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Case No: FD07DOOO36

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2010

Before :

MR JUSTICE CHARLES

Between :

J	**Applicant**
- and -	
J	**Respondent**

Martin Pointer QC and Geoffrey Kingscote (instructed by **Mishcon de Reya**) for the **Applicant**
Lucy Stone QC and Marcus Lazarides (instructed by **LMP**) for the **Respondent**

Hearing dates: 22 to 26 and 29 and 30 June and 6 to 8 July 2009
Draft judgment circulated 28 October 2009

Judgment

Charles J :

Part 1

Opening remarks

1. I have divided this judgment into Parts:

   i) Part 1, opening remarks and introduction (paragraphs 1 to 16).

   ii) Part 2, the headline disputes of fact and findings of fact (paragraphs 17 to 285).

   iii) Part 3, the law (paragraphs 286 to 423).

   iv) Part 4, conclusions (paragraphs 424 to 474).

   v) Part 5, general comment for consideration by the profession (paragraphs 475 to 484)

vi) Part 6, chronology.

I apologise to the reader for its length not least because, as will appear in Part 4, I have concluded that the core facts and magnetic factors to be taken into account can be stated reasonably succinctly. The length of this judgment flows from the way in which the factual disputes were prepared and presented and the general points that I have decided to make in that context (Part 2). But also, as appears from Part 3, the case has raised points of principle that are not directly covered by existing authority.

2. For convenience I shall refer to the parties as the wife and the husband.

3. This has been a hard fought claim for ancillary relief in which there was a number of disputes of fact advanced that raised credibility issues. The procedure adopted in respect of such issues, and the general preparation of the case, followed the rules and a fairly standard path in proceedings of this type.

4. It follows that the comments and criticisms I make of the product of that path are criticisms of the path, and thus an approach to the preparation and presentation of "big money" cases that is generally adopted, rather than to the individuals involved in this case, who it seems to me have adopted an approach that accords with that adopted by many others who specialise in this field of litigation. This is not surprising because the solicitors and counsel involved are experienced and respected practitioners in the field.

5. In my view, the product of this fairly standard path was that a number of the factual stepping stones or building blocks in the rival arguments were not constructively or adequately addressed. So, in my view, this case provides an example of endemic failures of the approach generally adopted in respect of the trial of "big money" cases to properly identify issues, and the evidence required in respect of them. I make some general closing remarks at the end of this judgment for consideration by the profession (Part 5).

Introduction

6. The parties were married in June 1996 shortly after they had met for the first time. For both of them it was their second marriage. At the date of the marriage the husband was 44 and the wife almost 30. The marriage finally broke down and the parties separated at the end of January 2006. So they were together as a married couple for 9 and a half years.

7. The husband has two adult children from his first marriage. The wife has a daughter from her first marriage. She was born in 1994, and is now 15. At the time of the marriage she was 2 years old.

8. There are cross applications for ancillary relief. In his affidavit of 11 October 2007 the husband asserted that both claims should be dismissed. The wife pursues her claim (which was issued later) and seeks a substantial award. She has therefore been treated as the Applicant and the husband has made her an open offer. So his stance is no longer, and for some time has not been, that both claims should be dismissed.

Chronology

9. I refer the reader to the chronology in Part 6. In the main it reflects common ground between the parties. But, where it does not do so, it reflects my findings or, as appears therefrom, assertions made by the parties. It also provides a framework for the consideration of the issues and assertions referred to in it.

10. The date fixed for the hearing, with a 10 day estimate, was 16 March 2009. The respective open positions of the parties (then and now) are dated 3 March 2009 (wife) and 10 March 2009 (husband). They are a long way apart. The wife's open position is that she seeks a lump sum which will result in a division of the total assets as to 60% to the husband and 40% to the wife on the basis of a clean break and that costs be dealt with by the court. The lump sum (subject to refinement by reference to updating disclosure and add backs) was estimated at £10 million. The husband's open position was that he would pay the wife £2,896,448 representing one half of the net increase in the value of his company between the date of the marriage and the date of separation, less the amount paid to the wife on account of her lump sum, and that there be no order as to costs. The offer was based on Mr A's valuations.

11. When the case came on for hearing in March 2009 (with its 10 day estimate) I gave the parties the opportunity to demonstrate to me that the case was ready for trial. Having heard them I gave an ex tempore judgment to the effect that in my view the case was not then ready for trial on a central dispute of fact, namely that the wife had undisclosed substantial assets or ready access to such assets. I therefore adjourned the trial on 17 March 2009. It was, and remains, my view that there had been significant failures to take proper steps to prepare the case. Fortunately a date in June 2009 was found for the trial. I rejected what to my mind was an inappropriate approach by both counsel that the case should be re-fixed for their convenience.

12. I ordered further disclosure in respect of that central dispute. It seemed (and still seems) to me that this disclosure was an obvious and vital element of any properly prepared and argued determination of that issue and I therefore fail to understand how the parties had not made provision for it prior to the first hearing. The point that the District Judge had limited disclosure of such material to dates after the breakdown of the marriage does not prevent the parties recognising that the issues raised in this case merit wider disclosure and it being provided by agreement, or further order. The terms of my order were agreed between the parties who took the opportunity to include provisions for disclosure in addition to the disclosure triggered by my decision.

13. In an attempt to focus the minds of the parties on basic aspects of the preparation of a case for trial, namely the identification of (a) the issues, (b) the facts that were agreed and (c) the facts that were in dispute, and thus the evidence that was needed to prove them, I also gave directions that:

> " ------ each party do file and serve a statement setting out:
>
> a the findings of fact that the party will ask the court to make;
>
> b the facts upon which those findings should be made;
>
> c other areas that will be the subject of examination in evidence"

I acknowledge that this could have been better drafted but, as explained in court, my purpose in making this direction was to provide a procedure through which the parties identified the findings that each of them was inviting me to take into account as factors in the s. 25 exercise and the subsidiary facts (stepping stones or building blocks) they were inviting me to find to establish those findings.

14. This is an essential part of the preparation and presentation of any case because it identifies the issues (of fact and law), and the evidence (oral and documentary) that needs to be given and tested.

15. The compliance with this direction, and thereby or otherwise, the fulfilment of its underlying purpose fell short of what I had intended and hoped for. To my mind, the results of this included the following:

    i) considerable periods of time were wasted in cross examination by both sides,

    ii) during the evidence and submissions it was difficult to follow the need for, and purpose of, some of the lines of questioning, by reference to what was in dispute, or likely to be in dispute, in connection with its subject matter. In particular this was the case in respect of the development of the husband's business and the reasons for the growth in its profitability and its increase in value post separation,

    iii) a failure by the husband to put fully and properly to the wife his alternative assertions as to the source of the substantial payments made and applied in the purchase of her houses. For example, his case (and thus its stepping stones or building blocks) that notwithstanding her father's will the payments came from funds to which she was entitled, was not put to the wife with any clarity,

    iv) the wife was not challenged by reference to underlying background documents, or some other material apart from bare allegation by the husband, on selected and identified examples of expenditure by her on items that the husband asserted he did not fund to found submissions that her assertions as to the amount of such expenditure were low and that the true full cost was funded by her from her own resources, or resources to which she had ready access,

    v) the experts were not given any updating information and had not been asked to comment on points that were put to them in the witness box concerning their valuations, and

    vi) important information was sought and obtained very late in the day.

16. It was also correctly common ground that the affidavit evidence contained a number of passages (which in some cases were quite lengthy) that were simply irrelevant.

Part 2

The headline disputes of fact and findings of fact

(1) The wife's wealth or access to wealth

17. The husband maintained that the wife has, or has access to, substantial wealth. The foundation of that assertion was essentially his account of what she had told him during the marriage and her expenditure. He also relied on (a) evidence from his brother of a conversation between him and the wife's mother to the effect that the wife had been gifted very significant wealth from her father, and (b) evidence from his son and his first wife of conversations they have had with the wife.

18. The findings sought on this headline dispute listed by the husband's legal team pursuant to my direction were simply that:

> "the wife's finances are closely linked to those of her mother and the presentation of her wealth belies the reality of the funds available to her".

This falls well short of compliance with my direction. It lacks definition. Further and importantly it was not said how such a generalised finding could be carried through into the s. 25 exercise. In particular, it fails to identify, and thus to seek findings in the alternative as to what is asserted to be the reality and thus whether, for example, a finding is sought that the source of the money used to buy her two houses was the wife's own money, or trust money to which she was or became entitled. It also fails to address the issue whether the moneys were provided by way of gift or loan if they were not the wife's funds.

19. The wife denies that she had had any inheritance from her father in addition to a legacy of £150,000. She maintains that the substantial sums she received from first her father, and then from her mother, that were used to purchase her two houses (and a car) were unsecured and interest free loans repayable on demand, made orally and without being recorded or evidenced in writing (the balance she alleged is due was described by her as a "speciality loan" in her Form E). The wife's mother supports her in this. They both assert that the £150,000 legacy from her father was paid by a series of round figure sum payments and a contribution to the cost of a gate at the Scottish Castle and some other expenditure.

20. Pursuant to my direction the wife specifically sought a finding that she had a debt of £2,125,000 to her mother (i.e. the speciality loan).

21. Pausing there, it is immediately apparent that background documentary material and explanation of the source of the funds used to purchase the wife's two houses is highly relevant to the establishment by both sides of their respective cases concerning this aspect of the identification and quantification of the assets that are subject to the s. 25 exercise.

22. The wife also accepts that she has had the ability to purchase items using credit cards on her mother's account. This was therefore a route by which she could have obtained funding over the years.

23. In respect of this headline dispute issues of credibility arise.

24. In one context it might be said the wife has the difficulty of having to demonstrate a negative. But the wife's position is not simply one of rebutting the husband's case because she has to establish that she has a substantial debt owed to her mother which, although not secured on her home, has the overall effect of significantly reducing its value in her hands. Put another way she has to establish her assets and liabilities. She therefore has a positive case to advance and, together with her mother, the ability to do so by providing relevant background material relating to the source of the payments.

25. The husband has the difficulty of having to establish the existence of wealth in the Isle of Man and, in respect of the position of the wife's mother, facts against a person who does not have a duty of full and frank disclosure as she is not a party. No steps were ever made to make her a party on the basis that findings which could have significant "knock on" effects relating to her wealth, and the manner in which she had provided funds to the wife, were being sought.

26. Notwithstanding the generality of the identification of the findings sought by the husband pursuant to my direction the evidence (and opening submissions) indicated that his assertions included the following alternative strands or assertions:

    i) an allegation that the wife was beneficially entitled to substantial funds in the Isle of Man and it was these funds that were used to fund the identified expenditure on the houses (and a car) and the alleged high expenditure on other items such as clothes, parties and holidays,

    ii) an allegation that the wife had access to such moneys for example as a discretionary beneficiary, and

    iii) the sums provided and applied were all gifts and none of them were loans.

    The wife denies points (i) and (ii), and on point (iii) she takes the opposite position in respect of the significant funding that was provided to enable her to buy her houses (and a car) and asserts they were loans. She also seeks a finding that some regular payments made to her by her mother were in satisfaction of her pecuniary legacy from her father rather than gifts from her mother.

27. Pausing here for a moment, to my mind a puzzling omission in respect of the preparation and presentation of this aspect of the case was the apparent lack of consideration by both sides of the wife's tax position by reference to the rival contentions. I asked about this during the hearing and overnight the wife's advisers provided some information on the basis that the source of the payments from abroad were not the wife's assets. This showed that:

    i) the available information relating to the wife's tax affairs was consistent with her case as to the source of the moneys,

    ii) the tax advantage in respect of sheltering the fund from inheritance tax by providing the moneys by way of loan, as opposed to gift, for investment in a house could be a reason why, on the wife's case, it might be advantageous for her in the longer term to move to the Isle of Man (as the husband alleged she had told him she might have to do), and

    iii) the treatment of her first house in Buckinghamshire for capital gains tax purposes (i.e. whether it was treated as her principal private residence) might be relevant.

28. But my question was primarily directed at the wife's tax position if the husband's assertion that the funds from which the substantial payments were remitted to the UK were her own funds was found to be correct. As I understand it, the wife is resident and domiciled in the UK and therefore liable to UK tax on foreign assets. If that is wrong, and she is not domiciled in the UK, she would be liable to UK tax on remittances. So it seems to me that the dispute as to the ownership of the relevant foreign assets had at least the potential for serious "knock on" effects outside this litigation for both the wife and her mother which warranted close attention being paid to its presentation by both sides.

29. On the wife's side she ran the risk that I would report to the Inland Revenue a finding that she and her mother have sought to hide the fact that the wife is beneficially entitled to substantial foreign assets. It seems to me that this risk provides a compelling reason for them to advance a clear positive case supported by relevant documents.

30. Further the point that the consequences of this part of the husband's argument, and his assertion relating to it that the wife was not being truthful, were not limited to the identification of assets in this case but introduced significant risks to the wife, to my mind, merited his case being fully particularised by his advisers, which it was not.

31. In any event, and ignoring those risks and their consequences, good practice required that the issues (which included allegations of dishonesty) in respect of this headline dispute should be defined and the relevant evidence obtained to support the rival positive cases.

32. It was common ground that the wife had received very substantial sums to enable the houses and a car to be bought. From that, the issues could have been restricted to the source and nature of those payments. As appears later, as a result of my direct and insistent questions during final submissions the issues concerning such substantial payments were effectively reduced to whether they were funded by gift or loan. But I deal with the wider disputes because they were pursued and this informs and underlies my criticisms of the preparation and presentation of this case.

33. As I have indicated, the dispute relating to the wife's access to funds was wide ranging and, in particular, included the alternative and disputed assertions by the husband that:

    i) the source of the substantial payments for the houses (and a car) and the other admitted regular payments (said by the wife to be gifts under £5,000) of significantly smaller sums were from the wife's funds,

    ii) the wife had access to substantial sums in the Isle of Man as and when she wanted them,

    iii) the round figure payments asserted by the wife to be in respect of her legacy from her father were either payments from the wife's own funds, or gifts from her mother, and/or

    iv) over and above the funding that was accepted (i.e. for the houses, a car and some gifts) the wife had throughout the marriage indulged in high expenditure on herself that had not been funded by the husband. (In this respect, for example, it was asserted (correctly) that the documents indicated that a surveyor for insurance purposes had valued her wardrobe of couture clothes, shoes and accessories at £1 million.)

34. In my view, basic and necessary preparation by both sides of the dispute relating to levels of expenditure and its funding prior to separation would involve the production (with supporting material) of documents relating to expenditure <u>before</u> the parties separated (as well as, or perhaps in substitution for, material ordered by the District Judge <u>after</u> the separation):

    i) by, and for the benefit of, the wife that was funded by the husband and/or his company, and

    ii) other expenditure by the wife and how it was funded.

    This necessarily involves appropriate disclosure of, for example, relevant financial records during the marriage (pre-separation) which, as mentioned earlier, had not taken place by the date set for trial in March 2009. Disclosure for three sample years was ordered and made in March 2009. Unsurprisingly it was relied on by both sides.

35. As mentioned earlier, my direction required the husband, through his lawyers, to identify from that disclosure and/or other information the facts he was inviting me to find on expenditure to found findings by inference, or based on further (identified) facts, in respect of the wife's wealth or access to wealth. This was not done. Examples might have been that I was invited to find that:

    i) the wife's wardrobe contained items bought during the marriage within an identified range of purchase price that was not funded by the husband, and/or

    ii) by reference to specific items of expenditure, the wife's denials and counter assertions in her written evidence of the round figure sums set out by the husband in his statement of expenditure on herself that he had not funded, were wrong and her explanations and supporting documents did not reflect the true position.

36. The identification of the first example as a fact that I was being invited to find would have shown that further evidence concerning the content of the wardrobe should be obtained. Indeed, the wife was asked in questionnaire to provide a valuation but did not do so, asserting that the collection went back to when she was 17 and that her large wardrobe had a negligible value. It is at least possible that an expert could date and identify what would have been paid for the clothes etc. From that the wife's expenditure on her wardrobe during and outside the marriage could have been identified. It seems to me that if this issue was to be properly pursued, as a minimum, the content of the wardrobe should have been more accurately identified. No such evidence was sought or provided. Cover was not taken out based on the surveyor's replacement estimate.

37. To my mind it follows that it was not possible for me to make any properly informed decision on the value of the wife's wardrobe and the reliance on the record of the view of the surveyor for insurance purposes without more, was misplaced notwithstanding the wife's somewhat disingenuous answer when asked to value her wardrobe.

38. In respect of the second example, if such specific items had been so selected it would have demonstrated that further evidence in respect of them, or types of expenditure (e.g. that two sets of garden furniture and not one were bought and/or that receipts produced by the wife did not explain alleged expenditure) should be sought or identified and specific points based thereon should be put to the wife. This would have provided a proper evidential basis for relevant findings, but it was not done.

39. I return to the point that it has been clear from the outset that an essential part of each side's case on this headline dispute relates to the source of the funds provided.

40. Before the hearing in March 2009 there had been skirmishes in respect of the affidavit evidence that the husband sought to rely on from members of his family relating to this issue, and thus what they had been told and observed relating to it. There had also been exchanges in questionnaire and correspondence. But it was not until some time after the March 2009 adjournment that the husband's legal team sought letters of request in respect of evidence from the wife's mother, and officers of relevant companies in the Isle of Man (albeit that at a much earlier stage letters of request had been sought by them in respect of evidence relating to the husband's company from persons in Scotland).

41. At an early stage of the hearing I asked myself what facts were likely to be relevant as stepping stones in the findings I thought the parties would be inviting me to make, or would be likely to be inviting me to make. My answers included points I have

already made in respect of the level of expenditure. In respect of the source of the funds it seemed to me that I would be asked to make findings as to the size of the wife's father's estate, its devolution and the funding of the payments shown to have been made by the wife's parents to the wife by the disclosure by the wife of heavily redacted bank statements.

42. As I have mentioned I acknowledge that both sides had problems in connection with this aspect of the dispute flowing from the point that, on their respective cases, they both have to rely on information from others. But, as demonstrated by my questions to the wife's mother when she had finished her oral evidence, it seemed to me that on her account (and that of her daughter) it should be relatively easy to provide information that strongly supported their account and that, to do so, would serve the wife's cause (and that of her mother) in this litigation and in respect of possible knock-on risks.

43. It would have been easy, and in my view obviously prudent, constructive and proportionate, for both sides to write at an early stage in the litigation inviting the wife's mother (and others in the Isle of Man) to provide such information or, in the case of the husband, that they should be invited to do so by the wife. To my mind, without I think much benefit from hindsight, this was an obvious step for both sides to take in the preparation of this case having regard to the overriding objective and good practice. So far as I know it was not taken. If it had been at an early stage either:

    i) the information provided by, and after the evidence of, the wife's mother (with other information from persons in the Isle of Man) would have been provided at an early stage, possibly within a structure to preserve confidentiality of information relating to the affairs of the wife's mother, or

    ii) it would have been known that the wife's mother was not prepared to volunteer such information and letters of request would have to be considered.

44. The position of the wife set out pursuant to my direction was that the evidence she relied on to prove the existence of the alleged loan of £2.125m was (a) the documents showing payment of sums making up the alleged loan to her from her mother, (b) the fact of repayment of what she asserted to have been an earlier loan and, of course, (c) her written and oral assertions (supported by her mother) that the payments were loans.

45. Albeit that (a) in a reply to questionnaire the wife asserted that she used the description "speciality loan" in her Form E because her mother told her that this is what it was called, which demonstrates that she discussed this with her mother at an early stage, and (b) it was clear, when she gave her evidence, that the wife's mother had discussed aspects of the case with her daughter, the wife's approach was:

    i) that her mother had been very reluctant to become involved and that, as the wife was not in a position to require her mother to provide supporting information, no inferences should be made against her because of the lack of supportive background financial information based on her duty of full and frank disclosure,

    ii) to provide material in her possession showing payments to her from her mother. This consisted mainly of bank statements which were so heavily redacted that this presentation alone, and together with the lack of other supporting material, inevitably and justifiably excited suspicion,

iii) that her father's will demonstrates that she did not inherit a substantial fortune from her father, and

iv) to rely heavily on the stance that, as the husband could be shown to have been dishonest in respect of his presentation of the value of his company, the wife's evidence should be preferred to his on all aspects of the disputes between them.

46. Pausing here, I accept that a will of the wife's father was disclosed at an early stage and that, as it was accepted that this is his will, it shows that the wife did not inherit substantial assets under it. So, at an early stage, the husband and his advisers knew that, if the husband was not going to assert that this was not the final will of the wife's father, he had to face up to this fact and assert (if it be his case) that the wife inherited outside the will and thus by lifetime gifts made by one of both of her parents (to her, or to trusts under which she is a beneficiary or a discretionary beneficiary), or that there is an enforceable arrangement between the wife and her mother.

47. As I have indicated in response to my directions to identify the findings sought, and the facts relied on in support of them, or otherwise, the husband failed to do this.

48. After the March 2009 hearing, and the very late application for letters of request directed to her and others in the Isle of Man involved in her financial affairs, the wife's mother told me that she decided to give evidence and to instruct such persons to provide information to show that the husband's assertions as to the wife's wealth were untrue. Whether she would have done this earlier, if asked in the manner I have suggested with an accompanying explanation, is speculation on the information before me.

49. The time available after the application for the letters of request was very short. But the information provided was nonetheless in my view thin, although I accept that in part this resulted from an approach of answering the questions raised rather than one of providing support for the case of the wife (supported by her mother).

50. That information showed that the wife's parents had set up an investment company in the Isle of Man and that after her father's death there was another investment company, funded by a loan from the wife's mother, whose shares were held by companies on trust for the wife's mother absolutely. She is a director of the investment company and she explained to me that she made its investment decisions. Her oral evidence was that the loan of around £2.5 million that she had made to her daughter was funded through this investment company. She remained very reluctant to disclose the size of the residue of her first husband's estate and the value of the investments in her company. After an exchange with me she gave an estimate.

51. At the end of her evidence I pointed out to her that the one set of accounts of the investment company that had been produced had at least a page missing (page 4 - this is not referred to in the description of the exhibit and may be a photocopying error because there are two pages 1) and that it seemed to me that if, as she was then asserting, she wanted to be helpful and provide information to support her evidence, and that of her daughter, it was likely that she could do so by instructing the relevant people in the Isle of Man to provide a paper trail showing the funding (a) of her investment company, and (b) of the loans and payments to her daughter.

52. It seemed to me that such a paper trail could show, in line with her evidence, that (a) the funding came from, or substantially from, her late husband's wealth and thus her entitlement to the residue of his estate, (b) there was no other regular, or significant

one off, funding of her investment company and (c) the loans to her daughter were funded by a repayment of part of her loan to her investment company (which I mention would not be a capital distribution or a loan from the investment company, because in response to the letters of request Mr M, a director of the investment company, having listed dividend payments stated that no such payments had been made but, to my mind unhelpfully, did not refer to there having been a repayment of part of the loan to the company shown in the incomplete accounts he exhibited and which he said was a loan from the wife's mother).

53. It was not asserted, or put, that the large loan to the mother's investment company was not a chose in action to which she was beneficially entitled.

54. Following the hearing, and I was told as a result of my comments, the wife's mother produced accounts of her investment company which supported her evidence concerning the funding of the loan she said she had made to her daughter.

55. This additional information had clearly always been readily and easily available, was supportive of the wife's contention (supported by her mother) but was only provided pursuant to the convoluted route I have described which had involved both parties in considerable expense that may well have been avoided if a constructive approach had been taken at an earlier stage.

56. This additional information showed (a) there was more than sufficient moneys available to the wife's mother to make the asserted loans by part repayment of her loan to the investment company, and (b) aspects of the paper trail referred to above. I also comment that, as is shown by this judgment, this support can be recorded without reference to the figures albeit that their disclosure is necessary to provide the support.

57. The litigation and tactical decisions that led to this position are of course ones for the parties to make. Equally they must both live with their consequences and effects which include:

i) the court not being provided with obviously relevant and important material until a very late stage of the trial,

ii) failures, in particular by the husband, to define (a) the findings of fact he sought as factors to be taken into account in the s. 25 exercise, and (b) the findings of fact he sought as stepping stones or building blocks in the establishment of such factors,

iii) failures to seek and provide appropriate discovery and evidence,

iv) the taking of a risk by the wife that the court might make findings that would have serious knock on effects when, with the co-operation of mother (and it would seem to the advantage of her mother because it may have avoided her giving oral evidence) evidence was readily available to support the wife's contention concerning the source of the funds,

v) the taking of an approach by the wife that excited suspicion as to both the admitted and large provision of funds from her family (for the houses and a car) and, more generally, as to her expenditure and maintenance of her lifestyle before and after separation, albeit that her mother does not have a duty of full and frank disclosure and the husband cannot properly rely on suspicion and needs to seek disclosure and obtain evidence, and

vi) the pursuit by the husband of issues that had not been clearly identified, pursuant to my direction or otherwise, and which he abandoned in final submissions.

58. The final written submissions of counsel for the husband asserted that he believed (now more so than ever as he told the court through counsel) that the large funds which the wife asserts were provided to her by her parents were in fact the wife's own funds emanating from her father and held on her behalf offshore. It took direct and insistent questions from me to elicit whether or not it was being submitted that I should make such a finding on the evidence. In doing so I reminded counsel that the husband's belief was not determinative or probative and what mattered was the evidence and its analysis. The answer was that I was not being asked to make such a finding because it was accepted that the evidence did not support it on the balance of probabilities. In my view, counsel had little or no chance of persuading me to make such a finding on the evidence and therefore this acceptance represented a correct analysis of the evidence.

59. It was therefore not until closing submissions, and then only in answer to my questions that this was accepted and thus that an important part of this wide ranging dispute that, at least potentially, raised serious knock on issues, was reduced to whether:

i) the accepted payments of large sums to fund the purchase of the two houses and a car were loans or gifts, and

ii) if loans, whether they would be enforced.

60. Naturally I do not know what passed between the husband and his advisers concerning (a) the preparation and presentation of the evidence to support the husband's case to the effect that the large funds which the wife asserts were provided to her by her parents were in fact the wife's own funds emanating from her father and held on her behalf offshore, (b) the prospects of proving it on the evidence gathered and put before the court, (c) the final written submission as to the husband's belief, or (d) the acceptance that the evidence was not there to enable me to make such a finding. In commenting on the draft of this judgment counsel for the husband argued that the approach taken in final written and oral submissions was an appropriate and conventional way of presenting a case when a client holds a deeply committed view which he is nonetheless unable to establish on evidential grounds and referred me to paragraphs 303 and 708 of the Code of Conduct. Although I fully accept that counsel were acting in a manner they considered to be correct and conventional: I do not agree with that view and I have not come across this convention. Rather, in my view, if a client who is funding the litigation will not give instructions to concede a point because he does not accept advice that his assertion cannot be established to the civil standard on the evidence as a whole then, unless for some professional reason counsel is unable to do so (e.g. he is aware that some evidence is false or of a refusal to put relevant material before the court), it is his duty to advance the assertion to the best of his ability on the evidence before the court, albeit that he is of the view that he has little or no chance of persuading the judge to make the finding sought by his client. The relevant assessments (e.g. of credibility and weight) are ones for the court to make.

61. Here, if their instructions had precluded the husband's counsel from abandoning the point (as they did when pressed in oral submissions) in pursuance of that duty in arguing it counsel for the husband would have had to rely on the evidential case presented by them on his behalf and thus, for example, on (a) the dispute between

the husband and the wife as to whether she had told him that she had inherited substantial sums from her father, and (b) the dispute between the wife's mother and the husband's brother concerning the conversation they had, together with points raised on the wife's expenditure. This evidence was at the centre of the presentation of this poorly defined aspect of the husband's case in the written evidence and during the oral evidence. So far as I am aware there was no professional reason why that evidence could not still have been relied on in submissions on the basis that its assessment was a matter for the court rather than counsel. The final position of the husband through counsel means that to a large extent the relevance of those two disputes falls away. However, as they both remain issues that were explored at some length and which go to credit, I comment on them elsewhere.

(2) The husband's misrepresentation and non-disclosure concerning the value and marketing of his company was a deliberate and dishonest attempt by him to get rid of the wife's claim cheaply and on a false basis, and that after the sale was known he recruited members of his family, to whom he had been very generous, to support him in making false claims about the wife's wealth or access to wealth to the same end.

62. This was a full scale attack first on the credibility and honesty of the husband and then on the members of his family who gave supporting evidence. Its relevance was as to credit on issues relating to (a) the wife's wealth, (b) other factual disputes between the parties and (c) other assertions by the husband.

63. To my mind there is a quantum leap from the first to the second stage of this assertion of dishonesty if one applies the *Lucas* direction and, in any event, because it involves three members of the husband's family in what is effectively being said to be a plan to lie to reduce the wife's award, and thus to behave in a dishonest manner to assist the husband achieve a gain.

64. The opening in March 2009 indicated that:

    i) in this and other contexts the wife was putting very considerable weight on the presentation by the husband of the value of his company at the early stages of this litigation, and

    ii) the second stage, namely such an attack on his family witnesses, had been decided upon without any steps being taken to support a positive case on (a) the wife's levels of spending and how it was funded by reference to disclosure relating to sample periods prior to separation, and (b) the source of the funds provided to the wife by her parents by reference to disclosure with the help of her mother of relevant material from the Isle of Man.

65. The obvious relevance of this material to the establishment of the serious allegations of dishonesty at the second stage, as well as to the underlying issue relating to the wife's wealth, add to my difficulties in understanding why they were not voluntarily produced or actively sought earlier. This is because a convincing platform to the assertion that the husband and his family were lying (or one that would render it unnecessary) would be to establish what her wealth, and access to wealth, was from material in the possession and control of the wife's family.

