing his home.

32. Unsurprisingly, the Articles of the company contain pre-emption provisions which provide for minority shareholdings to be bought at discounted values to reflect a minority holding.

33. *The assets of the 1983 settlement.* These comprise:

    i) The shares in the family holding company. The Revenue agreed in March 2009 that the gross or non-discounted value of a share was £297.84. Taking that value per share (which is not a current value and is not the discounted value payable under the pre-emption provisions) the shareholding has a value of £14,579,565.

    ii) Two cellos, worth in the order of £1m and £500,000. The second cello was bought for £486,375 in the year April 2010 to 2011, and so during these

proceedings, from cash then held in the trust account. The wife's father gave convincing evidence in support of the view that these cellos were very good investments because they are rare, and there is a good market for them in the Far East and other countries with strong currencies. He expects that the trust would be able to realise these cellos easily and at substantial gains over their cost price. The wife's father has a great interest in music and rare stringed instruments.

iii) Quoted investments of £221,329 as at April 2011.

iv) Cash at bank as at April 2011 of £364,957 (as at 16 November 2011 £306,687 (the reduction being caused primarily by the payment of legal costs (including £9,720 counsel's fees) totalling £63,357, which the wife's father understood related to advice concerning, and in respect of work done in respect of, the provision of information to these proceedings).

v) Loans of £20,000 and £30,000 to the wife and one of her sisters.

vi) Liabilities as at April 2011 totalling £1,033,088, including income due to the wife and her two sisters but made up primarily of three interest free loans repayable of demand totalling £989,125 from (the wife's father - £100,000, the 1985 settlement made by him - £689,125 and from a settlement made by his sister - £200,000).

34. It is clear that the loan indebtedness of the 1983 settlement is a "soft one" and the extent of those loans which were used to fund the purchase of the more valuable cello is an example of the point that unsurprisingly, from time to time moneys have been lent as between the family trusts to fund expenditure that one set of trustees wanted to incur by using cash lent interest free and repayable on demand by another family trust.

35. The position of the 1983 settlement is therefore that if the family loans were called in it would have to sell the cellos or some shares, or borrow elsewhere.

36. It appears that the trust assets have not been appropriated or allocated into shares and so each daughter has a life interest in a third of the whole. The cellos are not income producing and the more valuable one is used by one of the wife's sisters, who is a professional musician. So she derives very considerable benefit from it, whereas her sisters do not, and will not, unless and until this trust investment is sold and they receive income on, or a share of the capital of, the proceeds. The cellist sister does not pay for its use, and I was told and accept, that this accords with the standard practice of investors in old and very valuable instruments, who regularly make them available for use by professional musicians. I was told by the wife's father that the other cello is likely to be provided to other musicians and/or his daughter for their use after the work presently being carried out on it is completed.

37. It was clear from the evidence given by the wife's father that, as one would expect, he has been privy to the advice given to, and the decisions made by, the trustees of the family trusts and the board of the family holding company, concerning disclosure and other issues relating to them that have arisen in respect of these proceedings. At no time during his evidence did the wife's father indicate that he was not in a position to

speak authoritatively on the approach of the trustees of the 1983 settlement. This is unsurprising and reflects the point that, as one would expect, he is in regular discussions with them (and the trustees of other family settlements) and there is, and has been, harmony between the trustees and the settlors of those trusts, whose wishes have been given weight by the trustees.

38. The wife's father made quite clear that the focus of his approach, and that of his generation and previous generations of the family, as individuals, directors and trustees, is, and has been, on capital growth of the trust assets and the business, rather than income yield, and that a significant reason for that approach was to encourage and promote an attitude in the next generation of self sufficiency and hard work. As I have mentioned, he however accepted that, the 1983 settlement was for his daughters, and so at some stage they would be likely to receive substantial financial benefits from it.

39. *Inter settlement and family loans.* The loans made to and by the 1983 settlement are in line with a history of loans being made between family trusts and to members of the family by trusts. For example, loans were made to the wife and her sister, who gave evidence, to assist in the purchase of their first houses; as will appear later, loans were made to the parties to assist in the purchase of their matrimonial home (together with moneys that had been advanced to the wife from a trust that has now been wound up). I am not clear what assistance was given to the wife in the purchase of her flat before she married, but her sister was assisted in the purchase of her home by her father guaranteeing her mortgage, a short term loan of £500,000 (on which she paid interest) and two loans from trusts of £50,000 and £30,000. As I have mentioned, bigger loans were made to the 1983 settlement to fund its purchase of a cello (£989,125) and another much larger loan has been made to the wife's father from his sister's trust (£826,101). The wife's father explained that his sister had told him that she wanted him to have this money to recognise his work in the business. This explanation indicates that he, his sister and the relevant trustees regard it as a soft loan.

Assets and liabilities of the parties

40. At the date of her Form E the wife held £329,000 in a savings account at Barclays. This sum represented the proceeds of her loan notes and other trust assets or gifts. So it represented pre-acquired assets and so was not marital property. Nearly all of it has now been spent on costs and living expenses.

41. Other assets in the names of the parties (or to which they are entitled) are:

i) In joint names

a) Net proceeds of matrimonial home, £2,437,868

ii) In the wife's name:

Assets

a) Bank accounts £23,862

b)	ISA	£141,742
c)	Shares	£1,300
	(there was a small difference as to this figure)	
d)	Unpaid trust income	£3,225
Total:		£170,129

Liabilities

e)	Overdraft facility (to be repaid from proceeds of the matrimonial home)	£83,056
f)	Loan from family settlement (used in purchase of the matrimonial home). This was made to both parties but the wife accepts responsibility for it	£20,000
Total		-£103,056
Net total		£67,073

Note:

Of that net liability £20,000 is a soft loan and is very unlikely to be demanded in the near future, and it is much more likely to be set off against a future capital payment.

I have taken a mid point between the competing values of the shares and excluded an aged debt of £3,788 included by the husband as there was no evidence that it was likely to be paid

iii) In the husband's name

a)	Current account	£301
b)	Euro account	£182,639
c)	Savings account	£56,415
d)	Investment portfolio	£30,433
e)	ISA	£33,193
f)	Premium bonds	£6,000
Total:		£308,981

iv) The husband also has:

a)	A pension	£181,713
b)	Capital in his partnership	£10,000

Note

I have left out of account the husband's tax reserve of £195,675 and his tax liabilities for the reasons set out later.

v) Outstanding liabilities for costs

a)	Husband	£98,089
b)	Wife	£100,477

42. No claim is made in respect of the pension. But the wife points out that in the current tax year the husband has made pension contributions of £128,750 and could have delayed doing so until after the hearing. But she recognises that by so doing he has sensibly taken advantage of a one off opportunity to enhance his pension and claim tax relief at the 50% rate on those contributions. However, it is clear that by making those contributions he has reduced the available cash.

Introductory points

43. It is common ground that a clean break is not possible and that there should be spousal periodical payments. This is important because it means that, it is common ground that:

i) the application of the sharing rationale to available capital does not provide the answer to this case (however the trust interests and expectations of the wife are taken into account), and

ii) at most, that rationale (a) is a factor in the reasoning process that founds the award to be made to meet housing needs, and (b) identifies the starting point for division of the liquid capital.

As to point (ii) it was accepted in final submissions made on behalf of the wife, that the answer suggested by the sharing rationale identified the floor of the capital payment to her. The husband however argued that it identified the ceiling of any lump sum to meet housing needs on the basis that, if the wife wished to spend more on a home, then she could look to the trustees or a commercial lender to raise the necessary balance.

44. It is common ground that, the husband is a high earner, and that the wife has worked and has an earning capacity but (save to a very limited extent) she did not return to work after the birth of their son.

45. The rival final open offers, both made on a no order as to costs basis, can be summarised as follows:

i) The wife suggests:

a) A lump sum of £1,675,000.

b) A joint lives periodical payments order (for wife and child) at the rate of £5,000 a month (£60,000 per year) plus 35% of the husband's annual net profit share (less his regular payments on account of it)

capped at £60,000 (with RPI increases) and so, if the cap is reached, a total of £120,000 a year.

c) The continuation of the child element of the periodical payments until the child completes tertiary education.

d) The wife is to inform the husband if her trust income entitlement exceeds £7,500 a year, and

e) the husband is to pay all school fees and reasonable extras, and the premiums for an identified insurance policy and medical insurance for the child.

ii) The husband suggests:

a) Payment of half the net proceeds of the matrimonial home (circa £1.218m) on the basis that the parties each retain other assets in their own names. (So, as I understand it, the wife would retain her ISA (£141,742),

b) Periodical payments at the rate of £5,000 per month (split £3,500 for the wife, and £1,500 for the child) plus 20% of his annual net profit share (less his regular payments on account of it) capped at £20,000 (with no index linking) and so, if the cap is reached, a total of £80,000 a year, split £18,000 for child, £62,000 for wife to cease on re-marriage or 6 months co-habitation.

c) Spousal periodical payments to reduce by £10,000 in August 2013, by another £10,000 in August 2015 and to end when the child is 11 (August 2018) subject to review, and if it ends the child maintenance to increase to £2,000 a month.

d) The continuation of the child element until the child ends secondary education and then it is to be reviewed to determine whether payments would then be made direct to the child.

e) If the wife's trust income entitlement exceeds £5,000 a year the husband's payments are to reduce £ for £, and

f) the husband to pay all school fees and reasonable extras, and the premiums of the identified insurance and the medical insurance for the child.

46. So, as I have already indicated, the central issues relate to:

i) the application of the available capital assets and income (and thus the borrowing capacities of the parties) to meet the housing needs of the parties, and those of their young son,

ii) the amount of the spousal periodical payments to be paid by the husband to the wife, and

iii) the period for the payment of those spousal periodical payments.

There are also issues concerning the period and amount of periodical payments to the wife for the child, which it has been agreed can be determined by the court. As I understood it, the initial attribution of periodical payments as between wife and child made by the husband was not disputed, and the husband accepted that he would continue to make payments either to the child directly, or for the child, until he completes tertiary education (as both parents hope and envisage he will).

47. The wife's figure of £120,000 a year is based on her budget in that sum and makes no allowance for (a) any income she may earn, (b) any continuation of gifts by her father and benefits in kind provided by him and/or a trust (e.g. use of the holiday house in Belgium) or (c) trust income or capital receipts (save for the provision concerning the provision of information about her trust income). She also asserts that her income through periodical payments should remain at that level for joint lives (or until re-marriage) absent an application for variation. On the assumption that the suggested caps are met the difference between the parties on the starting figures for periodical payments is £40,000 per annum.

48. An irony in the case is that:

i) to support her contention that her interests and potential benefits under family trusts or from parental gifts are of no, or only very limited relevance, the wife has asserted that she and her family espouse, and have taken an approach to life, that each generation should work hard, and so be financially self sufficient and independent, but

ii) she nonetheless asserts that there should be a joint lives award of spousal periodical payments and so effectively that, after a short marriage, she should remain financially dependent on her ex husband, for their joint lives or until re-marriage (subject to variation by the court).

In pursuance of that family approach the wife (and her sisters) have worked hard and made much of their respective talents and abilities.

49. The essential justification for this approach by the wife is that she asserts that:

i) the welfare of the child of the marriage will be best promoted if she is his primary carer and that the understanding of the parties was that she would not pursue a full time career, so that she could and would be the primary day to day home maker and carer of the children of the marriage,

ii) her approach accords with *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, and recognises in a fair way the uncertainty and lack of evidence as to what her future earnings will be, and

iii) her interests and prospects under the trusts have little value in the foreseeable future and, in any event, should not be taken into account, or given weight, unless here trust income exceeds £7,500 in any year (the inference of her agreement to notify the husband of that is that she should give credit in respect of trust income in excess of that figure).

50. A central point in the case is therefore for how long, after a short marriage between two highly qualified persons, should a high earning spouse (here the husband) remain completely (or very substantially) responsible for supporting the other spouse (here the wife) who has a good earning capacity but does not wish to pursue it to the full (or to give any credit for it absent an application to vary made by the husband) so that she can (a) be at home to act as the primary carer of the child of the marriage, and (b) effectively decide what work she will do and whether it will be paid or unpaid.

51. That issue would arise in the context of her earning capacity alone, but it is complicated by the point that the wife comes from a very comfortable family background, is a beneficiary under family trusts and has been and is (albeit recently to a lower extent) the recipient of parental financial support.

52. It follows that, this central issue introduces the need for a reasoned analysis of the extent to which (by reference to both amount and time) the wife's needs, her continuing contributions towards the care of the child of the marriage and the disadvantages this causes her, should be met from:

    a) the s. 25(2)(a) factors relating to the husband, and

    b) the s. 25(2)(a) factors relating to the wife.

    In one sense that issue is a very narrow one because an order under s. 28(1A) was not sought and so it relates to who should make an application for variation before the end of any term that is fixed.

53. Hotly disputed points were raised in respect of the following issues of fact:

    i) What was the agreement or understanding between the parties relating to the wife returning to work after the birth of their child or children?

    ii) Prior to these proceedings, what did the wife know about her interests under the family trusts and about the family holding company?

    iii) What was the agreement or understanding between the parties concerning the purchase of a holiday property in Italy, before they were married?

