Neutral Citation Number: [2021] EWCA Civ 247

Case No: B6/2020/0679

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
HHJ WALLWORK
LV17D01182

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

- -

Between:

Nicholas Ratcliffe	**Appellant**
- and -	
Tracey Ratcliffe	**Respondent**

- -

Ms S Harrison QC and Ms A Dawar (instructed by Slater Heelis LLP) for the **Appellant Husband**
Miss A Hussey Qc and Mr S Rowbotham (instructed by **Stowe Family Law LLP**) for the **Respondent Wife**

Hearing date: 19th January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 1st March 2021.

Lord Justice Moylan:

1. The husband appeals from the final financial remedy order made on 2 March 2020 by His Honour Judge Wallwork, sitting as a Deputy High Court Judge.

2. The issue at the heart of this appeal is whether the judge's determination of the award he made in favour of the wife, of £3.435 million, was flawed because it was based in part on a flawed figure for the parties' capital resources advanced on behalf of the wife. The judge's determination was based on competing figures for the total available capital resources as set out in a composite schedule provided by the parties as part of their closing submissions. The wife contended for a total of just under £9 million while the husband's total was £4.75 million. As explained further below, the judge took a figure midway between the respective totals, namely £6.87 million, and awarded the wife half of this sum. The husband argues that this determination was flawed because the total advanced on behalf of the wife included a significant element of double counting thereby distorting and invalidating the judge's consequent award.

3. Regrettably, given the long and troubled history of the proceedings, I have come to the conclusion that the judge's decision was flawed for the reason summarised above and has to be set aside. I have considered whether this court is able to substitute its own decision but, as set out below, I have, again regrettably, concluded that we cannot. There will, therefore, have to be a rehearing. As set out below, the scope of the rehearing will be a matter for the judge but to assist with that, and to assist the parties in seeking an agreed resolution, I propose to deal with all the matters raised by the husband in support of this appeal.

Background and Judgment

4. I take the facts from the judgment below.

5. The husband is now aged 61 and the wife 51. They started living together in or about 1992 and married in 1993. They have two children now aged 25 and 19. The marriage came to an end in 2016. The parties remained living in the former matrimonial home until the husband was ordered to leave in 2018 pursuant to an occupation order. The wife has remained living in the former matrimonial home. The younger child moved with the father to rented accommodation. The older child acquired his own home with a loan from one of the husband's companies.

6. The wife's application for financial remedy orders was issued in March 2017.

7. The husband is a chartered surveyor and for most of the marriage worked as such through a company called NHR Limited ("NHR"). The wife worked for the company in an administrative capacity. She also assisted in the administration of NHR's directors' pension scheme.

8. One of the key assets in the case was a four-acre site ("the site") which had been purchased by the husband, with two others, either shortly before the parties' relationship began (in 1990, as argued by the husband) or a few years later (in 1994, as argued by the wife).

9. In 2013 "an opportunity arose for an application to be made for the development of (the site) for a luxury housing development". The judge went on to say that, "although the word 'luxury' is much overused in respect of property, the proposal here was for a superior development in a prime rural location with excellent accessibility and close to amenities". As set out in the judgment: "Planning permission was eventually granted after various appeals and shortly after the parties' separation it appears that the development was begun in earnest".

10. The precise sequence of the following events is not entirely clear. In 2017 a company (which I will call "HH") was incorporated as, it would appear, the vehicle through which the development of the site would be effected. Initially, the husband owned 90% of the shares and the parties' elder child, Tom, 10%. At some point the husband transferred a further 40% interest to Tom, by way of a gift, making them equal shareholders. The husband also settled his interest in the site on trust for HH. In addition, during this period, the other two owners sold their interest in the site to the husband. The end result was that HH became the sole owner of the site and the developer of it.

11. In order to determine the wife's award, the judge had to resolve a number of issues when dealing first with quantification or computation and then with distribution. As he set out in his judgment, he had to determine the value of the assets available to the parties; the "classification of the assets", namely "whether a particular asset can be considered to be a matrimonial asset"; liquidity; and "a *Wells v Wells* argument" (i.e. taking into account that some "assets … can be considered 'copper-bottomed' and (that some) are more speculative"). The judge also had to consider how to deal with Tom's shareholding in HH.

12. As set out in the judgment, one of the "biggest issues" between the parties was the value of the site in terms of the profit likely to be generated through its development. At the date of the first part of the final hearing before the judge in early 2019, the position in respect of the development was that although "some properties are now ready for marketing, it will be some time before the development is completed". The chartered quantity surveyor instructed to value the site/development assumed a sales rate of three properties per month which would lead to the development being completed in about April 2020.