66. The second stage involves serious allegations of dishonesty against members of the husband's family (and the husband) and such findings by the court could have serious knock on effects for those family members one of whom is a bishop and one a senior officer in the RAF. They are allegations of, or equivalent to, an allegation of fraudulent conspiracy that if they were relied on as a cause of action in other civil litigation would have to be pleaded with particularity. Here the assertions do not

constitute a cause of action and they are inherent in (albeit not expressly set out in) the underlying dispute and the exchange of written evidence. But nonetheless in my view such serious allegations should, as a matter of fairness and good practice, be spelt out clearly so that the parties, and the witnesses, know the case they have to meet and disclosure issues can be considered in that light.

67. In my view, good practice and compliance with my direction required that, if they were to be pursued, they should have been included as findings sought by the wife pursuant to my direction. But although the facts set out in the list provided pursuant to my direction that the wife through her lawyers was inviting me to find included findings (a) that the husband's presentation of the value of the business in his Form E was knowingly untrue, and (b) that the wife owes her mother £2.125m and has no undisclosed assets they do not include any stepping stone findings (i) as to the husband's motives (at stages 1 and 2), or (ii) to the effect that members of his family were joining him in a dishonest presentation (at stage 2). Rather these points were put during cross examination.

68. In my judgment, if my direction had been complied with by covering the second stage allegation weaknesses in it would have been identified. This is because such compliance would have been likely to demonstrate, as I set out later, that there was little between the wife and the husband's family members concerning her presentation of her family wealth and there was considerable room for misunderstanding between the husband's brother and the wife's mother.

69. I return to this but record now that having seen and heard the witnesses I have no hesitation in rejecting the second stage of this attack.

(3) The manner in which the parties arranged their marital partnership and thus their respective roles in it which fall to be assessed on a non-discriminatory basis

70. In this context there was argument as to the relevance of issues raised by the husband.

71. The husband, through his legal team, consistently asserted that he was not alleging "conduct". To my mind, lack of definition of the facts the husband was inviting me to find in this context, and why, and thus of the way in which he was putting his case, had the result that it was unclear what aspects of the fairly wide ranging written and oral evidence (a) were directed to establishing this aspect of his argument, or (b) were accepted as being irrelevant assertions relating to "conduct".

72. Naturally this complicated the position concerning the generally expressed counter-argument that this aspect of the husband's case was an impermissible attempt to introduce "conduct".

73. Elements of the dispute were whether there were, as the wife alleged and the husband denied, two matrimonial homes and whether, as she alleged and he denied, the plan was that when her daughter had settled in boarding school in England she would move back to live in Scotland with the husband.

(4) The value of DGT Ltd at the start of the marriage and when the parties separated and the reasons for, and amount of, the increase in its value after separation. The part played by the wife in the company as per her Form E as a "fully contributing wife".

74. As it turned out there was no need for an up to date valuation of the company because it was sold. It remains a mystery why it was agreed that KPMG should be instructed to value at two historic dates and not to produce an up to date valuation.

No explanation, other than it being a mistake or oversight on behalf of the wife's solicitors, was given.

75. In this context I heard evidence from (a) Mr Y who joined DGT Ltd in March 2006, and who remained as a member of its management team after the sale of its shares, and (b) Mr C a regional director of the company's Bank who was involved with the company during the period up to the sale. In particular, Mr C was involved with the finance provided by the Bank to fund the proposed setting up of premises and facilities in Norway but which, in the events that happened, was (with the knowledge and approval of the Bank) to a large extent utilised to fund a considerable increase - in the company's stock of cylinders which enabled it to take good advantage of the favourable trading conditions in and from Aberdeen.

76. Both of these witnesses were plainly doing their best to give the court a full and true account of the events that they took part in, and of their views. Their questioning involved in the main them being taken through documents.

77. After final submissions I remain puzzled why so long was spent with these witnesses, and I am quite satisfied that if my direction in March had been complied with a great deal of their evidence would have been unnecessary because it was directed to facts that were agreed and were essentially indisputable.

78. Mr Y confirmed, as the documents indicated, that the husband had been the driving force behind the company and it was his decisions, expertise, experience and hard work that (a) lay at the heart of the development and success of the company, and (b) formed the platform from which the high profits in the period leading up to and following its sale were made. That is not to say that others did not contribute. But, for example, the important decision to invest in increasing the stock of cylinders was one for the husband to take and one which he took.

79. It is plain that the business was the husband's brain child, and that its success and position in the market was based on his early working life and the knowledge and experience he gained at that stage and then on his hard work, expertise and experience over the years.

80. The creation and development of the business plainly had nothing to do with the wife before the marriage or after the separation of the parties. During the marriage and prior to separation the husband did this work against the background of the marriage and the domestic, emotional and other support this provided. But this support did not include any active participation or support in the business that had a material effect on its development and growth. In reaching this view I have not forgotten that she naturally had a number of discussions with him about the business and some problems that arose, particularly in connection with employment issues, and helped in drafting some documents. But none of these matters had any significant impact on the development of the business and to the extent that they did it was the husband who took the relevant decisions.

81. So in my view counsel for the wife were correct not to place any weight on arguments that by reason of her part in, or by her discussions with, or by her support of the husband in the decisions that were made in respect of the company, the wife had directly contributed to the building of his business and value of the available assets. This was a proper and inevitable acceptance that her assertion in her Form E, and the parts of her written evidence directed to it, that she was a "fully contributing wife" in this sense was flawed. Her case on this assertion was based on her domestic contribution within their lifestyle, and the point that there should be no discrimination between the contributions of husband and wife.

82. It follows that the company did not become in any sense a joint business venture and it is plain that it was naturally and inevitably regarded by both of them as the husband's company and the only source from which he provided the funds that he contributed to providing and maintaining the lifestyle enjoyed by the parties as a married couple. So it was regarded and treated by them both as the source of the income and capital of the "money maker" within their marriage partnership. And thus in general terms they regarded it as his asset and the husband as the person who made the decisions relating to it and his shares in it.

83. The jointly instructed accountant (Mr A, from KPMG) and an accountant instructed by the wife (Mr G) were also called. They had reported and met before the hearing set for March 2009. The areas of dispute between them were narrow.

84. Importantly they agreed on the methodology to be adopted. They used two variations of an earnings basis of valuation: PBT (profit before tax) and EBITDA (earnings before interest, tax, depreciation and amortisation). In the former a PE multiple is applied to the PBT figure less tax and, in the latter, an EBITDA multiple is applied to the figure so calculated. I pause to comment that EBIT (earnings before interest and tax) is another variant that was used by some of the prospective purchasers in 2007.

85. Mr G considered that the PE multiple (used in the PBT approach), and the EBITDA multiples used by Mr A, were at the lower end of the appropriate range and he had used higher multiples, which Mr A considered were at the upper end of that range. So they recorded that they were in broad agreement on those multiples, but as is necessarily the case when applied to a significant maintainable profit assessed on a PBT basis, or an EBITDA basis, variation of the multiple within such a range produces significant differences in result.

86. The results using (a) Mr A's multiples, and then (b) Mr G's multiples, to Mr G's maintainable profit figure produce a range of value between (a) £11.18m and £13m net (after deducting capital gains tax (at 10%) and selling costs. These figures include an add back in respect of a Zonda car of £170,000, which was transferred to the husband. Mr A's valuation of £9.87m did not deduct capital gains tax and selling costs. The difference (over £1.4m) between his net figure after those deductions and the £11.18m arises from their different approach to the maintainable profit figure.

87. The difference in their view on the level of maintainable profit/earnings reflected two points (a) Mr G used the adjusted results to 31 January 2006 only (100% weighting to that year) whereas Mr A used a weighted average on the adjusted results to 31 January 2005 (25%) and 2006 (75%), and (b) a difference in the adjustments for 2006.

88. *Weighting.* For reasons that were not explained the accountants had not been updated with information appearing in the bundles and, in particular, with the existence of management accounts with profit forecasts in December 2005 / January 2006. Also a finding sought by the wife that they were both wrong in their valuation as at 31 January 2006, and a reason for it, namely that forecasted as well as actual figures should be used to assess the maintainable profit figure which is multiplied in the valuation, were not raised with the accountants before they gave evidence. In my view both omissions reflect bad practice and give rise to the risks that it would be unfair to put some questions to the experts, and that they would lead to a result in which the court has no re-worked figures if criticisms are accepted. Here, however

the points raised for the first time in the witness box were easily and convincingly dealt with by the two accountants.

89. It is plain that the papers prepared for the trial (and available in March 2009) showed that profit forecasts were in existence in December 2005. No oral evidence was needed to establish this, or that such forecasts were relevant to the weighting given to the adjusted profits to 31 January 2006 in the valuation. But neither accountant knew of the existence of the forecasts, and the dispute between them had been whether this weighting should be 100% or 75%. When he was shown these forecasts Mr A accepted that the weighting to the profits to 31 January 2006 should be 100% and therefore this dispute, as was obviously predictable, evaporated. The husband's counsel accepted this before Mr G gave his evidence.

90. Mr A had been told incorrectly that there were no such management accounts and profit forecasts. This is therefore another factor in the wife's case that the husband set out to hide the process for the sale of the company that was in being in 2006 and 2007, and its true value.

91. I record that although I accept Mr A's points that more weight is given to actual profits and that valuations at a past date should not be done with the benefit of hindsight, in my view he was wrong to proceed on the basis that, as he had been told that there were no existing profit forecasts, such forecasts would not have been available and should not be factored into his valuation. This is because on the hypothetical basis of his valuation (i.e. willing seller and willing buyer) it is highly likely, if not inevitable, that such forecasts would have been produced. I accept that an assessment of what they would have contained, if they had not existed, has some problems, but that does not mean that a view should not be taken as to what they would have contained.

92. The wife's leading counsel embarked on a series of questions of Mr A directed to inviting me to find that the 2006 profits as forecast (or as they turned out to be) should be incorporated into the weighted profit figure in the valuation as at 31 January 2006. The purpose of this was to seek to establish the finding sought by the wife that both accountants were wrong in their valuation as at 31 January 2006 (albeit that the wife's primary position was that it was unnecessary to decide what that value was). To the non-accountant this point may have potential. But, as it related to the methodology used by both accountants (and thus to something that was well within their expertise as the expert witnesses instructed by the parties), in my view, as a matter of good practice relating to expert evidence and common sense, it should have been raised with the accountants, together with any published material from an appropriate source which was to be used to support it, before the hearing. This was not done. When the point was put to Mr A, unsurprisingly he did not agree with it. Counsel did not put to him that Mr G would be agreeing with it, or what Mr G would be saying about it. This is a clear indication that the questioning was pursued either on the basis that it was not known what Mr G would say, or in the knowledge that he did not agree with the point being made. Also no published material indicating that the suggested and different approach / methodology would be appropriate was put to Mr A or Mr G. When the matter was raised with Mr G, he too did not agree.

93. The point was easily and clearly dealt with by both of the accountants on the basis that in such valuations forecasts are not generally used to determine the weighting to be given to past actual profits but are covered, and were covered in this case, by the multiple applied to that profit. Mr G added, and I accept, that the multiple they had both used was a high one. It follows that both experts agreed that the point was a

bad one and counsel did not point to any contrary expert view in published material or elsewhere. Accordingly I find that the point has no substance.

94. A different, albeit connected point, that was not investigated with the accountants relates to the quantification of the impact of the factors underlying the increase in value of the company between the separation of the parties and sale. Accordingly there is no accountancy evidence specifically directed to this issue in the case, namely how that increase in value should be shared between the parties. The factors include:

i) the general position concerning perceptions relating to the prospects of the oil and gas industry,

ii) the management decisions,

iii) the position of the company in the market as created over the years and its ability to take advantage of the market conditions and management decisions during 2006 and early 2007, and

iv) the views of an actual purchaser on the prospects of the company under its control.

95. Point (iv) reflects a point made by Mr G in his oral evidence that a valuation is a hypothetical exercise and a point made by Mr A in his report dated 18 May 2007 (paragraph 3.2.3) where he says that in addition a purchaser would take account of the prospects of the business and cost synergies which they may make following acquisition and that for the purposes of a hypothetical valuation, where the buyer is hypothetical, no such acquisition synergies are assumed.

96. I suspect that the accountants would have indicated that it would be very difficult to quantify the impact of points (i) to (iv) with precision or by reference to a formula or set methodology.

97. *Adjustments.* On the valuation as at 31 January 2006 that left the difference in approach to adjustments to the 2006 earnings. Here Mr G had taken the figures in the presentation by S and Co to potential purchasers (and in the events that happened the actual purchaser) and, as a result, added back an additional £94,000 (£66,000 net) whereas Mr A had exercised his own judgment. At the time he made his first valuation he was unaware of the S and Co presentation, or the process being undertaken to market the company.

98. I see force in Mr G's approach because, as he said, inaccuracy in the S and Co presentation would have been unprofessional and counter productive. But it seems to me that the view taken by Mr A could also have been one reached by S and Co.

99. With the change to the weighting accepted by Mr A his valuation as at 31 January 2006 would (if my calculation is correct) be approximately £10.3m net of selling costs and capital gains tax (including an add back for the Zonda car).

100. I entirely agree with, and endorse, the point added by Mr G that it cannot be said with any certainty that S and Co would have found a buyer, whether a private equity investor or otherwise, in January 2006 (or an earlier date) at the valuation he, or Mr A, puts on the company at those dates, or at a higher or lower figure. As he commented, the position is that although, of course, accountants do the best they can to put an accurate value on a company applying the hypothesis of a willing seller and buyer (and like to cross check against actual offers and sales) the hypothetical nature

of the exercise they are carrying out, and its methodology (which leads to wide differences in result if components of the figures and multiples used are varied within a permissible range), mean that there is uncertainty in the valuation given and often a wide range of reasonable figures.

101. *The valuation as at 3 June 1996.* It was asserted that Mr A tried to press Mr G to agree his figure for the valuation at 3 June 1996. Mr G readily agreed that this was not the case. Rather he confirmed that he agreed the approach and methodology but had not carried out his own valuation. So it is a mystery where that allegation, which at least arguably would amount to an allegation of unprofessional conduct by an expert witness, which has the consequence that its basis should be checked carefully before it is put to the witness, came from and why it was advanced.

102. The relevance of the purchase by the husband of the balance of 35% of the shares held by the investor who had initially provided finance was put by leading counsel for the wife to Mr A and Mr G Unsurprisingly, they both responded that it depended on the circumstances relating to that sale of that minority shareholding. Mr A was asked why he had not investigated these circumstances, but Mr G was not (perhaps because he had not done a valuation at the earlier date).

103. Neither of them had those circumstances put to them before they gave, or during, their evidence.

104. This was therefore a superficial, and to my mind inappropriate, approach to attacking Mr A's figure for the value of the company as at 3 June 1996, which together with the husband, the wife had asked him to give.

105. The circumstances as explained by the husband, and not challenged in evidence, were that originally this investor had 65% on terms that on repayment of the finance he introduced this would reduce to 35%. This happened and the investor who had got back his investment and more wanted to move on. He asked the husband what he could afford to pay for his remaining 35% and accepted his answer and offer.

106. In my judgment:

i) when those circumstances are taken into account the purchase of the 35% shareholding by the husband (alone and together with the offers made for the company over the years) do not cast any doubt on Mr A's figure as at 3 June 1996, and

ii) the assertion made in closing submissions that because of his general unreliability the husband's account should not be accepted is not one that can properly be accepted by the court.

As to point (ii) in my view this is far too generalised an approach. As a minimum the husband should have been challenged on this account and he was not. Later the point was pursued with the accountants and therefore cannot be said to be something that became an issue after the husband gave his evidence. If, as it appears it was, this issue was identified before the trial began documents and information relating to it should have been sought.

107. Further, and in any event, on the evidence before me I accept the husband's account of his purchase of the 35% balance from this investor.

108. Mr G pointed out that taper relief had not been taken into account in Mr A's net valuation and that, if it was, his net value after costs would be approximately £1,986,560.

109. *The valuations as at the date of sale (May 2007) and the sale price.* Using their methodology the accountants agreed that there was a significant increase in value of the company after the separation of the parties. Naturally they agree that what it was sold for represented its value as between a willing seller and buyer.

110. It was asserted on behalf of the wife that Mr A's explanation of the increase should be looked at with caution because he could be said to be protecting his earlier reasoning and conclusion. Whatever the general force of that point may be, it evaporates when the following points from the reports of the two accountants are taken into account, namely:

    i) the private equity firms that made offers, and the firm that bought the shares, based their calculations of the price on approaches and methodology which equated to the approach and methodology used by Mr A and Mr G, and

    ii) there is effective common ground between Mr A and Mr G as to the reasons for the increase from the valuations as at 31 January 2006 applying the methodologies used by them on the one hand and the purchaser (and others who made bids) on the other.

111. As I have mentioned, the accountants used two earnings bases (PBT and EBITDA) and blended the result. The purchaser based its offer on EBIT for the most recent financial year of the company and an assumption as to what it would achieve in the current financial year. The impact of this view and how it was reflected in weighting and multiples was not investigated, and would be difficult to investigate. Other potential purchasers based their assessments on EDITDA alone. This shows that:

    i) in comparing the valuation and the sale price there is in large measure a comparison between like and like,

    ii) there are a number of different methodologies and in the multiple used or otherwise they look to and assess the future having regard to earnings achieved, and

    iii) in an actual sale and/or a personal assessment of what a company is worth, and when it should be marketed to achieve a good price, there are subjective value judgments for both vendor and purchaser as to amongst other things future prospects.

112. The volatility and uncertainty in valuations based on the chosen methodology to reflect maintainable earnings is demonstrated by the following:

    i) using the same overarching valuation approach Mr A and Mr G reached effectively the same figure as at May 2007 albeit that they based this on different conclusions on the constituent parts of the calculation (i.e. the maintainable profits and the multiples). Their valuations were £35.4 and £35.5m. If Mr A had used the adjustments used by S and Co in marketing the company (as Mr G did) to the earnings for the year to 31 January 2007 to assess his maintainable profit / earnings, his figure would have been £37.2m (but it was not investigated whether he would then have used the same multiples), and

ii) the purchaser offered £34m plus or minus an adjustment based on the net asset position as at completion.

113. The use of equivalent methodologies by the valuers and the purchaser shows that the essential reason for the increase between the valuation as at 31 January 2006 and the valuations and sale price as at May 2007 was the profit made for the year to 31 January 2007.

114. This and the essential and immediate cause of the increase in profit that year are demonstrated by the documents.

115. The essential and immediate cause of the increase in profits for the year to 31 January 2007 was the decision to invest the moneys raised to purchase plants in Norway (which in the events that happened were rented) in assets (primarily cylinders) to service the market. This led to a significant increase in the sales of the company (excluding Norway) because of its ability to service market demands. In the year to 31 January 2007 the company increased its customer base by about 30 companies which was a reflection of the growth in the oil and gas service sector of the market and the company's investment that enabled it to take advantage of that growth.

116. The key factors for the increase were therefore the market, that investment decision and the ability of the company on that basis to increase its earnings. It is difficult to see how this would not have become common ground if my direction had been complied with.

117. There were of course some other factors taken into account in assessing the price offered and accepted for the company in May 2007. These included the view taken of the expansion (through leasing rather than as originally planned purchase) into Norway. This led to the losses incurred in respect of the business based in Norway for the year to 31 January 2007 being discounted in the assessment of the profit to 31 January 2007 that was included in the calculations. This indicates a view that these losses, or losses in Norway would not recur.

118. Other factors were a more general assessment of the prospects of the diversification into Norway, the growth of the interest of private equity houses in the acquisition of companies in the sector and the good job done by S and Co in marketing the company and achieving a price £9m higher than the highest bid from a trade buyer.

119. Mr G criticised Mr A's analysis of the reasons for the differences between the valuations as at 31 January 2006 and the sale price (and valuations) as at May 2007 on the basis that he had dissected component parts of the valuation, and valuation is not an exact science. I agree with that general point on the nature of valuations but in considering and comparing the methodologies it seems to me that Mr A's approach has a place, and then there is a need to stand back to identify the main reasons for the differences between:

i) earlier (3 June 1996 and 31 January 2006) and later (May 2007) valuations applying the relevant methodologies, and

ii) those earlier and later valuations and the actual result in the market place in May 2007 having regard to the approach and methodology used by the purchaser to calculate the price that was accepted and the views of the seller as to why this was a price that should be accepted.

120. When that is done the written evidence indicated that Mr G's assertion in paragraph 5.11 of his report reflected effective common ground between the accountants and Mr Y where he says:

> " The price, and the increase in value between 31 January 2006 and 25th May 2007 was essentially attributable to:
>
> (i) the profit for FY 2007 achieved by the management and staff, plus an expectation of rising profits in the future;
>
> (ii) the job done by S and Co - which achieved £9 million more than the highest bid from a trade buyer "

121. Mr Y has had the advantage of discussions with the purchasers before and after the sale, and I accept his evidence and find that:

i) the expansion into Norway was, and was likely to have been regarded by the purchasers as an attractive feature of the company because it added diversity, and spread risk albeit within the same overall market, because of the approach in Norway to source material in Norway and because the expansion had a real potential for profit. But I repeat, and as Mr Y confirmed, that

ii) as is apparent on the figures used by the purchasers, and S and Co, the key to the increased profits, and thus the increase in value in their calculations of value / purchase price, was primarily based on (a) the upturn in the market, (b) optimistic views as to the future of the market and (c) the ability of DGT Ltd to take advantage of that upturn, because it had given itself the capacity to do so by acquiring many more cylinders and by establishing its place in the market over many years.

122. Also Mr Y, in answers to questions I put to him told me and I accept that:

i) in 2007, when he was involved in discussions relating to the sale of the company, oil was hitting unprecedented levels and in fact was actually forecast to go beyond $200 a barrel, there was no cliff edge in sight so the outlook for the industry broadly looked very bright and no matter which activity happens in the oil and gas industry somewhere along the line is a cylinder of gas. So increase in business in the industry generally means an increase in the cylinders of gas that are needed and as the company had made an investment in cylinders it was well placed to take advantage of the bullish market, and

ii) the bigger companies supplying gas were effectively catalogue gas companies, whereas over the years the company was much more focused on devising bespoke solutions for clients on a 24/7 basis and the unique selling points of the company rested firmly on the entrepreneurial vision and decisions made by the husband.

123. The husband pointed out and I accept that a further factor was the creation of a management team, importantly including Mr Y, who could take the business forward after sale and the departure of the husband.

124. Mr Y therefore confirmed that, as a proper analysis of the written evidence and reports demonstrates, the expansion, as a new venture, into Norway, by setting up two facilities there was not a significant factor in the increase in the value of the

company between the times of earlier offers and first, the separation of the parties and then the date of sale, albeit that this expansion was regarded as a plus factor.

125. In my view the above analysis and conclusions indicates that if, by following my direction or otherwise, a constructive and commercial approach had been taken to the definition and exchange of the facts and issues relating to the company that the parties respectively sought to establish, significant and important common ground should have been identified, with the result that the length of the hearing would have been significantly reduced.

126. I pause to add that, in my view correctly, it was not suggested that the granting of the option to Mr Y to acquire shares was anything other than an arm's length commercial transaction and a sensible management decision. In the events that happened it produced significant financial reward for Mr Y through the sale of the shares. But his appointment was to add strength to the management and his participation both before and after the sale was a plus factor in achieving the sale.

Some initial remarks on the first two headline issues of fact

127. It is clear from the chronology that in advancing the point that the husband had deliberately sought to hide the process that was being carried out with a view to selling the company in 2006 and 2007 the wife was, at least, in a very strong position if she did not have an unanswerable case.

128. In my judgment, when considering these two headline issues it should be remembered that:

i) From the outset the husband's stance was that the wife was wealthy in her own right or had access to family wealth.

ii) The wife was clearly aware that the offer of £9.3m had been made for the shares in the company in 2005. This is in line with her evidence concerning what she knew about the company and is confirmed by the position she adopted through counsel at the first appointment. What the wife did not know, and the husband did, was that the offers made in the process underway at the end of 2006 were very considerably higher.

iii) No assertion was made, or could have been made, that the wife ever thought that the value of £3.2 million (Shareholders' Funds) put in the husband's Form E represented the actual value of the company.

iv) No competent legal adviser of the wife (or the husband) would have proceeded on the basis of the value and explanation given by the husband in his Form E. There was no evidence or explanation as to why the valuation said to be based on shareholders' funds was included by the husband's solicitors in his Form E, which they completed and served on instructions.

v) It was agreed that there should be a valuation (albeit surprisingly not including a current one) before the date set for the FDR.

vi) No assertion was made that the husband sought to delay the sale.

vii) When the sale took place the wife and her advisers were told of this promptly.

Overview of the evidence of the parties

129. In my judgment neither of them were impressive witnesses and neither were helped in establishing their credibility by the product of the litigation and tactical decisions that were made in the presentation of their cases.

130. Both were clearly enmeshed in the ill feeling and dispute that now exists between them. Neither was prepared readily to accept an apparently obvious point against them and both sought doggedly to uphold and defend the positions they had adopted. They were entrenched in hostility that built up between them in the period leading up to their separation and which has been fuelled by the exchanges since.

131. I am therefore not able to consider the major factual disputes on the basis of a conclusion that generally either of them was doing his or her best to give me a full and accurate account of what they were describing and their lives together.

132. Although I acknowledge that such advice may well have been given and rejected, it was not apparent through the presentation of their cases that either side has looked at the issues by standing back from the hostility and emotion and concentrating on the essential issues in this litigation, which is about financial provision and therefore money. Of course I accept and acknowledge that (a) the role of a legal team is to advance their client's case and that this covers attacks on the credibility of the other side, and (b) their clients may reject their advice. But against the background of the overriding objective, and generally, it seems to me that when sadly emotions are running high advisers should take particular care (a) to stand back from that hostility, and (b) to give advice directed towards achieving the result that the focus is on the relevant issues and that attacks on the other side are appropriately supported by the evidence.

The husband's initial valuation of his company in his Form E and his failure to disclose that a process was in progress with a view to selling his shares in the company

133. The husband had no option but to admit, and did admit, that he did not disclose the process relating to the sale and the offers made within it until after the company was sold.

134. He apologised for this, and for the valuation he put in his Form E, which he said was based on advice he received from his accountant. He mentioned several times that he had told his solicitors in early April of what he thought was the first bona fide offer but he made no mention of seeking or receiving advice from his solicitors in completing his Form E.

135. In final submissions on his behalf his approach, in particular to the answers he gave to questionnaire and the adoption of them in answering questions raised by Mr A, was described as "cringe making" because his answers were obviously untrue. I add that his attempts to justify himself in his written and oral evidence do him no credit.

136. In my judgment it is clear that he made deliberate decisions:

i) to keep the fact that a process was under way with a view to selling the company, and that high offers had been received pursuant to it, from the wife and his solicitors knowing that the wife would not think that the company was worth anything approaching the offers then being made, and

ii) to seek to protect his position, if and when a sale took place or a valuation was made, by the description added to the figure in his Form E.

137. In my judgment in doing this, as was inevitably accepted on his behalf in submissions, he gave answers that he knew were untrue and misleading whatever he may have been told by an accountant relating to the completion of his Form E. I am also not satisfied that the husband gave a full and honest account of that discussion.

138. I agree with the submissions made on behalf of the wife that until the sale of the company the husband knowingly and dishonestly adopted a course of hiding the sale process that was being carried out from the wife. This is clear from the chronology and, for example, his Form E and his answers to, and the information he volunteered to, Mr A.

139. This approach is confirmed by the final submissions made on his behalf which recorded that after he had told his solicitor in early April 2007 of the recent offer which he said was the first offer that he considered to be a bona fide one, he was still reluctant to disclose it before the valuation as at January 2006 was given. I do not remember this evidence but accept that it was given in re-examination after he had received advice (with the consent of the wife) on legal professional privilege. Earlier he had made reference to advice being sought from counsel about disclosure of the April offer. It is not easy to see why this was necessary but does indicate that he was unwilling for the information to be disclosed.

140. He was given many opportunities to explain why he had taken this approach. His explanations did not include one that he was of the view that disclosure might impede or harm the sale process (- which at least means that he did not try to invent this as a reason). Rather he said that he thought it might complicate the ancillary relief proceedings.

141. This explanation relates his motive directly to the ancillary relief claim and in my judgment the conclusion urged on behalf of the wife is inescapable that he was concerned to keep the value of the company as at January 2006 as low as possible to found arguments that that limited the amount of the wife's claim. Whether or not this was based on a view of Scottish law does not matter.

142. His apology and related assertions of regret and stupidity lost much of their force, and his general credibility was damaged, by attempts to justify what he had done in his evidence by reference, for example, to (a) advice from his accountant, (b) his action in telling his solicitor in early April 2007 of a bona fide offer, (c) his disclosure when the sale was completed, (d) the dates at which the jointly instructed accountant was asked to value the company (albeit that these dates were agreed some time after the Form E) and (e) the timescale referred to in the questions asked by that accountant and the wife.

143. These justifications were unconvincing and it seemed to me they were in part based on attempts at self justification rather than a genuine acceptance of his lack of openness and honesty in completing the Form E and answering subsequent questions. They were of course also advanced in response to the attack being made on his honesty and in that respect they were counter productive.

144. So, as it seems to me was inevitable, this attack on the husband's honesty is established.

The husband's motives relating to and the wife's reaction to the non disclosure of the sale process

145. As soon as the sale was disclosed the wife and her advisers were aware that they had a very powerful, if not unanswerable, point on misrepresentation and non-disclosure. In my judgment they have sought to rely too heavily on it.

146. An application for maintenance pending suit also immediately followed.

147. In connection with the ascertainment of the husband's wealth the points against him on non disclosure and misrepresentation are irrelevant because the value of his major asset is established by the sale. Their relevance relates to credibility in the context of the disputes concerning the wife's wealth and other matters in dispute. The dispute relating to the wife's wealth gives rise to counter allegations of non disclosure and misrepresentation and therefore issues as to her credibility.

148. As I have mentioned, the wife's assertion is that having been foiled in plan A (non disclosure) to reduce her award the husband then embarked on plan B with the dishonest help of his family to reduce the award to the wife by falsely asserting that she is independently wealthy.