Property acquisitions by the parties

54. When they were on holiday in the Spring of 2004, the parties found a property in Italy. This was bought in the husband's sole name. The property was sold in January 2010 and its proceeds are held in separate account. The purchase price was 212,000 euros.

55. In July 2005, the matrimonial home in Hampstead was bought for £1,632,501 (including costs). Thereafter, that property was renovated at a cost of around £250,000. The house was bought in joint names and the purchase costs were funded as follows:

    i) Mortgage (joint liability) £899,965

    ii) Wife (effectively from the sale of her flat) £350,000

iii) Wife from her own funds £110,000

iv) Husband (effectively from the sale of his flat) £202,535

v) A family loan £50,000

vi) A family loan £20,000

56. Surprisingly, the parties were unclear whether they knew of the £20,000 loan. But they both knew of, and thought that, the loan of £50,000 was from the wife's father and the husband repaid it to him in 2007. This litigation has shown that the £50,000 loan was in fact from the wife's father's 1985 settlement (under which the wife is a discretionary beneficiary as are a number of other members of her family including her cousins), and the £20,000 loan was from the 1983 settlement (and it remains outstanding).

57. The mortgage was increased to £1 million to help in the funding of the renovations, and over the years to 2009 the husband paid the costs of renovations and payments to reduce the mortgage (to its present level of £584,000) from his voted profit share. Those payments total £663,200 and, if the loan repayment of £50,000 is added, £713,200. However, these payments have been made from earnings during the marriage and so, on an application of the sharing rationale on a non-discriminatory basis, they fall to be attributed to the parties equally as part of the fruits of their marital partnership. The wife also made some payments towards the mortgage in much smaller amounts from her much smaller earnings.

58. Contracts for the sale of that home had been exchanged by the date of the hearing with completion on 15 December 2011, which was the last day of the hearing (after a short adjournment). The sale was completed on that day.

The application of the sharing rationale to the assets in the names of the parties and the husband's earnings post separation.

59. At times during the hearing, it seemed to me that the arguments relating to this were being advanced and refuted on the flawed basis that the housing needs of both parties should be met only from the shares of the available capital assets that each party should receive pursuant to the sharing rationale.

60. As appears from paragraph 43 hereof, this was at odds with the common ground that a clean break was not possible, periodical payments would be made, and the husband's income (and/or trust interests or prospects of the wife) could fund or provide significant borrowing or capital. It was also at odds with:

i) the effective common ground between the starting points of the parties concerning their housing needs, by reference to the standard of the matrimonial home and their needs for a home for themselves and their child, and

ii) the sensible and pragmatic approach adopted at trial (but not in the husband's skeleton argument) by the parties to the application of the sharing rationale in respect of (a) assets representing pre-acquired or trust assets of the wife (i.e.

the fund of £329,000 now largely spent), (b) the earnings of the husband after separation (that were not quantified); namely that they should be left out of account in the application of the sharing rationale, and (c) the husband's pension and his capital in his partnership.

Also, to my mind correctly, neither side argued that the wife's trust interests should be taken into account in applying the sharing rationale.

61. At the hearing, the wife's ISA was not referred to in the context of the application of the sharing rationale and the division of the available assets. No doubt this was because in both of the assets schedules it was taken into account in reaching the net liability of the wife. To identify the liquid capital available for allocation pursuant to the sharing rationale there was a dispute as to how the husband's liability for tax should be assessed and taken into account.

62. *The property in Italy*. It has been sold and its net proceeds are represented by the sum of £182,639 in the husband's euro account. At the start of the hearing, it appeared to be common ground that the purchase price of the holiday home in Italy was provided as to 10,000 euros by the wife and the balance of 202,000 euros by the husband. The dispute was as to whether they regarded the holiday home as a joint asset, and so as marital property, to which the sharing rationale applied with full force.

63. They found the house before they were engaged and the purchase was completed after the engagement.

64. During her oral evidence, the wife introduced into the case the assertion that her mother had provided £45,000 towards the purchase price and said that this had been something she thought had happened but, as she had no documentary material to back it up, she had not made reference to it previously. She told me that her oral evidence was prompted by her recent discovery of an email that indicated that the payment was made at a different time to that originally thought and, as to which, back up documentary information had been sought and not found. In respect of the later date, some back up evidence was produced to show that the wife's mother had paid out £45,000 from her account, but it did not show to whom this was paid and how it was applied. The wife's mother declined to swear a statement, and so run the risk of being cross examined, on her recollection. The husband told me that he had no recollection of any such payment being made, but he had not provided documentary evidence of his funding of the whole balance of the purchase price. What he had provided, against the common ground that he had paid that balance from his own funds, indicated that a sum of the order of the sum that the wife now said was provided by her mother was not backed by documentary evidence.

65. In my judgment, the approach of the wife to this issue was unfortunate (as was her late introduction of assertions relating to the reason why the husband was dismissed from his employment in 2005 – which only go to credit and as to which I do not have to make findings and would have had difficulty in doing so on the available material, when clearly disclosure on this issue should have been given and sought if it had been raised earlier). On the funding issue, her approach has resulted in her providing too little too late to enable me to make a finding on the evidence that departs from the opening common ground as to the financing of this purchase. Indeed, in my view

correctly, in his final submissions counsel for the wife did not submit that I should make any such finding.

66. I confess to having considerable sympathy for the view of the wife's father that he did not agree with an approach that the couple should be buying a holiday home before a main home. However, this is what they did and this process started at a time when they were in love and ended after they were engaged and so planning, and expecting, to have a long and happy marriage. The wife's parents were asked to, and did, view the property and, it is clear that, both parties were closely involved in, and very enthusiastic about, its purchase.

67. In my view, both of them have to an extent rewritten history in their evidence concerning, both the thought they gave to, and their understanding of, who would own this holiday home. As to that, the email from the wife to the husband about powers of attorney in Italian law is explainable on both accounts. In my judgment, the parties gave little, if any, thought to who the owner would be or was, but they both regarded this property as their holiday home and their first property venture together. In that sense, it was a joint venture at the start of what they hoped would be their lives together.

68. It is at last potentially a nice, but thankfully an irrelevant and unargued point, whether, if the house had been purchased in joint names (with or without an express declaration of trust), or on the basis of an express agreement that it was a joint and equal venture, there would be a "good reason" to depart from equality in applying the sharing principle or rationale (see *Charman (No 4)*) to it, on the basis of an accepted inequality of contributions from pre-acquired assets.

69. I shall assume that such an argument is available in the application of the sharing rationale to this property. But on that assumption, in my view, that argument should fail because, in the circumstances of this case, the purchase of the holiday home was closely followed by the purchase of the matrimonial home and the evidence shows that:

    i) the wife made a greater contribution to the purchase of the matrimonial home,

    ii) if the holiday home had not been bought, the husband would have applied his pre-acquired savings used in the purchase of the holiday home towards paying for the matrimonial home,

    iii) his and her later contributions to the purchase and renovation of the matrimonial home (and the upkeep of the Italian property) were from earnings after the marriage,

    iv) a point made by the husband that the wife did not apply her capital in her Barclays account derived from pre-acquired assets, is irrelevant, and

    v) the two homes were treated as representing their marital property interests acquired from joint contributions from pre-acquired assets and earnings during the marriage.

This means that the application of the criterion of fairness in this case points strongly to the conclusion that the two properties should be treated in the same way and that their net proceeds should be divided equally.

70. *The treatment of the husband's tax liability and the payments into his pension.* The dispute concerning the approach to be taken to his tax liabilities arises because the husband is taxed on an earnings basis but does not receive part of those earnings in the tax year. His prudent practice has been to put aside moneys as and when he is paid them to meet his tax liabilities. If this continues, it will mean that, when he ceases working as a partner of his present partnership, he will receive payments from which he will not have to set aside moneys to meet tax from his share of those profits, because he will already have done so.

71. The wife argued that the husband's tax liabilities for next year should not be included as liabilities for ascertaining the available capital for division between the parties now because they relate to his earnings during next year. That premise is correct, but to my mind it does not found the view that those tax liabilities should be left out of account. To do so, would fly in the face of the prudent practice the husband has adopted over the years and create significant cash flow problems for him.

72. In my judgment, the fair and pragmatic course is to ring fence and allocate the bank account utilised to create his tax reserve, to the husband's tax liabilities that are payable in 2012. This allocation, on the figures he has provided, will not cover all of his tax liabilities due in January and July next year. However, in my view, on the same pragmatic approach, the balance should not be included as a liability because:

    i) his reserve probably would have been, and clearly could have been, higher if he had not made his recent pension contributions,

    ii) those contributions trigger a claim for tax relief,

    iii) no claim is made for pension sharing, and

    iv) the husband has ample opportunity before next July to fund the balance of the tax then due (whether or not it is reduced by a claim for relief based on the pension contributions).

73. Accordingly, in my view, in determining the amount of liquid capital, the overall criterion of fairness and pragmatism mean that the cash flow issues relating to tax and pension contributions should be so dealt with. This means that the husband's "tax account" should be left out of account, as should his liabilities for income tax.

74. *Application of the sharing rationale to the available capital assets.* Applying the above approach to the capital assets set out in paragraphs 40 to 42 hereof the assets and liabilities to which the sharing rationale applies on a 50/50 basis, are (a) Net proceeds of the matrimonial home £2,437,868, (b) Wife £67,073, and (c) Husband £308,981. But the costs already paid (or funded by loan) have not been added back in reaching those figures and both sides in calculating the liquid capital available for division deducted the outstanding costs. This was in line with the broad and pragmatic approach taken by the parties to the wife's pre-acquired and trust assets, her ISA and the husband's post separation earnings, pension and capital in his

partnership, in computing the liquid capital available to which the sharing rationale applied on a 50/50 basis. Also, outstanding costs and the total costs of both sides are broadly equal (the wife's total is approximately £20,000 higher). So, in line with the approach of the parties, I have not added back the costs on the basis that, subject to an order for costs, they will be paid by each party from their assets after the award, albeit that in my view it may often be right to add back the costs on that basis. Deducting outstanding costs produces the result that the liquid capital is:

(i)	Net proceeds of the matrimonial home	£2,437,868
(ii)	Wife	-£33,404
(iii)	Husband	£210,892
	Total	£2,615,356

75. In reaching that total I have left out of account the husband's pension and capital account in his partnership and included the loan of £20,000 (as a loan to the wife as in her asset schedule). I agree that it is a soft loan but it was used towards the purchase of the matrimonial home and it is a liability that would naturally be repaid when the home is sold.

76. The floor of the wife's entitlement to a capital or lump sum payment, resulting from her receiving one half of the available liquid capital, which it was common ground would go to meet her housing needs (and those of the child) is therefore £1,307,678.

The approach to be taken in law to the trusts for the benefit of the wife and members of her family

77. The wife is a beneficiary under 11 family trusts. But the most relevant is the 1983 settlement and, in my view correctly, the focus of the argument was on that trust.

78. It is clear that assets held in trust can be a financial resource that one of the parties *has, or is likely to have in the foreseeable future* (the statutory language), within s. 25(2)(a), and thus one of the matters (which have no statutory hierarchy) to which the court is in particular to have regard in determining the award it should make under the MCA (see the introduction to s. 25(2)). So if they are such a resource the court is to take them into account and give them such weight as is appropriate applying the overall criterion of fairness and the rationales identified in, and the guidance given, by the authorities.

79. In doing this, it is clear that the Family court must recognise and take into account the fact that assets are held in trust and thus how, when and whether the party will receive any such assets, or any benefit from them.

80. Overall, the relevant exercise has two stages, namely (1) are the interests in trust assets a resource, and (2) if so, how are they to be taken into account.

81. In *Whaley v Whaley* [2011] EWCA Civ 617 at paragraph 54, Black LJ says, in respect of the issue whether interests in trust assets should be treated as part of a party's resources for the purposes of s. 25(2)(a):

> "Whatever the nature of the trust, this issue is always approached by asking the question set out by Wilson LJ in Charman [2005] (see above) although plainly the court will have regard to the circumstances of the particular trust - how it came into being, who the beneficiaries are, what duties do the trustees have, what other relevant terms there are, how it is being administered in practice and so on - in answering the question and in determining, in due course, what ancillary relief order to make. "

The passage she cites from *Charman* relates to an interlocutory appeal in that case and is the part I have underlined in the following extract from the judgment of Wilson LJ in *Charman v Charman* [2006] 2 FLR 422. He said:

> "12 --------- Superficially the question is easily framed as being whether the trust is a financial "resource" of the husband for the purpose of s 25(2)(a) of the Matrimonial Causes Act 1973 (the 1973 Act). But what does the word "resource" mean in this context? In my view, when properly focused, that central question is simply whether if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so. In other cases the question has been formulated in terms of whether the spouse has real or effective control over the trust. At times I have myself formulated it in that way. But, unless the situation is one in which there is ground for doubting whether the trustee is properly discharging its duties or would be likely to do so, it seems to me on reflection that such a formulation is not entirely apposite ---------
>
> 13 --------- In principle, however in the light of s. 25(2)(a) of the 1973 Act, the question is surely whether the trustee will be likely to advance the capital immediately or in the foreseeable future. "

The reference to "immediately or in the foreseeable future" reflects the language of s. 24(2)(a).