13. Another specific issue was the extent to which the site and the likely profit from the development were or were not marital assets.

14. The husband's case was that neither the site nor any profit generated through its development were marital assets. At most, if the site was a marital asset, he contended that it had a value at the date of the parties' separation of £300,000. The development of the site and any profit were "attributable to post separation" activities. The husband also relied on the fact that he had only a 50% interest in HH as a result of Tom having "a 50% shareholding in the company because (as the husband contended) … the development is really Tom's baby"; he was said by the husband to be "the driving force and in charge of the development".

15. The wife's case was that the site was a marital asset and that its value "should be taken into account as at the date of the hearing". The other owners' interests had been

acquired with family resources and the development was the realisation of a longstanding intention. The judge summarised the wife's submissions as follows:

> "There were two important and significant figures to be taken into account. The first was the profit or gross revenue which the development is estimated to accrue and the second relates to the calculation of the land value. In some ways she argues that the distinction may not be so important because the land was in the name of the husband prior, of course, to the division of shareholding, and therefore both land and profit could be attributed to the husband and she would say that the gift to Tom should be disregarded for the purposes of calculation. She does not ultimately seek to challenge the value of profit share to be attributed to Tom because although it should be accounted for on the husband's side of the balance sheet it is a sum which may reasonably be attributed to post separation endeavour."

The wife also accepted that the value to be attributed to the site (including its development) should not be shared equally because of "the current illiquidity and … the risk inherent in the undertaking".

16. The judge found that the site itself was a marital asset. The date of its purchase was not material to this determination because "it had become subsumed in the family assets". However, he also found that there was "no evidence to support the husband's contention that it had been acquired in 1990" and that the available evidence, "including conveyancing documents transferring the land from the partners to himself corroborate acquisition in 1994".

17. He was also satisfied that the process leading to the site's development was "well established at the time of separation" and that the funds which were used to purchase the other partners' interests in the site and "which provided funding for the continuing development as reflected by the accounts showing the inter-company loans" were "funds which were derived from family assets". His overall assessment was that the "development … can properly be regarded as a matrimonial asset".

18. As for Tom's shareholding in HH, the judge rejected the husband's case that the initial allocation of 10% to Tom was "an error on the part of his solicitor" and that it should have been 50%. In his view, a 10% allocation was "an interest which one might think was more appropriate for a young man fresh from college with no previous practical experience". The judge concluded that what had happened was "a clear endeavour on the part of the husband to remove a family asset to which the wife is entitled" to share.

19. The judge was provided with a composite schedule, as referred to above, which set out the parties' available capital assets and their respective contentions as to the total net value. To repeat, the total contended for by the wife was just under £9 million; that contended for by the husband was £4.75 million. The judge's ultimate conclusion, for the purposes of determining the wife's award, was to take a figure midway between the two, namely £6.87 million, and to award the wife half, namely £3.435 million. He later explained that this was not just splitting the difference between the two figures. Rather, he had determined that reducing "the likely capital

'pot' … by a sum equal to half the difference properly reflect[ed]" the factors in the case which meant that the wife's award should be less than half the arithmetical total asset figure, in particular to reflect the fact that the wife was receiving secure rather than risk assets and the impact of the husband's post separation work. This was the method he used (by way almost of a proxy) which reflected his assessment of what reduction would be "commensurate" with those factors.

20. As can be seen, the judge's determination was based on the principle of sharing although, as explained further below, he took other issues into account when arriving at the figure of £6.87 million for the purposes of calculating the wife's award. It is clear that he applied this principle because he was satisfied that the level of wealth in this case was such that each party would be able to meet their respective needs with their share of that wealth.

21. In respect of housing, both parties sought the former matrimonial home. The judge noted that the husband had not provided his home address "and merely says that he is living in rented accommodation". This meant that it was "not possible to evaluate his domestic circumstances" which the judge determined had been "a matter of choice" by the husband being part of his "litigation strategy".

22. The principal assets were (values are approximate): (a) the former matrimonial home with a net value of £1.27 million; (b) NHR's self-administered pension scheme with assets valued at £2 million; and (c) three companies, NHR, NHR (UK) Ltd, and HH. NHR (UK) Ltd was described by the judge as principally "a vehicle for funding" the development of the site.