149. In my view there are three formidable obstacles to proving plan B. Aspects of these existed when this attack was launched by the wife and do not depend on my assessment of the witnesses. As I have mentioned, to my mind these obstacles increase if, as was the case, the wife decided not to provide and seek (from her mother and others) supporting details of the funding she received from the Isle of Man both before and after the separation of the parties.

150. Firstly in respect of plan A, the undervaluing of the company by reference to "shareholders' funds" and probably more importantly the hiding of the sale process and the offers made in it:

i) as a plan to settle the case on a false and low basis was one that was doomed to failure unless the case was settled before the sale took place, and even then it was unlikely that the sale would not have come to the attention of the wife and lead to proceedings,

ii) is not supported by any evidence that the husband sought to delay the sale, and indeed the evidence strongly indicates that he did not do this, and

iii) did not deceive the wife, or cause her to think that the company had a value of the order of £3.2 million (although it kept from her information that it was, or might be, worth much more than the offer she knew about and the figure advanced by her counsel on the first appointment (i.e. £10m) which provided a clear indication to the wife's view as to the value of the company).

151. Timing is important. The husband's assertion that the parties had agreed that they would not make financial claims against each other was denied in September 2006 and thus before the non disclosure relied on. Also (a) by the time of his Form E the wife's Form E had been served by which in broad terms she is asserting that she does not have family wealth and is making it clear that she is seeking an award, and (b) his Form E was served before the first appointment and thus before the surprising terms in which the jointly instructed accountant was instructed were agreed.

152. As things turned out, the evidence shows that the husband was reluctant to give full and frank disclosure until after the valuation as at 31 January 2006 was given by Mr

A, but it is not clear why this would have been behind his decision to give the value he did in his Form E, because then he would not have known that a current valuation would not be sought. A possibility suggested was that a valuation at the date of separation accords with Scottish law, but this was not pursued.

153. At the time he swore his Form E the husband's stance was that the wife was independently wealthy and that because of the balance between his and her wealth he should not have to pay her anything (as he had asserted had been agreed, but did not pursue in his Form E or later) or not very much. In my judgment at least part of his thinking must have been based on this.

154. I agree that dishonest people often make stupid plans and are thus found out. But the husband is not a stupid man and in my judgment he had not thought through his reasons for hiding the sale process and thus, for example, whether his aim was:

i) to achieve a settlement without disclosing the sale process, and/or

ii) to protect his position if no sale took place, and/or

iii) to achieve a settlement without disclosing any sale that took place before or after it was agreed or implemented.

155. Rather, in my judgment when embarking on the course of action of hiding the sale process he was driven by emotion and gut reaction because he did not want to, and did not think it would be right for him to, make any payment to the wife based on the offers then being made for the company that represented the product of his working lifetime and greatly exceeded anything he had been offered or had expected before.

156. This conclusion means that, in my judgment, he did not think through the chances that his approach would achieve that result. But the point that if he had done so he would have realised that it was unlikely to succeed, particularly if a sale took place, is a pointer to the conclusion that he did not embark on a considered and dishonest plan.

157. That does not mean that he did not behave reprehensibly and dishonestly and with the motive of restricting any award to the wife, but such motivation is different from a thought out plan such as one in which assets are moved and hidden with a long term aim of keeping them from the knowledge of a wife.

158. In my judgment, the husband did not plan to keep the sale if it took place from the wife and his thinking, as far as it went, was to avoid valuations and an award to the wife on the basis of a sale process and high offers that came to nothing having regard to his view based on experience (I acknowledge without an equivalent sale process having been mounted) that such offers may well not result in a sale at such a price.

159. As to that I accept his evidence that he was keen to keep his eye on the ball of the company's day to day business to ensure that if a sale did not go through it would prosper and to keep it attractive to purchasers and that he left the detail of the day to day sale process to others. Mr Y confirmed that this is what happened but both he and the husband accepted, as was clear in the documents, that the husband was kept fully informed as to the progress of the sale process.

160. This conclusion goes some way towards, but not as far as the wife's contention of there being a dishonest plan A, to found the alleged plan B.

161. Secondly, there is considerable overlap and common ground between (a) the evidence of the husband's family concerning the wife's family wealth, which she asserts is untrue and prompted by a request from the husband and his generosity, and (b) the impression the wife accepts that she gave and fostered concerning this wealth.

162. Indeed in final submissions counsel for the wife correctly asserted and recognised that it would be dangerous to try and hang on that evidence of the husband's family the proposition that the wife has significant undisclosed additional assets. I agree. But this submission recognises the considerable overlap between that evidence and that of the wife (and her mother) which was apparent from a reading of the relevant statements. To my mind this makes it difficult to understand why the wife launched and persisted in her assertion that there was a plan B, namely her assertion that the evidence of the husband's family was untrue and prompted by a request from the husband and his generosity, and thus a full scale attack on their honesty. It seems to me that the answer must be that this attack was based on the hostility and mistrust between the parties rather than a dispassionate analysis of the evidence.

163. It is clear that both the husband and the wife took pleasure in expenditure on and the use of expensive cars, watches and other displays of wealth through personal items for themselves as well as owning a castle in Scotland, houses in Buckinghamshire and taking expensive holidays. They both enjoyed an approach to life, and a lifestyle, that through their houses, cars, clothes, jewellery, parties, and holidays entailed considerable expenditure on personal luxuries and indicated to third parties that they were wealthy.

164. The wife accepted and asserted that she had tried to make it clear to members of the husband's family, who she acknowledged would naturally be concerned at the short period between their meeting and marrying, that she was not marrying him for his money and was not a gold digger. She accepted and asserted that her clear message to the husband and his family was that she was a woman of independent family wealth. This was demonstrated by the two houses she bought with family money and her lifestyle.

165. It is clear that her message by words and actions to the husband's family was that she was a high maintenance wife who had never worked (and never would work) for a living and who had, and enjoyed, independent family wealth. It is also clear that this message was correct. For example, it was not disputed that her mother told the husband that her daughter was a high maintenance wife. It seemed to me from their evidence that both the wife and her mother took pleasure and some pride in this approach to life and in promoting this image.

166. So the allegation that members of the husband's family had dishonestly invented their evidence has the difficulty that it accords with the image presented by the wife. This image and message conveyed the impression that the wife had, or had access to, wealth well in excess of the capital she asserts she held at the date of marriage (cash £157,000, on her case her legacy of £150,000, the London flat sold in 1999 for £167,444 net. and the first house in Buckinghamshire - less the speciality loan as it then stood).

167. The only evidence from members of the husband's family that the wife had significant funds of her own inherited from her father, rather than access to family money on an undefined basis, was a conversation between his brother and her mother.

168. The relevance of this diminished when, very late in the day, the husband accepted through counsel that the only issue relating to the significant sums used to buy the wife's houses (and a car) was whether they were provided by way of loan or gift. But it retains a relevance, as do assertions by the husband as to what he was told by the wife relating to her, and her family's wealth, on credibility issues relating to other matters.

169. Thirdly in respect of the disputes between the wife on the one side and the husband's first wife and son on the other as to what the wife had said and done having seen and heard them all give evidence I unhesitatingly prefer the evidence of the husband's first wife and son.

Funding provided by her parents to the wife apart from the moneys provided in respect of the purchase of her houses and a car described as the speciality loan (other than those provided by the husband)

170. In reaching my conclusions on issues relating to this funding (and the alleged speciality loan) I have regularly reminded myself of the point urged on behalf of the wife, which I accept, that her mother did not have a duty to provide full and frank disclosure and much of the supporting material for the wife's case was in the possession and power of her mother.

171. Also I have taken into account (a) that the aspects of the presentation of the wife's case concerning the lack of disclosure by making requests of her mother, in respect of credit cards and the redaction of documents, which I agree with the husband excite and add to suspicion, must in part have been the product of advice, and in any event (b) that suspicion does not found findings of fact.

172. But giving due weight to those points in my judgment, the evidence of the wife and her mother on these matters was generally unconvincing, in parts was evasive and in some respects was untrue.

173. The wife and her mother are plainly intelligent women and both clearly had a message which they were determined to give to, and did give to, the court. It was also plain that they had discussed their evidence.

174. The wife had kept and produced full records in respect of a number of matters relating to her expenditure. Indeed she said in her first affidavit that:

> "My expenditure during our marriage was unfettered. I kept all of my receipts and therefore whilst not having direct access to the bank or credit card statements (as they have always gone directly to [the husband]) I have been able to provide an accurate figure for the level of [the husband's] support"

Also from records she kept she was able to make assertions relating to the number of her visits to Scotland. I agree with the submission made on behalf of the husband that, in line with her assertions, the wife kept a remarkable amount of records relating to her funding by the husband. She also demonstrated an ability to supplement her case on this from her memory.

175. Her mother demonstrated equivalent abilities in respect of past events and expenditure. She produced a note she had made on the back of an envelope in September 2004 of a telephone conversation she had had with the husband in which he was apologising for his behaviour towards the wife. She did this, and presumably

had kept the note in case she wanted to make and support a point concerning problems caused by the husband in the marriage.

176. Although the wife had kept and produced some receipts and calculations relating to her expenditure from the funding provided by her parents, and some material relating to this was provided by her mother, when they were dealing with the funding the wife had received from her parents equivalent support from documents and memory was lacking. I naturally accept that family arrangements can often be informal but this includes these between husband and wife and I agree with the husband that the contrast between the approaches of the wife and her mother to, and their evidence on matters concerning (a) funding provided by the husband, and his behaviour, and (b) the arrangements made between the wife and her parents, is significant and raises doubts about the latter, albeit that I acknowledge that in part it may have flowed from their wish to keep their arrangements private.

177. *The round figure payments made between 27 August 1999 and 9 March 2006. totalling £148,500.* I do not accept the evidence of the wife and her mother that before they were asked for, and made, they agreed that the payments were on account of, and in satisfaction (with some other expenditure) of, what was due to the wife in respect of the £150,000 legacy (and interest thereon). In my judgment this was an invention by the wife and her mother to seek to explain these payments (which exceeded the £5,000 limit set by the District Judge as to her particularisation of the gifts from her mother referred to in her Form E).

178. At the heart of my reasons for this conclusion are the points that neither the wife nor her mother:

    i) kept any records of the payments,

    ii) provided a sensible explanation for the alleged arrangement both when it was said to have been made (i.e. shortly before the first alleged payment in August 1999, the next being in May 2001) and whilst the payments continued (i.e. up to March 2006) against the background of (a) the ready availability of funds to pay the legacy in full, (b) the treatment of the legacy and the alleged loan by her parents on the wife's divorce from her first husband, (c) the approach asserted by the wife's mother in connection with the legacy in her administration of her husband's estate and (d) why the arrangements continued after, and were therefore kept separate from, the payment of £1m by the wife to her mother in 2004 (which would have provided an obvious time for both of them to finalise the position relating to sums outstanding under the legacy), or

    iii) was able to give any examples of the reasons for, or the conversations relating to the alleged irregular requests the wife said she had made for payments as effective drawdowns on what the wife was due in respect of her legacy, albeit that I accept that this was not pursued with them in detail and similar conversations may well have taken place in respect of a series of gifts unrelated to the legacy.

179. This lack of supporting material and detailed and logical explanation is in contrast to the approach demonstrated by other parts of their evidence as to the keeping of records, and, for example, the careful steps the wife took to ensue that the capitalised sum from her first husband for their daughter was used to finance expenditure on the daughter by making regular withdrawals from it in cash to ensure that such moneys did not become repayable to her first husband should their daughter die. I do not criticise her doing this but it is an example of her exercising care in her approach to her financial affairs, which is in marked contrast to her approach relating to the

alleged payment of her legacy albeit that in both cases she referred to her bank account as a record.

180. Further, as to the alleged payment of the legacy and interest there was no explanation given or calculation provided of how and when the balance between the sum of £148,500 and £150,000 plus interest was arrived at when the payments stopped in March 2006, which was after the separation and close to the time that the wife was not invited to the christening of a grandchild of the husband which caused her some upset. This inaccurate and generalised approach to this balance is out of character and does not fit with the assertion that the wife's mother was performing her duty as the administrator of her first husband's estate.

181. Also, I agree with the husband that if the arrangement alleged relating to the payment of the legacy had been reached it would have been natural, and in line with what the wife was saying in her Form E as to her financial position and past support, to have said that over the past few years she had been receiving her legacy but that this had now been paid in full and so those payments would not continue.

182. *Other support*. I now turn to look at other support to the wife by her mother. Although the wife described herself as an independent woman, it is clear that the wife has never based that independence on her own work and earnings. Rather after she left university and before her first marriage she did not work. During and after that marriage, and during her second marriage, she did not work. Before her first marriage she received generous support from her father and mother through a settlement and otherwise, for example she was given a BMW and later a Mercedes car. When her first husband was having financial difficulty in paying the mortgage on their matrimonial home there was no suggestion that they should move to the flat the wife had lived in before the marriage, or that the wife should work, or that they should in effect fend for themselves with some modest assistance from the wife's parents. Rather, the solution suggested and put into effect was that the wife's parents should provide the funds for a substantial home in Buckinghamshire and its refurbishment.

183. It is clear, and not disputed, that before her second marriage the wife had the benefit of generous and substantial support from her parents which provided her with the independence she asserts she had, and which she enjoyed without having to work. Further the evidence shows that the wife and her parents did not have any expectation or plan that the wife would support, or partly support, herself by working. None of this is recorded or set out by way of criticism and when her first marriage broke down I recognise that she had a very young child and shortly after it she and her mother suffered the loss of the wife's father.

184. Rather it is included to show that before she met and married the husband the wife and her family were in the fortunate position that her lifestyle was, could be and was expected for the foreseeable future to be, funded by the wealth created by her father.

185. Further in my view this assertion and feeling of independence based on her family wealth is important when the way in which the parties chose to fund the various aspects of their expenditure and their attitudes towards the funds provided by the husband from his company (and thus his work) and those provided by the wife's mother fall to be considered. In short it provides a foundation for the wife's approach (which was accepted by the husband) of effectively ring fencing the support from her mother and mainly applying it on her expenditure, which I refer to later as her top up expenditure.

186. After her marriage to the husband, he provided directly and indirectly through his company significant funding to support their lifestyle. I return to the level of this provision.

187. But there is common ground that the wife continued to receive funding from her mother. The dispute is as to its amount (and whether part of it was in payment of the wife's legacy from her father).

188. I have already commented on deficiencies in the preparation and presentation of this aspect of the dispute. Against that background, the husband through counsel correctly accepted that, on the evidence, he is not in a position to quantify, and therefore to ask me to make findings based on, what he says is the wife's high level of spending over and above that which he funded.

189. The wife's stance was that the husband has not proved that her expenditure from funds provided from sources other than the husband and his company was higher than she accepts and asserts.

190. But this does not mean that I have to accept the wife's figures.

191. I have already rejected her evidence concerning the payment of her legacy. In my judgment it is more likely than not that either (a) the capital resources she asserts she had at the start of the marriage and during it, and which she says represented her entitlement under the P settlement, also represented this legacy, or (b) and as represented on her first divorce, the arrangement reached was that it falls to be set off, or in the minds of her family was set off, against the sums owed by the wife in respect of the moneys provided for her first house in Buckinghamshire.

192. The wife has provided a calculation of what she asserts was expenditure of her own money for the three sample years chosen during the marriage by an analysis of her bank accounts. In addition she has provided an analysis of her capital at the outset of the marriage and as at 31 January 2006. In that analysis (a) the sum of £148,500 is included as "inheritance", and (b) a sum of £30,000 from her mother in 1998 and a sum of £29,000 for ad hoc gifts are included (which is broadly in line with an analysis of credits into the wife's disclosed bank accounts prepared by the husband over a different period, albeit that an accurate comparison is not practical). For the purpose of identifying annual spend over and above what was provided by the husband characterisation of receipts as inheritance or gifts is irrelevant and so the maths of these calculations is not affected by my conclusion that the £148,500 was not paid in respect of the wife's inheritance.

193. "One off expenditure" was also deducted to show an average annual spend. This included £8,000 towards the cost of the husband's 50th birthday party. Another £5,300 approximately was paid towards the cost of this party on a credit card on the account of the wife's mother. And the discovery of this bill by the husband was a trigger to disclosure relating to this account, which I refer to later.

194. The calculations as such were not challenged and they show an annual spend excluding "one off expenditure" (most of which is incurred on the wife's house and on the castle) of about £40,000. This equates to that shown on the analysis of the bank accounts for the sample years (although 1998 is lower). This result also equates to the figure asserted by the wife to be her expenditure from her own money before these calculations were produced to the other side and the court. (Whether or not the wife had done either of them earlier and, if so, the records she had used was not pursued). In final submission, although inheritance and gifts are included in the above analysis, it was said that her expenditure was funded by the husband, from her

own money which she had consistently put at £40,000 per annum and by money from her parents by way of inheritance and periodic gift (and therefore from 3 sources).

195. But taking the analysis and calculation of her expenditure at the rate of £40,000 per annum to include funds provided by inheritance and periodic gifts (which when paid become the wife's own money) and therefore treating it (and her consistent assertion that it was at the rate of £40,000 per annum) as funded from two sources, what they do not cover and include is funding and expenditure that has not passed through the wife's bank accounts and which has been made on behalf of the wife by her mother to the relevant provider of goods or services to the wife. An example of this is bills rendered by the wife's present solicitors in respect of her first divorce and, as I understand it, in respect of disputes concerning the wife's daughter. Some of these bills may have been paid before the marriage but, for example, by the letters of 6 December 1996 and 9 January 1998 Mishcon de Reya sent bills to the wife's mother for payment and, on 9 January 1998, there is an internal memo to the effect that all bills relating to the wife are to be sent to her mother for payment. These bills related to costs incurred in respect of advice and litigation concerning her first divorce and her daughter. It is accepted that these bills were paid by the wife's mother and it was not asserted that the payments were treated as loans or part payments of the wife's legacy.

196. This example must have been known to the wife and her solicitors. Indeed the husband sought to put her to strict proof of the bills rendered by her solicitors in respect of litigation with her first husband. The documents referred to in the last paragraph were not however disclosed until April 2009. They, and the method of funding the wife's expenditure that they reveal, raise questions as to what, if any, other liabilities of the wife were so funded and how such payments were treated as between the wife and her mother.

197. Issues relating to expenditure by, or for, the wife on credit cards funded by accounts other than those of the wife are relevant to this aspect of the dispute. I would add that it seems to me that in the context of an allegation that the wife had money in the Isle of Man, or was funded by family money in the Isle of Man, the ability of the wife to use a card or cards on her mother's accounts is something that merited close attention by both sides. This is because it is an obvious method by which the wife could access such money without it going into any account she has in the UK or had disclosed.

198. The husband alleged in his first affidavit sworn in October 2007 that the wife's mother had funded (a) part of a holiday they had all been on in 2001, and (b) part of his 50th birthday party, and that the wife had a card on her mother's account with HSBC. The wife did not reveal the existence of this card until 15th December 2008 and statements in respect of it for 2004 and from January 2006 were provided in February 2009. The wife says that these are the periods over which she had joint use, through a card, on this account. But on the assumption that that is correct, it has been demonstrated by the disclosure of this account that her mother has used it to fund a contribution to a holiday in 2001 (perhaps her share), a contribution to the husband's 50th birthday party in 2002 and since the separation around £50,000 of the wife's holiday expenses.

199. In response to an assertion in the husband's affidavit to the effect that her holidays after separation had been funded from an undisclosed source the wife responded in her affidavit sworn on 25 January 2008 that: "I have needed to purchase cheap flights from airlines who only market over the internet (such as Easyjet). As I have

never shopped on the internet I have friends who have purchased such flights for me and I have repaid them either by giving them the funds owed or buying them dinner or a present. My mother has also purchased some flights for me and Gabriella as our respective birthday or Christmas presents".

200. When, by a letter dated 15 December 2008, the wife's solicitors informed the husband of the existence of the Mastercard that enabled the wife to draw on an account of her mother, her solicitors also indicated that the wife did not disclose the existence of her card on this account of her mother because she had last used it in November 2006 and then returned it to her mother. She swore her Form E on 30 November 2006, and her solicitors say that she thought that pursuant to the orders made the credit cards she had to disclose were those that she held on that date. The Court had in fact ordered them to be produced from 1 January 2006, but I shall assume that this was a genuine mistake. However, on that assumption the description of the financial help provided by the wife's mother for holidays (some £50,000) does not match the wife's description of it and was the result of the wife's mother making the payments rather than the wife using her card on the account.

201. This funding of holidays post separation is thus an example that the husband has been able to prove (and is now accepted) of the wife being generously funded by her mother, and of what he alleges to be her "hidden economy".

202. I agree with the husband that it is instructive to look at the way in which disclosure of this card occurred. No reference is made of it in the wife's Form E, or in answer to questionnaire, or in her replies to the schedule of deficiencies. Thereafter the husband obtained from Gleneagles a copy of the receipt for the bill for his 50th birthday party, which he knew the wife had paid for. It showed that a part of that bill had been paid with a credit card, the number of which did not relate to any card which had been disclosed in these proceedings. In November 2008, the husband's solicitors asked the wife to sign an authority in relation to the obtaining of copies of the statements for that credit card. They replied that she had complied already with her disclosure obligations. But the husband then issued a summons for this disclosure and on 28th November 2008 the wife's solicitors said in relation to the bill for the husband's 50th birthday party that:

> "£5,255.65 was paid by our client's mother on her credit card, and this appears on her credit card statement. An additional £84 was also paid. The expenditure is referred to elsewhere in our client's disclosure with regards to her inheritance from her father. Our client's mother no longer has the credit card in question as she later married our client's step-father and accordingly changed her name and consequently her cards."

203. This assertion links the payment to an inheritance from her father but it is not listed in the sums totalling £148,500 (which were round figure sums paid into the wife's bank account), and no other inheritance has been identified by the wife.

204. The assertion that the wife's mother had changed the card because on remarriage she had changed her name was incorrect, and must have been known to the wife. The credit card on this account, which the wife accepts she used in 2006 and the existence of which had not, by the date of that letter, been disclosed, was the same card, and had the same name and number, as that used for Gleneagles.

205. I agree that this history shows that the wife made a deliberate attempt to hide:

i) the facts (a) that she had had the use of this card on her mother's account, and (b) that that account had also been used by her mother to fund expenses incurred by or for the wife, and thus

ii) the extent and nature of the regular financial support provided to her by her mother and thus, as the husband would have it, her invisible economy.

206. I acknowledge that the disclosure of this card (and statements relating to it) and the lifting of the extensive redacting of the bank statements as originally disclosed has not revealed either:

i) significant regular expenditure funded by that financial support during the time the parties were together, or

ii) significant use by the wife of a credit card enabling her to make purchases with it from accounts of her mother.

But the disclosure of the account of the wife's mother which funded expenditure on this card, as I have already mentioned, shows that it has been used to enable the wife to take 20 holidays in 3 years, by funding around £50,000 of holiday costs which is not expenditure of the order indicated in her affidavit.

207. This expenditure has a linkage to the point asserted by the wife in her Form E that prior the death of her stepfather in early 2006 (May) she had received gifts from her mother which she used to meet her day to day expenses (together with funds provided by the husband), but that these gifts from her mother had ceased as her mother had had to reconsider her financial position in the light of the wife's stepfather's unexpected death. The wife's mother supported the assertions that these gifts ceased and did so for this reason. In my judgment this is not true.

208. When challenged about the comparative wealth of herself and her second husband the wife's mother demonstrated that she was upset and annoyed by what she described as a love letter in his will and the reference to it in the husband's affidavit (which is an example of the point I have already made that she was aware of the content of the evidence in the proceedings). But she had to accept that in comparative terms she was much better off than her second husband. Although I accept that many of her generation have a different approach to money, and the cashing of investments, from a younger generation I do not accept her evidence that she felt a need to reconsider her finances on the unexpected and sudden death of her second husband although I naturally accept that that was a very distressing time for her.

209. The reasons for this conclusion are that:

i) because of her inheritance from her first husband, and an annuity he had arranged for her, the wife's mother in income and capital terms was much better off than her second husband and was well aware that she could easily afford to meet the expenditure he had met during their marriage (she mentioned groceries), and

ii) the expenditure on holidays for the wife and her daughter shows that the wife's mother did not reconsider her position with the result she and the wife asserted, but continued to be very generous to the wife for the purpose of enabling her to enjoy holidays.

210. My conclusion under this heading is therefore that:

i) the wife has received regularly throughout the marriage (both before and after separation) funding over and above that which she asserts and has calculated by reference to her bank statements and that this has been done by payments being made directly to persons who have provided goods and services to her, and by other means that do not entail money passing through the wife's accounts, and

ii) both she and her mother attempted to underplay the extent of that funding and support.

211. The evidence does not enable me to assess whether the wife's estimate of ad hoc gifts under £5,000 (the limit set by the District Judge) from marriage to separation (£29,000) is accurate.

212. Further in my judgment, and although I accept that following the separation, and the withdrawal of financial support by the husband, the wife's capital reduced, other pointers in favour of the conclusion I have reached under this heading are (a) the scale of that reduction, and (b) the point that the wife did not seek interim maintenance until notified of the sale of the company at a price above that she would have expected from her knowledge of an earlier offer.

213. I am not in a position on the evidence to quantify this funding in money terms. However I am satisfied that during the marriage the wife had ready access to generous funding from her mother (and thus from the money she inherited from the wife's father) to enable her to enjoy a high standard of living and luxury items of her choice.

214. In my judgment it is clear from the history and the limited material available as to the capital and income resources of the wife's mother that this funding of the wife's lifestyle will continue.

Loan or gift

215. It does not follow that because the funding referred to under the last heading was by way of gift, and I have found that the wife and her mother have sought to down play its amount, that the significant funding used to buy, carry out work on and furnish etc. the two houses, and on a car, was provided by way of gift and not by way of loan as the wife and her mother assert.

216. I have already commented on deficiencies in the preparation and presentation of this aspect of the dispute which, to my mind, have made it more difficult to decide. But on the evidence I have concluded that, although I have rejected aspects of the evidence of both the wife and her mother on their financial dealings and relationship, it is more likely than not that the funds making up the "speciality loan" (a term that was never explained) were provided by way of interest free loans repayable on demand.

217. I have not based this conclusion on a simple acceptance of the evidence of the wife and her mother on the point, although it has that result. Rather, my main reasons for it are that it seems to me that in all the circumstances:

i) it makes more financial and commercial sense for the wife's parents having gone offshore, to provide this very significant financial support in this way and thereby to shield this capital from UK capital taxes and any income it might produce (if and when a property was sold) from UK income tax. I accept that the capital tax shield is fairly remote because the wife is very likely to survive

both her parents and the money has primarily been used to buy houses as a home, but nonetheless it seems to me that an interest free loan fits with prudent and lawful fiscal planning,

ii) it also fits with an approach that the wife's father was likely to adopt to providing large sums of capital during the wife's first marriage because her first husband was in financial difficulties, and

iii) it is likely that the wife's mother and the wife would adopt the same course particularly in the light of what I say below about the disposition of, and understanding between husband and wife relating of the wife's father's estate.

218. When the wife's father came to make what turned out to be his final will the financial difficulties of the wife's first husband had not been cured, and no repayments had been made. But there was no evidence as to his view of the wife's first husband at that time. By the time of his death that marriage was in major difficulty, the wife's daughter was very young and she suspected that her husband was having an affair. The wife's mother said, and I accept, that her first husband's greatest pleasure in his final years was seeing the beautiful and confident young woman that his daughter had become; but that this pleasure "was marred in the final months of his life by [her first husband's] behaviour". The wife's mother said, no doubt correctly, that her husband would have referred to him as "a cad" and was very distressed by his behaviour.

219. This view would be a natural background to an approach by the wife's father that he would not change his will to leave, or otherwise provide, substantial funds to his daughter but would leave his fortune to his wife on the basis of an understanding between them that she would continue to provide generously for their much loved daughter. This approach and understanding could be an explanation for the conversation related by the wife's mother with her first husband shortly before his death to the effect that she would be alright and there would be enough for her. This is because the money would be used for her and their daughter. Although I acknowledge that these points could also fit with, or support, other conclusions relating to the creation of a trust or other formal arrangement outside the will for the benefit of the wife, in my view the provision in the will coupled with an understanding of a continuance of generous support (which her parents could well afford) fits readily and easily with what has been proved and admitted to have happened.

220. As to this, it is clear that the wife had a very devoted and generous father who did so provide for her and who wanted the wealth he had created to continue to be used to provide for his daughter. Clearly the wife's mother knew this and it is clear that,(no doubt in part because of her own love for her daughter and her generosity, but also in my judgment because it accorded with the wishes and actions of her first husband, who made the money), the wife's mother has used his estate to provide generously for the wife by making regular gifts (directly and indirectly) and by interest free loans of the moneys now described by the wife as a speciality loan.

221. The payment of £1m by the wife to her mother after the sale of the first house in Buckinghamshire is in line with my conclusion that there was a series of loans. But in my judgment, of itself, it is not a particularly powerful point because at that time, as the wife's mother pointed out by reference to the note she had kept, there were real problems in the marriage and thus a real incentive for the wife not to retain significant cash or liquid assets.

222. *The likelihood of repayment of the outstanding loan being demanded.* In my judgment history suggests, and I find, that (a) there is no real prospect that the wife will be called upon to repay her mother the outstanding loan, and (b) it is fanciful to suggest that the wife's mother would demand repayment if it had the result that the wife could not retain her present home or buy another one.

223. I have reached this conclusion because a demand for repayment would run counter to the approach of the wife's parents over the years and the wife's mother has significant other funds.

224. To their credit the wife and her mother did not suggest that the wife would be asked to and would have to, repay the loan on receipt of her award in these proceedings.

225. The upshot of these conclusions is that in my judgment the wife in effect has the benefit of her present home, and any replacement, on the basis that the interest free loan will remain in place so long as she wishes. Her mother's testamentary intentions were not gone into but the wife is an only child and the history of the funding of the wife by her parents indicates, and I find, that the wife will be able to set off the loan against her entitlement under her mother's estate, or it will be forgiven by her mother's will.