82. In *Charman v Charman (No 4)* [2007] 1 FLR 1246 Potter P says:

> "48 The primary argument now put before us on behalf of the husband is that the judge failed to resolve the "secondary issue" which Mr Pointer on behalf of the wife had purported to identify for him, namely the issue as to the likelihood of advancement. ----------
>
> 51 The judge would certainly have obviated energetic argument upon this appeal if he had expressly found that Codan would be likely to advance all the capital of Dragon to the husband upon request. But for the reasons set out at para [50], above, it is obvious that the need to address such a question

was in the forefront of his mind. We are quite clear that he effectively made such a finding; ----------

52 We turn to the second question, namely whether it was open to the judge to find a likelihood of advancement. ----------

53 Mr Boyle [counsel for the husband] ---------- accepts that the judge was required to look at the reality of the situation and that trustees of such trusts can generally be expected to respond favourably to reasonable requests made of them by settlors and to comply with any expression of wishes on their part. Mr Boyle even concedes that, if disaster struck the husband's business and he fell into real financial difficulty, Codan could properly make available to him a large sum of capital. But, so Mr Boyle contends, such a hypothesis is inapt because the husband has no "need" for any capital out of Dragon. Our reaction to that contention is twofold. First, it is in law a perfectly adequate foundation for the aggregation of trust assets with a party's personal assets for the purposes of s 25(2)(a) of the Act and that they should be likely to be advanced to him or her in the event only of "need". Secondly, the content is inconsistent with another area of the husband's argument, which is to the effect that, although his personal assets computed by the judge at £55m exceed the lump sum award of £40m, the judge must have expected him to have recourse, directly or indirectly, to the assets of Dragon, particularly its cash and investments other than in Axis, for the purposes of satisfying the order and that indeed the order can only reasonably be satisfied in that way. If so, why then does the husband not have a "need" for capital out of Dragon in order to assist him to discharge his legal obligations? Mr Boyle is driven to respond that the suggestion that, because the moment at which the judge considered whether to attribute the assets of Dragon to him was prior to the making of any order against the husband, the husband had no need for them at that critical moment. This is chop-logic of the most specious kind, all of those who have discharged their liabilities to ex-spouses without court orders will readily understand.

57 For reasons of policy we are pleased to find ourselves able to uphold the judge's attribution to the husband of all the assets in Dragon. Although the list of matters to which, upon an application for ancillary relief, the court must have regard pursuant to s 25(2) of the Act presently remains unchanged, the decision in *White* alters the necessary extent of the focus on some of those matters in cases of substantial wealth. The needs of the parties remain to be considered, but in many cases focus upon them has waned as the result of an early conclusion that they will on any view be met as part of the outcome of other aspects of the requisite exercise. As a result of the advent of

> reference to proportions, the focus has largely shifted to computation of resources. Prior to the decision in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 the elaborate enquiry in the present case as to the attributability of the assets of the trust to a party as part of his or her resources would probably have been unnecessary. But, whenever it is necessary to conduct such an enquiry, it is essential for the court to bring to it a judicious mixture of worldly realism and of respect for the legal effect of trusts, the legal duties of trustees and, in the case of offshore trusts, the jurisdiction of offshore courts. In the circumstances of the present case it would have been a shameful emasculation of the court's duty to be fair if the assets to the husband built up in Dragon during the marriage had not been attributed to him." (my emphasis)

83. Counsel for the husband advanced an argument in closing submissions based on paragraph 53 of the judgment in *Charman (No 4)* (and exchanges that took place in the course of argument) that:

> "One third of the value of the assets in, at least, the 1983 settlement is looked on as the wife's and will come to her at some stage. These assets are available to her now in the Charman sense".

This was described as Trust Finding A.

84. The "Charman sense" contended for was that a trust asset, and in this case one third of the assets of the 1983 settlement, was to be treated both:

i) as a financial resource of the wife within s. 25(2)(a), and

ii) a resource that is available and attributable to her now,

if it could be established that it would be advanced or paid to her in the event of a disaster. He therefore sought to equate payment in the case of "need" referred to in paragraph 53 of the judgment in *Charman (No 4)* to payment in the case of a disaster. This explained some of the questions he put to the wife's father, which I confess I had found puzzling.

85. I do not accept this argument of the husband. In my judgment:

i) it is out of line with:

a) the wording of s. 25(2)(a), which refers to financial resources that the party has or is likely to have in the foreseeable future, and

b) the thrust of the passages I have cited from *Charman (No 4)*, *Charman v Charman* and *Whaley* because they show that to determine whether trust assets, interests and prospects are a financial resource for the purposes of s. 25(2)(a), the court should consider whether there is a

likelihood that the relevant spouse will receive income or capital (e.g. as a result of an advancement or appointments) immediately or in the foreseeable future (see in particular the citation at the end of paragraph 81 hereof), and

ii) that likelihood question is determined by reference to the existing circumstances of the case and not by reference to a hypothetical disaster. The answer to it, and thus the view taken on the likelihood of receipt of income and/or capital from trust assets, identifies the relevant financial resources of the relevant beneficiary.

86. However if, and in any event to the extent that, this "likelihood question" falls to be addressed at the distribution stage rather than at the earlier stage of computation of the financial resources, referred to in *Charman (No 4)* at paragraph 67, the "Charman sense" argued for by the husband, and thus Trust Finding A, does not address the vital aspect of the approach to be taken under the MCA in respect of trust interests and assets, highlighted at the end of the passage I have quoted from *Whaley*, namely what order for financial relief should be made. It is clear that this aspect of the approach is not premised on disaster but (with other statutory factors and rationales) on need, in the sense used in s. 25 MCA, and thus by reference to the lifestyle of the parties.

87. So, when read in context and as a whole, the passages I have cited from the cases dealing with the approach to be taken to interests under trusts confirm that the correct approach or rationale is focused on what the trustees would be likely to do in the future in all the relevant circumstances of the case and not on the hypothesis of what they would be likely to do if there was a disaster.

88. The argument that in the event of a disaster, the trustees would be likely to advance capital, or to seek and then pay out more income, and so can be expected to do the same to meets the needs of a party assessed on any other basis (e.g. to maintain a reasonably high standard of living equivalent to that enjoyed during a marriage):

i) is akin to the chop-logic that was roundly rejected in *Charman (No 4)*, and

ii) does not address, at the distribution stage, the question as to how the balance is to be stuck between the resources of a paying spouse and the resources of the other spouse held in family trusts.

89. In my judgment, the cases show that in carrying out the s. 25 exercise, the Family court is engaged in considering what is likely to happen if the relevant trustees act properly in all the circumstances of the case, as trustees of their trusts, and so in applying trust law and practice, which introduce the criterion of fairness judged against a different set of factors and rationales. *Charman (No 4)* confirms, in line with the approach in the much earlier case of *Thomas v Thomas* [1995] 2 FLR 668, that when doing this the court (a) is taking a view, (b) is not seeking to put pressure on trustees, and (c) is bringing to its task "*a judicious mixture of worldly realism and of respect for the legal effect of trusts, the legal duties of trustees and, in the case of offshore trusts, the jurisdiction of offshore courts*".

90. In my view, that judicious mixture is of central importance. This is because:

i) it recognises the validity of arguments based on the legal effects of trusts, but also

ii) in some cases, to ensure that a fair overall award is made applying the MCA, it enables the court to treat, or approach, assets of a trust, or of a company controlled by a party, as the assets of a spouse, whilst respecting and taking account of their legal identity and independence.

Point (ii) means, that the "judicious mixture" can lead to the result that the Family court does not accept expressions of intention given by trustees or company directors, or barriers based on the legal independence of a trust or a company advanced by trustees, directors and/or a spouse.

91. Further, and importantly, this approach also recognises and takes account of the significant differences between different types of trust (and companies), and thus, for example, the differences relating to control and the likelihood of receipt of assets by a spouse from:

i) a trust, or company structure, created by a party to the marriage into which assets earned or acquired during the marriage have been transferred and whose trustees, or directors, quite lawfully have been acting at, or can be expected to act at, the direction of, or in accordance with, the wishes of that party (a *Charman* type situation), and

ii) a trust created by a non party under which a spouse is one of the beneficiaries and which is not a nuptial settlement (and thus this case).

Point (ii) is reflected in the common approach that the wife's trust interests were not resources that should be taken into account in applying the sharing rationale.

The wife's trust interests and prospects

92. *Past receipts.* As to these she could and did provide information. In particular, she provided her tax returns and tax calculations. The husband's counsel provided a schedule based on these that was not challenged, but I have been unable to completely follow and cross reference it to the identified source material, or to the evidence concerning the payment of £1,400, rising to £,1500, a month firstly in respect of interest on the loan notes and, after their repayment, on their proceeds. In part, this failure relates to the allocation of income sources in the schedule and the tax returns and the use in the schedule of gross and net figures. But, in my judgment, a detailed analysis is not necessary. The essential sources of her trust and other non-earned income have been:

i) interest on the loan notes and, after their repayment, on their proceeds, and on some other investments and cash, and

ii) trust income apart from that derived from dividends declared by the family holding company.

93. In the years to April 2008 and 2009 her trust income derived from dividends declared by the family holding company was about £28,000 and £61,000 after tax deducted at

source (which included dividend declared as a result of the sale of assets by the family holding company). These dividends can therefore be described as exceptional and dividends that are only likely to be repeated if there are similar sales in the future. But their payment had the result that over the two years or so leading up to separation the wife received this significant additional income.

94. Her tax computations show that in the tax years to April 2007 to 2009, her total income comprising her earned income (after tax deducted at source from her employment income, but not her self employed fees), her investment income (after deduction of tax at source) and the additional tax she had to pay were:

	Earned	Investment	Total	Additional Tax
April 2007	34,597	17,030	51,627	7,397
April 2008	17,999	47,040	65,039	9,232
April 2009	4,085	94,638	98,723	12,387

95. Adjusting for the exceptional dividends and dividing the tax proportionately between earned and non-earned income that gives net rounded non-earned income of £14,600 for the year to April 2007, £16,300 for the year to April 2008 and £29,400 for the year to April 2009 (which includes the monthly payments of £1,400 or £1,500 less their share of additional tax). Adding back the exceptional dividends her net non-earned income (calculated on the same basis) was £40,390 and £82,760 for the years to April 2008 and 2009.

96. To that can be added the point, accepted in evidence, that during the marriage she received payments or benefits (i.e. the payment of outgoings or items bought on shopping trips with her mother) from her father of the order of £3-4,000 per year, and she was treated by her parents to opera and other tickets reasonably regularly and an annual holiday. Also, she had the ability to use the family's holiday flat in Belgium (which is owned by a trust of which she and her sisters are the beneficiaries).

97. For the years to April 2010 and 2011 the wife's non-earned income has reduced significantly with the reduction of the proceeds of the loan notes and the absence of exceptional dividends, it was around £4,500 for the year to April 2010 and £2,000 for the year to April 2011. The payments and benefits from her father have also reduced although she has still been treated to tickets and, as I understand it, a holiday and she has had use of the flat in Belgium.

98. *Prospects of an increased trust income and capital payments from the 1983 settlement.* At present, the prospects of an increased income under the 1983 settlement have two possible sources (a) a sale of the cellos and investment of the net proceeds after repayment of the inter trust loans (taken to fund the more valuable of the two cellos) , and (b) an increase in dividend payments.

99. The prospects of a payment to the wife of capital by the trustees of the 1983 settlement, depends on the exercise of their power to pay it, and such capital being available.

100. *Discussion*. On its face, Trust Finding A can be read as an assertion that the court should proceed on the basis that one third of the assets in the 1983 settlement are immediately available or attributable to the wife and so should be treated as liquid capital in her hands, and thus in a similar way to the approach taken to the assets of Dragon in *Charman (No 4)*. That interpretation fits with some of the submissions made in opening and closing on behalf of the husband. However, that approach is wrong as a matter of law and fact and, in my view, a proper reading of all the submissions put in on behalf of the husband indicates that this is (and during the disclosure process was) accepted by him in respect of the shares in the holding company. This is because the submissions made on his behalf relating to (a) the correct approach in law to achieving a balance between income and capital beneficiaries, (b) the ability of the holding company to pay a dividend and (c) the rights and ability of minority shareholders to issue a petition under s. 994 Companies Act 2006, clearly recognise that increased dividend income and liquid capital from the shares are not immediately available, and that steps (which might include litigation) would have to be taken to render them so available.

101. There was unsurprisingly common ground on the cases that are relevant to the approach that the trustees should take to investment with a view to income and capital return. Also, there was a significant overlap between the submissions made on their impact. A leading case is *Nestle v National Westminster Bank Plc* [2000] WTLR 795, which, with other cases, and in summary, shows that a fair approach has to be taken that has regard to the competing interests of income and capital beneficiaries and the imponderables relating to investment and the future. So a particular course of action is not prescribed and trustees have a wide discretion. (No doubt some might say that this approach is analogous to the s. 25 exercise.)