23. The gross value of the assets held by NHR and NHR (UK) were largely agreed. The husband put the total realisable amount from these companies at £1.16 million and the wife's total was £1.67 million. It is relevant to note that included within these totals were loans due from HH of, gross, £1.4 million. The dispute between the parties in respect of these assets centred on whether the tax treated as payable on any distribution should be capital gains tax or income tax. I would also note that the husband's total failed to reflect the fact that repayment of the director's loan account, of £313,000, would not be subject to tax.

24. As for HH, its value depended on the profit generated by the development. The expert evidence had divided the profit into a notional "developer's return" of either 17.5 or 20% of the gross proceeds and "residual land value", broadly being the gross proceeds less development costs. It appears that this division reflected the legal arguments being deployed by the parties for the purposes of addressing the characterisation of this asset, namely whether and the extent to which it was marital property. In fact, of course, both the developer's return and the residual land value would both be part of HH's assets.

25. The judge "heard a great deal of evidence about the development, the likely profit and how the underlying value of the land should be determined". This included evidence from a single joint expert quantity surveyor; a single joint expert forensic accountant; the "consulting manager" of the development; and the husband. The extent of the evidence no doubt reflected the fact that, as the judge noted, this development was "a very significant, if not the most significant issue in this case and valuation of it is central to a determination of the wife's application".

26. The judge undertook a careful analysis of the evidence as to the profit likely to be generated by the development of the site. He found the consulting manager of the development an "impressive witness". In contrast, he found that the expert surveyor was an "unimpressive witness", although his "methodology was accepted by all parties", and that the husband was "not … a credible witness". The judge also relied on a valuation report (from LSH) which had been commissioned by the commercial lending company that had provided the bulk of the funds required for the project.

27. The judge's ultimate conclusion was that the "valuation which (Miss Hussey QC) urged me to accept was likely to be nearer the mark than the report of the single joint expert". That valuation was set out in a separate schedule ("the development schedule") prepared on behalf of the wife as part of her final submissions. This contained a table setting out specific figures from the evidence which the judge was invited to accept, including total revenue of £16.84 million and total development costs of £9.2 million. This gave a total profit before tax of £7.65 million which was divided into residual land value of £4.28 million and developer's return of £3.37 million (being 20% of £16.84 million). I would also note that, although the judge accepted that these figures were "nearer the mark", he added that he "did not … simply adopt" them. He considered he should take "a figure which falls between the two figures urged upon me and it seemed to me that an uplift of over half the difference between the parties should be applied to the husband's valuation".

28. The judge also took into account "the principle in the case of *Wells v Wells*", namely the distinction between "copper-bottomed assets" and other risk assets. This meant that, although he accepted the "calculation" put forward on behalf of the wife, "equally I am satisfied that where one is concerned with building projects in particular it is often the case that unexpected expenses arise, difficulties occur and, of course, in this case, it may be subject to market variations, although they are not at this point of great significance".

29. On the issue of tax, the judge noted that, if the husband were to retire as he said was his intention, "his transfer to Tom of 50% of the shareholding in (HH) was perhaps financially imprudent". This was because, as set out in the evidence from the accountant, when a company is wound up, entrepreneur's relief is potentially available so that distributions are taxed at the rate of 10%. However, under anti-avoidance rules, this is not available when the shareholders "are involved in another business carrying on similar activities within two years of the winding up". This would mean that any distribution would be treated as income. As the judge observed, if the husband intended to retire, "as he has stated", his transfer of shares to Tom meant that "he has, to put it colloquially, shot himself in the foot".

30. As referred to above, the judge determined the wife's award by taking the figure of £6.87 million, being midway between the competing totals in the composite asset schedule of £9 million and £4.75 million. I need to explain the difference between these figures.

31. There was no significant difference between the parties in the values attributed to the former matrimonial home and to assets held in pensions. As referred to above, there was a difference in the net sums realisable from NHR and NHR (UK) which depended on the rate of tax applicable to distributions. The difference would have

been reduced to about £400,000 once the husband's figure was adjusted to take into account that repayment of the director's loan account to him would not incur tax.

32. The main reason for the difference was the different sums attributed to HH. As set out in the composite schedule, the wife's total for the amount which the husband would receive from HH net of tax was £3.76 million. This total included two elements. The first was the residual land value. The figures were as follows: a gross value of £4.28 million (as referred to in paragraph 27 above) less corporation tax and dividend income tax giving the net sum of £2.2 million. All of this sum was attributed to the husband on the basis that this was a marital asset. I would repeat that the figure of £4.28 million was calculated, in accordance with the wife's development schedule, after deducting £3.37 million in respect of the notional developer's return.