Miscellaneous

226. The conclusions I have reached do not fit with some parts of the husband's evidence as to what he says the wife told him concerning her inheritance and in particular the husband's evidence that on hearing of her mother's second marriage the wife told him that her father did not trust her mother and had left his estate to her and provided for his wife by way of an annuity. Albeit that the wife's father did purchase an annuity (its amount was not contained in the evidence) I reject the balance of this evidence of the husband. Even in temper or distress I do not accept that the wife would have said this and her father's will and the information we have (albeit limited) as to the size of his estate indicate that this was not true. Further, for reasons I have explained, it seems to me more likely than not that the wife's parents had an understanding and joint desire to help their daughter financially. As they have done so generously, this supports the view that I have reached that the wife's father did trust his wife to continue this support. This finding against him, like others, goes to credit.

227. Now that the husband accepts that I cannot make a finding that the wife inherited substantial assets from her father, like that evidence of the husband, the evidence of the husband's brother of his conversation with the wife's mother is not relied on to found such a conclusion and essentially goes to credit concerning the wife's alleged plan B and the evidence of the wife's mother.

228. The relevant conversation, and its circumstances, is remembered by both the husband's brother and the wife's mother and they are at one on parts of it. It took place at a lunch party celebrating the brother's enthronement as a Bishop. In my judgment, the husband's brother was recounting what he understood from the conversation and the wife's mother was being honest in her evidence that she did not tell him that her first husband had settled nearly everything on his daughter.

229. The husband's brother understandably said that he did not remember the exact words used. So he gave evidence of his impression and in my judgment there is considerable room for his getting the wrong impression against the background (a) that as the brother remembers he was told, the wife's father doted on her, and (b) that

as I have found it is more likely than not that he left his estate to his wife on the basis that she would continue to provide generously for her daughter.

230. Having seen the wife's mother give her evidence it seems to me:

i) likely that she would have told him something to the effect that the wife's father had provided generously for his daughter. This reflects the common ground that the wife, and in my judgment her mother, were understandably keen to make clear to the husband's family that the wife had not married the husband for his money,

and highly unlikely that

ii) in doing so, she would have gone into any details, and thus explained that the provision would be through her from her first husband's estate.

From that it is easy to understand why the husband's brother would gain the incorrect impression that the provision was in the wife's father's will.

231. Also, having seen the wife's mother give her evidence, I can understand why the husband's brother got the impression that she felt that there was a sense of unevenness in what her husband had done, if as I have found to be the case the provision for the wife was to be through a continuation by her mother of generous support for their daughter. For example, when she was describing the terms of the will of her second husband she left me with an impression that the provision of his will she described as a love letter was unfair and she should have received more, albeit that she had to accept that this passage in his will was accurate as to their respective wealth. So, it seems to me, that in asserting that the husband had provided generously for their daughter she could well have given the same impression because of the moral obligation this imposed on her to make this provision for him to the daughter he doted on, even though by doing so there would be still be very substantial sums available for her own use. I add that to my mind both impressions do not reflect the considered underlying views of the wife's mother on the fairness of the approached adopted by her husbands.

232. I record that:

i) I have not placed any weight on the differences between the accounts of the wife's mother and the husband's brother in determining the credibility of the wife's mother on other issues, and

ii) as is apparent from what I have already said, that I reject the assertion that the husband's brother was not giving his evidence honestly and to the best of his recollection.

Financial support provided by the husband during the marriage up to separation

233. Albeit that I have found that the wife received generous additional support from her mother in my judgment the husband's assertion in his Form E that he and the wife "had largely funded their own lifestyles" is exaggerated to an extent that renders it untrue. The making of, and limited persistence in, this allegation does the husband, and his advisers, no credit. In my judgment when he made this allegation it was intended to, and did, carry the implication that the parties effectively ran separate economies. He must have known that that was untrue and it seems to me that minimal checking of records in his power and control would have demonstrated that this was the case.

234. In my view this was clearly demonstrated by the analysis the parties performed of the expenditure relating to their lifestyles funded by the husband and his company in respect of the disclosure relating to sample years ordered when the trial was adjourned in March 2009. This additional disclosure covered a joint account and cards used during the marriage and other payments made by the husband and the company for the years 1998, 2001 and 2004. The analysis carried out by the wife demonstrated that the wife's assertions (which she had made without access to this or similar material provided by the husband and the company) as to the total amount of the funding by the husband of expenditure on, or attributable to, her, was reasonably accurate although her division between direct financing and money spent on credit cards and through the joint account was less accurate. (This is an example of the wife's ability to detail items of expenditure from limited records and memory that was lacking in her evidence relating to the agreement alleged relating to her legacy from her father and her requests for payments in respect thereof.)

235. There were some disputes concerning allocation of this funding by the husband from the joint account and cards. But on both results it demonstrated that the husband was providing significant funding to support the lifestyle of the family (comprising himself, the wife and her daughter) by these methods.

236. It is common ground that he provided further support through the company posted to his loan account and there was some dispute about other items of support (e.g. holidays and a lady paid by the company who spent some time in Buckinghamshire helping the wife with her daughter). I am not in a position to resolve these disputes.

237. In her Form E the wife assessed this level of funding at £100,000 and her budget prepared by reference to 2005 figures was higher (around £146,000). It includes some expenditure on her house that the husband maintains was not funded by him prior to separation and although this was not disputed, to my mind it is not clear from the documents to what extent the husband was funding day to day running costs in respect of the wife's houses in Buckinghamshire over and above the payment of the insurance premium. The budget does not include a figure for depreciation on the cost of her cars that were provided by the husband which the wife sought to include in her analysis at the trial.

238. I also have information from Mr A's firm extracted from the records of the company of the husband's income and benefits in kind. This showed income of about £486,000 in 2001 and about £153,000 in 2004 compared with support through the joint account and on cards for the wife of the order of £60,000 and £70,000 respectively.

239. Drawing these sources of information together in my judgment a fair estimate of the annual support provided by the husband as at separation and his ceasing to provide support equates to that given in the wife's Form E and is about £100,000 to £110,000 per annum. This excludes council tax, utilities, gardener, window cleaner and housekeeper that the husband said the wife paid, any provision for depreciation on the cost of cars and any provision for the lady who spent time in Buckinghamshire helping the wife with her daughter.

240. This level of support is substantial and does not support the assertion that they were running separate economies. Rather as an exchange between the husband's counsel and the wife in cross examination showed:

i) the husband and his company were providing the funds for a high standard of living enjoyed by the parties,

ii) the wife was "topping up" her expenditure from other sources to which the husband had no access, and so

iii) the position was that the husband provided substantial funds that were shared and used to finance a good lifestyle and the wife also spent on herself from other sources.

The consequence of these findings relating to the wife's access to family money

241. The husband has failed to establish his case that:

i) the wife has very substantial funds of her own, or was a beneficiary of trusts with substantial assets, and

ii) he and the wife largely funded their own lifestyles.

242. He has also failed to establish his alternative case that the "speciality loan" is a gift.

243. He has not pursued his initial assertion in correspondence that the parties agreed that they would not make any claims against each other.

244. However, in respect of the wife's expenditure that he did not fund he has had some success because I have not accepted aspects of the evidence of the wife and her mother in connection with the funding provided by the mother to the wife and for the benefit of the wife. I have not been able to put a figure on this and my findings mean that I am of the view that the full picture of the extent and nature of this funding has not been revealed. But on the evidence I am able to, and do, find that this funding and expenditure:

i) has been made by direct gifts to the wife and by bills being paid on her behalf by her mother without any expectation that she would repay her mother such amounts,

ii) it exceeds the total she has put on it and it has not only been funded in the way she asserts (namely by gifts under £5,000, the payments totalling £148,500 and her capital (and interest) that she brought into the marriage), and it

iii) can be categorised as "top up" expenditure (a) on luxury items, clothes, holidays, leisure for herself and her daughter, (b) litigation costs relating to her first husband and her daughter, (c) on and in respect of her houses, and (d) on some items for the castle.

245. In my judgment this approach to the funding of their joint and separate lifestyles reflects the choices they made as to the way in which they ran their marriage and treated the assets and access to funds that they respectively brought to the marriage. Namely that:

i) the husband would fund a good lifestyle for them both from his earnings and benefits as the owner of his company,

ii) save for the funding of some items at, and in respect of, the castle and her houses the wife would not contribute to this expenditure, and

iii) the wife would be free to spend moneys provided from the wealth of her family as and when she saw fit to "top up" her lifestyle and on other matters (e.g. litigation with her first husband) without consultation with the husband.

246. So, the choices they made and lived by included the results that:

i) the moneys provided to the wife by her parents were "ring fenced" and apart from the "speciality loan" were used in the ways I have described,

ii) this ring fencing was an aspect of the wife's wish for an assertion of the independence that she describes in her affidavit, and reflected the approach of the parties to the funds made by the wife's father through the sale of his business,

iii) the source of the husband's support for their general and high lifestyle was his company and therefore they identified it as the vehicle for the provision of that lifestyle,

iv) the income from the husband's company was therefore shared, but

v) that income source and more generally the company was, as was obviously the case, recognised as being the product of the husband's working life before the marriage and something that was his creation and central to his life before and during the marriage.

Claim in respect of maintenance of the wife's child

247. The wife sought an order that the husband should support her child. The court has jurisdiction to make such an award because he is resident outside England and Wales.

248. I accept and find, as the husband asserted, that he never agreed to be responsible for the child's education or maintenance, save as a member of his household (and thus the family constituted by his second marriage up to separation) and that it is inconceivable, in the light of the evidence of the wife and her mother that the child's needs will not be met by them.

249. The manner in which the funds provided by the husband for the benefit of the wife have been analysed and assessed include some expenditure on the child both in respect of the payments from the joint bank account and by credit and direct expenditure by the husband or his company (e.g. on food, insurance and holidays).

250. These analyses, and the wife's assessment of her annual spend from her own money, show that she has taken responsibility for paying the school fees of her child and has utilised the capital sum paid by her first husband provided to meet these fees and other expenses for her daughter in that manner by meeting school fees and making regular transfers to her account to cover such expenses.

251. In my view my award should not include (a) an amount to cover the education of the wife's child even though the provision made by the wife's first husband will not, and was not designed to, cover all the costs of the child's education, or (b) a separate award to or for the benefit of the child. Rather the award to the wife should recognise that, as was the case during the marriage, the day to day expenditure of the wife included an element for the child's maintenance reflecting what was provided by the husband to the household.

252. Further, and in any event, the lump sum I have decided to award to the wife will enable her (without the help of her mother) to cover all costs relating to the education and maintenance of her child, without her having to suffer any significant

lowering of the standard of living funded by the husband that she enjoyed during the marriage.

Two homes

253. I reject the wife's evidence that when she bought the second house in Buckinghamshire in 2002 following her move back to England in 2001 with her daughter (then aged 7), her plan (or the joint plan of the parties) was, and remained, that when her daughter had settled in boarding school (which she was due to start and started at 11) the wife would move back to live in Scotland.

254. Rather, in my judgment the decision to school her daughter in England and thus the move back in 2001 to the house in Buckinghamshire the wife had retained was effectively the wife's decision alone, as was the later decision to buy another house. Further, that decision to buy a new build house, that she did not move into until 2004 (and thus only about a year before her alleged planned return to Scotland), does not fit easily with a plan to return to Scotland even though Christmas cards had both addresses on them and the wife bought the same crockery for both houses.

255. I accept the husband's evidence that the houses in Buckinghamshire were regarded as the wife's and the castle as his. In my judgment the retention by the wife after she and her daughter moved to live in Scotland of her first house in Buckinghamshire was in large measure based on her stance accepted by the husband that this asset had been bought with money from her family assets and that she could and would use funds provided by her mother (from the funds made by her father) as she saw fit.

256. In my judgment these conclusions reflect the joint approach of the parties to their marriage based on (a) the background that the husband and his business were based in Scotland, and the wife had a daughter and she and the daughter's father were the persons responsible for the decisions to be made about her, (b) the point that at the start of the marriage the husband's home in Scotland was not suitable for the wife and her small child and the husband could easily, and did, travel to be with them at the weekends, (c) the fire at, and damage to, the castle which was a blow to both of the husband and the wife and had made life in Scotland more difficult as did travelling time from the castle to Aberdeen for schooling, (d) in any event, the wife wanted her daughter educated in England, (e) the husband travelled extensively and worked long hours and so often was not at home, and (f) the journey from Aberdeen to Buckinghamshire was quick and convenient and could be fitted in with other travelling.

257. So, and although the wife's assertion that she was responsible for running two matrimonial homes is in my judgment exaggerated and incorrect, the parties adopted from 2001 by mutual consent or acceptance a way of life that had aspects that suited them both, or which they were prepared to accept, in which they had two houses which were both used as homes but one of which was regarded as the husband's and one the wife's.

258. This was the way they ran their marriage and in large measure it flowed from their commitments before the marriage, the husband to his business and hard working lifestyle and the wife to her child. It had the effect within the way that they ran their married life together of "ring fencing" the wife's houses which she purchased with the benefit of the "speciality loan" the first of which was a pre-acquired asset. In this context I note that in her allocation of expenditure the wife has treated the insurance premiums on her house in Buckinghamshire as being 100% for her and not a joint expense which in my view reflects and supports my conclusion.

259. This approach to the castle and the houses in Buckinghamshire does not mean that the parties together and individually did not derive benefits from their use as a family of the properties.

260. It is also the case and common ground that the castle was bought as a joint venture during the marriage and in 1997 and 1998 the parties and the wife's daughter lived there full time and after it was damaged they all remained living together in Scotland until 2001.

Add backs

261. I was provided at the end of the hearing with a very helpful agreed schedule setting out the assets and items in dispute. These included the disputes as to what should be added back in respect of expenditure by the husband. Sensibly given their impact little or no time was spent on these disputes in argument.

262. It is accepted that there should be an add back in respect of the gifts by the husband to family members and an investment he has made in precious stones. In my view, in the circumstances of this case and notwithstanding the high amount of liquid cash available and the reasonableness of charitable donations and sums spent on his girlfriend, that expenditure should be treated in the same way and added back. But I have concluded that the sum for holidays to be added back should exclude the sum of £33,363 listed by the husband and which primarily relates to trips to London for the purposes of this litigation. That gives a total for add backs of £3,797,805.

Assets

263. Again given their impact little or no time was spent in evidence and submission on the disputes on the asset schedule apart from that relating to the alleged "speciality loan" of £2,125,000.

264. I take the net value of the wife's house in Buckinghamshire as being equal to the "speciality loan", namely £2,125,000. This is just higher than half way between the two valuations.

265. I have disregarded the contents of both the castle and that house (which includes the wife's wardrobe). As I have mentioned I have no reliable value of the wife's wardrobe. To take a figure by reference to the insurance value of her contents and no equivalent for the castle (which the husband told me and I accept was not now insured) would not be appropriate.

266. In my view the cars should be taken at valuations rather than cost prices.

267. This has the result that the assets are as follows:

	Husband	Wife
Castle	£1,261,000	
House		£2,125,000
Property	**£1,261,000**	**£2,125,000**
---	---	---
Bank accounts	£19,886,677	£71,192

Add backs	£3,797,805	
Third party liabilities	(£265,153)	
Net liquid assets excluding properties and the speciality loan	**£23,419,329**	**£71,192**
Pensions	£80,844	
Sub Total	**£23,500,173**	
Total plus properties	**£24,761,173**	**£2,196,192**
Cars	£280,645	£76,000
	£25,041,818	**£2,272,192**
Moneys held on account		£163,000
Speciality loan		(£2,125,0000
Unpaid costs	(£234,382)	(£192,563)

(This leaves out of account the £1m paid to the wife after the hearing but includes the product of the expenditure by the wife from her own moneys and the moneys provided by the husband since separation.)

268. The assets were also presented on the present basis that the castle is now free of mortgage. The last figure I have found of what needed to be paid to discharge the mortgage is £607,731 as at 31 December 2006. My understanding is that it was repaid from the proceeds of sale of the husband's shares sometime in 2007 and I have taken the amount so paid as being £600,000.

Support provided by the husband after separation and costs

269. At the end of the hearing I was informed that the husband had agreed to pay the wife £1m on the basis that such sum was to be deducted from, or treated as an advance payment of my award by way of a lump sum.

270. This clarity is in contrast to the loose terms set out in the chronology on which earlier interim payments were made. The dispute that arose in respect of them was that the husband asserted that they should be treated in the same way as the £1m paid at the end of the hearing and the wife asserted that although referred to as a lump

sum they should be treated as on account of her disputed claims for interim maintenance including a provision for costs.

271. As a matter of construction I prefer the wife's argument. Further it seems to me that the husband's argument that she was not entitled to any interim maintenance must have been based on his assertion that the wife has substantial sums of her own and as, on the evidence he has correctly abandoned that assertion, the basis for denying her entitlement to interim maintenance also goes.

272. The costs are large. The Forms H show that the husband's costs total £926,189 of which he has paid £691,807 leaving £234,382 unpaid and the wife's costs total £782,424 of which £589,861 have been paid leaving £192,563 unpaid. The grand total for costs is therefore £1,708,613. The unpaid costs are included as liabilities in the assets schedule set out above and the monies held on account for the wife of £163,080 represent the balance of the moneys paid to her by the husband as set out in the chronology (the total of those payments was £800,000).

273. The new costs rules in FPR rule 2.71 apply because no petition or claim was filed before 3 April 2006. No notice has been given under the President's Practice Direction that either side is claiming costs, although the wife's open offer leaves costs to the court. The starting point is therefore that each side will bear their own costs.

274. Any payment by way of interim maintenance in respect of costs is generally brought back into account and in my view that should be done here. The dispute in this context therefore narrows to how the interim payments totalling £800,000 should be allocated and what approach should be taken to the allocated parts. No argument was addressed to this.

275. The wife has paid costs totalling £589,861 and if the moneys held on account are added to that the total is £752,941 leaving about £47,000 for other living expenses from the £800,000 paid by the husband.

276. I pause to add that although I have not carried out an analysis of the wife's day to day expenditure since separation, and how it has been funded, it seems to me that however she allocated her resources derived from the husband and elsewhere as between costs and other expenses this balance of £47,000 when added to her figures relating to her capital as at 31 January 2006 (£246,074) and now (£71,192) a reduction of £174,882, shows that these two sources have provided £221,882 to cover her outgoings since the husband stopped funding her in June 2006 (say for 3 years) and thus at the rate of about £77,000, which is well below the level of funding provided by the husband. There is no indication that the wife has suffered a drop in her standard of living and so this shortfall, and the point that the wife made no application for interim maintenance until one year after the husband ceased to maintain her, are supportive of the views I have reached (without taking this into account) as to the level of support that her mother has been giving to her.

277. Whatever the wife's allocation in my judgment in computing the assets now available for sharing I consider that £450,000 (3 years at £150,000, the figure I have based my needs assessment on – see below) should be allocated to general maintenance and so £350,000 to costs. If £450,000 is so treated, and so equated to the husband's expenditure that has not been added back, and that £350,000 allocation in respect of the wife's costs and the costs incurred by the husband that he has paid are added back, the assets available become:

	Husband	Wife

Totals	**£25,041,818**	**£2,272,192**
Add back	(£691,807 + £350,000)	
	£1,041,807	
Totals	**£26,083,625**	**£2,272,192**
Speciality loan		£2,125,000
Costs	£926,189	£782,482

Pre-acquired or gifted assets and how they are reflected in the present assets

278. The husband had his company and his flat in Aberdeen which was mortgaged.

279. The wife had her first house in Buckinghamshire, her flat in London cash of £157,000 and on her case her legacy of £150,000, which on my findings should not be treated as a sum due to her. She also had the liability under the speciality loan as it then stood.

280. In my judgment:

i) the first house was effectively replaced by the second house in Buckinghamshire and in any event its purchase was funded by money provided by her mother on the basis of what I have found to be a very soft loan, and

ii) her bank account (£71,192) should be treated as representing the balance of the capital she brought into the marriage and gifts from her mother.

281. I have not been able to identify which, if any of the wife's three cars is the Mercedes bought in 2001 with the help of a loan from her mother. It seems that if she retains it, it is the car valued at £9,000 and I have therefore left it out of account and treated her three cars as having been bought prior to separation and thus the sale of husband's shares.

282. The Zonda was bought by the husband from the company when his shares were sold and in my judgment it and the sum paid in repaying the mortgage should be treated as having been funded from the proceeds of the sale of his shares.

283. In my view the husband's pensions relate to the product of his working life and in this exercise should be treated in the same way as the assets now representing the proceeds of sale of his shares.

284. This allocation leads to the following conclusions:

Assets acquired during the marriage and prior to separation

	Husband	Wife
Castle	£661,000	
Cars	£110,645	£76,000

£771,645	£76,000	(£847,645)

Assets and liabilities representing assets brought to the marriage by the wife and funds provided by her family

	Wife
House	£2,125,000
Bank account	£71,192
Speciality loan	(£2,125,000)

	£71,192

Assets representing the proceeds of sale of the husband's shares

	Husband
Bank accounts	£19,886,677
Add backs	£3,797,805
Further add back	£1,041,807 (Unpaid costs)
Further add back	£170,000 (Zonda)
Further add back	£600,000 (Castle mortgage)
Pensions	£80,844

	£25,577,133
Third party liability	(£265,153)

	£25,311,980
Less costs	(£1,041,807)

	£24,270,173

(Naturally the same result would be reached if all the costs were added back and then subtracted. Both reflect my top slicing approach to the funding of the costs from the assets representing the proceeds of sale of the husband's shares)

The breakdown of the marriage

285. Both sides included allegations about this in their affidavits. It is fair to say that the exchange was started by the husband in his first affidavit by passages to the effect that the marriage was over before final separation. Correctly in my view these allegations were not pursued in oral evidence or submissions. This of course raises the question why was effort, time and money expended in including them in the affidavits.

Part 3

The law

286. In this case points of law have arisen relating to the application of the sharing principle, namely:

i) How is the departure from equality to be assessed in the application of the sharing principle when, as here, there is an established ground or good reason (pre-acquired assets) for such a departure?

ii) What is the approach to be taken when there has been an increase in value of a relevant asset after the breakdown of the relationship?

iii) To what extent, if at all, in assessing such a departure from equality (or more generally) can the choices made by the parties during their marriage and thus the way in which, and the principles by which, they have run their lives be taken into account in determining how the available assets are to be shared?

287. In my view these points have not been fully addressed and dealt with in the cases. But, of course, the approach to be taken to them is informed by the existing cases. So I turn to them, and what they establish, first.

288. *General starting point.* In my judgment the following propositions can now be stated with some certainty:

i) Fairness is the objective.

ii) The distribution of assets between the parties should be effected on a principled and not on an arbitrary basis.

iii) The starting point is the financial position of the parties and s. 25 MCA 1973. This appears for example at paragraph 67 of the judgment of Sir Mark Potter P in *Charman v Charman* [2007] 1 FLR 1246 (*Charman (No 4))* where he says:

> "… the starting point of every inquiry in an application of ancillary relief is the financial position of the parties. The inquiry is always in two stages, namely computation and distribution;"

and at paragraph 24 of *B v B (Ancillary Relief)* [2008] 1627 (cited below).

iv) The House of Lords in *White v White* [2001] AC 596 and *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 has given guidance as to the approach and principles to be applied in the exercise of the statutory discretion conferred by the MCA 1973.

v) That guidance makes it clear that the court is to have regard to, and apply, the relevant statutory provisions.

vi) In doing so the three main principles that inform the second stage of the enquiry (i.e. distribution), and thus the reasoning to be applied in determining on a principled basis applying the statute what is a fair result, are need (generously interpreted), compensation, and sharing.

vii) The source of assets is relevant.

289. The compensation principle does not apply in this case but the other two principles do. Obviously given the cash available it was common ground that there should be a clean break.

290. The cross-reference to the statute in resolving the difficulties that arise in achieving the objective of fairness is confirmed in respect of the application of all three principles by, for example:

i) Sir Mark Potter P in *Charman (No 4)* at paragraphs 68 and 70:

> "68 In *Miller* the House unanimously identified three main principles which together inform the second stage of the inquiry, namely that of distribution: "need (generously interpreted), compensation, and sharing", per Baroness Hale of Richmond at para [144]; and see, similarly, Lord Nicholls of Birkenhead at paras [10] to [16]. The three principles must be applied in the light of the size and nature of all the computed resources, which are usually heavily circumscribing factors.
>
> 69. It is worthy of note that, although two of them are not expressly mentioned, each of the three distributive principles can be collected from s. 25(2), or any rate from s. 25(1) and (2), of the Act and that each of the matters set out in (b) to (h) of s. 25(2) can conveniently be assigned to one or other of the three of them
>
> 70 …the principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e))", and

ii) Hughes LJ in *B v. B (Ancillary Relief)* [2008] 2 FLR 1627 at paragraph 24:

> "We have been taken helpfully to the landmark cases of *White v White* [2001] 1 AC 596 and *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618. These cases do not establish any rule that equal division is the starting point in all cases. On the contrary the starting point in all cases is the financial position of the parties and section 25 MCA 1973: see Sir Mark Potter P in *Charman v Charman* [2007] EWCA Civ 503, at paragraph 67. And in all cases the objective is fairness, which requires an individual assessment of each case …….. the process of distribution of assets after divorce is generally informed by need (generously interpreted), compensation and sharing"

291. As I have explained in other cases (for example *H v H* [2007] 2 FLR 548 and see Moylan J in *C v C* [2009] 1 FLR 8) in my view the guidance given by the House of Lords, and the Court of Appeal, on the principles to be applied is as to the process of reasoning to be followed in applying the statute to reach a fair result.

292. *Need (generously interpreted).* "Generously interpreted" is not a term found in the statute. It is a description used by Baroness Hale in *Miller* at paragraph 144 which has been adopted in later cases. At paragraph 154 she also refers to the wife in *McFarlane* being entitled to generous income provision. In my judgment the use of the word "generous" in these descriptions should not be given a separate life and used as if it is a part of the statutory provisions. To do so would be to apply a flawed approach for essentially the same reasons as the approach based upon "reasonable requirements" was found to be wrong.

293. In my judgment the use of that description by Baroness Hale was as a useful shorthand for the description and explanation that she gives of the need principle in her speech, in particular at paragraphs 137 to 139 where she says:

> " 137 So how is the court to operate the principles of fairness, equality and non-discrimination in the less straightforward cases? ---------- In my view there are at 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 at factors which are linked to the parties' relationship, either causally or temporally, and not to 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 (note that the House did not adopt a restrictive view of needs in the *White* case [2001] 1 AC 596 ant 608G – 609A). This is a perfectly sound rationale where the needs are the consequence of the party's relationship, as they usually are. ---------- *A further source of need may be the way in which the parties chose to run their life together.* ---------- *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.*
>
> 139 But while need is often a sound rationale, it should not be seen as a limiting principle if other rationales apply. This was the error into which the law had fallen before *White*. Need had become "reasonable requirements" and thus more generous to the recipient, but it was still a limiting factor even where there was a substantial surplus of resources over needs ---------- . Counsel would talk of the "discipline of the budget" and suggestions that a wise budget might properly contain a margin for savings and contingencies, or to pass on to her grandchildren, were greeted with disbelief."

294. In those paragraphs Baroness Hale is to my mind making it clear that a proper application of the "need principle (generously interpreted)" identifies needs that the

relationship has generated and that magnetic factors as to the amount of the award to meet those needs are the standard of living during the marriage, and the choices made by the parties during their life together. In addition she makes the point that such needs can extend to the making of savings and the provision of assets so that they can be passed on to children or grandchildren.

295. Her cross reference to *White* at 608G to 609A shows that her description of needs that the relationship has generated and her shorthand description given later - "need (generously interpreted)" - accord with what was said by Lord Nicholls in that passage in his speech. He said:

> "There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression "reasonable requirements" in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognised, there is some overlap between the factors listed in section 25 (2). In a particular case there may be other matters to be taken into account as well."

This provides clear support for the proposition that financial needs, and thus financial needs (generously interpreted), are to be assessed and quantified by reference to the factors set out in the statute and in particular age, health, accustomed standard and style of living and available resources.

296. So in my judgment "need generously interpreted" is a reference to need assessed with flexibility, having regard to, and applying, the terms of the statute and although it is a helpful and accurate shorthand it should not be given an independent life or meaning.

297. *Sharing.* In *Charman (No 4)* at paragraphs 64 to 66 Sir Mark Potter P says:

> "64 "The yardstick of equality of division", first identified by Lord Nicholls in White at p. 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of "reasonable requirements". The origins of the yardstick lay in s. 25(2) of the Act, specifically in s. 25(2)(f), which refers to the parties' contributions: see the preceding argument of Lord Nicholls at p. 605D-E. The yardstick reflected a modern, non-discriminatory conclusion that the proper evaluation under s. 25(2)(f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.
>
> 65 Although in *White* the majority of the House agreed with the speech of Lord Nicholls of Birkenhead and thus with his description of equality as a "yardstick" against which tentative views should be "checked", Lord Cooke, at 615 D and 999 respectively, doubted whether use of the words "yardstick" or "check" would produce a result different from that of the

> words "guideline" or "starting point". In *Miller* the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls of Birkenhead, at paras [20] and [29], referred to the "equal sharing principle" and to the "sharing entitlement"; those phrases describe more than a yardstick for use as a check. Baroness Hale of Richmond put the matter beyond doubt when referring to remarks by Lord Nicholls of Birkenhead at paras [29], she said at para [144]:
>
> > " I agree that there cannot be a hard and fast rule about whether one starts with 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 "
>
> It is clear that the court's consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take the "sharing principle" to mean that property should be shared in equal proportions unless there is a good reason to depart from such proportions, departure is not *from* the principle but takes place *within* the principle.
>
> 66 To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in paragraph 68 below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale in *Miller* at [141] and [143] to "sharing … the fruits of the matrimonial partnership" and to "the approach of roughly equal sharing of partnership assets". We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at 605 F-G and 989 respectively, and in *Miller*, at paras [24] and [26], Lord Nicholls of Birkenhead approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale of Richmond, that in *White* the House had set too widely the general application of what was then a yardstick."