102. Turning to the worldly reality of this case, it seems to me that the following facts are of considerable importance, namely that (a) the three income beneficiaries under the 1983 settlement are all adults, they are the only objects of the power to advance capital and so they have an interest in both income and capital returns, (b) their generation of the family, and thus the children of the two directors of the family holding company, if they act together, have a powerful voice as to how the family holding company should approach the payment of dividends and issues as to when the family, as a whole, should look to realise liquid capital, which would be maximised by a sale of the whole company, (c) the success and value of the family holding company has been nurtured and built up over many years by the efforts of the wife's father and more recently his brother, and so it has been in, and remains in, good family hands, (d) the wife and her sisters have great love and respect for their father and trust his commercial judgment (and I have no reason to think that their cousins do not feel the same about their father), and (e) notwithstanding the desire and ability of the wife's father (and I assume his brother) to continue working for a number of years it is highly likely (if not inevitable) that the family as a whole will have to consider, in the reasonably near future, the best course to be taken for their common good towards the income and capital return from the family holding company, and thus the goose that has produced, and remains capable of producing,

the golden eggs for the family. That consideration will have to include whether a member of the family is to take over the running of the company, whether it should be run by others as a private family company and whether it should be sold (or listed). In the first two cases, it is almost inevitable that good dividends would be paid annually (provided the company continued to be successful, and if that was not the case, a sale would be considered). A sale of the company as a whole would maximise the value of the trust holdings (and all minority holdings) and produce a significant liquid capital sum in the 1983 settlement and, given its obvious purpose, there would then be a strong likelihood that, whether or not one or more of the wife and her sisters sought a capital payment, the trustees would exercise their power to make capital payments to them from that available capital (and, in any event, they would be entitled to the income of the sale proceeds).

103. I accept that the dividend history, and the circumstances relating to the creation of the 1983 settlement, would probably enable a case under s. 994 Companies Act to be pleaded. But, worldly reality, and my experience in practice relating to such proceedings, lead me firmly to the conclusion that a prudent adviser would not recommend that such proceedings were issued now. Rather, the advice would be that the wife and any of her siblings (and so the trustees of the 1983 settlement) and their cousins who were not happy with the present, and planned future income returns, or the plans for the future concerning the sale of shares, should discuss this and focus on (a) the negotiating position the present generation (and so the trustees of the 1983 settlement) have because of their ability together to control the holding company in general meeting, and (b) the income and capital interests of the family, as a whole, over the next five to ten and then ten to twenty years.

104. Albeit that the husband identifies arguable points of law relating to (a) the duties and powers of the trustees of the 1983 settlement relating to investment, and (b) s. 994 proceedings, to support his case (and in particular Trust Finding A), none of them are without difficulty and I have concluded that, in doing so, he has not had proper regard to worldly reality and the wide range of competing factors concerning:

i) the interests and attitude (a) of the wife and her siblings as adult beneficiaries, and (b) of their cousins, as absolutely entitled beneficiaries, under family trusts,

ii) the history of the trusts and the holding company, and

iii) the established approach of the wife's family, to the family business and trusts and the close relationships within that family

which, in my judgment, found the view that the wife and/or the 1983 settlement trustees would be ill advised to seek to litigate the issues identified by the husband, particularly in the short term. Rather, in my view, she and they would be better advised to focus on a longer term view by reference to the interests and rights of all members of the family who would or could benefit from income and capital returns from the family holding company.

105. The position relating to the other assets of the 1983 settlement is different. It was strongly asserted by the wife's father, and I accept, that the cellos were bought because they were good investments and thus not to provide instruments for one of his

daughters (albeit that that was an obvious side effect and potentially the investment would be enhanced by them being played by her, or other professional musicians), or trust assets that are of considerable interest to the settlor and other members of the family. It seems to me that this investment purpose necessitates a regular review of whether these investments made to create a capital return should be continued, or that capital return should be realised. The benefit obtained by only one of the income beneficiaries from at least one of these investments will be relevant to this investment decision, as will the rate of capital return and the loan indebtedness. On the evidence, the trustees of the 1983 settlement plainly have the ability to sell these investments and the logic and reasoning behind their purchase supports the view that they should be sold when the trustees consider that capital distributions should be made to all or any of the three sisters, as the persons for whose benefit, as the settlor confirmed, the 1983 settlement was primarily created. I confirm that I acknowledge that some capital distributions might not necessitate such sales, and that their timing may in part be dependent on the view taken as to when it would be best to take the capital profits that the investments in the cellos were designed to make.

106. So raising capital and income from the sale of the cellos is a much easier prospect for the trustees, and would accord with, what I was told and accept was the reason for their purchase.

107. The cash and quoted investments are income producing (albeit that income is and will remain relatively small) and they are now available for a capital distribution.

108. I pause to record that I do not accept the assertion of the husband that the wife's one third interest under another trust in the home used as a holiday home by her family is an asset that I should treat as a liquid capital asset, to which the wife is entitled to a share, or an asset that is likely to be so realised in the near future by a sale of her interest to another family member or otherwise. This is because it has been a long term holiday home for the family and realistically, reasonably and lawfully is likely to be retained as such, absent a need (in the sense of a disaster) that cannot be met from other sources, or a negotiated family solution.

109. *The wife's knowledge of the trusts and her interests in them.* Some time was taken up on this issue which arose initially in the context of disclosure. However, to my mind there is not, and never has been a real issue of non disclosure in the sense that assets were being hidden in breach of the wife's duty of full and frank disclosure. Rather, the dispute has concerned what the trustees should disclose directly or through the wife. The wife's knowledge also has some relevance to the approach taken over the years by the trustees and the family to trusts assets.

110. In my judgment, both sides overstated their rival contentions and in truth there was not much between them on the issue concerning the wife's knowledge of the trusts. This is because, on analysis, the husband was not asserting that the wife knew a significant amount about her trust interests and the wife was not asserting that she knew nothing about them, albeit that, at times, it seemed that they were, or might be, taking those extreme positions. The husband's oral evidence was to the effect that he overheard a conversation between the wife and her sisters during which the sister, who is in now living in America, said that they should find out more about their trust interests rather, than a conversation that indicated that the sisters knew significant amounts about them. I accept his evidence that he overheard such a conversation.

However, this was an isolated event and he accepted and asserted that the wife was not good with, or particularly interested in, the management of her financial affairs.

111. To my mind, the wife's evidence about her knowledge of her trust interests, and the completion of her tax returns, showed that she knew that she was a beneficiary under a number of trusts and that over the years she had received income, capital and loans from them and her father.

112. It was common ground that she did not discuss this, or the amounts of capital and income she was so receiving, with her husband. In this sense, she was running and benefiting from a "hidden economy".

113. But, her evidence also demonstrated that she had little interest in, and did not seek information about, her entitlements under trusts and the sources of her unearned income, capital and loans and that she left such matters to her father, an employee of the family company (acting on her father's instructions), the trustees and her accountant. This approach is exemplified by her lack of interest in the source of the monthly payments of £1,400 initially from the loan notes and her acceptance, without any explanation, of her father's instruction or advice that she should ring fence and preserve the capital sum paid into a separate account at Barclays which was largely funded by the redemption of the loan notes (see paragraphs 22, 23 and 40 hereof). It is also consistent with the ethos and approach that she and her father told me had been taken by her family over the years.

114. The wife's father made it very clear that a part of that ethos was that he and the trustees operated an approach of telling the wife and her sisters very little about the trusts, their value and what they might receive from them in the short and longer term. He accepted the description of him being a "pater familias" who made the decisions about what his daughters should receive and be told about the trusts, and it was clear that he took and performed this role with the support and trust of his well educated and able daughters. I accept and find that he (with the knowledge and acceptance of the trustees) has been a supportive, loving and secretive financial decision maker so far as his daughters' inherited and gifted wealth is concerned.

115. It is not for me to criticise or praise that approach. Rather, I acknowledge that it is the approach that has been adopted and the success of the successive generations of the wife's family in various fields which they have achieved, in large measure, as a result of their abilities and hard work.

116. But the position under, and in respect of, the trusts and the wife's inherited and gifted wealth is as I have described it and, it seems to me that, even in the absence of this litigation and the information it has provided to the wife about the trusts, that approach of the wife's father and the trustees would have merited review given the ages, success and positions of the wife's generation. Further, and in any event, it is clear that that approach will now need some moderation and thought as a result of the issues brought to the knowledge of the wife during this litigation, family discussions relating to the breakdown of her marriage and the respective interests in the trusts, and the family company, of the wife's generation and their parents.

Conclusions from the discussion and points set out under the last two headings and the history of inter trust loans and the history of financial assistance that has been provided to the wife and her siblings in the past from trust assets and by her father.

117. The parties took widely divergent positions.

118. On the husband's side he sought the finding I have referred to above (Trust Finding A), and the following findings:

i) there is a culture of assistance and support in the wife's family for those who are in need. The trusts are run in a highly informal way; liquidity can be found as and when a family member requires it (Trust Finding B), and

ii) it is unjust to dismiss the 1983 settlement's holding in the family holding company as "illiquid" and non-generative of income; it could easily, at the very least, generate a dividend income of 10% of pre-tax profits plus directors remuneration in any year without its business even being affected; if forced it could generate a much more substantial dividend income than that (Trust Funding C).

119. Whereas, the wife (and the relevant trustees) took the stance that effectively her trust interests and her prospects of receiving income or capital from the family trusts were very limited. Indeed, and in line with their earlier stance, in opening it was submitted that, by referring to the trusts, the husband was seeking to lead the court up the garden path and that apart from her entitlement to a small income under the 1983 settlement her trust interests were irrelevant.

120. There is (and always was) much that is incapable of dispute, in respect of:

i) Trust Findings A, B and C, and

ii) the assertion made on behalf of the wife, and the trustees, by reference to the present trust income and trust assets, the terms of the trusts and trust law, that what the trustees will do from time to time (and thus the wife's prospects of receiving more income and capital) will depend on circumstances and amount.

But, that indisputable background is only a starting point to the task of the relevant assessment by applying *a judicious mixture of worldly realism and of respect for the legal effect of trusts, and the legal duties of the trustees* of what the wife is likely to receive from her trust interests by way of income and capital in the short term and foreseeable future.

121. This task involves the making of predictions and is complicated by the point that, in large measure, it is directed to considering what the reaction of the trustees is likely to be to an award under the MCA. This is because the court is determining what award it should make in the light of its view on what a spouse is likely to receive in the future from his or her trust interests.

122. The husband has established:

i) the point in Trust Finding A that one third of the assets of the 1983 settlement are looked on as the wife's that will at some stage come to her or her children.

Indeed, this is what the trusts expressly provide, and if the capital is to "come to the wife" directly this has to be by an exercise of the power to pay it to her, and

ii) Trust Finding B on the bases that:

a) the references therein to "need" and "requirement" are not to "need or requirement" to meet a disaster, but to a provision in line with the underlying purpose of trusts created to benefit the wife, her sisters and their children in the case of the 1983 settlement (and the wife and members of her family under other settlements) assessed against the background of the approach and ethos that each generation should make its own way in life, and

b) the reference therein to "liquidity" is to be assessed by reference to such a need or requirement, and what has happened in the past (e.g. the limited provision to assist the wife and her sisters in the purchase of homes, their trust and other unearned income over the years, the much larger capital provision by way of loan to fund trust acquisitions and a large loan to the wife's father to recognise his efforts in the family company).

But, as I have said these are only starting points to the central question concerning what the wife is likely to receive in the future.

123. As to Trust Finding C, I acknowledge the truth, prudence and force of the points made on behalf of the trustees, and the directors of the family holding company, relating to dividend policy and the preservation of distributable profits within the family holding company either as cash, or in sound further property investments. But, in my judgment, it is clear from the accounts that the family holding company could easily, and without jeopardising its ability to meet its liabilities or its continued profitability and success, declare a dividend equating to 10% of pre-tax profits plus directors' remuneration. Whether the directors could be compelled to do so is however, as discussed above, a different matter. But it is something they might agree to, as a result of family discussions of the type I have referred to, with a view to prolonging family harmony and promoting (a) a balance between the competing interests of shareholders, directors, and the continued success of the business, and (b) the implementation of longer term plans for the realisation of more income, or of capital, from the family business and thus the main source of the family wealth, that has been created by hard work and skill over the years.

124. I have concluded that:

i) it would be in line with the history and the purposes of the 1983 settlement (and other family trusts) for the 1983 settlement alone, or with the assistance of other family trusts:

a) to assist in funding the purchase of a home for the wife and her child to an extent that is at least equivalent to the assistance given to her sister who gave evidence, and thus by providing short term finance of the

order of £500,000 and longer term loans of the order of at least £100,000,

b) to assist the wife and her son to maintain a reasonably comfortable standard of living that is not significantly different to that enjoyed during the marriage and by the husband in the future whilst, at the same time, encouraging the wife to maximise her own earnings on a basis that enables her to also care for her son on a day to day basis, and

c) to fund that financial assistance by a mixture of (i) loans and capital payments from the 1983 settlement, and (ii) income payments derived from assets of the 1983 settlement including, if necessary, (*a*) the sale of one or both cellos, pursuant to the investment policy relating to them, (*b*) the investment of loans to the trust, or of its existing assets, and (*c*) dividends declared by the family holding company.