33. The second element in the schedule as advanced by the wife, however, did *not* use the figure of £3.37 million for the developer's return but, instead, started again from the headline figures of gross revenue and development costs and was based on the overall profit before tax figure of £7.65 million (i.e. the total sum generated by the development, as also referred to above). The net sum available to the husband was then calculated using the figures provided by the accountant. This involved deducting corporation tax (of 17%) and adding the balance of £6.35 million to HH's balance sheet giving "Net cash for distribution" of £4.99 million. The wife allocated half of this sum to the husband (to reflect his 50% shareholding and post separation work) which, after deduction of income tax, would give the net sum of £1.56 million.

34. It can be seen, therefore, that the net profit before tax *total* derived from the development, as used by the wife in the composite schedule, was £11.9 million (i.e. £4.28 million plus £7.65 million) as against the sum advanced in her specific development schedule of £7.65 million.

35. The figures included in respect of HH in the composite schedule on behalf of the husband also comprised two elements. The first calculated the residual land value, including after deducting a notional developer's return of 20% (£3 million), as being £780,000. Half of this was allocated to the husband which, after deduction of dividend tax, gave the net sum of £250,000. These amounts were based on different figures for the gross revenue from the development and development costs which, as referred to above, were clearly not accepted by the judge.

36. As to the second element, instead of taking the developer's return of £3 million, and in some ways replicating what the wife had done, the husband started again from the headline figures but additionally deducted other sums including the sum of £2.1 million for "cost of land". This specific deduction might be relevant for tax purposes but was not otherwise relevant for the purposes of determining what HH was worth. However, using this approach, the husband contended for a profit before tax figure of £1.312 million. After deducting corporation tax, the resulting figure of £1.1 million was added to HH's balance sheet with the rest of the figures (as with the second part of the wife's analysis) being those provided by the accountant. The result was a net deficit of £271,000.

37. Whilst it is not comparing like for like, the total profit before tax figure for the development included by the husband in the composite schedule was £2.1 million (i.e. £780,000 plus £1.3 million) as against the wife's figure of £11.9 million. The net

figures for the sums available to the husband from HH (*after* payment of loans to NPR and NPR (UK)) were respectively £250,000 and £3.76 million.

38. In his substantive judgment, the judge explained that, in "coming to the midway figure" of £6.87 million, he had "added back Tom's share but then deleted it again to represent the fact of post separation acquest". The judge also said, and repeated later, that he had "taken into account … the *Wells v Wells* arguments and made appropriate deductions". The judge later clarified that his reference to "post separation acquest" had been a "misnomer". I am not sure what he meant by this as he made clear that he *was* making "some allowance" to reflect the husband's "input" into the development since the parties separated.

39. The judge proposed that the wife's award should comprise the former matrimonial home, a total of £1.2 million (payable by three lump sums of £400,000) and a pension share of just over 40%. He proposed that the lump sums should be paid on dates between March 2020 and September 2020 because he was satisfied that this would "allow for the completion and realisation of at least various portions on the … development and for the extraction of the capital".

40. In response to what could properly be described as a barrage of requests for clarification on behalf of the husband, the judge gave a short addendum judgment and provided a written response to the requests for clarification. These dealt with a number of issues.

41. The first was housing. In response to a request for clarification of "the Court's assessment of the (husband's and the younger child's) housing needs", the judge said:

> "In summary, in reaching my determination I have first given consideration to the welfare of (the younger child). As made clear (the child) and his mother are sadly estranged and the father has provided no information as to where (the child) is living other than with himself. He says they are in rented accommodation but provides no other detail. There is nothing in what I have heard to show that they have anything other than a satisfactory standard of living. The order which I make will ensure that the husband and wife have similar provision for themselves with more than sufficient to provide in the husband's case for (the younger child) until he achieves independence."

For the avoidance of doubt, the judge further reiterated that the husband's "share" of what the judge had found to be the available resources was "sufficient to provide (the husband) with suitable accommodation for himself" and the younger child.

42. The judge confirmed that he had "had regard to the criteria set out in section 25(2) of the Matrimonial Causes Act 1973" and, again, that he was satisfied that both parties would have "sufficient capital to meet both their capital and income needs".