298. The exceptions referred to in paragraphs 83 to 86 relate to unilateral assets, to which I will return.

299. As explained in *Charman (No 4)*, the departure therein from the description or application of the sharing principle in *White* is based on developments in *Miller* and in my view, whether or not this departure or change is obiter, I should apply it.

300. As paragraph 64 of the judgment makes clear the sharing principle is founded on a non discriminatory approach to contributions to the welfare of the family.

301. To my mind, the end of paragraph 65 makes it clear that a departure from equality takes place within the sharing principle and is not a departure from it. This also makes it clear that the disadvantages identified by Lord Nicholls based on the burden of proof relating to a presumption or starting point of general application do not apply to an application of the sharing principle as described in *Charman (No 4).* But, as any departure from equal division is within the sharing principle (and thus its application in the circumstances of a given case does not introduce evidential burdens) it is difficult to identify examples when such a "starting point" (or application of the sharing principle) and a "cross check" would lead to a different result.

302. So, in my judgment, the approach in *Charman (No 4)* enables the relevant circumstances of the case to be taken into account at all stages of the reasoning and therefore it promotes the flexibility referred to by the House of Lords in the performance of the statutory task in a principled way.

303. *Departure from equality within the sharing principle.* On the *Charman (No 4)* approach (which I follow) the principle applies to all property of the parties but in its application equality can be departed from for "good reason". It is clear that the nature and source of an asset can provide such a reason.

304. An underlying rationale of the sharing principle is that there is to be no discrimination between the contributions made by the parties to a marriage based on the roles they have played in their life together. This rationale provides strong support for the view that property acquired and built up during the marriage through the respective efforts and roles of the couple should be shared equally. Such property is a product of the relationship.

305. *Pre-acquired or gifted assets.* That rationale based on there being no discrimination between the contributions made by parties to a marriage does not apply to property acquired before the marriage (or commencement of the relationship) or to gifted property. The classic statement of this is in the speech of Lord Nicholls in *White* at page 610 where he says:

> "*Inherited money and property*
>
> I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and "matrimonial property" on the other hand. A distinction along these lines exists, for example, in the Family Law (Scotland) Act 1985 and the (New Zealand) Matrimonial Property Act 1976.
>
> This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it.

Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Plainly, when present, this factor 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 it 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. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

306. In *Miller* Lord Nicholls said:

"16 ---- A third strand is sharing. This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. … When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule.

17 This principle is applicable as much to a short marriage as to long marriages ----------

20 --------- In all cases the nature and source of the parties' property are to be taken into account when determining the requirements of fairness. The decision of Munby J in *P. v. P. (Inherited Property)* [2005] 1 F.L.R. 576 regarding the family farm is an instance. ...

22 ---------- there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short marriage may have been.

23 The matter stands differently regarding property (non-matrimonial property) the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in *White v White* [2001] AC 596 610 (cited in paragraph 159 of this judgment) ----------

24 In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

25 With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from *White's* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs. "

and Baroness Hale, in paragraphs 147 to 153 of her speech, said (with my emphases):

"*The source of the assets and the length of the marriage*

147. Nevertheless, such debates are evidence of unease at the fairness of dividing equally great wealth which has either been brought into the marriage or generated by the business efforts and acumen of one party. It is principally in this context that there is also a perception that the size of the non-business partner's share should be linked to the length of the marriage: see, eg, Eekelaar, "Asset Distribution on Divorce - the Durational Element" (2001) 117 LQR 552; and "Asset Distribution on Divorce - Time and Property" [2003] Fam Law 828; and *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108.

148. The strength of these perceptions is such that it could be unwise for the law to ignore them completely. In *White v White* [2001] 1 AC 596, it was recognised that the source of the assets might be a reason for departing from the yardstick of equality (see p 610c-g). There, the reason was that property had been acquired from or with the help of the husband's father during the marriage, but the same would apply to property acquired before the marriage. In *White*, it was also recognised that the importance of the source of the assets will diminish over time (see p 611b). As the family's personal and financial inter-dependence grows, it becomes harder and harder to disentangle what came from where. But the fact that the family's wealth consists largely of a family business, such as a farm, may still be taken into account as a reason for departing from full equality: see *P v P (Inherited Property)* [2004] EWHC 1364 (Fam); [2005] 1 FLR 576. So too may be the nature of the assets, where these are businesses which will be crippled or lose much of their value, if disposed of prematurely in order to fund an equal division: see *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69.

149. The question, therefore, is whether in the very big money cases, it is fair to take some account of the source and nature of the assets, in the same way that some account is taken of the source of those assets in inherited or family wealth. Is the 'matrimonial property' to consist of everything acquired during the marriage (which should probably include periods of pre-marital cohabitation and engagement) or might a distinction be drawn between 'family' and other assets? Family assets were described by Lord Denning in the landmark case of *Wachtel v Wachtel* [1973] Fam 72, at 90:

"It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole."

Prime examples of family assets of a capital nature were the family home and its contents, while the parties' earning capacities were assets of a revenue nature. But also included are other assets which were obviously acquired for the use and benefit of the whole family, such as holiday homes, caravans, furniture, insurance policies and other family savings. To this list should clearly be added family businesses or joint ventures in which they both work. It is easy to see such assets as the fruits of the marital partnership. It is also easy to see each party's efforts as making a real contribution to the acquisition of such assets. Hence it is not at all surprising that Mr and Mrs McFarlane agreed upon the division of their capital assets, which were mostly of this nature, without prejudice to how Mrs McFarlane's future income provision would be quantified.

150. More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality? On the one hand is the view, already expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money's worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.

151. On the other hand is the view that this is unrealistic. We do not yet have a system of community of property, whether full or deferred. Even modest legislative steps towards this have been strenuously resisted. Ownership and contributions still feature in divorcing couples' own perceptions of a fair result, some drawing a distinction between the home and joint savings accounts, on the one hand, and pensions, individual savings and debts, on the other (*Settling Up*, para 128 earlier, chapter 5). Some of these are not family assets in the way that the home, its contents and the family savings are family assets. Their value may well be speculative or their possession risky. It is not suggested that the domestic partner should share in the risks or potential liabilities, a problem which bedevils many community of property regimes and can give domestic contributions a negative value. It simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition. If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him. Further, great wealth can be generated in a very short time, as the *Miller* case shows; but domestic contributions by their very nature take time to mature into contributions to the welfare of the family.

152. My lords, while I do not think that these arguments can be ignored, I think that they are irrelevant in the great majority of cases. In the very small number of cases where they might make a difference, of which *Miller* may be one, the answer is the same as that given in *White v White* [2001] 1 AC 596 in connection with pre-marital property, inheritance and gifts. The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). *If the assets are not 'family assets', or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. (my emphasis)* As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, "Comment on *GW v RW (Financial Provision: Departure from Equality)*" [2003] Fam Law 386, at p 388) rather than in terms of accrual over time (see Eekelaar, "Asset Distribution on Divorce - Time and Property" [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

153. This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. *The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. (my emphasis)* There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home. ”

307. These passages from the speech of Baroness Hale are the foundation of the argument relating to unilateral assets addressed by the Court of Appeal in *Charman (No 4).* As appears from the judgment of the President she received some support from Lord Mance in particular at paragraphs 169 and 170 of his speech (part of which is included in my citation below of the judgment of the President in *Charman (No 4)*), where Lord Mance said (with my emphases):

“169 Baroness Hale acknowledges that the difference between the two approaches will in the great majority of cases be irrelevant. Further, it seems to me that after a short marriage it may in reality often be difficult to determine precisely what assets (other than family assets) were generated during the marriage. The present case is an example, with arguments about whether Mr Miller can be said (by reason of his contacts, his gentleman's agreement with Mr Duffield and/or his experience) to have brought into the marriage any asset relating to his potential interest in New Star. To take into account the shortness of a marriage could enable a court to cut through some

of these more intricate arguments in a manner consistent with section 25(2)(d) of the 1973 Act. More fundamentally, to allow the duration of a marriage as a relevant factor would cater for the considerations that, while some people may make a large amount of money in a short time, the nature of their work or other factors may mean that they do not do so at a consistent rate over their lives as a whole or for more than a short period of their lives, and furthermore, as Baroness Hale has pointed out, that there may be long-term risks in relation to non-business-partnership, non-family assets which remain with those directly involved in generating them. The longer the marriage, the less likely these are to be significant considerations. In a short marriage, the timing of which may or may not coincide with a period of significant increase in the value of non-business-partnership, non-family assets, such considerations argue in favour of some further flexibility in the application of the yardstick of equality of division. I see force in and would agree with the views expressed by Baroness Hale in paragraphs 152-153 of her judgment to the effect that the duration of a marriage, mentioned expressly in section 25(2)(d) of the Act, cannot be discounted as a relevant factor.

170 Fourthly, and whatever the position on the third point, I agree with what Baroness Hale has said in paragraph 153, which is, as I see it, also consistent with the last sentence of paragraph 25 of Lord Nicholls' speech. The present marriage had what one might call a traditional aspect. Mr Miller worked, and Mrs Miller gave up work to look after him. But there can be marriages, long as well as short, where both partners are and remain financially active, and independently so. They may contribute to a house and joint expenses, but it does not necessarily follow that they are or regard themselves in other respects as engaged in a joint financial enterprise for all purposes. *Intrusive enquiries into the other's financial affairs might, during the marriage, be viewed as inconsistent with a proper respect for the other's personal autonomy and development, and even more so if the other were to claim a share of any profit made from them.* In such a case the wife might still have the particular additional burden of combining the bearing of and caring for children with work outside the home. *If one partner (and it might, with increasing likelihood I hope, be the wife) were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony. Once needs and compensation had been addressed, the misfortune of divorce would not of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married.*."

308. In *P v P (Inherited Property)* [2005] 1 FLR 576 (mentioned with approval by Lord Nicholls in *Miller*) at paragraphs 37 and 38 Munby J said:

"…There is inherited property and inherited property. Sometimes, as in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 itself, the fact that certain property was inherited will count for little: see the observations of

> Lord Nicholls of Birkenhead at 611 and 995 respectively and of Lord Cooke of Thorndon at 615 and 998 respectively. On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations.
>
> [38] That said, the reluctance to realise landed property must be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse's inherited wealth tied up in the long-established family company and a spouse's inherited wealth tied up in the long-held family estates. And as Coleridge J pointed out in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 at 80:
>
> 'There is no doubt that had this case been heard before the *White* decision last year, the court would have strained to prevent a disruption of the husband's business and professional activities except to the minimum extent necessary to meet the wife's needs. However, I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.'

And in N.A. v. M.A. [2007] 1 F.L.R. 1760 Baron J said of the family wealth that had been introduced by the husband:

> "[173] I am clear that this is not a case where there should be an equal division of assets. This relationship which began as cohabitation and led subsequently to marriage lasted some 12 ½ years. There was no marital acquest which falls to be divided. In fact, the assets have diminished substantially over the last 5 years. Moreover, all the assets in this case were inherited by the Husband and that is another factor which is of central relevance. All these factors convince me that an equal division would not be appropriate and it would not be discriminatory to the Wife if she received less than half.
>
> [174] The ratio of *Miller and McFarlane* makes it clear that the Court must give careful consideration to the materiality of the source of the assets that fall to be divided. In this case the assets fall into the bracket known as "Non matrimonial" because they all derive from the Husband's inheritance in 1998. Therefore, I must give proper weight to their origin and I accept that they should not be invaded unnecessarily. However, in this case, there is little marital property (as it has now been defined) and so the award will have to be made from the Husband's inheritance. I have no doubt that the Court is entitled so to do, for this was made clear per Lord Nichols in *White*.
>
> "The fact that property was inherited was one of the circumstances of the case, to be given the weight appropriate in the circumstances. Inherited property could be seen as a contribution made to the welfare of the family by one party to the marriage. However, where the claimant's financial needs could not be met without recourse to the property inherited by the respondent, its source would carry little weight"

309. These citations of authority show that pre-acquired and gifted assets supply a "good reason" for departure from equality within the sharing principle, and that when considering that reason and its effect both the source and the nature of assets (e.g. whether it is the matrimonial home) are circumstances to be taken into account.

310. They also show that the length of the marriage and thus the period that pre-acquired or gifted assets have been enjoyed by the parties during their relationship is relevant and that the weight to be given to such matters is fact sensitive (see for example *Vaughan v Vaughan* [2008] 1 FLR 1108 at paragraph 49 and *C v C* at para [36]) and thus that the way in which such property has been treated, enhanced, damaged and regarded are all factors that can be taken into account.

311. I return later to the impact of the passages in the speech of Baroness Hale that I have emphasised (and which were emphasised by counsel for the husband), and the support for them from Lord Mance, concerning the way in which and the principles by which the parties have run their lives when considering whether and if so how they are to be taken into account and differentiated from conduct which should be excluded from consideration.

312. *Unilateral assets.* It was argued in *Charman (No 4)* that the speech of Baroness Hale at paragraphs 149 to 152 founded the conclusion that the sharing principle did not apply to "unilateral assets" - that is the fruits of a business in which only one of the parties had worked (see paragraph 82). This was roundly rejected save in limited circumstances. In *Charman (No 4)* the considerable wealth had been generated during a long marriage and thus during the continuance of the matrimonial partnership. So the argument on unilateral assets was advanced as a reason for departure from equality in a context in which the underlying rationale of the sharing principle applied with full force. The President said (with my emphases):

> "81 In *Miller* Baroness Hale said, at [146],
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> "Section 25(2)(f) of the 1973 Act does *not* refer to the contributions which each has made to the parties' *accumulated wealth*, but to the contributions they have made (and will continue to make) to the *welfare of the family*. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it should this be taken into account in determining their shares."
>
> These words have provoked lively debate upon this appeal. Like the introduction of property into a marriage at its inception (being property helpfully described by Burton J. in *FS v. JS* [2006] EWHC 2793, at [28], as "pre-matrimonial") or the introduction into it of property received during it by inheritance or gift (being property there described by Burton J. as "extra-matrimonial"), the generation of wealth during a marriage has conventionally been taken as one obvious form of contribution to the welfare of the family. Here, however, Baroness Hale articulated a refinement, namely that the generation of wealth should not always qualify as a contribution to the welfare of the family and in particular perhaps that in excess of a certain level its generation should not so qualify. The dividing-line is no doubt elusive. But, if the present case were to be one in which, in excess of a certain level, the husband's wealth were not to qualify as the product of a contribution to the welfare of the family, how should the court treat the excess? Mr Singleton submits, albeit with diffidence, that the excess would not be susceptible of redistribution and so should all lie in the hands into which it has fallen, namely

those of the husband. We reject that submission: a party's property would not fall outside the court's redistributive powers in s.s.23-25 of the Act just because it was not the product of a contribution within the meaning of s.25(2)(f). With equal diffidence Mr Pointer submits, by contrast, that, because it is only a special contribution to the welfare of the family which justifies unequal division, the excess, not being the product of a special contribution, should fall for equal division. Such a result would in our view be almost absurd. The facts are that, before the judge, the case was accepted on both sides to be one in which, apart from £1 million which is the subject of the third subsidiary ground of appeal, all the property, notwithstanding its size, was the product of the husband's special contribution to the welfare of the family within the meaning of s.25(2)(f); and that Mr Singleton, followed reactively by Mr Pointer, now uses this difficult passage in the speech of Baroness Hale as a bandwagon on to which to jump. *In our view the size of the property in the present case should not compel departure from the usual conclusion that wealth generated by a party during a marriage is the product of a contribution on his or her part to the welfare of the family.*

82. Next Mr Singleton submits that, in her speech in *Miller*, Baroness Hale identified a category of cases in which property should in no way be subject to the sharing principle, notwithstanding that the principle allows in rare cases for special contributions, and that the present case falls into the category. Baroness Hale described such cases, at [150], as "non-business-partnership non-family asset cases". In *FS v. JS* Burton J., at [29], usefully abbreviated the description to cases of "unilateral assets". In summary Baroness Hale suggested, at [149] to [152], that within the definition of matrimonial property a distinction fell to be made between "family assets" and the fruits of a business in which both parties had substantially worked, on the one hand, and the fruits of a business in which only one party had substantially worked, i.e. unilateral assets, on the other. The suggestion was that it was property only of the former character which was subject to the sharing principle.

83. *We hasten to correct a serious misapprehension at the heart of this submission. As we will show, Baroness Hale put forward the distinction between unilateral assets and other matrimonial property for use in cases in which the marriage was short. And, although obiter she suggested an extension of it to another situation, namely that of the dual career to which we turn in paragraph 86 below, she definitely did not commend the distinction for use in other cases. Its application in a case such as the present would be deeply discriminatory* and would gravely undermine the sharing principle articulated, albeit embryonically, in *White* and emphatically developed in other parts of the speeches in *Miller* itself.

84. In *Miller* the marriage endured for less than three years. The husband had assets of about £32 million, of which £17 million was pre-matrimonial property. Ostensibly the balance of £15 million was matrimonial property; but its characterisation was complicated by the fact that it represented the value of shares in a venture which the husband joined six months after the marriage pursuant to plans made with a colleague prior to the marriage. By dismissal of the husband's appeal against dismissal of his appeal to this court, the decision of the House was to uphold the judge's award to the wife of £5 million, i.e. one third of the ostensible matrimonial property.

85. Such was the context in which the House turned to consider whether the sharing principle applied to cases in which the property had been generated during a short marriage. It was in this area that the members of the House were in substantial disagreement; and we cannot subscribe to the ingenious attempt of Burton J. in *FS v. JS*, at [30] and [31], to reconcile their differences. We suggest with respect that, while the approach of Lord Nicholls was perhaps the more logical, the approach both of Baroness Hale, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls, at [17] to [20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in *Miller* by reference, at [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled *"The source of the assets and the length of the marriage"* Baroness Hale, at [147] to [152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at [158], her rationale for justifying departure from equality in *Miller*. *Lord Mance, at [169], powerfully stressed the practical value of Baroness Hale's approach, namely that it would often obviate the need to address the argument, sometimes called the "seed-corn" argument, raised in Miller itself, to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.*

86. The extension of the concept of unilateral assets, suggested by Baroness Hale in *Miller*, at [153], was expressly endorsed by Lord Mance, at [170]. Although *obiter*, it clearly commands great respect. *It relates to the 'dual career'. The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined. Lord Mance offered, at [170], the following interesting rationalisation for the suggested extension:*

"Once needs and compensation had been addressed, the misfortune of divorce would not of itself ... be justification for the court to disturb principles by which the parties had chosen to live their lives while married."

Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.

313. Paragraphs 87 to 91 contain discussion of special contribution. Special contribution was not relied on as a separate factor in this case. But the discussion and guidance as to the range of departure from equality provided in respect of it, in the context of a case when the sharing principle applied with full force, is in my view of some general relevance, albeit that inevitably the court accepted that such guidance was arbitrary and qualified it. That range was between a 55/45% and a 66.6 /33.3% split.

314. In my view *Charman (No 4)*:

i) considers the unilateral asset argument as it is described in paragraph 82 of the judgment, and thus on the basis that at paragraphs 149 to 152 of her speech Baroness Hale had suggested that there is a distinction to be drawn between "family assets" and the fruits of a business (or occupation) in which only one of the parties worked (i.e. unilateral assets) and that the sharing principle applies to the family assets, but not to (or not with full force to) the unilateral assets as so defined,

ii) makes it clear that it is only in the case of a short marriage that the House of Lords has indicted that that unilateral assets argument can provide a basis for departure from equality under the sharing principle,

iii) indicates that there is potential for development of the application of that unilateral assets argument in the case of the "dual career" couple which would apply the argument to the respective products of the separate careers,

iv) like *Miller*, is not dealing directly with the impact of pre-acquired assets because it was not an issue, but is focusing on whether there can be a departure from equal division of the assets identified as matrimonial property (the £15m in the *Miller* case) on the basis of whether they should be classified as unilateral assets, (and/or special contribution and/or (and in particular at first instance) on what were said to be neutral facts),

v) does not identify what is, or is not, to be treated as a short marriage for the purpose of the unilateral assets argument (*Miller* was a marriage of less than 3 years),

vi) does not expressly deal with whether, and if so in what circumstances, a unilateral assets argument can be deployed in respect of a case where there are pre-acquired or gifted assets and thus an established good reason within the sharing principle for departing from equality,

vii) does not cover the linkage (if any) between the "fledgling or seed corn arguments" in respect of property identified as matrimonial property (see Lord Mance in *Miller* at paragraphs 171 and 172) when other property is identified as non-matrimonial property or other cases (and thus a case where there is a good reason for departing from equality within the sharing principle), and

viii) does not address in any detail what approach should be taken to pre-acquired and/or post separation assets in assessing a departure from equality within the sharing principle for "good reason".

315. In my view point (i) is important because it demonstrates that:

i) the unilateral assets argument that was put was in direct conflict with the non-discriminatory approach to contributions established by the House of Lords. This is because it was being argued in respect of assets acquired by the development of a business during the marriage (and thus the matrimonial assets or acquest to which the sharing principle applied with full force) that a departure from equal sharing should be based solely on the point that the husband had worked in the business and the wife had not, and

ii) the argument was not based, or primarily based on paragraphs 153 and 138 of the speech of Baroness Hale (albeit that the dual career is mentioned in 153),

or paragraph 170 of the speech of Lord Mance, and thus the passages primarily relied on by the husband in this case to bring into account the way in which the parties ran their lives together.

316. But notwithstanding that focus of the argument and point (vi), in my judgment the reasoning and approach in *Charman (No 4)* founds the conclusion that it would only be in exceptional circumstances that the unilateral assets argument, as presented therein (i.e. an argument that solely because one party had worked in the business during the marriage), could be a relevant factor in any case (including ones where there is a good reason for departing from equality within the sharing principle). This is because it runs directly counter to the non discriminatory approach that is required to be taken to the different contributions of the parties during the marriage (up to separation) in assessing how the product of those contributions, and thus that partnership should be shared.

317. But this leaves open questions as to:

i) how a departure from equality should be quantified when the good reason for such departure is the existence of a pre-acquired asset that has been created and then developed by the day to day work of one of the parties before, during and after the marriage (or separation), and

ii) whether the choices made by the parties, and thus the way in which and the principles by which, they have run their married life can of themselves be a good reason for departing from equality in an application of the sharing principle to the product of their contributions to the marriage, and

iii) whether the choices made by the parties and thus the way in which, and the principles by which, they have run their married life are relevant factors when there is an established good reason for departing from equality in the application of the sharing principle (i.e. pre-acquired or gifted assets).

318. The argument in *Charman (No 4)* was not based on the conclusion reached in that case that the sharing principle applied to all property that was within the ambit of the s. 25 discretion but in its application the court could depart from an equal division for "good reason", which reduces or eliminates the exercise of identifying the matrimonial property or acquest.

319. Rather as in *Miller*, the arguments and much of the reasoning in *Charman (No 4)* are linked to points relating to the identification of the matrimonial property or acquest.

320. But, in my view, the conclusions in *Charman (No 4)*, and the authorities and discussion on which they are based, do inform the reasoning process to be adopted in applying its conclusion and thus when there can be a departure from equality within the sharing principle for good reason. This is because an approach that is directed to categorising property to which the equal sharing principle applies with full, or less, force also identifies factors that are to be taken into account, or excluded, in determining what departure there should be for good reason from an equal sharing of all the assets subject to the s. 25 exercise.

321. *Pausing here.* As I indicated when starting the discussion of the law, in my view the position is reached that the recent guideline cases that bind me do not expressly, or directly, cover the approach to be taken in law to the points set out at the beginning of this discussion.

322. I now turn to deal with them more directly.

323. *The date at which the assets to be taken into account are to be assessed and valued. In other words what is to be identified as the property that is the subject of distribution applying s. 25 MCA.* This identifies the extent and value of the assets to be considered, and thus the starting point for a departure for good reason (e.g. the existence of pre-acquired or gifted assets) from equality within the application of the sharing principle on a non discriminatory basis. In my view, some aspects of the questions that arise in respect of such a departure because there are pre-acquired assets overlap with issues that arise in respect of the approach to be taken to post separation property flagged up in *Charman (No 4)* as a difficult and future issue (see paragraph 104).

324. In my judgment, the relevant date is the date of the trial and not an earlier cut off point by reference to separation, or some other event. Those events, and what happened before and after them may be relevant in identifying what award should be made, but that is part of the second stage of the exercise.

325. As submitted on behalf of the wife this conclusion is supported by, and follows:

i) Paragraph 70 of the judgment of Thorpe LJ in <u>*Cowan v Cowan*</u> [2001] 2 FLR where he says:

> " All the above considerations are capable of inclusion in a review of the respective needs, responsibilities and/or contributions of the parties. They cover three of Mr Pointer's four submissions summarised in [21] above. The third, namely that much of the husband's fortune was generated in the six years post separation, receives no reflection because in my opinion it is inherently fallacious. The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in Baco. The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit. If this factor has any relevance it is within the evaluation of the husband's exceptional contribution.",

ii) Paragraphs 65 and 66 of the judgment of the President in *Charman (No 4)* (cited above) relating to the property to which the sharing principle applies, which I agree supports the line of first instance decisions that the court should not strive to identify the matrimonial property or acquest, and

iii) the authorities I refer to later when dealing with post separation assets.

326. *Conduct.* The statute makes express provision in respect of conduct (s. 25(2)(g) MCA 1973) namely that conduct of each of the parties is a matter to be taken into account "*if that conduct is such that in the opinion of the court it would be inequitable to disregard it*".

327. There is a substantial body of law confirmed in *Miller* that to be so regarded the conduct has to be grave, gross and truly exceptional (see <u>*S v S*</u> [2007] 1FLR 1496 and <u>*McCartney v Mills McCartney*</u> [2008] 1 FLR 1508). In *Miller*:

Lord Nicholls said at paragraph 59 to 63 that:

> "*Conduct*
>
> 59. Next is the question of the parties' conduct. The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.
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> 60. Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.
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> 61. At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel* [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'.
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> 62. The Law Commission then considered the problem. The commission concluded that courts should be obliged to take account of conduct where to do otherwise would offend a reasonable person's sense of justice. To this end the court should be free to examine sufficient of the matrimonial history to enable the judge to 'get a feel of the case': see the Law Commission report on Family Law - The Financial Consequences of Divorce, (1981) Law Com no 112, paras 36-39.
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> 63. Parliament gave effect to this recommendation in paragraph (g) in the new section 25(2) introduced by the Matrimonial and Family Proceedings Act 1984. One of the matters to which the court should have regard is 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. It is implicit in this provision that conduct outside this description is not conduct which should be taken into account.
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> 64. This history is well known. I have mentioned it only because there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.
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> 65. This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of

> having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

Baroness Hale, at paragraph 145, having referred to the history and approbated the decision in *Wachtel v Wachtel*, said:

> "This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases. Yet in *Miller v Miller*, both Singer J and the Court of Appeal took into account the parties' conduct, even though it fell far short of this. In my view they were wrong to do so."

and Lord Mance said at paragraph 164, said

> " ---------- Where there is no conduct which it would be inequitable to disregard, the court should not seek to weigh the parties' respective conduct or attitudes in an attempt to assess responsibility for the breakdown of a marriage, or to attribute "legitimacy" or "reasonableness" to the wish of one party to continue the marriage against the wishes of the other. One problem about any such attempt is evident from the first sentence of paragraph 37 of the judge's judgment quoted in paragraph 162 above. If "this marriage may well have been doomed", what significance can there be in the fact that one party recognised this earlier than the other? How is one to judge between harsh realism and wishful thinking? More fundamentally, section 25(2)(g) recognises the difficulty and undesirability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions - conduct and contributions are in large measure opposite sides of a coin: see e.g. *G v. G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, per Coleridge J at paragraph 34. "

328. These are a powerful confirmation of the points made on behalf of the wife (and of the reasoning that lies behind them) that (a) before "conduct" can be taken into account it has to be of the nature described, and (b) it cannot be introduced through the back door under the guise of being part of the circumstances of the case, or otherwise.

329. So I agree that if "conduct" within s. 25(2)(g) is to be advanced it should be formally and clearly raised (see paragraph 109 of the judgment of Coleridge J in <u>*Charman v Charman*</u> [2007] 1 FCR 33). This was not done here not least because the husband asserts that:

i) he is not raising matters of conduct under s. 25(2)(g), or otherwise, but is

ii) relying on the way the parties ran their lives and the passages I have highlighted earlier in the speeches of Baroness Hale and Lord Mance in *Miller.*

330. *How is the line to be drawn between (a) "conduct" that cannot be taken into account unless it satisfies the degree of seriousness and exceptionality to bring it within s. 25(2)(g), and (b) allegations(if any) that can be take into account because*

they relate to the way in which the parties ran their lives? The first point I make is that this is likely to be fact sensitive and cries out for precise definition by the party seeking to bring into account allegations that he or she asserts can be so taken into account.

331. "Conduct" is an ordinary English word and its meaning can extend to cover the application by the parties of the choices they made as to the way in which, and the principles by which, they ran their lives, and perhaps to the agreements and discussions that underlie those choices. For example, its width of meaning is demonstrated by the comment of Baroness Hale in paragraph 25 of her speech in *MacLeod v MacLeod* [2008] UKPC 64, [2009] 1 All ER 851 when she says, when commenting on *Edgar v Edgar*[1980] 1 WLR 1410, that:

> "Ormrod LJ considered that the agreement should be taken into account as part of the conduct of the parties".

332. In *Miller* Baroness Hale makes the point that the choices made by the parties and the way they have run their lives can be relevant in applying:

i) the principles of need generously interpreted and/or compensation (see paragraph 138 of her speech), and

ii) sharing (see paragraph 153).

And, as pointed out in *Charman (No 4)*, Lord Mance (in *Miller* at paragraph 170) indicated that once needs and compensation have been addressed divorce would not of itself be justification for the court disturbing principles by which the parties had chosen to live their lives while married. This links the principles adopted by the couple to the application of the sharing principle after needs and compensation have been assessed.