125. And, applying the approach set out in italics in paragraph 120 that:

i) this assistance would be affordable and would accord with the family ethos of encouraging each generation to stand on their own feet without undue assistance from, or reliance on, trust assets or gifts,

ii) subject to a natural reluctance to meet expenditure that the trustees think should be, or arguably should be, met by the husband, it is highly likely that this assistance would be provided to the wife mainly through the 1983 settlement, which was created for the benefit of the wife and her sisters, as its terms show, and as was confirmed by her father. The opening qualification to this conclusion is a point that the court should recognise and take into account in determining its award, and thus in deciding what future expenditure of, and for, the wife should be funded by the husband, rather than by a combination of her earned income and the income and capital benefits she is likely to receive from her trust interests, and

iii) in the longer term, which I estimate as starting in 5 to 10 years, it is likely that the wife will either receive significant income or capital from the 1983 settlement as a result of the decisions taken by the family shareholders and directors on the future management and sale of the family holding company. To my mind, the commercial and trust reality is that in that time scale either the family holding company will declare dividends at a level that persuades the majority of its shareholders that a sale of the company is not in their best interests, or there will be a sale of the company as a whole (or it will be listed).

126. In addition, I record that:

i) the wife's father confirmed that he would be prepared to guarantee a mortgage to the wife,

ii) it was also clear from his evidence, and the history, that the prospects of him being able to find third party mortgage finance were good, and no suggestion was made that the wife would have any difficulty is raising mortgage finance, and

iii) in my judgment, it is likely that the wife's father will continue to provide support to the wife by paying for entertainment and a holiday with her parents.

Approach in law to the s. 25 exercise in this case

127. Thus far, by reference to the computation and the distribution stages of the s. 25 exercise (see *Charman (No 4)* at paragraph 67):

i) in respect of the capital in the hands of the parties I have carried out the computation exercise and applied the sharing rationale, and

ii) in respect of the trusts interests I have carried out the computation exercise and included within it (or as a preliminary step in the distribution stage) a consideration of what the trustees would be likely to do.

I now turn to consider how these conclusions are to be taken into account in determining, at the distribution stage, the award to be made under the MCA.

128. By and since *White*, and then *Miller & McFarlane*, there have been considerable developments in, and guidance in respect of, the approach to be taken to the s. 25 exercise. It is a statutory exercise and so particular attention must be paid to the words of the statute, but it also has to be recognised that Parliament has given the court a wide discretion to achieve the underlying objective of achieving a fair result. That discretion is a judicial discretion and so it must be exercised on a principled, and thus a reasoned, basis having regard to the circumstances (including the nature of the available assets) of the given case.

129. As a matter of policy and application, tension exists between (a) the taking of a reasoned but flexible approach, and (b) certainty and consistency. This is regularly exacerbated by the need to balance "apples and pears" and the absence of any mathematical or formulaic basis for an award.

130. As I have already mentioned (see paragraphs 50 to 52) a central issue is how the wife's inherited and gifted wealth (which I shall refer to as her trust assets) should be taken into account. In my judgment, a mathematical or formulaic basis for doing this is not available, and one was not identified in argument.

131. As I have mentioned, it was common ground that the trust assets should not have a direct impact on the application of the sharing rationale to the capital in the names of the parties. But, in my judgment, the comments made in the cases on the breadth of the judicial discretion and the flexibility available to the court concerning the application of that rationale to inherited and gifted assets remain relevant. An example is found in the speech of Lord Nicholls in *Miller & McFarlane* under the heading "Flexibility"

> " 27. Accordingly where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or

> particularity as he considers appropriate in the circumstances of the case. ”

This reflects what he said in *White* [2001] 1AC 569 at 610 F under the heading “Inherited money and property” namely:

> “----- Plainly, when present, this fact is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered.”

132. Baroness Hale makes it clear that the wife’s trust assets are to be considered and that a flexible approach is to be taken in the application of all the rationales identified in *Miller & McFarlane* (namely need, sharing and compensation) when under the heading “ The search for principle”, she says:

> 124 When the marriage comes to an end, the court’s powers are also flexible. They are no longer based upon the assumption that there is one male breadwinner to whom all or most of the resources belong and one female home-maker in need of his support (and entitled to it only as long as she remains deserving). The court is directed to take into account all of their resources from every source. It is then given a wide range of powers to reallocate all those resources, be they property, capital or income. It is directed to take account of all the circumstances, and in particular the checklist of factors listed in section 25(2). But what, at the end of the day, is it supposed to do? What is it trying to achieve?

133. She goes on to say:

> 125 In its original form, section 25 directed the court to try and place the parties in the financial positions in which they would have been had the marriage not broken down and each had discharged their financial obligations towards the other. This made perfect sense when the assumption was that the financial obligations undertaken, mainly by the husband, at marriage endured for life even if the marital consortium came to an end (indeed, before the Matrimonial Proceedings and Property Act 1970 came into force, a rich man whose divorced wife married a poorer one might still have to support her in the manner to which she had become accustomed during their marriage). But it made less sense once the basis of divorce was that the marriage had irretrievably broken down, the law no longer drew formal distinctions between the obligations of husbands and wives, and the court had a wide range of powers

to distribute their resources in such a way as to enable each to go his or her separate way.

126 Hence the assumption of lifelong obligation was repealed by the Matrimonial and Family Proceedings Act 1984, following the Report of the Law Commission on The Financial Consequences of Divorce ---------- The Commission's reasoning (see para 17) was essentially pragmatic. In the great majority of cases, it simply was not possible to enable two households to continue to live as if they were one. Nor in many cases was it desirable to perpetuate their mutual interdependence. The whole point of divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives. But at least the discredited objective had encouraged a sort of equality: if the marriage had not broken down, the couple would still be enjoying the same standard of living. The object therefore, was to get as close as possible to that for both of them. John Eekelaar dubbed this the "minimal loss" principle (I used to refer to it as the principle of "equal misery").

131 ---------- If it decides to make a periodical payments order, it must consider how quickly it can bring those payments to an end. It has therefore to consider fixing a term, although in doing so it must avoid "undue hardship". This is linked to other powers: section 28 (1) allows the court to specify the duration of a periodical payments order: generally, it is open to the recipient to apply to extend the term, provided this is done before it expires; but section 28 (1A) allows the court power to prohibit any application for an extension. ----------

133 Section 25A is a powerful encouragement towards securing the court objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the principle of the lifelong obligation. Independent finances and self-sufficiency are the aims. Nevertheless, section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect.

The rationale for redistribution

137 -------- in my view there are a least three. Any or all of them might supply such a reason, although one must be careful to avoid double counting. The cardinal feature is that each is

looking to factors which are linked to the party's relationship, either causally or temporally, and not extrinsic, unrelated factors, such as a disability arising after the marriage has ended.

138 The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage ---------- This is a perfectly sound rationale where the needs are the consequence of the party's relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or rather dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they were hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties respective resources in compensation.

140 A second rationale, which is closely related to need, is compensation for relationship generated disadvantage. Indeed, some consider that provision to need is compensation for relationship generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties needs, then a premium above needs can reflect that relationship generated disadvantage.

The ultimate objective

144 Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three

principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with the equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless it is justified by need or compensation. The ultimate objective is to give each party and equal start on the road to independent living.

Application in the McFarlane case

154 There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate the disadvantage, then there should be no continuing financial provision. In the McFarlane case, there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage. The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life. She is also entitled to share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which he might have been in had she not compromised her own career for the sake of them all. That she might have wanted to do this is neither here nor there. Most bread winners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours.

Application in the Miller case

158 That is undoubtedly more than she would need to get herself back to where she would have been had the marriage not taken place. But that has never been the express object of the law, even in the 1970s and 1980s when the Court of Appeal supported such an approach in short childless marriages. Even without the former statutory objective, the court has to take some account of the standard of living enjoy during the marriage: see section 25(2)(c). The provision should enable a gentle transition from that standard to the standard that she

could expect as a self-sufficient woman. But she is also entitled to some share of the assets. The couple had two homes and there is no reason at all why she should not have a share in their combined value, together with other assets obviously acquired for the benefit of the family. ----------

134. To these citations, I add my application of the guidance given in *Miller & Mc Farlane* in *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548, I said:

> " 96 In this context it seems to me important to remember that a non-discriminatory, equal and fair approach is two sided and an approach that has to be assessed and applied against the background and nature of a marital partnership. Therefore it seems to me important to ensure that the pendulum does not swing too far from
>
> (i) a discriminatory and unfair award based on "reasonable requirements" and a *Duxbury* capital sum giving the ex-wife enough to meet those requirements until the date of her death based on an actuarial basis and nothing more; to
>
> (ii) an award that is unfair and discriminates against the party that has made the main direct financial contribution because it fails recognise that:
>
> (a) the marital partnership is terminable at any time and there is not a legitimate expectation of long-term economic parity by reference to what the position of the lower earner would have been if the marriage are not broken down,
>
> (b) ----------
>
> (c) the aim is self-sufficiency and to give each party and equal *start* (my emphasis) on the road to independent living (see Baroness Hale of Richmond at para [144] having regard to their own talents and attributes, and their obligations and economic disadvantages flowing from the marriage (e.g. the wife continuing to be the primary caretaker of the children),
>
> (d) in general the assumption is that the marital partnership does not stay alive for the purpose of sharing future resources unless that is justified by needs or compensation and that if a capital division is enough to provide me in compensation then there should be no further financial revision (see Baroness Hale of Richmond, at paras [144] and [154]
>
> (e) the provision awarded should enable a gentle transition for the party made the domestic contribution from the standard of living enjoyed during the marriage to the standard that she should expect as a self-sufficient woman (see Baroness Hale of Richmond at para [158], in the context of the Miller case) and

> in my view the length of the marriage and the role of an ex-wife as the primary caretaker of the children of the marriage would be factors to be taken into account in determining the amount of the provision to meet that transition."

I also note that in *M v L* [2003] EWHC 328 (Fam), [2003] 2 FLR 425 Coleridge J said:

> "42 Nowadays a young spouse at the end of a short marriage, and in the situation in which this wife found herself in 1973 (even with young children), would normally be expected to take proper steps to make him or herself financially independent to a significant extent within a reasonable time so that by the time the children were adult the requirement for support would have at least diminished if not wholly disappeared. But in 1973, more than a generation ago, judicial and public attitudes were different. Term orders and maintenance were non-existent; joint lives orders were the norm. The irony in this case is that if it had proceeded conventionally in England it is likely that the courts would have put pressure on the wife at the periodic applications to vary the maintenance to take more effort to find work. And as there are not any applications there was no such opportunity. "

135. I should also record that I was referred to *Re C* [2008] 1 FLR 625, which provides an example of trust assets being taken into account applying *Thomas v Thomas* [1995] 2 FLR 668. But the circumstances of that case are different and Baron J's reasoning on quantum is limited to the expression of her view that, having regard to the wife's trust, the ordered division between the liquid and illiquid marital assets was fair. That is not a criticism. Rather it supports the view that a formulaic or mathematical rationale is not generally available or appropriate.

136. What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):

i) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but

ii) is met by an approach that recognises that the aim is independence and self sufficiency based on all the financial resources that are available to the parties. From that it follows that:

iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important buts:

a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,

b) the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payor), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,

c) if the marriage is short, this supports the conclusion that the award should be directed to providing a transition over an appropriate period for the payee spouse to either a lower long term standard of living than that enjoyed during the marriage, or to one that is not contributed to by the other spouse,

d) the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self sufficient independence that (i) should be compensated, and (ii) make continuing dependence / provision fair,

e) the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,

f) a continuing relationship generated need is often reflected in a continuing contribution to the day to day care of the children of the relationship, that contribution being recognised by the continuing financial contribution of the paying spouse (which is a continuing contribution to the day to day care of the children),

g) the choices made by the parties as to the care of their children are an important factor in determining how that care should be provided and shared both by reference to day to day care and the funding of the independent households, and

h) the provisions of s. 25A must be taken into account.

As to points (e), (f) and (g), s. 25(1) provides that when the court is having regard to all the circumstances of the case first consideration is to be given to the welfare while a minor of a child of the family, and in my judgment this is a clear indicator that the impact of the manner in which that welfare has been, and is to be, promoted has particular weight.

137. In respect of the periodical payments she seeks the only credit that the wife offers is, by inference, credit in respect of her trust income above £7,500. So, until a change to the periodical payments ordered is made on an application to vary them, she is seeking an order that provides that:

i) the husband should continue to fund her at a level which enables her to continue to enjoy a lifestyle equivalent to that enjoyed during this short marriage,

ii) she is free to decide whether or not she will utilise her accepted and undoubted ability to earn, and

iii) she does not have to give credit for any of her earnings.