43. He clarified that he had "preferred the wife's approach to the valuation of the assets", in particular Miss Hussey's approach "to the valuation of the … development". He repeated that this did not mean it was right "simply (to) divide that figure in two

without there having been an adjustment to reflect a number of factors". The wife's figures were the "starting point in determining the value to be attributed to the assets" but which had to be discounted "when coming to a final determination in achieving fairness".

44. There were "three areas in relation to which an adjustment (was) required": (a) the "*Wells v Wells* factor"; "caution" was required because the figures for the development were based on estimates and it was "difficult to quantify the unknown"; (b) taxation, namely the "adverse impact" the transfer of the shares to the parties' son Tom had had on the husband's "ability to obtain entrepreneur's relief" which "should not be visited on the wife"; and (c) although it would be wrong to "ring fence the land or the development", "recognition of the (post separation) efforts which have gone into the realisation of the development" warranted "some adjustment". The judge declined to ascribe any particular "definitive figures for the adjustments" because he did not consider this was an apt approach. Rather, he had adopted a "broad evaluation" and, as referred to above, he decided that reducing the value of the available resources "by a sum equal to half the difference" between the parties' competing totals was "a reduction commensurate with" the above factors. This amounted to a reduction of approximately 25% from the wife's total: namely a reduction from £9 million to £6.87 million.

45. As for the dates for payment of the lump sums, the judge stated that his proposed dates for payment had been based on the evidence that "the project would be completed in 2020". He made clear that the husband could make an evidenced application or request that the time for payment be extended. The judge subsequently adjusted his proposed dates by extending the time for payment to 21 September 2020, 22 March 2021 and 20 September 2021.

Appeal

46. I propose, first, to address the issue of, what I have called, double counting.

47. As can be seen from the above summary, the figures used by the wife in the composite schedule did not reflect her case as set out in the development schedule. The latter contended for a total profit before tax of £7.65 million while the figures in the composite schedule totalled £11.9 million. These totals, and the difference between them, inevitably reduced once tax and other issues were taken into account. However, the net effect was that the figure used by the judge, of just under £9 million, as representing the available resources significantly overstated the true position. The judge discounted this figure for the purposes of calculating his proposed award to reflect the factors referred to in paragraph 44 above. This could be said to mitigate the effect of starting from the wrong figure but it, nevertheless, means that the judge's award was based on a flawed analysis which, because of the amount involved, in my view sufficiently undermines his ultimate determination to require that it be set aside.

48. In her submissions, Miss Hussey sought to persuade us that the judge could have arrived at the same result by a different route. The problem with this argument is that he did not and we are not in a position to say whether, if that other route had been proposed, he would have accepted it. At a theoretical level, her submission might be right, but there is no basis on which we could properly undertake what would be such a radical rewriting of the judgment.

49. Further, I do not consider that it would be appropriate for this court to seek to replicate the judge's approach save for the excision of the amount double counted. First, neither party invited us to take this approach. Secondly, and more fundamentally, this would again require a significant rewriting of the judgment. The wife's figures included 100% of the residual land value (at net £2.2 million) but only 50% of HH's assets (at net £1.56 million). Deducting the former would reduce the wife's total from just under £9 million to approximately £6.8 million. But would it still be appropriate to deduct 50% of the value of HH's net assets on the basis of post separation accrual? Further would it still be appropriate to use the husband's figure of £4.75 million as, what I have called, a proxy to determine the value to be shared equally between the parties? Would that still be the right discount to reflect the three factors identified by the judge? We are not in a position properly and fairly to answer these questions.

50. Before dealing with my proposed disposal of this appeal, I next address the other challenges mounted by the husband to the judge's determination.

51. The judge's approach to the value of the site is also challenged on the basis that he wrongly included "a figure for future profit in addition to the current value of the land". In so far as this is an additional point to what I have called the double counting point, it is without merit. The resources available from the site included both the "residual land value" and the developer's profit as described above. If, as appeared from Ms Harrison QC's submissions, the reference to "the current value of the land" meant its current sale value as a site, there was no reason for the judge to adopt that approach when HH was plainly going to complete the development. Indeed, as described above, the evidence and the parties' respective cases as set out in the composite schedule were based on an analysis of the realisable profit.

52. It is also argued that the judge was wrong to rely on the "untested evidence" in the LSH report. This has no merit because the judge was entitled to rely on that evidence.