333. Although the choices made by the parties and the way in which, or the principles by which, they have run their life together can be said to be aspects of their conduct, in my judgment, these comments of Baroness Hale and Lord Mance provide confirmation, if it be needed, that in applying the statute (and the principles enunciated in *Miller*):

i) such matters can be taken into account, and

ii) they are not subject to the approach taken in the authorities under s. 25(2)(g).

I say, if it be needed, because to my mind such choices of the parties and their product are plainly relevant to a number of the matters set out in s. 25(2) MCA in that, for example, they identify or affect earning capacity, the financial needs obligations and responsibilities of the parties and their standard of living.

334. Further, in my view, it cannot be said that such matters could only be relevant to, or taken into account in, an assessment of those matters if they were "grave, gross and truly exceptional".

335. In my view, the main difficulty comes when considering what choices as to the way in which or the principles by which a couple have run their lives, or their effect, are relevant factors to be considered in the context of the non discriminatory approach to be taken when considering contributions under s. 25(2)(f). This reflects statements in the cases to the effect that conduct and contributions are two sides of the same coin.

336. This main difficulty is therefore closely linked to the application of the non-discriminatory approach to contributions, and thus the application of the sharing principle, against a background that, on a case by case basis, the way in which and the principles by which parties run their married lives together, and in that sense their conduct towards each other, will be very different.

337. In *Charman (No 4)* the Court of Appeal regarded Lord Mance's concept as foreshadowing a no doubt cautious movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed. This comment also reflects the approach of Baroness Hale to the dual career family.

338. Also, it seems to me that that movement gains support from the decision and reasoning of the Privy Council in *MacLeod* and of the Court of Appeal *Radmacher v Granatino* [2009] EWCA Civ 649. These cases were concerned with post nuptial (and ss. 34 to 36 MCA 1973) and pre nuptial agreements. The approach taken to post nuptial agreements, and thus the conduct of the parties in entering into them and in applying them, are more relevant for present purposes. This is because these matters relate to choices made during the marriage that set or influence (a) the way in which and the principles (and expectations) by which the parties ran their married life together, and (b) how their assets should be divided after a separation. As Wilson LJ comments in paragraph 119 of his judgment in *Radmacher*, the Board in *MacLeod* helpfully explained that as the spousal duty to live together no longer subsisted, the public policy based on it that founded the conclusion that agreements that made financial arrangements for a separation that had not already occurred were void at common law, no longer subsists.

339. These decisions (and the cases referred to in them) show as do ss. 34 to 36 MCA 1973 that formal agreements are not "presumptively dispositive" but that they do fall to be taken into account.

340. In *MacLeod*, the Board (at paragraph 42) prefer the approach of Ormrod LJ to that of Oliver LJ in *Edgar* and state that it is not necessary in this context to think in formal legal terms because family relationships are not like straightforward commercial relationships.

341. This returns one to the point made in *Charman (No 4)* concerning a cautious movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.

342. Of course, there is a distinction between what has been agreed, or appears to have been agreed, (a) as to the distribution of property after the end of a marriage, and (b) choices made as to the way in which and the principles by which parties ran their married life and whether, and if so how, they have an impact on the s. 25 exercise.

343. To determine the approach to be adopted to drawing the line between what can and cannot be taken into account in respect of the choices made by the parties and their effects it is necessary to return to the terms of the statute, the guiding principles and the reasoning that underlies them and, in particular, to (a) the sharing principle and (b) the established application of s. 25(2)(g) MCA. But before doing so I:

i) record my respectful agreement with paragraphs 27 to 29 of the judgment of Thorpe LJ in *Radmacher*, and

ii) note the emphasis placed by Wilson LJ therein (in paragraph 120) on the duty of the court to take account of all the circumstances,

because in my view these comments inform that exercise in the present context.

344. Returning to the statute in that way, it seems to me that it would be remarkable, and at least potentially very unfair, in the overarching search for fairness if common ground between the parties that they knowingly and willingly made a formal and express agreement which:

i) governed the choices they made and thus the way in which and the principles by which they lived together as a married couple, but

ii) did not amount to an agreement which made financial arrangements for a separation or when they were living separately,

had to be left out of account in considering the application of the sharing principle. I put it this way because this hypothesis removes evidential difficulties. My main reasons are:

i) It would, under the present law, only be a factor.

iii) In any event, as I have said such matters necessarily inform, and could dictate, a number of the factors that the court is required to have regard to and which underlie an assessment of their needs.

iv) Such matters may well be an integral factor underlying an award based on compensation.

v) So, such factors are highly likely to be before the court and whilst fully recognising the point that there should be no discrimination between the contributions of the parties to a marriage, and thus the underlying basis for equality in the application of the sharing principle, if the court was to leave out of account arrangements made during a marriage between the parties to it that have an impact on the search for a fair distribution of their assets on divorce this would fail to have due regard to the autonomy of the parties (see Thorpe LJ at paragraph 29 of his judgment in *Radmacher*).

vi) Also, whilst fully recognising (a) the force of the conclusion that Parliament has by s. 25(2)(g) drawn the line as to what conduct can be taken into account (see Lord Nicholls in *Miller* at paragraph 65), (b) the reasons for the approach taken under s. 25(2)(g), and (c) that Lord Mance links his comments (at paragraph 164 of his speech) to contributions, it seems to me that a main focus of the approach to be taken to conduct (and thus the firm rejection of the approach taken in *G v G* (see paragraph 64 of the speech of Lord Nicholls) is based on allegations of fault or misconduct linked to the break down of the marriage and that choices made by the parties, as to the way in which, and the principles by which they ran their married life, are of a different character, and either (a) fall to be classified and considered as conduct of a different kind which it would be inequitable to disregard, or (b) are not within s. 25(2)(g) and are part of "all the circumstances of the cases" that the court has a duty to have regard to under s. 25(1) (see Wilson LJ at paragraph 120 in *Radmacher*).

vii) The high likelihood (if not the inevitability) that such choices, and the course of conduct they result in, will be relevant to and will be taken into account in respect of the court's consideration of a number of the matters listed in s.25(2),

and the consideration of the need and compensation principle, supports this view on the construction of s. 25 MCA because it indicates that Parliament has not drawn a line so as to exclude them from consideration when applying the section.

345. Having got that far it seems to me inevitable, given the lack of formality within a marriage, and the point endorsed in *MacLeod* that the arrangements and agreements between a married couple should not be assessed in formal legal terms, that the relevant underlying agreement, understanding or choices that founded the way in which and the principles by which, the parties ran their lives can be founded on informal arrangements and/or conduct. This is recognised by the Court of Appeal in *Charman (No 4)* and in other areas, for example, when agreement or acquiescence is considered in the context of an abduction.

346. In my view, evidential difficulties should not preclude this conclusion although of course there will be grey areas and room for argument when there is no common ground. But that is nothing new and, in my view, an approach that enables the court in all aspects of the s. 25 exercise to take account of the choices made by the parties as to the way in which and the principles by which they ran their lives does not trespass upon or undermine the existing approach to contributions and conduct. For example:

i) it does not reintroduce the "unilateral assets argument" through the back door because a choice that one party would be the bread winner and one the home maker would not (save in truly exceptional circumstances) be a choice that, of itself, led to a departure from equality because of the approach that there is to be no discrimination between the contributions made by the parties to the marriage, and

ii) if the choices and their consequences that fall to be taken into account are properly defined it does not undermine or change the established approach to the application of s. 25(2)(g) MCA in respect of conduct or the powerful reasons that underlie it.

347. As to point (ii):

a. the divide between (a) what can be taken into account because it is a choice as to the way in which or the principles by which the parties ran their married life, and (b) what cannot be taken into account because it is conduct (or a course of conduct) is probably not capable of general definition. But in many cases, like the elephant in the room, it will be easily identifiable when the points that a court is invited to take into account, and the reasons why they are relevant, are clearly enunciated, and

b. in determining what can and cannot be taken into account, in my view the court must apply the principle of non discrimination as between the contributions of spouses and the reasoning that underlies the approach that has been taken to deciding when it would be inequitable to disregard conduct.

348. So, disputes over the performance by a party of the role of home maker or money maker, or allegations as to who was responsible for the breakdown of the marriage because of infidelity, violence or drinking are very unlikely to be matters that can be taken into account for the reasons given by, for example, Baroness Hale at paragraph 145 of her speech in *Miller*. On the other side, the choice made by Mr and Mrs McFarlane that she should give up work, as to which it seems to me it was the fact of this choice rather than the reasons that underlay it that was important and relevant,

can be taken into account in applying not only the compensation and need principles, but also the sharing principle in respect of the product of the husband's earning capacity.

349. The resolution of grey areas and difficulties in establishing (a) what factors are relevant and what are irrelevant, and (b) in measuring the effect of the relevant ones should be greatly assisted by a change in practice to identify clearly:

i) the facts that a party is seeking to prove to establish the factors relating to the choices made by the parties during their marriage, and thus the way in which and the principles by which they have run their lives, and

ii) why and how they should be taken into account.

This should avoid the generalised assertion and denial relating to conduct that occurred in this case, and difficulties relating to definition referred to by Coleridge J in *Charman* at first instance (see in particular paragraphs 99 to 109) when dealing with the argument advanced by the husband on what he asserted were neutral facts, namely the wife's alleged failure to support the husband in his business endeavours and the alleged refusal to move to Bermuda.

350. There, Coleridge J found that these alleged "neutral facts" could not be dressed up as anything but conduct and therefore should not be allowed to seep into the case (and, in any event, he found that they were not established as matters of fact). Although the case was not put this way, he therefore did not regard them as choices or a way of life that could be taken into account by either of the routes I have suggested. Rather he classified them as "conduct" that could only be introduced through s. 25(2)(g).

351. But, in my view, his conclusion is not at odds with my approach. Rather it provides an example of a grey area. The first and general point advanced as a neutral fact was closely related to the argument on unilateral assets and thus, in my view, fell foul of the approach that there should be no discrimination as between contributions, and this analysis strongly supports the view that it could only be introduced through an application of the established approach taken to s. 25(2)(g). The second allegation was an aspect of the first and was couched in terms of a refusal. So it was effectively an allegation of misconduct rather than one that the parties made a choice, or ran their lives in a particular way (by the husband going to Bermuda and the wife staying in England). It seems to me that if it was common ground, or it was established that this was a choice made or accepted by the parties as a way of life then either:

i) this would be something that it would be inequitable to exclude albeit that it could not be said to be a choice or conduct that was gross, grave or exceptional, because it reflected a choice as to the way in which the parties ran their married life together, or

ii) it is a relevant circumstance.

352. In reaching these conclusions I have accepted and reminded myself that there is strength in the point, advanced on behalf of the wife, that:

i) the force and central role of the non-discriminatory approach to contributions, and

ii) the difficulties of, and the approach taken to, examining conduct,

found the conclusion that when considering the distribution of assets created during a long marriage all that matters is the existence of the marriage and therefore the court cannot, when applying the sharing principle, to assets acquired and created during the marriage have any regard to the way in which, or the principles by which, the parties have run their married life together unless this is based on "conduct" that is gross, grave and truly exceptional.

353. This point was advanced on the basis that so long as the parties are married and have not separated and therefore their marriage partnership, as they have chosen to conduct it, continues the court is to proceed on the basis that (absent special contribution) their contributions to the creation of assets during that partnership are equal and there should be no departure from equality in applying the sharing principle to those assets. If that is right, when considering the application of the sharing principle to assets created during the marriage, the court would not be able to differentiate between:

i) a long marriage in which the parties live together and the wife is the home maker and the husband the sole money maker (the classic example of a case where the non-discriminatory approach and equal division under the sharing principle applies), and

ii) a long marriage in which there are no children and the parties have chosen to live what are in effect separate lives with the result that the mutual support and co-operation that exists in the classic case for equal sharing is not present (by mutual choice/consent).

354. If the point made on behalf of the wife was right, in my view it would not be conclusive because in this case established good reasons for departing from equality within the sharing principle exist (i.e. pre-acquired and gifted assets and post separation enhancement in value of assets). But I acknowledge that, at least potentially, the point has an impact on what can and cannot be taken into account when there is such a good reason in determining the extent of the departure for equality. Also it is relevant to the assets acquired and developed during the marriage up to separation.

355. So I record that for the reasons given above, in my view the statute permits, and the present authorities do not preclude, the court having regard to the impact of such widely different choices and their consequences, and therefore more generally to the choices made by the parties and thus the way in which and the principles by which they ran their married life, when carrying out the s. 25 exercise in respect of assets acquired and developed during the period between marriage (the start of the relationship) and separation. However, the non-discriminatory approach that must be applied will probably mean that in most cases the result of the choices made by the parties will be that their contributions to the creation and development of assets during that period will be treated as being equal.

356. In my view that conclusion on relevance and admissibility is supported when one turns to consider the position in a case in which there is an established good reason for a departure from equality within the sharing principle.

357. A short marriage can be looked at discretely without looking at the choices made within it and their consequences. But it would be difficult to do this in the context of a dual career family and so the comments of Baroness Hale and Lord Mance relating to such a marriage, and thus the choices made in it, provide a strong pointer in favour of the conclusion that the choices made by the parties and their consequences on, for example, income, the accrual of savings and capital, income earning

capacities, needs, compensation and after needs and compensation have been considered the sharing of assets on divorce are relevant and admissible factors, when the court is carrying out the s. 25 exercise.

358. Turning to an established good reason for departing from equality in an application of the sharing principle (i.e. pre-acquired assets), I ask rhetorically whether it would be fair to parties who marry in say their fifties, and after previous marriages where assets have been created for them and their children, to leave out of account their agreement to ring fence part of those assets and to pool others. To my mind it would not be, both in assessing their relationship generated needs and a departure from equality in applying the sharing principle (see again paragraphs 27 to 29 of the judgment of Thorpe LJ in *Radmacher*). Similar examples and answers could be posed and given in respect of gifted assets and post separation enhancement in value of assets.

359. Of course, it is not possible to introduce such factors under the umbrella of the non-statutory phrase "good reason". So, what I regard as the obvious need to do so when a good reason for departure from equality within the sharing principle exists to achieve fairness supports that view I have reached that such choices, and their consequences on the way in which and the principles by which the parties ran their married life arrangements can, on the true construction of the statute, be taken into account.

360. Finally under this heading, I record that in my view a guide to the identification of what can and cannot be taken into account flows from the point I have already made that the approach to "conduct" that has to be gross, grave and truly exceptional before it is inequitable to disregard it focuses on allegations of misconduct and it is easy to see why the exclusion of such allegations links to the points made by Lord Nicholls relating to divorce being based on the neutral fact that the marriage has broken down, and to the difficulties of analysing and making findings about the rival perceptions for the causes of that breakdown. Whereas the way in which, or the principles by which, the parties have run their lives would generally relate to the period when the relationship was not breaking down and to conduct based on choices that were agreed, accepted, or at least at the time not criticised.

361. But the need for those choices and way of life to be obvious before they can be taken into account should it seems to me be adopted. This reduces the risk of there being an analysis of matters relating to the choices made, the principles adopted and the way a married life has been run that are susceptible to different perceptions which an outsider would have great difficulty in unravelling and concentrates on the obvious and major choices made by words and conduct.

362. *Post separation assets, or as the issue is aptly described by Singer J in* Hv H [2009] EWHC 494 (Fam) *the fruits of post cohabitation endeavour.* As I have mentioned earlier, and as Singer J points out in paragraphs 75 and 76 of his judgment, this is a vexed issue that has been the subject of different approaches at first instance. The existence of this difficult issue was recognised, but not addressed, in *Charman (No 4).*

363. In my view there are conceptual differences (albeit also some overlaps) between (a) future earnings (and the earning capacity acquired and developed during the marriage), and (b) capital assets such as the shares in a private company. In respect of changes in the value of capital assets there are also conceptual differences between changes in value that are, and are not, based on effort, work or skill of a party to the marriage even when the asset has been created by such work etc.

364. Here, as in an earlier case before Singer J *S v S* [2007] 1 FLR 2120, the court is concerned with the shares in a private company in which the husband has worked. In *H v H* [2007] 2 FLR 548 (quoted by Singer J in his *H v H*) I was concerned with future earnings and bonuses.

365. When dealing with the shares in a private company the points made by Thorpe LJ in *Cowan* (cited earlier) when he refers to (a) the language of the statute requiring identification and valuation of the assets at the date of the trial or appeal, (b) exceptions to that being rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial, (c) the reality of that case being that the husband traded his wife's unascertained share as well as his own between separation and trial, and (d) to her share going on risk so that in his view she was plainly entitled to what in the event has proved to be a substantial profit, are relevant.

366. In my judgment, Thorpe LJ was not there equating the wife's unascertained share to assets held on some sort of trust or quasi trust for her (even if she was claiming a transfer of relevant shares or other assets). Also he was not equating her position as an applicant for ancillary relief to that of a shareholder or a partner in a business. Both approaches would run counter to the point that we have a matrimonial property regime which still starts with the premise of separate property (see Baroness Hale in *Miller* at paragraph 153) and the nature of a claim for ancillary relief.

367. So, in my judgment, the issue of changes in value of a wife's unascertained share, or perhaps more accurately of the assets that fall to be considered in the s. 25 exercise, should not be approached as if the wife was a beneficiary under trust of a proportion of the relevant assets looked at as a whole, or of particular assets within them (e.g. shares in a private company) or as a shareholder, or a partner in a business. This conclusion is supported by the points made by Mance LJ in paragraph 133 of *Cowan* when he says that the bulk of the assets was between separation and the hearing the husband's and under his control and he could do with it as he wished. But he goes on to say that:

> "If the husband had lost the monies the wife would suffer. If he added to them, one might expect the wife to benefit"

368. This mirrors the point made by Thorpe LJ that if assets have decreased in value since separation that it is only in an exceptional case that the award is not based on what is then available. This has been the recent approach in a number of cases in the present economic climate and reflects the point that the court is concerned with the division of what is available at the date of the hearing in the absence of exceptional circumstances.

369. In my judgment, this approach to decreases in value of assets, such as shares in a private company or business properties, and the other points made by Thorpe LJ provide strong support for an approach that as the party who does not work in the business (usually the wife) has to have her award assessed by reference to the effect of post separation losses, a mirror image is that a wife should, in line with the approach in *Cowan*, be entitled to have her award assessed by reference to post separation growth in the capital value of business (and other) assets.

370. This reflects, and is confirmed by, the approach in *Charman (No 4)* to the assets that fall to be distributed but it does not directly cover whether within that assessment there can be a departure from equality in the application of the sharing principle by reference to post separation assets, or the increases in value of assets, after separation.

371. This mirror approach founds the accepted approach that there should not be any such departure in respect of assets whose value has increased by reason only of the relevant markets (e.g. houses and quoted shares). Such increases can be described as passive growth.

372. The position is more difficult when the relevant asset is a business in which one of the parties works (or the product of an earning capacity) and in my view a "mirror image argument" in respect of increases and decreases in value does not found the conclusion that there cannot be a departure from equality in the application of the sharing principle to increases in value of capital assets created, acquired or developed before separation, or that generally the departure can only be based on exceptional circumstances. In my view this is recognised by the House of Lords in *Mcfarlane* in the context of the product of an earning capacity.

373. The conclusion and reasoning of Singer J in *S v S* recognises and confirms that what has happened between separation and the hearing in respect of the capital growth of a company (and the future work required before its shares were marketable) might be very significant in the search for a fair result. I agree.

374. As the approach taken by the deputy judge at paragraph [24] of his judgment in *Rossi v Rossi* [2007] 1 FLR 790 (which was cited and adopted by Singer J in *S v S* at paragraphs 109 and 110) recognises a number of issues can arise in relation to the reasons for post separation capital growth including the effect of passive economic growth, and the length of the separation. I note that he also added the behaviour of the parties in this context, as appears from my earlier conclusions relating to the way in which the parties ran their lives; I agree.

375. Additionally, in my view, just as with pre acquired assets the "platform, fledged, seed corn or spring board" arguments (the spring board effect) are relevant to post separation growth because the party involved in the business after separation has the benefit of what was created, acquired or developed before separation. This factor and the relevance of the relevant periods of time (the length of the marriage, or the length of time between separation and trial) is referred to by Lord Mance in *Miller* by reference to earlier decisions. He said (with my emphases):

> "171. Fifthly, Singer J was inclined to assimilate to property inherited or brought into a marriage property which was generated by one spouse "using his or her pre-marriage assets or on the back of his or her pre-marriage 'fledged' experience" (paragraph 69). The word "fledged" arises from the reasoning of Mr Nicholas Mostyn QC in a judicial capacity in *GW v. RW (Financial Provision: Departure from Equality)* [2003] EWHC 1 Fam; 2 FLR 108, paragraph 51, where he treated "a developed career, existing high earnings and an established earning capacity" as "as much a non-marital asset as the provision of hard cash" and as "a contribution unmatched by any comparable contribution by W". In the present case, Mr Mostyn QC representing Mrs Miller was accordingly prepared before the judge to discount any claim by Mrs Miller relating to the matrimonial *acquest* (from 50% to 37.5%) to take into account that Mr Miller "brought very valuable acquired expertise and acumen to this marriage".
>
> 172. A possible difficulty about this approach is that it reintroduces, at the commencement of the marriage, a requirement to attempt to assess and compare the value of the contributions which each party is or would be likely to make during or apart from the marriage. I am not very confident that an established earning capacity or very valuable acquired expertise and acumen

would, if viewed as "assets" brought into a marriage, be easily or reliably measurable or comparable with other qualities, or indeed how far would one carry the enquiry into expertise and acumen. The concept of "fledging" is probably anyway one which would diminish in relevance, the longer the marriage, so that, in the light of the answer I would give to the third point above, the answer to this fifth point may be correspondingly less important.

173. On the other hand, where at the beginning (or end) of the marriage an actual transaction is under way or in view which in due course yields a considerable new asset, there is no difficulty in principle (even if there may be some difficulty in valuation) in accepting that part of that asset may have to be excluded from any assessment of the matrimonial *acquest* or included in what the parties brought into the marriage. In the present case, Mr Miller already had, at the marriage date, real connections in the form of the Jupiter funds which he later took to New Star and real prospects under the gentleman's agreement made with Mr Duffield of acquiring, as he subsequently did, valuable shares in New Star. I would regard these as real contributions brought into the marriage, which should on any view be taken into account accordingly.

174. Sixthly, if account is taken of the increase in the value of the parties' assets during the marriage (the matrimonial *acquest*), a question may arise about the date up to which one should measure it. Should this be up to the date when the parties ceased effectively to live as married partners (here April 2003), as Mr Mostyn considered in his judicial capacity n *GW v. RW (Financial Provision: Departure from Equality)* at paragraph 34? Or should it be up to a later date such as the date of trial, or even, in a case where an appellate court thinks it right to re-exercise the discretion, up to the date of the appellate decision? Reference was made by Mr Mostyn to my remarks in *Cowan v. Cowan* [2002] Fam 97, paragraphs 130-135. The matters to which the court must have regard under section 25 include several which exist or appear likely as at the date the court has regard to them (cf section 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look back at the past (e.g. section 25(2)(c), (f) and (g)). *To the extent that the focus is on the matrimonial acquest, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance*. The present may be viewed as a case (paralleling the then unreported decision of Coleridge J in *N v. N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 to which I referred in *Cowan v. Cowan*) *where the increase in value of the New Star shares between separation in April 2003 and trial in October 2004 or judgment in April 2005 was contributed to by the husband's further investment of time and effort,* independently on its face of any contribution by the wife. Further, Mrs Miller had here no right to, and could not have been given, any part of Mr Miller's New Star shareholding in relation to which Mr Miller carried the risk. Mrs Miller has at all times been living in the house, which has now been formally transferred to her. Her only further claim was to a sum of money, assessed by the judge at £2.7 million (which Mr Miller paid in two instalments in May and June 2005). *Mr Miller cannot easily be said in this case to have*

been holding on to any asset which should have been Mrs Miller's, or to owe anything other than money. Assuming that the focus is on assets acquired during the marriage, rather than on the husband's overall means, it seems to me therefore natural in this case to look at the period until separation."

376. In *S v S* at paragraph 109 Singer J said: " ------ but I also entirely agree with Mr Mostyn in his judicial capacity when he concluded (at the end of para 23 in *Rossi*) 'that Lord Mance [in *Miller*] was approbating emphatically the principle that independent endeavour after separation which is productive of money or property should be reflected in the division of assets". Again I agree, and add that in my view he was also making it clear that pre-acquired and gifted assets could also be so reflected.

377. Understandably, the analyses in the earlier cases I have mentioned refer to the identification of the marital property or acquest to which the equal sharing principle applies with force, but I repeat that in my view they inform the approach to be taken post *Charman (No 4)* when applying the sharing principle to all the relevant assets and departing from equality for good reason. So, for example, just as the impact on the current value of a pre-acquired asset will probably diminish as a marriage continues the impact of the asset built up during the marriage on its value at trial will probably decrease with the length of time that passes between separation and trial.

378. The cases to my mind necessarily recognise the fact sensitive nature of the exercise of departing from equality under the sharing principle by reference to post-acquired assets, the fruits of post-separation endeavour or post-separation increases in value. I repeat my view expressed in *H v H* [2007] 2 FLR 548 that the position relating to the application of the sharing principle changes when the mutual co-operation between the parties pursuant to their choices as to how to run their lives together, as equal partners making different contributions that fall to be treated as equal, ends (see for example paragraph 83) and that the assessment of an award by reference to that change is fact sensitive, and cannot be the subject of a formulaic or arbitrary approach (see paragraph 60 and paragraphs 124, 126, 130 to 144). There I was dealing with income and bonuses. In my judgment when, as here, the court is concerned with the shares in a private company and thus a business the court should have regard to:

i) the income return by way of salary, benefits and dividend that the business provides fairly to the party working in it, and

ii) the other aspect of its value namely the capital value of the shares.

379. The income return may (a) equate to the salary and bonus of the money maker in say a bank or a professional firm in which he or she has no capital interest, and (b) represent the product of his or her earning capacity. But care needs to be taken to consider whether the overall package of remuneration is fair. And it could be that by reason of problems with selling or raising money to fund an award the "run off" to independent living may be longer.

380. The consideration of the capital element introduces in many cases problems concerning (a) whether the capital can be fairly realised or realised at all (i.e. would it be fair to order a sale and is the company saleable), (b) valuation and (c) the funding of an award by reference to such a valuation.

381. Because here the company has been sold these problems only relate to historical valuations. But I pause to record, as I have urged in other cases, that in this context and in others my view is that when the assets include a private company or business to achieve fairness it is important:

i) to adopt a commercial approach (see *D v D and B Ltd* [2007] 2 FLR 653), and

ii) to recognise that although it may appear to be simple and fair to make an award by reference to an equal, or other percentage sharing, based on the total of the valuations of all the available assets, when part of those assets is a private company such appearance will often be an illusion and such an approach can often carry with it a very high risk of unfairness. This is because of the hypothetical and assumed nature of the valuation (and thus the point that in reality there may not be a willing buyer let alone a willing seller), the uncertainties inherent in the process flowing from the range of the reasonable judgments made as to the constituent parts of the valuations, the income and other benefits derived from such a business and the potential for unfairness in requiring the party who works in the business either to sell, or to raise money to pay a lump sum by utilising the income it produces and the security for any borrowing that it may provide.

To my mind point (ii) is an important one that should never be overlooked. I say this from a background that includes litigation between shareholders of private companies, and note that in *H v H* [2008] 2 FLR 2092**,** Moylan J from his background in ancillary relief litigation makes the same point at paragraphs 5, 99 and 104.

382. It follows that in my judgment an approach, such as that taken by the husband in advancing his open offer (but not pursued with any vigour in final submissions), that bases the calculation of an award simply on valuations of a company at the beginning of a marriage and at separation, and ignores an increase (or a decrease) in valuation between separation and trial, does not accord with the authorities and is wrong because:

i) the starting point is the current value at the date of trial, and in any event

ii) it is likely that the two valuations cannot properly and fairly be taken as anything but a guide to a range of value assessed on assumptions, and

iii) the approach ignores the spring board effect on income and capital yields of the business after separation of the work done in the creation and development of the business before and during the marital partnership up to separation.

At most in my view the valuations, or range of valuations, as at the date of the marriage and separation are, as such, likely to be no more than factors that can be looked at in determining what is a fair result.

383. In this case the major impact and importance of those valuations is that a comparison between (a) the valuation at separation, and the sale price, and (b) the methodologies that underlie the valuation and the assessment of the sale price by the purchaser, provides clear and convincing evidence of the reasons for the increase between that valuation and the sale price. It therefore informs the impact of the spring board effect in respect of post separation endeavour and its product in terms of income return and capital growth.

384. In line with what Lord Mance said in *Miller*, in my view it is likely that in many, if not most, cases it would not be practical or sensible to adopt a formula or valuation

methodology to quantify the spring board effect and thus to assess the impact of pre-acquired assets, and/or the assets created or developed during the marriage on a sale price or a valuation as at the date of trial, although I acknowledge that in some cases this may be possible by way of a valuation of goodwill.

385. In addition to the spring board effect issues relating to increases in value being based on inflation and general market conditions as opposed to the decisions made in the management of the business are likely to be difficult to assess by reference to a formula or valuation methodology.

386. No such formulas or methods were suggested in this case.

387. *Quantification of the departure from equality because of the good reason of there being pre-acquired or gifted assets and/or increases in value after separation.* The wife approached this by simply taking a percentage and both parties referred me to a number of cases to demonstrate percentage awards made in them, or the effect of the awards assessed in percentage terms.

388. This approach is likely to lead to an arbitrary result and any comparison of cases on this basis is fraught with difficulty. Also, as appears from *Charman (No4)* when the court was dealing with special contributions, the setting of a range for percentage departures from equality is something that has to be advanced with considerable caution and has to be qualified. But, with those warnings, it seems to me that the range for departure from equality for good reason within the sharing principle would be wider than that referred to in *Charman (No 4)* in respect of a special contribution. Indeed, in my judgment, the authorities in respect of pre-acquired or gifted assets indicate that, so long as an award satisfies a fair application of the need and compensation principles, pre-acquired and gifted assets could be retained by the person who provided them (and so divided 100% / 0%).