138. In my judgment, the points listed in paragraph 136 show that such an award would not reflect a proper application of the s. 25 exercise, and so would not be fair (judged by the criteria set by the MCA), unless and to the extent that, she can show that it is justified by relationship generated needs or choices, which will often be reflected in, or found, continuing contributions or disadvantages.

139. Naturally, I recognise that in many cases where a wife has stayed at home to look after the children she will be awarded a joint lives periodical payments order, but this is not because she can simply choose whether or not to work. Rather, it is because she cannot fairly be expected to do so having regard to her earning capacity and her past and continuing care of the children (and thus her relationship generated needs and disadvantages). Indeed, s. 25(2)(a) makes it clear that her earning capacity is a relevant factor, and as is pointed out at paragraph 67 of *Charman (No 4)* "likely future income must always be appraised". It is also the case that on a day to day basis the earning capacity of a payee spouse is assessed and taken into account in reducing the amount of periodical payments orders.

140. As mentioned earlier, the wife placed great reliance on *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26. She did so not only to resist a term being set for the periodical payments pursuant to s. 25A(2), but also to support her contention that (apart from limited credit for trust income) the level of periodical payments she sought should only be reduced as a result of an application for variation.

141. Two preliminary points are relevant. Firstly, like all cases of its and earlier dates, *C v C* must be read and applied in the light of the significant changes that have resulted from *White*, and later cases (in particular *Miller and McFarlane*), and this is so notwithstanding that *C v C* is specifically directed to the application of s. 25A(2). Secondly, s. 25A(2), and so *C v C*, is expressly directed to the termination of financial dependence and not to the issue whether, applying other sections and the relevant rationales, the initial order for periodical payments should (a) take immediate account of the earnings and/or earning capacity of the payee, or (b) build in reductions to take account of them and so reduce rather than terminate financial dependence on the other spouse. There is of course an overlap, and so an analogy to be drawn, between reduction and termination.

142. Further, the language of s. 25A(2) contains word of degree that fall to be applied in the context of the overall application of the s. 25 exercise, and thus the relevant rationales. So what is "sufficient" and "undue hardship" must be so applied, and the court must consider whether, applying the statutory test, it would be "appropriate" to terminate (or by analogy reduce) "financial dependence".

143. As argued, I accept that *C v C* confirms that s. 25A(2) is directed to the payee's hardship, that the court must take an evidence based approach to whether the payee can and will adjust and that unless the court concludes, on that evidential basis, that a term should be imposed it should not impose one on the basis that the payee can seek an extension (or on any other basis). Further, I accept and acknowledge that, as with

all its other conclusions the court has to base any reductions in periodical payments on an evidential foundation.

144. But, in my judgment this need for an evidential base does not mean that the wife can assert (which at times she seemed to be arguing) that she can avoid an evidence based finding on her likely earnings by not providing an estimate of her earnings from the work she is planning to do, and/or by not co-operating in obtaining a report from an expert on her earning potential. As to the latter point, I do not accept that the absence of such a report is an indication that she is unlikely to be able to earn significant sums from part time employment. Rather, in my view, by not quantifying her earnings, and/or co-operating in their quantification, the wife acted contrary to her duty to give full and frank disclosure of her business plans (and thus her s. 25(2)(a) resources) and the overriding objective.

145. I remain of the view I expressed about *Fleming v Fleming* [2004] 1 FLR 667 in paragraph 104 of my judgment in *McFarlane v McFarlane* [2009] 2 FLR 1322. But, if that is wrong and in any event, *Fleming* does not have direct application to an order that provides for reductions in periodical payments to take account of the predicted earnings of a spouse rather than its termination pursuant to s. 25A(2). Notwithstanding the overlap between a termination and a reduction by reference to an assessment of future earnings, in my view the intention of the court in so ordering reductions, would not normally found the legitimate expectation referred to in *Fleming*, and thus the need for the payee to provide an exceptional justification for a variation. Rather, when reductions are ordered it seems to me that the expectation is, and the approach on a variation would be, that the court will look at the reasons why, in the events that have happened, the predictions upon which the reductions are founded have been shown to have been wrong, the reasons for this and their impact in all the circumstances (including the reasons for the original award).

146. So, in my judgment the wife's arguments that I should not make an order that either terminates or reduces the periodical payments to her on the basis of my estimation of her future earning capacity alone (or together with her trust interests) are flawed, and I reject them.

147. Apart from confirming that inherited or gifted assets are a factor to be considered, the authorities mentioned above (and the other cases to which I was referred) do not directly relate to the following central issues in this case, namely whether, and if so the extent to which, the income and capital interests and prospects of a payee spouse in and from those assets should be utilised to reduce what should be paid by the paying spouse to:

i) meet, or to contribute to, either (a) the independent lifestyle, or (b) the continuing relationship generated needs and contributions of the payee spouse, or

ii) to compensate for relationship generated disadvantages of that spouse.

Put another way, these issues relate to whether, and if so to what extent, those outgoings, needs or disadvantages should be funded by (a) the paying spouse, and (b) by the payee spouse and third parties (here family trusts and gifts).

148. However, the cases do show that to achieve the objective of a fair result, on an approach aimed at achieving independence and self sufficiency, the court can approach these issues in a flexible way depending on the circumstances of the case.

149. In my judgment, different issues arise in respect of (a) the funding of the independent lifestyle of the payee spouse, and (b) his or her continuing relationship generated needs, contributions and disadvantages.

150. I shall deal with the approach to be taken to these issues later.

The understanding of the parties concerning the day to day care of the child of the marriage and any more children they may have had

151. This is important because it relates to one of the ways in which the parties planned and chose to live their married life together, and thus to relationship generated needs and disadvantages flowing from the birth and upbringing of their child, and their respective continuing contributions to that.

152. In their s. 25 statements, both parties baldly asserted that there was an "agreement" concerning this care. Unfortunately the respective "agreements" were so advanced (a) without any particulars of when, where or how the parties asserted they were reached, and (b) were very different. So, the s. 25 statements introduced stark disputes of fact on this issue. Sadly, but not uncommonly, the oral evidence clearly demonstrated that both parties had overstated their respective positions in their s. 25 statements.

153. As a consequence, by the time of submissions both parties acknowledged that they were not advancing an express agreement but an agreement based on what they believed to be their common understanding based on general discussions throughout their relationship. Hence my reference in this heading to an understanding rather than an agreement. Of course I acknowledge that such an understanding can be expressed as an agreement, or something that was agreed. But the primary evidence, and so the particulars to support it, are different to those relating to an express agreement and this gives rise to different credibility issues.

154. In my judgment, the common understanding, and so the "marital choice" of the parties, was that:

i) the husband would continue to advance his career on a full time basis,

ii) the wife would give up the Bar until the child went to nursery or school,

iii) then the wife would want to, and would, return to work that she then wished to do,

iv) if, before the wife so returned to work, they had more children (as they hoped they would) it is likely that such a return to work would be delayed until their children were at nursery or school,

v) the work the wife would do would enable her to continue to act as the main day to day carer of the children and so would enable her to "work round" those child care needs and responsibilities, and my references to part time work are used in that sense, but

vi) the issue for them was not whether the wife would return to remunerated work but when she would do so and what that work would be.

155. In reaching those conclusions, I have had regard to the following:

i) it was a common theme of their approach to having a family that their children should not be brought up by nannies and they would not be a full time two career family. This accorded with what the wife wanted to do and regarded as important, notwithstanding her considerable commitment to qualifying and practising at the Bar,

ii) this common theme was expressed from a very early stage in the relationship (the wife said it was mentioned on their first date and I accept that), and it was put into practice after their child was born,

iii) this common theme was supported by their knowledge that they had the ability to put it into effect and still maintain a good standard of living because of the level of the husband's earnings,

iv) an aspect of the common theme was that they both believed that the wife would want to return to paid work in which she could use her undoubted talents, experience and intelligence and that, by so doing, she would promote both her overall emotional well being and happiness and that of the family as a whole, and

v) a further aspect of the common theme was that the level of the husband's income meant that the choice of what work the wife would do, would not be dictated by her level of earnings and she would be able, with the husband's support, to choose what work she wanted to do and combine with her care of the child (and any future children).

156. So, I reject the husband's assertion that it was agreed that the wife would return to work probably four days a week when the child started Reception, and that her stated intention was that she would return to work when he was at school full time. Not least, this is because any such agreement or statement would have been qualified by the prospect of them having another child.

157. In my judgment, the common understanding, and the stated intention of the wife, was that she would return to work that would enable her to work round the lives of their children (and thus, as it has turned out, the only child they had).

158. I reject her description of that work by cross reference to what her mother had done and I have concluded that the common understanding was that the welfare of the family, and what they thought the wife would want to do, would best be promoted by her returning to remunerated work in an area connected with the law, or some other area, that:

i) interested the wife,

ii) enabled her to maintain and enjoy work related and adult based opportunities that her education, intelligence and hard work had created for her, and so

iii) promoted, or provided a platform from which, she could return to full time work, when her role as a carer was compatible with this.

So, the "marital choice" was that (in the terms of s.25(2)(a)) the wife would utilise that financial resource during the marriage.

159. Albeit that this "marital choice" was directed to, and based on the premise of, a continuing marriage it has the potential for providing the basis for an argument that, in all the circumstances of the case, the wife has a continuing relationship generated need and disadvantage because not only did it result in her ceasing to practise at the Bar and leaving employment, it also has a continuing effect on the contribution she will make to bringing up the child and her earning capacity.

160. This "marital choice" is reflected in the care arrangements made and agreed against the background of the joint residence order. I accept that the wife could (as do many other similarly qualified mothers) return to a full time career as part of her attainment of self-sufficiency and that such a marital choice does not automatically "carry over" to the child care arrangements after separation. But, in my view, in all the circumstances of this case, and in particular having regard to:

i) the depth of the parties' commitment as a couple to this marital choice concerning the upbringing of their children, and thus its reflection of their views as to the best way to bring up a child,

ii) the present commitment of both parents to providing two homes for their child and caring for him, and

iii) the level of the husband's earnings,

the fair approach here, applying the terms of the MCA and the rationales underlying their application, is for the award to be based on the premise that the wife can and should work part time on a remunerated basis and that this level of work creates a continuing matrimonial need and disadvantage because:

a) she will be making that continuing contribution as a carer,

b) her level of earnings will be affected, and

c) her ability to return later to full time work may be affected, albeit to a significantly lower extent to that of a wife who has not worked during a long marriage and until the children have left school.

Budgets and the starting level of periodical payments

161. In her Form E, the wife put her budget at approximately £10,000 per month (£120,000 a year) excluding a figure of approximately £570 a month based on the mortgage payments in respect of the matrimonial home. She has stuck to that level.

162. In his Form E, the husband put in a very similar figure. If mortgage repayments (at £70,000 per annum – so much higher than the wife's figure for mortgage instalments), school fees and £10,200 for an ISA contribution are excluded, his figure was approximately £120,800 (which did not include a figure for pension contributions). In

his s. 25 statement, he revised his figure and, on the same basis (i.e. not including figures for mortgage, pension contributions, ISA contribution, and school fees), that revised estimate equated to £95,500.

163. Sensibly a detailed analysis of the budgets was not carried out during the hearing. The wife told me that she had based her estimate on what she had been spending during the marriage, primarily through an analysis of her bank statements, and added that the husband had always paid for some items. I accept both points. But, in my view, an overall assessment of her budget founds the view that some of the figures are too high. On an equivalent basis, I have concluded that the husband's initial budget is also too high.

164. But, it must be remembered that the two Form E budgets are similar and reflect a lifestyle that was readily affordable if only the husband's income is taken into account. With that in mind, I have concluded that the overestimates in the s. 25 budgets do not warrant a reduction to the revised figure advanced by the husband. Rather, they warrant a reduction of £10,000, and thus a budget of £110,000 for each of them, if the lifestyle during the marriage is to be replicated.

165. But, and to my mind it is an important but, it needs to be remembered that the wife was funding some of her expenditure from her trust income and payments made to her by her father (see paragraphs 93 to 96 hereof). It is also common ground that she did not tell the husband about this and he did not know about it. So she was in this sense operating a "hidden economy".

166. As appears from paragraphs 94 and 95 hereof, for the three tax years leading up to the year of the breakdown of the marriage this funding could have been considerable. The wife's approach to calculating her level of spending to found her budget did not divide expenditure between the income she and the husband earned and her unearned income, or quantify items in and outside her budget which she said were paid for by the husband. The level of her investment income set out in paragraphs 94 and 95 hereof shows that during happy years of the marriage the contribution to her expenditure of £120,000 from her "hidden economy" could have been significant. But evidence was not directed to this, and thus for example how much of this income was saved. I therefore have to do the best I can on limited evidence. On that approach, I have concluded that the level of the wife's "hidden economy", combined with the point that the husband paid for some items, warrants the conclusion that a budget of £95,500 for the wife would enable her to enjoy a standard of living equivalent to that enjoyed during the marriage based on their earned income. This is a reduction to, but not below, the husband's revised figure and it does not include mortgage payments or rent.

The housing needs of the parties

167. Both parties need a home in which they can care for their child. In their Form Es, they took a very similar approach to that need and, in so doing, must have taken into account the standard of living and housing they enjoyed during the marriage. The wife did not quantify that need but the husband did by saying that he needed a house with a value of up to £2m. In my judgment, £1.5 to £2m is a fair guideline figure judged by reference to the standard of living of the parties and the area in which they

lived and want to live. The issue therefore becomes one of affordability and how such housing needs should be funded from their respective financial resources.

Affordability

168. I acknowledge that there is some uncertainty as to the level of the husband's future earnings having regard to the general economic climate and the retirement of an important partner. But that uncertainty is not sufficient to cause me to proceed on any basis other than that he is likely to maintain at least his present level of earnings – indeed I was not invited to do so. This means that there is no need for an investigation of whether his estimate of his future income is conservative.

169. So affordability from the husband's s. 25(2)(a) financial resources is not a factor that can go to reduce the award to the wife. Also, an unchallenged table provided by the wife's counsel makes it clear that if I made the award she seeks, and the husband continues to earn at the level he has been (or at a higher level), he will (on his revised budget and adding back savings of £50,000 a year and school fees of £15,500) be able to make savings of between £40,000 and £50,000 a year. That revised budget, and so that table, did not include a figure for rent or mortgage repayments, but if a sum for that was included he would still be able to make significant annual savings.

The wife's likely level of earnings

170. As mentioned earlier, I accept that the approach taken by the husband's counsel to the assessment of the wife's likely income, if she proceeds with her proposal of working with one other person in providing assistance to divorcing couples, was appropriate. It used a charge out rate of £140 per hour provided by the wife and was based on a 45 week year. This estimate was:

Hours per week	Gross	Net
10	£63,000	£42,000
20	£126,000	£75,000
30	£189,000	£107,000

171. Naturally, that estimate is dependent on this venture progressing and being successful, and the chargeable hours that the wife works. It does not include overheads and does not factor in the number of non-chargeable hours the wife would have to work. The wife failed to provide an estimate of her overheads, or of the likely split between chargeable and non-chargeable hours. Also, she gave only limited information of her investigation and work concerning the setting up of this business venture. But the little information she did provide was positive.

172. At the start overheads are likely to be small but they will increase by stages to provide appropriate support for the business if it grows (e.g. to provide secretarial or other

support services). If the wife was able to charge for 20 hours a week (and her partner was doing the same) they would need such support. Taking overheads at 25% of gross fee income, the table produced by the husband's counsel would be:

Hours per week	Gross (net of overheads)	Net (rounded)
10	£47,250	£33,000
20	£94,500	£60,000
30	£141,750	£85,000

173. By reference to that table and thus the wife's proposed business venture, and the limited information she provided about it, I have concluded that a reasonable estimate, and one that is fair as between husband and wife, is that it is likely that in 2, 4 and 6 years she can and would be earning on a part time basis not less than £20,000, £40,000 and £60,000 per annum net if she sought to maximise her earning potential in this business venture.

174. It is clear, and common ground that given her undoubted intelligence, her qualifications and her experience, that the wife would be able to obtain different part time work if she decides not to proceed with her planned business venture or contrary to the limited evidence she gave me about its prospects, it proved to be unsuccessful. No evidence was given as to such other part time work and I have therefore (a) based my estimate of her future earnings, on what she says she wants to do and the limited information she has given about it, and (b) used that estimate in arriving at my award. This, I hope will inform and assist the parties and the court on any future application to vary (see also paragraphs 145, 185, 188, 189 and 199 to 203 hereof).

My award and the essential reasoning behind it having regard to the approach in law and my conclusions set out above

Preliminary.

175. In my view, it is instructive to pause to consider the hypothetical exercise of what the award would have been likely to have been if the parties had not had a child. Then the wife would have continued to work and she would have had essentially the same trust interests and prospects (with the qualification that the fact that she has a child provides a factor that increases her prospects of receiving income and capital payments from the trusts, as it reduces her ability to work and make her own way in accordance with her family ethos).

176. On this hypothesis, it was accepted on the wife's behalf that her claim would have been very different and, as I understood it, that the wife would have been likely to have received (i) a capital sum to meet or assist in meeting her housing needs, and (ii) periodical payments over a term to enable her to adjust from (a) the standard of living enjoyed during the marriage because of the size of the husband's income (compared to her much lower income at the Bar), to (b) self sufficiency, and thus a standard of

living based on a combination of her earned income and her income and capital receipts from her trust interests and her family. On her case, that standard of living would have been significantly lower than that enjoyed during the marriage because her case is that she will not receive significant sums from her trusts, particularly in the short term. In my view, that is the award that the court would probably have made.

177. In my view this hypothetical exercise is instructive because:

i) it shows that, on that hypothesis:

a) the wife would not have received a joint lives award of periodical payments that would have enabled her to fund a lifestyle that was equivalent to that enjoyed during the marriage, and

b) her trusts interests would have been relevant to the level of her independent standard of living funded by them and her earnings and the period of periodical payments from the husband to fund her adjustment to that level,

and thus, that

ii) the wife has to base the joint lives award she seeks on matrimonial needs and/or disadvantage stemming from the birth of the child, and the marital choices and continuing contributions concerning him and his upbringing.

178. Indeed, this was the approach taken by the wife.

The matrimonial needs and disadvantages, and continuing marital contributions, relating to the child and his care

179. As appears earlier (see in particular paragraphs 136 and 138 hereof), on the correct approach in law to achieving a fair overall result applying the MCA and the rationales set out in the cases, these needs, contributions and disadvantages do not warrant an approach that the wife can choose not to work, or to do unpaid work. So these needs, contributions and disadvantages could only negate an award that was based on a transition to complete self sufficiency (in the sense of reliance by the wife on, and only on, all her s. 25(2)(a) resources) if it would be fair to conclude that:

i) they prevent the wife from working,

ii) they reduce her likelihood of receiving income and capital from her trust interests, which it was not asserted they might do, or

iii) they provide a continuing matrimonial need, contribution or disadvantage that should be funded by the husband, rather than the wife's earnings and/or her likely income and capital receipts from her trust interests.

180. The marital choice made by the parties does not prevent the wife from working in paid employment on a part time basis that enables her to care for her son. Indeed, that marital choice envisaged that the wife would work part time. But the fact that she gave up work, and that part time limitation on her work in the future, do have an impact on her level of earnings, and her ability to find full time work when her

commitments to the child render this practicable (albeit that she would not have the same difficulties she would have had if she had not been working part time) and thus on her ability to make savings and provide for a pension. At least potentially, these are lifelong consequences.

181. Additionally, by working only part time the wife will be continuing to make a marital contribution as a carer and reducing the need for others to have to be paid to provide such care. The husband is however also making a continuing marital contribution to this care through periodical payments for the child and the payment of school fees.

182. No evidence or argument was directed to the quantification of these matrimonial needs, contributions and disadvantages. To my mind this was unfortunate and a failure to perform a necessary and basic part of the preparation and presentation of the case by addressing alternative solutions in the middle ground (see the confirmation of that view at paragraph 69 of the judgment of Ward LJ in *Robson v Robson* [2011] 1 FLR 751). I acknowledge that the parties may not wish to suggest such alternatives but, if they do not do so, they create the result that the court either has to deal with the middle ground without such help, or call for further evidence and argument which would result in additional costs and in delay.

183. The quantification of these needs, contributions and disadvantages cannot be based on a formula. Two elements of it relate to the level of the wife's earnings and her contributions during the first stage, namely whilst the child remains a minor, or until his care needs no longer enable the wife to assert that the marital choice means that it is fair as between her and the husband that she should work part time. The third element relates to the disadvantage she may have of moving to full time employment and the impact that her working history has on her earning capacity at the end of the first stage.

184. It is also likely that, as the child gets older during the first stage, the wife will have more hours available to work and, in any event, because of that, or for other reasons, the differential between what she is earning and could have been earning is likely to vary over the first stage. There is also the possibility in this case that wife's ability to work part time will be affected by the child's health. I have not tried to factor that in, and if sadly his health has such an impact, to my mind, this would be a relevant factor to take into account on an application to vary the periodical payments.

185. The wife was not a big earner at the Bar when compared with others at the start of their careers at the Bar. And there is no estimate of what she might now be earning at the Bar or elsewhere, or her long term earning prospects, if she had not had a child. An assessment based on what the wife would have been earning in her independent life, if the marriage had been childless, (a) overlaps with or subsumes one based on a payment for her continuing contribution as a carer, and (b) provides an available benchmark or cross check. Whilst she works part time this will remove, or greatly reduce, the need for expenditure on outside carers or a nanny. So, on a "loss of earnings approach" a provision for such savings during the first stage would introduce double counting. Payments founded on a continuing contribution to the care of a child of a marriage might be categorised as a carer's allowance but, in my view, the approach under Schedule 1 to the Children Act 1989 to including a carer's allowance in an award of maintenance for the child is an inappropriate analogy to an award under the MCA of periodical payments for the parent. However, I acknowledge that

the level of awards in favour of ex wives who continue to be the primary carers of the children of the marriage and who do not have a good earning capacity, and to a lesser extent "carer's allowances" under Schedule 1 are relevant to the consideration of the ultimate question whether the overall award, and this part of it, is fair in all the relevant circumstances applying the terms of the MCA, and the rationales relating to its application.

186. Having regard to the high costs burden already incurred and the uncertainties involved in the quantification of a provision to cover the wife's marital needs, contributions and disadvantages I have not called for further evidence on, or for argument, on this issue. On the limited evidence before me, I have concluded that a fair provision to cover these marital needs, contributions and disadvantages during the first stage is a flat rate of £35,000 per annum. This is in addition to the periodical payments and other payments for the child (£18,000) and so provides £53,000 per annum to the wife for, and in respect of, the care of the child, on the basis that the husband will be paying his school fees etc (see paragraph 217 hereof). A cross check with my estimate of the wife's likely earnings from her proposed business venture (see paragraph 172 hereof) shows that my figure equates to the difference between:

    i) my estimate of her net income if she worked around 20 chargeable hours (£60,000 net per annum and so my estimate for her part time work after 6 years – see paragraph 173 hereof), and

    ii) her net income if she worked 35 chargeable hours a week calculated on the same basis (£140 per hour for a 45 week year is gross £220,500, net after 25% overheads £165,375, approx £96,000 net (calculated as follows £150,000 gross = £88,484 net (At a Glance page 19) plus £15,375 at an overall tax rate of 51% = £7,534). Other tax calculators available on the internet produce different results (e.g. Prudential income tax calculator gives a net figure of £92,374 on a contracted out of S2P basis), but a more accurate calculation is not warranted and similar calculations can be done for uplifts from my other estimates of the wife's net income from part time work.

    Further, in my judgment, on an overview this award fairly meets this element of the award during the first stage.

187. In my view, the third element of the quantification of her relationship generated needs, contributions and disadvantages arises at, and is likely to found a change at, the end of the first stage, and so it should not be factored in now.

Should some or all of the funding of that £35,000 per annum be funded by the wife's trust interests? And, if so, how much and when and does such funding by her trust interests warrant a termination date being put on the payment of that sum by the husband?

188. In my judgment, for the time being and thus unless and until this element of the periodical payments ordered is varied by the court (by approving an agreement or after a dispute) the husband should make such periodical payments. This is because:

    i) he is able to afford them,

ii) they are directly related to the marriage, and would not have existed but for the child of marriage, and

iii) the wife's trust interests have no connection with the marriage.

189. In my view, it follows that the inclusion within the wife's financial resources of her trust interests does not warrant the imposition of a term in respect of periodical payments to meet this payment of £35,000 per annum.

190. I say "for the time being" because although it seems to me that the points made in paragraph 188 hereof are always likely to have force it may be that in the future the balance between the parties s. 25(2)(a) resources would warrant the termination or diminution of these payments by the husband.

Should the uncertainties relating the wife's earnings and the quantification of the sum of £35,000 in respect matrimonial needs, contributions and disadvantages found the view that any reduction in periodical payments to effect the appropriate transition to self sufficiency be left to a future application to vary.

191. In my judgment, the answer to that is that they should not.

192. I acknowledge that there are uncertainties and that they have been added to by the failure (a) of the wife to provide more information about her business plans and expectations, and (b) of both parties to address the issue of the quantification of the award directed to meeting continuing matrimonial needs, contributions and disadvantages. But, at best, those failures support a view that the parties should be able to provide further evidence and argument now, rather than a view that no estimates should be made and taken into account in making the award for periodical payments until an application to vary is made.

193. My estimates are based on the evidence given to me. And, as I have set out earlier (see paragraph 146) I have concluded that the wife's arguments based on earlier authorities (and in particular *C v* C) that I should not make an order that terminates or reduces the periodical payments ordered are flawed.