389. To my mind this flows from the points made by Lord Nicholls in *White* at page 610 (cited in paragraph 305 above and which is regularly taken as the starting point in a consideration of pre-acquired or gifted assets) and, in particular, the point that this factor will carry little weight if the claimant's financial needs cannot be met without recourse to it. Further, in my judgment, his approach to this "good reason" for departing from equality in applying the sharing principle that:

> "The judge should take it 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. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

applies to all such "good reasons" and thus to the effect of what has happened after separation. The application of that approach is echoed in his speech in *Miller* at paragraphs 26 and 27 when he says:

> "*Flexibility*
>
> 26. This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is

not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day. Similarly the 'equal sharing' principle might suggest that each of the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate. The case of Mr and Mrs Miller illustrates this only too well.

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 identifies a principled approach by reference to the words of the statute and the fact sensitive and broadly based nature of the exercise it sets the court in the exercise of its judicial discretion.

390. To promote consistency, I accept that a cross check to earlier decisions is appropriate but, in my judgment, a general approach of effectively arriving a percentage simply by reference to the results of other cases and the range of percentages that gives is wrong. In my judgment such an approach offends against point (ii) of the general starting points listed above, namely that the distribution of assets should be effected on a principled and not an arbitrary basis. This underlies the guidance given in *Miller* on the principles to be applied and in my view needs to be carried through into the application of those principles.

391. To my mind, a principled approach does not lead to the court taking a formulaic or mathematical approach, or a one approach fits all cases approach, or an approach that requires it to closely identify and quantify (by valuation or otherwise) assets that fall to be treated as matrimonial assets and those which represent pre-acquired or gifted assets and post separation assets.

392. Rather, in my judgment, it means that the court has to make an assessment in each case having regard to the factors or ingredients I have mentioned (and other relevant factors in a given case) relating to the impact of pre-acquired business assets, and events and work since separation, to gauge their impact on the creation and value of the relevant assets and how that should affect the award to be made.

393. In a case such as this one, where the most relevant asset (the company) is the same before and after the marriage the relevant factors include the point made by Lord Mance namely, whether it can be said that after separation the husband is holding onto something that should be the wife's. But this factor is linked to the spring board effect on the development of the asset during the marriage and after separation.

394. Often the principled approach applied in a case by reference to its circumstances will be best demonstrated in, and by, the reasoning relating to the award. This will identify the building blocks of, or the magnetic factors in, the discretionary exercise.

395. A consideration of the approach to be taken to post-separation assets, or the fruits of post-separation endeavour, has been considered by Moylan J in two cases and Bodey J in one.

396. In *CR v CR* [2008] 1 FLR 323, Bodey J, at paragraph 40 said that he did not propose to cite from authorities to which he had been referred because in his view the point is both discretionary and pre-eminently fact specific. But he then goes on to identify, through identifying the key point in the case before him, the manner in which he exercised his judicial discretion namely that:

> "40 ---------- Here, the key point is that the assets accruing to the husband post separation (and the mortgage reduction) were only able so to accrue to him by reason of the wife's sustained commitment to the family and the domestic infrastructure, whilst he was making his way up the ladder. ----------
>
> 41 Without the wife's support, the husband would not have had that important role and status within the group by virtue of which he came by those assets for which he seeks differential and favourable treatment. In other words there was a financial continuum, the groundwork for which was laid and the seeds sown during the parties' married life together, through how they chose their respective marital roles. Attempted forensic distinction between the differing assets in the kitty creates issues which are in many (though not all) cases sterile. In my view, therefore, whilst the 'matrimonial property' may nowadays need to be identified, the court should still strive to take as broad a view as possible, especially in cases such as this, where the husband's asset-accruing role has not changed in any way since the separation and where the accruals have not come from any new source of risk, endeavour, or luck".

397. I agree that an important issue in many cases will be whether there was in effect a "financial continuum" because this has a direct impact on or relationship with;

i) the "spring board effect " of the asset base created during the marriage prior to separation, and

ii) the mirror image argument relating to increases and decreases in value.

Further, in my judgment, Bodey J's view that the court should take as broad a view as possible should not be interpreted as advocating an unprincipled or general approach. This conclusion flows from his reasoning which demonstrates that this was not his approach because he identified the important elements of that case that informed the fact sensitive and discretionary exercise involved in it.

398. So, it seems to me that:

i) what Bodey J is advocating (and I agree) is that when a principled approach to the fact sensitive and discretionary exercise is taken there is generally no need to attempt to closely identify and quantify (by valuation or otherwise) classes of assets because of difficulties in, if not the impossibility of (a) that task, and (b) applying any formula based on the result of that task to the determination of what departure there should be from equality, and

ii) Bodey J is not saying that the appropriate percentage departure should be determined by a comparison with the results of other cases. Again this is because he makes it clear that what he was performing was pre-eminently fact specific.

To my mind the same can be said of the two decisions of Moylan J.

399. In P v P [2008] 2 FLR 1135, Moylan J commented on my decision in *H v H* and Bodey J's decision in *CR v CR.* He rejected a formulaic approach and went to say that :

> "[123] ---------- whilst I adhere to Baroness Hale of Richmond's approach namely 'that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation', this does not require me to define what is and is not matrimonial property. Further, the weight to be given to the fact that some of the resources have accrued through the husband's earnings since the separation is a matter for my discretion".
>
> [125] In reaching my decision, therefore, I take into account both the fact that a significant part of the wealth has been earned by the husband since the separation and the fact that he has a very significant earning capacity."

400. It is then necessary to look to see how he exercised his discretion by considering the reasons he gave for arriving at his award. When that is done it is plain that he looked at needs and sharing and reached a result that the wife was to receive more than half of the net current wealth and then dealt with sharing of the value of deferred shares and an investment in a company.

401. In *H v H* [2008] 2 FLR 2092**,** Moylan J was dealing with a case that H owned a business which he had run for over 33 years (and I have already mentioned the points he makes on the valuation of such a company). The marriage had subsisted for 15 years, and there were two children. Moylan J said:

> " [24] .. In the light of this evidence, it seemed plain to me that the current value of the business reflects the husband's work in it for the past 33 years and, as a result, it would be artificial to seek to define the business as solely matrimonial property.
>
> [115] Mr Bishop submits that both parties brought some assets into the marriage but they counter balance each other. In respect of the business, Mr Bishop seeks to discount the effect of the pre-marital history based on the fact that the husband was operating as a licensee and, accordingly, did not have an asset with any significant realisable value. Whilst this might be technically correct, it is a highly artificial argument and, even in its own terms, glosses over the fact that the buy-out in fact occurred after the effective end of the marriage. It is artificial because it is clear that the present value of the business is very significantly based on the fact that it has been operating successfully at the same site for over 30 years."
>
> "[116] … the current value reflects 33 years of endeavour. I do not consider it appropriate, or indeed possible to seek to divide this current value into marital and non-marital property. In this case such an exercise would be a wholly artificial exercise …"

402. He goes on to explain that he has adopted the word "artificial" from a passage in the speech of Lord Nicholls in *Miller* at paragraph 27, which I have cited above.

403. His reasoning identified how he exercised the broad discretion given to him by the statute and his key conclusions on the facts of that case that led to his conclusion that the parties had adopted extreme positions in an attempt to achieve an unrealistic outcome, and the case was not a clean break case (see paragraphs 122 and 124).

404. In that approach Moylan J makes clear that "the relevant building blocks have to be assembled in a provisional structure" and a global assessment of fairness is then to be performed (see paragraph 122). From that base he identified key factors and explained why the rival positions of the parties did not produce a fair result. He also made the point that the building blocks have to be based on the evidence at paragraphs 8 and 29 (and following), I agree, and pause to add that some of my remarks on the evidence in this case echo some of his.

405. In my view Moylan J's references to the taking of a broad approach are;

i) firstly directed to the task set by s. 25 and not to the establishment of the building blocks that have to be proved and taken into account, and that

ii) in the context of establishing the building blocks they are directed to the nature, accuracy and usefulness of some types of evidence, the dangers or impracticality of taking a formulaic approach and the inconsistency of such an approach with the task set by s. 25 MCA.

406. This analysis, as with that relating to conduct and the choices made by the parties as to the way in which and the principles by which they ran their lives, highlights the need for the parties to identify the facts and matters they are seeking to prove, the evidence that should be obtained and given for this purpose and from that base the factors they are inviting the court to take into account in exercising its broad judicial discretion under s. 25.

407. So, in my judgment, the approaches taken by both Bodey J and Moylan J recognise and proceed on the basis, and therefore confirm that:

i) in determining the impact of post separation enhancement in the value of assets the court is exercising a broad discretion and must do so in a principled way by reference to the facts of the particular case, and

ii) the nature of aspects of the exercise is such that having established from the evidence the relevant building blocks and key points it is not practical or sensible to search for a mathematical or formulaic solution.

408. *Overlap between the principles.* It is clear that need (and compensation) are not determinative. This is apparent from the passage in Lord Nicholls' speech in *White* at 608 (cited above) and for example:

i) *Miller* at paragraphs 34 and 139 where Lord Nicholls and Baroness Hale say:

> "34 The wife's financial needs, or her "reasonable requirements", are now no more a determinative or limiting factor on an application for a periodical payments order than they are on an application for payment of a lump sum.
>
> 139 But while need is often a sound rationale, it should not be seen as a limiting principle if other rationales apply."

ii) *Charman (No 4)* at paragraph 73 where Sir Mark Potter says:

> "----- when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in *Miller* at [142] and [144]. …. It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail---"

Indeed this point is at the heart of the basis for the sharing principle, namely the non discriminatory approach to the contributions made by parties to the marriage, and the rejection of an approach that based an award only on the reasonable requirements of the recipient, usually the wife.

409. It follows that there can be no return to an award that ignores sharing and so is based only on need however generously interpreted (except when as is often the position sharing will not meet need).

410. But, as earlier citations indicate, there can be an overlap between the principles. The citations in paragraph 408 show that if there should be a conflict in the results produced by the application of the need and sharing principles, in principle, and thus generally, the applicant should receive the higher award.

411. However in my judgment the flexibility and overlap within the application of the principles must be remembered in assessing whether the proper and fair application of the principles do in fact produce different results.

412. It is easy to see that:

i) In many cases the need principle would produce a higher award if capitalised than the sharing or compensation principles because that capital sum would exceed one half, if not all, the available assets. This is the situation that is likely to prevail in a great many cases and in them the need principle will prevail and will usually give rise to an award of periodical payments, and

ii) in many cases in which very substantial assets were acquired during the marriage (and by the efforts of the parties in carrying out their roles within their marriage) the sharing principle might produce a higher result than the need principle (unless it extended to cover a relationship generated need to share in savings and the product of assets of the partnership, including an earning capacity).

413. However, in my judgment, in a case such as this where a factor that can provide a good reason for departing from an equal division within the application of the sharing principle applies this can favour a conclusion that, in all the circumstances of the case the same result should as a matter of fairness be reached applying the need and sharing principles or provide a cross check or guide to the separate application of the principles.

414. So, it seems to me that if in such a case an application of the need principle leads to a result that is less than an equal division of the assets this can in some cases inform or influence the extent of the departure (for good reason) from equality within the sharing principle, and in others dictate such departure and thereby found the same conclusion being reached on the application of both principles.

415. As is shown by the decision of Moylan J in *P v P* a cross check or overview in respect of a departure from equality of sharing by reference to need can be undertaken when the need principle results in the payee receiving more than half of the current net assets. Because of the price achieved for the company this does not arise in this case. But, in this general discussion of the approach at law I mention that, in a case where the need principle based on the standard of living during the marriage points to a capitalised award that is higher than a half (or approaching one half) of the value of the immediately available assets, questions arise as to whether the factors that potentially provide a good reason for departure from equality in an application of the sharing principle:

i) found the making of a capital award equating to one half or less than one half of the value of the assets, and if they do

ii) whether there should or should not be periodical payments to meet the application of the need principle, and/or

iii) what approach should be taken to the pre-acquired or gifted assets of each of the parties.

In my view these questions raise the potential for an argument that, as with a short marriage, the existence of gifted or pre-acquired assets can reduce the amount of an award based on needs for the independent life of a party after the marriage to a level below the standard of living enjoyed during the marriage based on the use of gifted or pre-acquired assets.

416. So, in my judgment, in this case the extent of the departure for good reason from equality in applying the sharing principle to all the available assets can be informed by an application of the need principle in the given case which will inevitably have regard to the standard of living of the parties enjoyed during the marriage and thus the way in which they ran their life together.

417. *Recourse to the assets of others and of the prospects of the receipt of gifts (by inheritance or otherwise.* The husband made it clear that he was not seeking to bring into account what the wife might inherit.

418. The issue however arises because of my finding relating to the softness of the loan (the "speciality loan" alleged by the wife) that it will be set off against the wife's entitlement on her mother's death or released on her mother's death.

419. My findings relating to the support provided, and likely to continue to be provided, by her mother to the wife also introduce the question whether, and to what extent can that likely continued support be relied on as a factor in the s. 25 exercise. In this context I was referred to *Thomas v Thomas* [1995] 2 FLR 668 (and the comments on it by Mr Mostyn QC sitting as a deputy judge in *TL v ML* [2006] 1 FLR 1263) and a decision of Singer J *H v H* [2009] 2 FLR 494 in particular at paragraphs 51, 63, 64, 68 and 69.

420. The court is primarily interested in assets in which the parties have vested or contingent interests and thus not in hopes or prospects of lifetime or testamentary gifts. The focus of the court is on assets generated by the parties during the marriage. But prospects by way of inheritance are covered by the language of s. 25(2)(a) and a hope or prospect of inheritance can be taken into account albeit rarely (see *Michael v Michael* [1986] 2 FLR 389). The same can in my view be said of a hope or prospect of a lifetime gift or transfer.

421. I agree with the point made by Mr Mostyn QC in *TL v ML* that there is a real difference between a hope or prospect of benefiting as a beneficiary under a trust, and thus pursuant to a discretionary trust power, and a hope or prospect of a lifetime or testamentary gift. By definition in the latter case the donor can act unreasonably. But that does not mean that it should be assumed, or that the starting point should be, that the prospective donor will act unreasonably or differently from the way in which that person has acted in the past. So, in my judgment, if for example a child of an extremely rich father has always had a very high standard of living before and during his or her marriage met by gifts from the father, and has not been given a stake in the wealth made or a beneficiary under trusts, the court can in applying the approach in *Thomas* and *TL* make an award by reference to the history that the father has generously provided funds in the past and will be likely to enable the child to pay the award. This approach is based on history and lifestyle, rather than the hope or prospects of a "one off" lifetime gift or a large inheritance.

422. Further, in my judgment there is a distinction between (a) financial provision that has already been made in the form of unsecured loans and thus the assessment of the prospects of a demand being made for their repayment, and (b) the hope or prospects of future gifts, or "soft loans" being made by someone who can by definition act unreasonably.

423. *Thomas* and *TL* were concerned with the prospects of the payer but in my judgment the same approach falls to be applied in assessing the prospects of the payee when assessing the award that should be made.

Part 4

Conclusions

424. *Key conclusions on the approach at law.* These are that:

i) The general starting points are as set out in paragraph 288 hereof.

ii) Need generously interpreted is not a statutory phrase but is a reference to need assessed with flexibility, having regard to and applying the terms of the statute.

iii) The sharing principle applies to all assets available for distribution and departure from equality can take place within its application for good reason.

iv) "Good reason" is not a statutory phrase and what comprises such a reason has to be assessed by reference to the statute and the earlier cases, many of which focus on distinctions between the matrimonial acquest or property and other property but provide guidance.

v) The "unilateral assets argument" in *Charman (No 4)* is as described in paragraph 82 of the judgment and was in direct conflict with the non-discriminatory approach to the contributions of the parties to a marriage.

vi) *Charman (No 4)* leaves open how the departure from equality within the sharing principle is to be assessed, and thus leaves open the points raised in this case and listed in paragraph 286 hereof.

vii) The date at which the assets are to be taken into account and valued for the purpose of the s. 25 exercise is the date of the trial.

viii) The existence of pre-acquired or gifted assets supply an established trigger, or a good reason, for a departure from equality within the application of the sharing principle.

ix) Post separation gains or enhancement in the value of assets also provide a good reason for departing from equality within the application of the sharing principle to that asset or enhancement.

x) In assessing any such departure the underlying aim is to achieve fairness applying the terms of the statute. In such an assessment the court is exercising a broad judicial discretion but must do so in a principled way by reference to the facts of the particular case that are established by the evidence, the terms of the statute and the guideline principles set out by the House of Lords.

xi) In assessing whether there should be a departure for good reason from equality and its amount the court can have regard to:

a) The choices made by the parties prior to separation as to the way in which, and the principles by which, they ran their married life.

b) The "spring board effect" of pre-acquired assets.

c) The "spring board effect" of assets in existence at the date of separation on the fruits of post separation increases in value.

xii) To assist the court in the determination of the issues that arise in considering the matters listed in sub paragraphs (xi) (a) to (c), and more generally in the performance of the s. 25 exercise, the parties should set out with appropriate particularity the building blocks and key aspects of their argument (and thus the facts and matters they seek to prove and their relevance) at an early stage to ensure that the appropriate evidence is gathered and preliminary arguments (if any) on admissibility (e.g. whether an allegation is one of conduct that can only be taken into account if it is grave, gross and truly exceptional) can be determined before the evidence is heard.

xiii) It many cases it will not be practical or sensible to assess the impact of some of the relevant factors by reference to a formula or valuation methodology and their impact will have to be assessed in a broad way by reference to the findings of fact in that case.

xiv) But the points that the judicial discretion is a broad one and that in some of its aspects has to be exercised in that broad manner do not mean that the establishment by evidence of the facts and matters (the building blocks) that the court is invited to take into account in exercising its discretion should be approached with a broad brush. Rather a pragmatic, proportionate and commercial approach should be taken to determining what evidence and argument should be put before the court to establish the facts and matters on which a part seeks to rely.

xv) The determination of what departure should be made from equality in the application of the sharing principle can be informed and/or dictated by the application of the need principle.

xvi) The statute permits, and the present authorities do not preclude, the court having regard to the impact of choices and their consequences, and therefore more generally to the choices made by the parties and thus the way in which

and the principles by which they ran their married life, when carrying out the s. 25 exercise in respect of assets acquired and developed during the period between marriage (the start of the relationship) and separation. However, the non-discriminatory approach that must be applied will probably mean that in most cases the result of the choices made by the parties will be that their contributions to the creation and development of assets during that period will be treated as being equal.

xvii) There is a distinction to be made between a provision of finance, from someone who has no legal duty to consider providing it (e.g. a parent or other donor) and someone who does have such a duty (e.g. a trustee). But in the former case (a) there is also a distinction between financial help that has already been provided and a hope of future gifts or other financial help, and (b) the history of past provision is a guide to the future.

425. *The important findings or building blocks.* As appears earlier in this judgment, these are:

i) This is a nine and a half year marriage. The allegations relating to its effective breakdown before separation were not pursued and, in any event, would not have been admissible because:

a) they do not satisfy the approach taken under s. 25(2)(g) to conduct, and

b) as they were advanced, they could not be considered as a part of the way in which, or the principles by which, the parties ran their married life.

ii) It was a second marriage for them both and they both brought assets to the marriage. In the case of the husband the most relevant asset was his company and in the case of the wife the most relevant assets were her house and some capital.

iii) The source of the husband's assets before, during the marriage and after separation has been his company and the proceeds of sale of its shares. The company was his creation and he was centrally and primarily responsible for its development over the years. It, and its sale proceeds, are the product of his life's work, skill and business decisions. It was his "corporate baby".

iv) The wife's contribution to the company was a domestic one.

v) The wife does not have, and is not a beneficiary of trusts that have, substantial assets. The source of her funding, other than that provided by her first husband for her daughter, and by the husband, has been and is her parents. She has never worked or been expected to work.

vi) As between the parties the wife was the decision maker concerning the upbringing of her daughter and in particular as to her education. It was her decision to educate her daughter in England and to return with her to her house in Buckinghamshire, which she had retained during the period the parties and the wife's daughter lived together in Scotland. The retention of this house was an aspect of the wife's "independence" and her use of moneys provided by her family.

vii) The second house in Buckinghamshire now represents the house she brought to the marriage, and so her main pre-acquired asset. The "speciality loan" that

was used to buy it is a very "soft loan" and there is effectively no prospect that her mother will demand its repayment during her lifetime, whether or not the wife sells the house.

viii) The choices the parties made, and thus the way in which and the principles by which they ran their lives together resulted in large measure from what they brought to the marriage and the responsibilities that went with them. The husband's business was based in Scotland and at the start of the marriage he did not have a home there that was suitable for him, the wife and her daughter. Then they bought and refurbished the castle as their main home. Then in 2001 the wife and her daughter returned to England and their main time spent together was during the husband's very regular weekends at the house in Buckinghamshire. This was the family life they chose or accepted.

ix) Following that return there was not a plan or settled intention that the wife would return to live in Scotland once her daughter had settled as a boarder. The position was that they had two houses which were used as homes, one of which was regarded as the wife's and one the husband's.

x) The husband had no access to the wife's financial affairs save to the extent that he benefited from some of her expenditure on her house, the castle and other items.

xi) The husband provided a substantial level of income support that was shared and utilised by him and the wife to maintain a good lifestyle. She "topped up" her expenditure from funds provided to her directly by way of gift and indirectly (also by way of gift) by the payment of her bills. His assertion that they had largely funded their own lifestyles was not made out. I cannot quantify the amount of the wife's "top up" expenditure but it can be so described and represents an aspect of the way in which and the principles by which they ran their lives together. There is no real likelihood that this top up from the wife's mother for the wife (and her daughter) will end.

xii) The financial support provided to the wife by her mother was "ring fenced" by the wife and the husband accepted this and the fact that he provided the support referred to in (xi).

xiii) Although the company provided income support for the lifestyle of the parties during the marriage the husband was the decision maker relating to it and his shares in it, because it was and was regarded by them as, his asset and the product of his working life.

xiv) The increase in value of the shares in the husband's company after separation was based primarily on the position in the relevant markets of the company as at separation, the buoyant and optimistic state of the oil and gas industry and the ability of the company (because of decisions made by the husband to buy cylinders with the funds initially raised to expand into Norway) to take full advantage of those circumstances. The expansion into Norway was a plus but not a significant factor. The interest of private equity investors and the job done by S and Co were also plus factors that were unrelated to the performance of the business.

xv) The husband did not take on financial responsibility for the wife's daughter save as a member of the household.

xvi) The assets are as I have set them out.

426. *Applying the principles I have set out to the facts I have found – how should I exercise my discretion under s. 25.* The compensation principle does not apply and I start with the need principle (generously interpreted).

427. The wife's present house should in my view be regarded as a pre-acquired asset that will (or whose proceeds will) provide her with a fine home for as long as she wishes.

428. In this context I acknowledge that a component of this conclusion is the view I have reached on the likelihood of her mother demanding repayment of the "speciality loan". But in my judgment (a) the history of lifetime support for the wife by her parents (and as an adult this has included providing her with a home), and (b) the fact that this loan arrangement has been made, and has been in place for some time, differentiates the prospects of its repayment from the general position taken in respect of a hope or prospect of a lifetime or testamentary gift from someone (who by definition is entitled to act unreasonably).

429. Additionally, this approach to her house reflects the choices made by the parties in respect of the castle and the house in Buckinghamshire.

430. In my view, the starting point for assessing the wife's relationship generated need is the substantial income support provided by the husband during the marriage which I have estimated at between £100,000 and £110,000 (excluding the matters mentioned). This effectively "ring fences" the wife's "top up" expenditure, other than that on utilities etc at the house in Buckinghamshire. This starting point (a) reflects the choices made by the parties and thus the way in which and the principles by which they ran their lives, and (b) focuses on the wife's need generated by the relationship and the standard of living provided to them <u>both</u> during it.

431. In my view, this starting point or level of funding needs to be increased to reflect a combination of the following to arrive at an assessment of her relationship generated need (generously interpreted):

i) a provision for car replacement. An aspect of their life together was the use of a number of expensive cars,

ii) the point that the husband took on the basic funding of their good lifestyle, and although the wife funded outgoings on her house (and this reflected the joint view that it was her house that had been bought with funds provided by her mother) such outgoings are a central part of her day to day living at a standard enjoyed during the marriage, and

iii) an ability to make some savings, or spend on additional luxuries commensurate with her lifestyle during the marriage notwithstanding my view that she will continue to receive "top up" funding for such expenditure.

432. It is not practical to give a precise figure for these add ons. Based on (a) the material I have used to assess the support provided by the husband, (b) the wife's budget and (c) the rival contentions relating to other expenditure I have arrived at a figure of between £40,000 to £50,000, giving £150,000 per annum for the assessment of her need. Using Duxbury, and capitalisation calculations provided by the parties, as a guide in my view a fair capital sum to provide the wife with an income of £150,000 a year for the rest of her life would be of the order of £4.2m. (In their helpful comments on the draft of this judgment counsel informed me that a conventional capitalisation for a female aged 43 at £150,000 per annum is £3,981,000. But my higher figure is an estimate based on the material referred to, and could be said to

have a small cushion over that amortised figure. The difference between these figures does not found a change in my overall conclusion.)

433. I have taken this approach to the periodical of payments because in my view it is reasonable and fair to approach this assessment on that basis and then make appropriate adjustments by reference to the interim support provided.

434. In my allocation of the £800,000 I have treated £450,000 as going to maintenance (which will replenish expenditure by the wife on items other than costs from other sources), and therefore I do not bring it back into account. But, from the starting point set by FPR Rule 2.71, that each side bears their own costs, the balance of her costs (£432,424) remains to be paid making the capital sum £4.2 plus £432,424 to cover costs (plus £350,000 already paid and allocated by me to costs).

435. This leaves out of account the "speciality loan" on the basis discussed above relating to her housing need and my findings as to the likelihood that it will ever have to be repaid.

436. *Sharing.* In my judgment this should be assessed in stages.

437. I start with the nine and a half years of the marriage up to separation and therefore with a focus on the assets acquired or developed during that period. In doing so I leave out of account points relating to pre-acquired and gifted assets and the post separation increase in value of the company.

438. On that basis I have concluded that the choices made by the parties and thus the way in which, and the principles by which they ran, their lives do not result in a conclusion that that there should be a departure from equality based on the role of the husband as the person who worked in the business and provided the bulk of the funds for their joint standard of living and the wife's domestic contribution.

439. I have reached this conclusion because in my view the non-discriminatory approach that must be applied founds the result that my findings as to the choices made, the reasons for them and their product do not warrant any such departure. The lifestyle they lived from 2001 reflected choices they made or accepted, and in my view they do not change the basic approach and result applying the non-discriminatory approach of them being treated as equal contributions to assets acquired or developed between their marriage and separation.

440. In this context it is to be noted that even on the findings sought by the husband as to their separate lifestyles his open offer was based on an equal division of the increase in value of the company between marriage and separation which points to an acceptance of my conclusion.

441. But more importantly by reference to my earlier reasoning and conclusions on the law I have reached the view that the departures in this case from what might be described as the classic case for an equal sharing of assets acquired during a marriage were dictated by the circumstances of the parties when they married and their commitments and choices in and outside the marriage thereafter. In my view it cannot be said that the product of those choices was not agreed or accepted by the parties as a lifestyle for their marriage or that that lifestyle is sufficiently unusual to warrant a different approach. For example, work commitments of the money maker can often lead to him or her being away from home very regularly and for long periods.

442. Also, although this was not a long marriage, on this approach of isolating the period between marriage and separation, in my view it is also not a short marriage to which the unilateral assets argument can be applied.

443. So, in my view any departure from equality within the sharing principle for good reason in respect of the assets subject to the s. 25 exercise has to be based on (a) pre-acquired or gifted assets and/or (b) the increase in value of the company after separation.

444. In my judgment there are two main strands to be considered. First is the approach to be taken to the assets the wife brought to the marriage and the gifts and the soft loans made to her during it.

445. In my judgment:

i) the source of these funds, namely the wealth her father created, and so the fact that they were gifts and soft loans from her family's funds,

ii) the "ring fencing" of her pre-acquired assets and the funds emanating from her family, and

iii) the lack of any need to bring these funds into account when assessing the needs of the parties,

found the conclusion that they should be left out of account in an application of the sharing principle and sharing should be based on the husband's assets and the wife's cars (with an adjustment in respect of the interim support to replenish expenditure made by the wife from funds provided by way of gift from her family before or during the marriage). This means that the loan or gift argument relating to the "speciality loan", and thus whether these ring fenced assets have a significant value, falls out of account in applying the sharing principle.

446. Turning to the husband's assets in my judgment in this context they fall to be divided between those that represent the proceeds of sale of his shares and the other assets. Those that do not represent the proceeds of sale are the equity in the castle (as if still subject to the mortgage) and some of the cars which together total £847,645.

447. I have already rejected the argument underlying the husband's open offer that the departure from equality in respect of the moneys he received for his shares should be measured by ring fencing the period of the marriage up to separation by reference to valuations, dividing the figure so assessed and providing that the husband should retain the rest.

448. As I have mentioned earlier no notice has been given under the President's Practice Direction that either side is claiming costs, although the wife's open offer leaves costs to the court. The starting point under FPR Rule 2.71 is therefore that each side will bear their own costs. However in my judgment, at this stage in applying the sharing principle the costs of both parties should be allocated to a top slice of the assets now representing the moneys received by the husband for his shares and I should proceed on the basis that it is the balance of those assets that is available for sharing. That top slice can then be dealt with separately before the order is drawn up, having regard to any argument raised on costs under FPR Rule 2.71 (e.g. 2.71(5)(f), which returns one to the overall quest for a fair result). This approach enables the parties and the court to consider those arguments in the light of the conclusions reached by the court that impact on the matters listed in sub-rule (5). It

also enables the court to consider the impact of the starting point for costs on an award that does not (a) equate to an equal sharing of the available assets, and/or (b) mirror the split between the parties of the total of their costs bills.