194. As appears earlier, I have concluded that £35,000 of the award for periodical payments should continue for the time being (see paragraphs 188 to 190). The issue however remains whether my order should provide for reductions down to that figure and, if so, what they should be. Such reductions would be founded on the underlying aim or rationale that the parties should live independent and self sufficient lives, and so on the approach set out in paragraph 136 and 138 hereof. In the case of the wife such a lifestyle would be one funded by (a) on my approach set out earlier, the husband's periodical payments in respect of her relationship generated needs, contributions, (b) her earnings and (c) her trust interests.

195. *The impact of the wife's earning capacity*. In my judgment, the wife's arguments based on *C v C*, and the application of the discretionary s. 25 exercise that any reduction in respect of her earnings and earning capacity should await the result of an application to vary are flawed. I have already dealt with arguments based on *C v C* (see paragraphs 140 to 146 hereof). As to the discretionary exercise, I have concluded that an award that did not include reductions in respect of the wife's likely

earnings would not be a fair one assessed by reference to the MCA and the rationales for applying it, and so by an application of the approach and conclusion set out in paragraphs 136 and 138 hereof. This is because:

i) it fails to take into account one of the wife's financial resources,

ii) it runs counter to the marital choice of the parties concerning the care of the child and the wife returning to work part time,

iii) given the underlying aim of independent self sufficiency, and that marital choice, it is not justified by relationship generated needs, contributions or disadvantages and it fails to strike a proper balance between the competing interests of the parties and their financial resources, and

iv) so far as is fairly possible, the court should take an approach that seeks to avoid a repeat of the emotional and financial cost of these proceedings in an application for variation, by setting parameters that the court can take into account as and when there is such an application (see paragraph 134 hereof).

196. My starting figure for reductions in respect of the wife's likely earnings is £95,500 per annum (see paragraph 166 hereof) and my estimate of those earnings is set out in paragraph 173 hereof. Applying those findings, in my judgment, to take account of the wife's earnings and earning capacity the order for periodical payments should:

i) start at £95,500 per annum,

ii) reduce to £75,500 per annum after two years,

iii) reduce to £55,500 per annum after 4 years,

iv) reduce to £35,000 after 6 years.

From then the periodical payments of £35,000 per annum should be increased annually by reference to the RPI, but before that there should be no such increases. (I should mention that I have not worked or reasoned backwards from this conclusion. Rather it is based on my estimates of the budget, the wife's likely earnings and the sum that the husband should continue to pay in respect of continuing matrimonial needs, disadvantages and contributions – the last reduction adding £500 to my estimate of earnings to "join up" the two estimates).

197. *The impact of the wife's trust interests* These are not marital assets, they existed before the marriage, and they continue after it as a part of the financial resources that are available to fund the wife's independent and self sufficient lifestyle.

198. I taken them into account in reaching my starting figure of £95,500 (see paragraph 166 hereof) and so I must be careful not to double count. Also I acknowledge that in happy years of the marriage a significant part of the wife's trust income (and so her "hidden economy") derived from the monthly payments of £1,400 a month (increasing to £1,500 a month), that the capital producing that income no longer exists and the present income from the 1983 settlement and other trusts is significantly less than the reduction I have made to the budget. But, to my mind, that does not mean that there should be an add back to the starting level of her periodical payments. This

is because, that starting level should be set by reference to the earnings of the parties, the trust interests were and remain part of the wife's financial resources and on my conclusions on what she is likely to receive from her trust interests (see paragraphs 124 to 126 hereof) they can better her "hidden economy" during the marriage.

199. However, the possibility that the wife might receive more from her trust interests than she did during the marriage does not, in my view, mean that the reductions to her periodical payments set out earlier should be increased. This is because the trust interests have a separate and independent existence from any assets acquired during, or derived from the contributions of, the parties to or during the marriage.

200. The points made in the last three paragraphs mirror the approach I have taken earlier concerning the balance to be struck between what the wife should receive from (a) the husband (and thus pursuant to the discretionary s. 25 exercise), and (b) her trust interests (and thus through the exercise by the trustees of their discretionary powers of investment and appointment) in respect of the funding of the wife's relationship generated needs, contributions and disadvantages. This is because, in my judgment, the guidance in the cases shows that:

i) the husband should be primarily responsible for relationship generated needs, contributions and disadvantages, because they were created by or during and flow from the marital relationship, whereas

ii) after an appropriate period of adjustment, the wife's resources (and thus her earnings (derived from her earning capacity and her exercise of it) and her trust interests) should be primarily responsible for the funding of the wife's independent and self sufficient lifestyle following divorce, and

iii) after that appropriate period of adjustment, the standard of living enjoyed during the marriage is not the appropriate benchmark for the independent lifestyles of the parties.

201. In my view, on that approach it is not double counting to take my conclusions on the wife's trust interests (and thus that financial resource) into account to found the conclusion that the following risks have little, if any, weight, namely:

i) the risk that I have made overestimates of the wife's earning capacity, and for that reason

ii) the risk that the home and lifestyle that the wife will provide for the child will be of a relevantly lower standard than that provided by the husband, and

iii) the risk that any reduction in the wife's standard of living from that enjoyed during the marriage to that based on her periodical payments, her earned income, and receipts for the trust, is too steep.

202. This is because:

i) her trust interests could, and in my view would be likely through a combination of income, capital and loan payments to, make up any difference

(subject to the view of the trustees by reference to the family ethos on the efforts being made by the wife to stand on her own feet),

ii) the combination of her trust interests and her earnings are the source of funds for her independent living and, apart from my award of £35,000 per annum (and child maintenance) it is those financial resources that should fund her independent lifestyle, and

iii) if the wife chooses not to, or is not able to earn at the levels I have estimated (unless the reason for this is generated by or sufficiently linked to the relationship e.g. illness of the child), and this shortfall is not made up by the exercise of the trustees of their discretionary powers, the wife should not be able to look to the husband (and thus the court) for monies to fund her independent and self-sufficient lifestyle.

203. The same reasoning founds the conclusion that if the wife receives significant capital and income from her trust interests, and thus can enjoy a higher standard of independent and self sufficient living than that enjoyed during the marriage and by the husband after divorce, this would not, of itself, mean that the husband should no longer make payments in respect of the wife's relationship generated needs, contributions and disadvantages (see paragraphs 189 and 190 hereof).

Housing need

204. Prior to the hearing the wife found a house she would like to buy in the area of the former matrimonial home and in which her parents and one of her sisters live. She made an offer for it of £1.458 million that was accepted. Her case was that it needed some alterations and renovation and she sought a housing fund of £1.675 million to include the purchase price, associated costs and a fund for renovations of £100,000. Counsel for the husband made vociferous complaint about this asserting that the wife was seeking to present the court with a fait accompli and that, if she wished to proceed with the purchase, she should fund any balance over one half of the net proceeds of sale of the former matrimonial home. To my mind, these complaints were not justified as a matter of fact relating to the wife's intention, and because I do not see that any judge would be influenced to increase the award because the wife had found, and had committed herself to buy, a new home.

205. During exchanges in court I made it as clear as I could that, in my view, it was in the interests of the child and fair that the wife should be able to fund this purchase from the net proceeds of the former matrimonial home on the basis that I would take this into account, and make appropriate adjustments, in my award.

206. The wife provided divergent estimates (one of which was informal) of the costs of the proposed works. Some of the works were recognised as being essential but others were not.

207. After the hearing, I was told that the completion statement showed that the wife needed £1,565,329.48 to complete her purchase. In addition, she will have needed a sum to meet the essential works on the property, other works that she wants to carry out and a sum to cover other expenses related to the move to a new home. I was also

told that, after deduction of the fee for electronic transfer, half of the net proceeds of sale of the former matrimonial home was £1,218,933.94.

208. On the approach set out in paragraph 74 hereof the ascertainment of the liquid capital to which the sharing rationale applies with full (50/50) force is as follows:

(i)	Net proceeds of the matrimonial home	£2,437,868
(ii)	Wife	-£33,404
(iii)	Husband	£210,892
	Total	£2,615,356.
	50%	£1,307,678

On the basis that the husband retains his £210,892 to achieve a 50/50 division he would receive (£1,307,678 – £210,892) £1,096,786 from the net proceeds of sale, and the wife would receive (£2,437,868 – £1,096,786) £1,341,082 from the net proceeds of sale giving her net (£1,341,082 – 33,404) £1,307,678.

209. I was told that in addition to her half share of the net proceeds of sale, she was paid an additional £292,653.50 towards the purchase of her new home, and that she funded the balance that she needed to cover works and other costs by a loan at 2.5% and an arrangement fee of £3,500 (I was not told the amount of the loan). She has therefore received:

i) £1,511,569 (half of £2,437,868 = £1,218,934 + £292,635) from the liquid assets in the names of the parties, and therefore

ii) £170,487 (£1,511,569 – £1,341,082) more than she would have done on an equal division of the liquid assets (see paragraph 208 hereof).

Also, she has received less than the housing fund she sought (£1,675,000).

210. The wife did not seek any additional liquid capital over the housing fund she sought (namely £1,675,000). But she was seeking periodical payments at a higher rate and for a longer period than I have ordered.

211. The question therefore arise whether:

i) she should be awarded a higher lump sum (and thus one that is more than half the available liquid capital) to meet her housing need, or

ii) she should be paid higher periodical payments to cover the costs of a loan to meet her housing need, it being remembered that the budget figures I have used do not include mortgage costs.

212. In my view, the answer to both questions is that she should not, and the fair result is that:

i) she should provide the balance by borrowing, if she does not receive a capital payment as a beneficiary under the 1983 settlement or another trust to cover it, and

ii) if her trust interests do not provide her with income to meet the borrowing costs, the level of periodical payments is sufficient to cover them.

213. I have not reached this view on the basis that the housing fund sought by the wife, and so the sum she is likely to spend on her new home, is too high. Indeed, in my view it equates to the starting common ground on housing need which is clearly affordable. This means that (a) it is unnecessary for me to analyse the expenditure that the wife has identified she would like to spend on necessary works (e.g. on security and safety) and other works on her new home, and (b) the issue is as to how that housing need should be funded.

214. In my judgment, that housing need, should not be funded by an additional lump sum (from available liquid capital or borrowing by the husband), or by higher periodical payments, because this was a short marriage, and:

i) on a non discriminatory basis the parties contributed equally to the liquid capital,

ii) there was no suggestion that the wife would not be able to raise the relevant balance, and more if she so decided, to meet additional expenditure,

iii) an alternative and available source of finance is the wife's trust interests, and such funding from them would clearly be in line with the underlying purpose and terms of the 1983 settlement. Also, the history indicates that the wife and at least one of her sisters have received support from their trust interests in buying a home,

iv) notwithstanding the assertion of the wife's father that the assistance from the trust interests of his daughters was towards a first home, it was not so limited when the parties bought their matrimonial home, and my conclusions on what the wife is likely to receive from her trust interests means that it is likely that the balance she wants to meet her housing needs will be provided from her trust interests, and if this does not occur

v) the periodical payments I have ordered will enable the wife to meet the payments due on the relevant borrowing to meet the balance, and

vi) on the approach taken above, to the balance to be struck to the funding of an award over and above an equal division of liquid matrimonial assets (and so the entitlement of the parties thereto based on their contributions to the marriage) between the financial resources of the two parties is properly and fairly reflected by this approach to the funding of the home in which the life will live as an independent and (subject to the continuing periodical payments) self sufficient person.

215. This means that the adjustment that is necessary is that the wife should repay to the husband the sum of £170,487. (He will then have a total of £1,218,934 - £292,635 =

£926,299 + £210,892 = £1,137,191 + £170,487 = £1,307,678 and so half of the liquid capital – see paragraph 208 hereof.)

216. As I indicated during the hearing, in my view this sum should be secured by a charge back over the wife's new home. That charge should provide that the sum is to bear interest at 2.5% from the date of its payment to the wife and is to be repayable two months after the date of the order. This reflects the commercial lending rate on the wife's loan and gives her some time to arrange for repayment.

217. *Periodical payments for the child.* In my judgment, having regard to the shared care arrangements these should be at the rate of £1,500 per month (£18,000 per annum) with annual RPI increases, which accords with the open offers (see paragraphs 45 and 46 hereof). The husband should also pay school fees, extras and insurance premiums as offered. In addition he should pay the equivalent until the end of tertiary education but, subject to agreement to the contrary, from the end of the child's secondary education or his 18th birthday (whichever is the later), the husband is to make the payments directly to the child, rather than to the mother.

218. As I understood it, the dispute was confined to whether the husband should continue to make the payments to the mother after the end of secondary education. In my view, it is reasonable and fair, particularly against the background of the shared residence order and care of the child, that the default position on who the husband should pay should change at 18, or the end of secondary education (whichever is the later). This recognises that the child is then a very young adult who has two parents and homes and the source of the payments.

219. *Overview.* My award is between the two extremes offered and argued for by the parties. My essential reason for taking a middle course is that, in my view, the parties failed to pay proper regard to the balance that should be struck between the financial resources of the parties in respect of the funding of:

i) relationship generated needs, contributions and disadvantages, and

ii) the independent, self sufficient and potentially divergent standards of living of the parties, following divorce.