449. That leaves in round figures £24m representing the moneys received by the husband for his shares. I have calculated this on the basis that the wife has already received £350,000 towards her costs from the top sliced sum (leaving £432,424 to be paid from it).

450. The range of the valuations, as at the date of separation, indicates that about half of the net proceeds of sale represent the post separation increase in value.

451. In my view, three main factors come into play in determining the departure from equality in respect of the assets representing the moneys received by the husband for his shares, namely:

i) his shares were pre-acquired assets,

ii) the increase in value of the shares after separation, and

iii) the way in which and the principles by which the parties ran the marriage which treated the company as an income stream but as the husband's asset.

452. The wife's open offer effectively attributes 20% to these factors because she seeks a sum based on a 60/40 split. In my view that is patently a significant underestimate of the impact of these factors in the context of the length of the marriage particularly when it is remembered, as I have found was acknowledged during the marriage, that the company represents the product of the whole of the husband's hardworking life.

453. In my view the first step (1) is to assess the impact on the sharing of the product of the shares in the company on the basis that it was a pre-acquired asset, and then (2) to assess the share of the post separation increase in value that is attributable to the spring board effect of the company as at separation.

454. In this context, I pause to record that in my view correctly no point was taken that Mr Y's shares should be added back, or that adjustments should be made, because of the option that was granted to him post separation. This is because the grant of this option was a reasonable and appropriate step to bring Mr Y into the management team.

455. In round terms the marriage lasted for one quarter of the husband's working life and one third of the life of his business that he started in 1986, and incorporated in 1988. The later years will have had a more immediate impact on the value of the company as at separation and when it was sold. Very little evidence was directed to the development of the business between inception and sale and in my view correctly it was not urged that the valuations obtained provide any real help in assessing its development over the whole of this period, in contrast to the help they give in assessing the reasons for the increase in its value between separation and sale.

456. The husband's written evidence unsurprisingly refers to "ups and downs" and market forces and competition. To my mind a constant was the husband's full-time contribution and its central part in the creation of the company's business, its business approach and practice and its position in the market. In my view, it is likely that if more evidence had been directed to the development of the business over all the years from its creation to its sale, it is unlikely that it would only have been possible to take anything other than a broad approach to the "spring board effect" of

this pre-acquired asset to its value as at separation, and thus to the attribution of its value as at that date between (a) its creation and the work done in its development prior to the marriage, and (b) its further development during the marriage.

457. In my view, on that basis around 60% of its value as at separation should be attributed to the creative years before the marriage. This reflects the importance of the later years but also has regard to the creation and earlier life of the business and thus the point that absent its creation and formative years there would not have been a company. Also it takes into account that there is no evidence of a major change in direction during the marriage and before separation. (This is mirrored when I turn to look at the increase in value after separation).

458. This results in an 80/20 split as between husband and wife on the basis that the percentage (40%) attributable to the years of the marriage is shared equally.

459. Further, to my mind this 80/20 conclusion based on the "spring board effect" of the existing company at the time of the marriage is supported by the approach of the parties to the company during the marriage as an income stream from the business (and a company) the husband had created and developed.

460. That split would carry through to all of the increase in value between separation and sale unless there should be a further adjustment in respect of the husband's endeavour and decisions during that period.

461. In my view, the highly profitable business decision to divert the funds raised for expansion into Norway to the purchase of cylinders falls to be classified as a good management decision of an experienced businessman in the field who had created and built the company, and thus the platform from which it could benefit from that management decision, rather than as a new venture or a significant change in direction. So (adopting the description used by Bodey J) it was in large measure a continuum of the decisions that had created that platform albeit that, fortunately for both parties, it (together with the other factors I have mentioned) led to a sale at a significantly increased figure over the valuation as at separation.

462. It has not been suggested, and I have not seen any evidence, that the husband (and through him until June 2006 the wife) did not have the continued benefit of remuneration appropriate to his role in the business. So, no question of an adjustment by reference to his remuneration arises.

463. Taking these points together in my view the share of the increase in value attributable to the spring board effect of the company's business and growth potential as at separation could not be put at less than 90%.

464. In my judgment, to divide the assets now representing the moneys received for the shares and take 20% (or some other share) of one half and 20% (or some other share) of 90% of the other would give a spurious accuracy to the exercise. Here this problem is not compounded by the application of the percentages to a valuation, but the amount of money involved means that say a 5% change in the percentage applied has a marked effect (£1.2m).

465. I have arrived at a figure of £5m (approx 21% of £24m) for the wife's share applying a departure from equality within the sharing principle.

466. If half of the other assets (the castle and the cars) is added to that (£424,000) that results a fund of £5.424m. Although the castle was bought in his name, and after 2001 it was regarded as his, in my view as it was bought during the marriage as a

family home the balance after repayment of the mortgage should be shared equally, as should the cars although he should keep the castle and his cars and she should keep her cars.

467. A further adjustment has to be made in respect of the interim payments of £800,000. in my view the sum of £450,000 treated as general maintenance should be treated as that and equivalent to the husband's expenditure that has not been added back. This effectively replenishes the wife's expenditure on day to day living from her gifted assets that I have determined should not be shared.

468. On the approach I have taken the whole of the wife's costs have been "top sliced" and she has received £350,000 by way of interim payment towards her total costs bill of £782,424 and the balance of £432,424 needs to be funded from the top sliced fund made up of the husband's paid and unpaid costs (£691,807 and £234,382) and the wife's paid and unpaid costs (£350,000 (from the interim payments) and £432,424).

469. That gives a total of £5.424 (plus £432,424 to cover costs plus £350,000 already paid and allocated by me to costs).

470. *Overview*. The two results on the above application of the need and sharing principles are therefore respectively:

i) Need: £4.2 (plus £432,424 plus £350,000 already paid to cover costs).

ii) Sharing: £5.424 (plus £432,424 plus £350,000 already paid to cover costs).

471. Both have a spurious accuracy by reference to their component parts.

472. In considering and comparing the two results I have had regard to:

i) the point that in my view on sharing the range of percentage division (around 60% to him / 40% to them both) is one that is more likely to favour the wife than the husband when one concentrates on the development of the business from its inception to its sale, but

ii) the sale seems to have been at a particularly opportune time having regard to world and market conditions and at an excellent price, which acts as a counter balance to (i),

iii) the capitalisation of an income stream is only a guide and is subject to the vagaries of the future,

iv) the points that I, and the parties, have not had to be concerned that the wife's need generously interpreted could not be met by her receiving a share that was less than one half, and thus any assessment of her needs and likely "top up" finance from her family has not been affected by this and has been "generous" by reference to the funding provided by the husband,

v) the point that I have proceeded on the basis that the wife's housing requirements are satisfied by what now represents the home she brought to the marriage which has worked in favour of the husband, and

vi) the point that my approach to the castle might be said to work against the husband because of my conclusion that they regarded themselves as each having a house.

473. It is not possible to reflect accurately the impact of these points (together with the factors in the two assessments), but in my view although the need assessment informs the sharing assessment in my view it does not in this case lead to a conclusion that it should dictate the departure from equality within the application of the sharing principle. Standing back from the two results and applying an overview I have concluded that a fair result is that the wife should have an award of £5m plus £432,424 to cover costs (plus £350,000 already paid and allocated by me to costs) on the basis mentioned earlier that if there is an argument on or relating to costs this could result in an adjustment before the order is drawn up of the provision to cover costs.

474. She has to give credit for £1m paid at the end of the hearing and her cars (at £76,000) against the sum of £5m.

Part 5

Final general comments for consideration by the profession

475. In making these comments I am acutely aware that (a) in cases I hear I am not privy to discussions between the parties and their advisers, (b) my practice at the bar was not in this field and so my relevant litigation experience is primarily in the field of disputes between shareholders and business partners and litigation relating to private companies and businesses, (c) a great many claims for ancillary relief settle, (d) I only see a small proportion of cases and, save on appeals, they are "big money cases" and (e) as demonstrated by this case (and those I mention below) the general approach, practice and expertise of those who specialise in these cases results in many aspects of them being well prepared and presented.

476. But, in three recent decisions of mine (D v D and B Ltd [2007] 2 FLR 653, R v R [2009] EWHC 1267 (Fam) and H v H [2009] EWHC 1549 (Fam)) and this case I have reached the conclusion that there were significant flaws in the results of their preparation and presentation, and it is this (and the criticisms made by Moylan J of the presentation of the case in H v H [2008] 2 FLR 2092, which I agree with) that have caused me to invite the profession carefully to consider individually, and as a specialist group, whether they should review and change their general approach to the preparation and presentation of "big money" cases.

477. At the heart of the flaws I have identified in the cases mentioned is the point that in my view there have been failures to properly identify the issues and, by reference to them, properly to identify (a) the findings the court is being invited to make and the reasons why they are relevant, (b) the facts and matters the court is being asked to find as the basis for those findings and (c) the evidence that is needed to achieve these goals. To my mind, all these steps are an essential and basic part of the efficient preparation and presentation of a case because they constitute the essential identification of the facts and matters relied on by each party and how they will set about proving them. So, they are an integral part of the process of establishing the building blocks of the case to be presented by the parties to the court as to how it should exercise its broad statutory discretion.

478. In my view, the points that the court is exercising a broad discretion, and that in assessing the impact of a number of factors necessarily has to take a broad approach, do not support a conclusion that the nuts and bolts or building blocks of litigation should be approached broadly, or with a broad brush, leaving the court, for example:

i) to weed out and identify the relevant allegations from discursive affidavits and/or valuations or budgets that (a) do not cover certain relevant issues or

items, and/or (b) do not provide proper information as to how they have been prepared and are supported,

ii) to embark on the oral evidence without (a) the facts and matters that each side is inviting the court to find, and by reference to them (b) the factors that they assert are important to the exercise of the statutory discretion, being defined, and then

iii) to reach findings (a) on generalised assertions and evidence and inferences based thereon, and/or (b) without central points being covered by the evidence, and/or (c) without appropriate disclosure in respect of the issues raised, and/or (d) from extreme positions adopted by the parties without proper attention being paid to the middle ground, and/or (e) by reference to a number of submissions or arguments directed at the client rather than the judge.

Each of the above has occurred in one or more of the cases I have mentioned at the start of this part of this judgment.

479. Indeed, in my view the very nature of the overall statutory task, and the broad discretion the court has to exercise in performing it, highlight the need to carry out the basic tasks I have mentioned to identify the facts and matters relied on, and thus the building blocks for the rival arguments as to the assets that are the subject of the s. 25 exercise and how that exercise should be carried out by the court. It seems to me that this should save money and promote the fair resolution of cases.

480. Experience in other fields (e.g. public law Children Act cases, Directors' Disqualification and indeed the history relating to whether proceedings should be started by originating summons or writ and now by a Part 8 claim or claim form) show that the presentation of cases through affidavits and generalised and brief statements of issues is not the best way of presenting disputes of fact and thus, where such disputes exist, the factors that parties invite the court to take into account.

481. So the process of Forms A and E, general identification of the issues through a short statement of issues couched in general and brief terms, questionnaires and s. 25 affidavits does not readily lend itself to a clear and succinct identification of the building blocks of the rival contentions, particularly when there are disputes of fact to be resolved. No doubt this process provides other advantages particularly at the early stages of proceedings and in smaller cases. It is also the basic procedure that has to be followed. But this does not mean that it cannot be supplemented where appropriate.

482. I agree with the suggestion made by counsel for the wife that in many cases after a failed FDR it would be appropriate for directions to be given for an exchange of documents identifying the building blocks of each side's case, particularly when there are disputes of fact and, even more so, if allegations of dishonesty are being advanced. It seems to me that often no such exercise is carried out, or committed to paper, before the preparation of skeleton arguments which is obviously much too late to inform the process of gathering evidence, and in any event often such skeletons do not set such matters out.

483. To my mind, by the time of an FDR each side should have identified the building blocks of their respective cases. Indeed, the assessment of them and their product is at the heart of an FDR. So the process of considering them should have started well before the FDR, and reducing them to writing after it should not be a burdensome or particularly expensive task. In my view, it will often be very helpful to set them out in an exchange of documents, and therefore I invite practitioners and judges after a

failed FDR to consider carefully what should be done to clearly identify the building blocks of the cases advanced by the parties. I also invite the parties to consider setting them out in writing in an open form before an FDR.

484. The costs of fighting a big money case are very considerable both in terms of money and emotion. There are public as well as private interests in ensuring that the litigants are getting value for money and thus, in my view, in the profession reviewing their approach to see if improvements can be made to it.

Part 6

CHRONOLOGY

Date	Event
1952	The husband is born.
1966	The wife is born.
1967	The husband started a marine engineering apprenticeship.
1973	The husband's first marriage.
1981	The P settlement was established by the wife's parents.
1982	A flat in London was bought by or transferred to the P settlement, of which the wife's parents were the settlors and she was the principal beneficiary.
1984	The husband joined a company whose core business related to saturation diving gas recovery systems.
1985	The husband established in the Court of Session that he was the inventor of a form of helium gas meter.
1986	The husband left his employment and established his own business relating to saturation diving gas management, using gas metering technology that he had invented.
1987	The husband and his first wife divorce.
1988	The husband's business was incorporated (D Ltd) and had the benefit of an exclusive helium distributor agreement with BOC.
1989	The wife's father sold his company and he and the wife's mother moved to the Isle of Man.
1990	The wife married her first husband.
1991	The wife's interest under the P settlement vested because she attained the age of 25 and she received £100,000 and the London flat.

1991	The wife says that her father provided by way of loan a sum of £495,000 that was used to buy and furnish etc a five bedroom property in Buckinghamshire mortgage-free (purchase price £410,000) for the wife and her first husband to live in. The property was bought in the wife's name.
1992	The wife's father made his will at a time when he knew he was terminally ill. It contained a legacy of £150,000 to the wife and left the residue to his wife (the wife's mother). It was accepted that this was his last will.
June 1994	The wife's daughter was born.
December 1994	The wife's father died.
1995	The wife's first marriage broke down.
1995	The husband bought out the shares in D Ltd, that were then still owned by an investor (35%), and became the 100% owner of the company.
February 1996	A consent order was made in respect of the wife's first divorce under which the wife was to receive maintenance at the rate of £6,000 per annum for her daughter. She received no substantive financial relief for herself but she received £6,000 towards her costs and it was recorded that she had earlier received £5,000 in respect of a loan. The wife was treated as the owner of the home in Buckinghamshire and the sum that she says was advanced by way of loan to buy it was treated as her liability. No indemnities were included.
April 1996	The parties meet.
June 1996	The parties marry.
June 1996	The wife's 30th birthday party.
1996/7	Following the marriage the parties lived separately in that during the week the husband continued to live in his flat in Scotland (which was unsuitable for a small child) and the wife in her house in Buckinghamshire. The husband came south at the weekends to be with the wife and the wife also made visits to Scotland.
October 1996	The husband bought a castle in Scotland in his own name for £400,000 which required substantial renovation. They had both been involved in looking for this home and were both actively involved in the renovation. The wife paid £50,000 for a new

	kitchen as part of that renovation; the balance was funded (as was the purchase price) by the husband.
1997	The husband received an offer of £6-£7 million for his company.
July 1997	The renovation of a wing of the castle was completed and the wife and her daughter moved to live with the husband in Scotland. The house in Buckinghamshire was retained.
May 1998	The castle was seriously damaged by fire and was uninhabitable. Renovation work had to start again and was in very large measure a replacement of what had been so recently completed and damaged.
April 1999	The wife sold the London flat for £167,440 and this sum was paid into her account. No repayment of the loan the wife asserts was due to her father's estate (and thus her mother) was made.
May 1999	An order was made capitalising the maintenance payments for the wife's daughter by her first husband; the lump sum was £125,000.
August 1999	The husband received an offer of £5.7 million for his company excluding its Singapore assets.
January 2001	The husband's company changed its name to DTG Ltd.
August 2001	The wife moved back to England to live with her daughter, who was then 7, at her property in Buckinghamshire and the daughter went to school in England.
November 2001	The wife asserts that her mother lent her £55,000 for her to buy a car.
2002	The husband's 50th birthday party at Gleneagles.
November 2002	The wife purchased a further property in Buckinghamshire for £2.45 million and further sums were spent on that property, totalling some £144,000. This was funded by moneys provided by the wife's mother which both she and the wife maintain are interest-free loans of £245,000 and £2.33 million.
April 2004	The wife sold her other property in Buckinghamshire for £1,153,407 net and paid £1 million to her mother; they both assert that this was in part repayment of the loans made by her parents in respect of the purchase of the two houses in Buckinghamshire.

October 2004	The husband signed an agreement with JC to advise on the sale of DGT Ltd.
2005	The husband received an offer of £9.3 million for DGT Ltd.
June 2005	The husband borrowed £300,000 secured on the castle to repay his director's loan account.
July 2005	The husband bought the wife a Mercedes.
August 2005	The parties holidayed in Cyprus and this was not a successful holiday.
December 2005	Discussions took place with the company's bankers about funding for an expansion of the business in Norway by setting up premises and facilities there. This finance was offered and taken up in 2006.
January 2006	Separation.
March 2006	Mr Y is engaged as the managing director of DGT Ltd. He had experience of working in Norway, he and the husband had known each other for some years and he had acted as a consultant to the company in the past.
April 2006	The husband had a mild heart attack when in Singapore.
May 2006	The wife's stepfather died, leaving his widow (the wife's mother) £50,000 and stating in his will that "this bequest is intended as a token to indicate my love and affection for my loving and devoted wife ------ who I am aware is already well provided for".
May/June 2006	The husband's maintenance of the wife ends (there is a dispute concerning the circumstances in which this occurred).
June 2006	An option was granted to Mr Y over 133 shares in DGT Ltd and its share capital was increased to 2000.
23 June 2006	The wife's petition based on conduct was issued and it contained a claim for ancillary relief.
July 2006	Solicitors' correspondence begins.
	The husband's position in letters dated 13 July 2006 and 19 September 2006 was that the parties had agreed that they would not make financial claims against each other. In a letter dated 21 September 2006 confirming receipt of the husband's Form A the wife's solicitors asserted that there was no such agreement and never had been any such agreement.

11 September 2006	The husband's Form A.
29 September 2006	S and Co's letter of engagement relating to the marketing of DGT Ltd.
October 2006	The first factory/depot in Norway became operational.
October 2006	The firm that had previously been engaged in seeking offers for DGT Ltd was disengaged and S and Co indicated that they were now running a more formal process relating to the possible sale of DGT Ltd and were preparing an information memorandum as a marketing document.
November 2006	An indicative offer for DGT Ltd at £17.3m was made by a company (AL)
30 November 2006	Wife's Form E. In it in respect of income needs she says that: " In June 2006 the Respondent stopped my access to a joint account, stopped my credit cards and ceased to make any payment with regard to my living expenses. My income has therefore decreased by approximately £136,000 p.a. Prior to the death of my stepfather in early summer 2006, I received monetary gifts from my mother which are utilised to meet my day to day expenditure. These have now ceased as my mother has had to reconsider her financial position in light of my stepfather's unexpected death. I am now, in the absence of maintenance from the Respondent, living by drawing down on capital. In addition, the lump sum provided by my former husband to provide for maintenance and education costs with regards to G is likely to be exhausted by mid-2007 increasing my income need accordingly." As to capital needs she says: " Repayment of the Isle of Man speciality loan £2,125,000" As to significant changes she repeats that the husband has stopped making payments for her benefit and that as a result she is obliged to draw down on capital which is depleting her asset base. As to contribution she says: " I have been a fully contributing wife. I have supported the Respondent in his business endeavours and in the building up of his business and accordingly the family wealth.

	In terms of direct financial contribution, I depleted the capital that I had accumulated prior to the marriage and for instance paid for the kitchen and utility room renovations at [the castle] at a cost of £50 – 60k and bought the Respondent expensive gifts such as Cartier watches"
	As to any other circumstances she says:
	" The Respondent is 54 years of age. I believe that as a result of a combination of factors including his alcohol consumption, his health may be suffering. I believe that once his business has expanded into Norway, he intends to sell it and retire."
	Her capital in bank accounts then totalled approximately £176,000, and in the asset schedule as at June 2009 this had reduced to approximately £71,000.
7 December 2006	Leave was given to the wife to file a second petition based on the husband's admitted adultery, the first petition and cross petition were stayed and were to be dismissed on pronouncement of divorce in the second petition. A direction was made that ancillary relief was to stand in the second suit.
December 2006	S and Co issued an information memorandum.
By 3 January 2007	First round offers for DGT Ltd had been received (five in total) between £20 million and £23.5 million.
8 January 2007	The husband's Form E. He estimated the value of DGT Ltd in the following terms:
	"£3,166,261 (Shareholders Funds)"
	and put his total assets at £3,228,135, his net income at £60,000 and his income needs at £85,575.56.
	As to other information and contributions he said that:
	" We each funded our own lifestyles, mine was largely in Scotland, the Petitioner's in the South East of England.
	We have largely funded our own lifestyles.
	I have no inheritance prospects and by definition my working life is limited, due to age/health. I have no plans to remarry.".
31 January 2007	The husband's concise statement of issues asserted that both parties are independently wealthy. It also asserted that the wife has received up to the date of the petition large sums of money from the Isle of

	Man, that she lives in a property ---------- bought purportedly with a £2m interest-free loan from an Isle of Man Foundation, that the origins of these monies are unclear…….. they originate from her family's wealth but there is an issue as to the current entitlements of or potential further benefits to the wife from these sources. The wife's statement of issues contained the following: (1) the true value and the liquidity of the Respondent's business interests, (2) the true level of the Respondent's income or access to funds, (3) the Respondent's future financial expectations, (4) the historic level of financial support provided by the Respondent for the Petitioner and her reasonable future income and capital needs, (5) the historical level of financial support provided by the Respondent for the child of the family and her future income needs, and (6) whether a clean break is achievable.
16 February 2007	First appointment. A direction is made for the instruction on a joint basis of an accountant to value DGT Ltd and for answers to questionnaire. A FDR was listed for 29 June 2007.
February 2007	A joint letter of instruction to the accountant Mr A (at KPMG) to value DGT Ltd as at 3 June 1996 and 31 January 2006 was agreed.
Early March 2007	Second round offers received for DGT Ltd (four in total) between £24 million and £29 million.
12 March 2007	The agreed joint instructions were sent to KPMG.
14 March 2007	The wife answered the husband's questionnaire as amended pursuant to the order made by DJ Cushing on 14th February 2007. In answer to a request that she do provide a narrative explanation of the Isle of Man Speciality Loan together with documentary evidence in respect of funds being released to the wife if available she said: " Please see attached. In 1991 the Petitioner's father lent her £495,000. In November 2001, the Petitioner's mother lent her £55,000. On 1 November 2002 the Petitioner's mother lent her £245,000. On 21 November 2002 the Petitioner's mother lent her £2,330,000. On 15 to April 2004 the Petitioner repaid £1m. This leaves a loan outstanding of £2,125,000 repayable on demand." (Nothing was attached) In response to a question whether she had any interest in or potential benefit from any Trust or

equivalent Foundation the wife responded that she did not.

In response to a request to list, together with providing documentary evidence of the payments in excess of £5,000 received by the Petitioner from her family whether directly or indirectly during the course of the marriage, the wife responded:

" Please see attached. Please note that all of these sums constitute monies due to the Petitioner under the provision of her father's will".

The attached document showed a list of 24 round figure payments between £5,000 and £8,500 over the period 27 August 1999 and 9 March 2006.

In answer to a request that she provide a narrative explanation together with supporting documentary evidence, save where of course already provided of her living by drawing down on capital the wife replied that this was evidenced by bank statements provided showing money passing out of two of her accounts.

15 March 2007

The husband answered the wife's questionnaire as amended pursuant to the order of DJ Cushing dated 14 February 2007.

In response to a request that he provide all documentation passing between the husband and others relating to "Project Ivan", the husband replied:

" Please see attached e-mails which are the only correspondence that the Respondent has"

One of those e-mails sent on 14 March 2005 indicates that after providing a company (AP) with the most recent financial figures for the year ended the 31 January 2005 that company indicated that it could not get to a price of £10m but could get to £9.3m with a view that it may be able to increase that number as it got more information.

In response to a request that he produce any valuations prepared in the past three years of any of the businesses in which the husband has an interest and confirm the basis upon which the valuations were carried out, the husband replied:

" The only valuation of the company prepared in the last three years was prepared in May 2006 for the purpose of issuing employee share options. Copies of this valuation have already been provided (with Form E). Because the

	purpose of the valuation was for the issuing of employee share options, it was necessary to get Revenue confirmation as to the valuation"
	In response to a question inviting him to produce details of any offers received for his company he says:
	"There has been only one tentative offer to purchase the company in the past three years and a copy of this is attached in response to question 18 above. The petitioner has had a copy of this offer, as the e-mails disclosed in response to Q 18 above show, for some two years……."
	This was the £9.3m offer and in my view it is clear that the wife knew about this offer at the time it was made.
By 4 April 2007	Further offers for DGT Ltd had been received including one for £34m and one for £34.5m.
5 April 2007	The questionnaire from KPMG included a question asking for:
	"Details of any approaches made for the sale of any or all of the Companies whether formal/informal, progressed abandoned etc including Project Ivan & 1999 approach from AP"
	The period referred to in the box that includes this question (and others) is between June 1994 to January 2006.
5 April 2007	The husband told S and Co to cease negotiations and confirm that the ultimate purchaser had exclusivity, its offer was £34m subject to adjustments for net assets.
early April 2007	The husband informed his solicitors of what he described as the first bona fide offer for DGT Ltd. His solicitor was on holiday.
19 April 2007	The husband answered the question from KPMG:
	"None – save as disclosed in replies to questionnaire"
11 May 2007	S and Co informed the husband that there were no major issues coming out of the due diligence exercise.
18 May 2007	KPMG valued DGT Ltd on the basis that the husband owned 100% of the company at £9.87 million as at 31 January 2006, and £3.2 million as at 3 June 1996.

21 May 2007	The wife replied to the husband's supplementary questionnaire and schedule of deficiencies. She asserted: " The term "Isle of Man speciality loan" is the correct term for the type of loan concerned. It does not indicate the source of funds, which have indeed come from the Petitioner's family as already disclosed." In response to a question why the sums she asserted were due to her under the provisions of her father's will totalled only £148,500 when she was left £150,000, she stated: " The balance of the money and the interest was enjoyed by the Petitioner (and indeed the Respondent) in other ways namely the purchase of a moon gate for [the castle] and the Respondent's 50th birthday party." In response to a request to clarify whether the payments totalling £148,500 were gifts from her mother or payments in respect of her pecuniary legacy from her father she replied: " The Petitioner has provided documentary evidence of all payments received from her inheritance. It is correct as she stated in her Form E that she also received monetary gifts from her mother and as these were not more than £5,000 she was not required to disclose them pursuant to the Order made at the First Appointment."
23 May 2007	Mr Y exercised his option (granted in June 2006) to acquire 133 shares in DGT Ltd.
25 May 2007	DGT Ltd was sold for £34 million with the potential for some small adjustments.
1 June 2007	The husband's solicitors wrote to the wife's solicitors telling them that the husband had important but sensitive information to disclose about DGT Ltd.
4 June 2007	The husband's solicitors wrote to the wife's solicitors informing them that the husband had sold his interest in DGT Ltd and stating that they understood that there would be a press release in relation to the sale that day. They also indicated that they had all of the documentation to disclose but that they needed an undertaking from the wife and her solicitors before this could be released.
4 June 2007	The wife's solicitors replied asking if there was a reason why no disclosure had been made relating to the sale before and indicating that they and the wife were bound by the implied undertaking and did not see that anything further was required. In addition they invited the husband to provide an undertaking

by return that the net proceeds of the sale would be frozen by him pending a final resolution of the case.

4 June 2007

After a further exchange of correspondence on that day the husband's solicitors sent to the wife's solicitors an explanation from the husband's accountants dealing with the sale together with a copy of the share purchase agreement and stated:

" As you will see from the letter from our client's Accountant, he has received a sum of £27,808,894.05, which is held in a Royal Bank of Scotland 90 Day Deposit Account. Our client will, without prejudice to his contention that your client will, when she has given full and frank disclosure of her financial position, be held to have no claim against him in these proceedings, hold the sum of £10 million pending final determination of these proceedings, and will not utilise any part of the £10 million without 28 days prior written notice to your client of his intention to do so, such written notice to be provided to yourselves."

The £27,808,000 sum is net of selling costs. Net of capital gains tax it became £25.028m.

26 June 2007

Notification was given of an application by the wife for maintenance pending suit.

28 June 2007

Form A was issued by the wife.

29 June 2007

The FDR was adjourned on the husband undertaking to preserve £10m and directions were given.

8 November 2007

Following correspondence between the solicitors an order by consent was made by HHJ Barnett that provided that:

"UPON the Petitioner's application for Maintenance Pending Suit dated 28 June 2007

AND UPON IT BEING RECORDED THAT the payment referred to at Clause 1 below is without prejudice to the Respondents contention that the Petitioner has no entitlement to interim maintenance, such contention not being accepted by the Petitioner

BY CONSENT IT IS ORDERED THAT:

1. The Respondent do pay or cause to be paid to the Petitioner a lump sum of £300,000 on account of her ancillary relief claims, by close of business on 7 November 2007 ----------"

Two further payments of £150,000 (making the total £600,000) were paid on equivalent terms (see an order of DJ Harper stamped 13 November 2008 and a letter from the husband's solicitors dated 10

March 2009). By an order dated 31 March 2009 (made when the final hearing was adjourned) the wife was ordered to provide details as to how that sum had been utilised between costs and maintenance and the husband was ordered to pay the sum of £200,000 “on account of all her applications for ancillary relief including costs and living expenses”.

I do not need to provide a further chronology of the proceedings.