53. The judge is said to have failed "to take into account the relevant" section 25 factors. More specifically it is argued that the judge failed "to have adequate regard" to the younger child's need and the husband's need for housing. This is not a sustainable submission. The judge expressly addressed the issue of housing. The husband had not disclosed where he and the younger child were living and "merely says that he is living in rented accommodation". As the judge noted, it "is therefore not possible to evaluate his domestic circumstances". In any event, it is clear that the immediate need for housing was met. Further, as referred to above, the judge was plainly entitled to conclude that, with the resources available to the husband consequent on the judge's proposed award, he would be able to meet his needs, including those of the younger child.

54. It is also said that the judge failed to take into account the husband's age and his future earning capacity. I fail to see any possible basis for these submissions. The judge determined the wife's award by application of the sharing principle. Based on his determination that the resources to be treated as available to be shared equally totalled £6.87 million, each party would have assets worth £3.4 million. The husband's age and earning capacity were irrelevant to the application of the sharing principle.

55. The husband has also argued that the judge "failed to quantify how the *Wells* discount", the husband's "unmatched contribution" and the issue of tax impacted on his award.

56. First, it is clear that the judge took each of these factors into account. He specifically referred to the husband's "unmatched contribution", namely what is described in the Grounds of Appeal as the husband's "post separation endeavours in relation to the development of the land"; and to the fact that the wife "retains more of the copper-bottomed assets"; and to the issue of tax. He discounted the wife's total figure of £9 million for the parties' available capital resources by approximately 25%. This was, as he said, a "broad evaluation" because he did not consider it appropriate to ascribe "a precise mathematical figure" to each factor. The judge was entitled to take this broad approach for the purposes of determining what award would be fair and he has sufficiently demonstrated how these factors impacted on his award. As I said in *Hart v Hart* [2018] Fam 93:

> "[96] If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in the *Jones* case [2012] Fam 1, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness". This accords with what Lord Nicholls said in *McFarlane v McFarlane* and, in my view, with the decision in the *Jones* case."

The judge was entitled to apply the same "broad assessment", in the manner in which he did to the factors he identified, in order to determine what division of the wealth would achieve "overall fairness".

57. I also reject Ms Harrison's submission that Tom should have been joined as a party to the proceedings or permitted to intervene. The wife's case, as accepted by the judge, was that the assessment of the marital wealth and the distribution between the parties of that wealth should not be affected by the fact that, either directly by gift or indirectly by allocation, the husband had chosen to give Tom shares in HH. This is a conventional approach which is often taken in cases of so-called reattribution. Of course, when adopting such an approach, the court has to be aware of the effect of this on the level of the resources which will, in fact, be available to the party to whom the asset is being reattributed: see *Vaughan v Vaughan* [2008] 1 FLR 1108, at paragraph 14. That was not an issue in the present case because, as explained by the judge, he considered it appropriate notionally to attribute the wealth which had been given by the husband to Tom to the husband's post separation endeavour and, as a result, deduct it before determining the share which the wife should receive. There was,

therefore, no need to join Tom as he was not affected by the judge's approach. It was the husband alone who was affected.

58. On the issue of liquidity, the judge did not "fall into error" in ordering the lump sums to be paid between September 2020 and September 2021. This part of his order was clearly based on his determination of when the development would have reached the stage when distributions from HH would be available. That was a finding which was clearly open to him on the evidence.

59. I would also note, in respect of the issue of tax raised in the context of this submission, that although the judge considered that the wife should not be adversely affected by the husband's decision to transfer shares in HH to the parties' child Tom, in fact the wife's total in the composite schedule was based on the deduction of dividend tax save only in respect of distributions from NHR and NHR (UK).

60. As will be clear from what I have said above, the only issue which has caused me to decide that this appeal should be allowed and the judge's order set aside is that of "double counting". In some respects, both parties have some responsibility for this, because the figures they each put forward had similar flaws in the approach they both adopted. In the circumstances, and in accordance with the overriding objective, I consider that the right course is for the case to be remitted to the judge for him to redetermine his award. This will save a considerable amount of time and expense. Although the scope of the rehearing will be a matter for the judge, he will clearly not have to revisit many of the issues he addressed in his judgment. He will, however, (and in saying this I appreciate the likely costs impact) have to revisit the value he ascribed to the development. It is now two years since the judge heard this case. The development was then at an early stage and, as the judge noted, a project of this type has significant intrinsic uncertainties. It would not be right that the court should now determine what award is fair on the basis of evidence as to the development which is historic. This does not, of course, mean that, however unlikely it might appear, it is not open to the parties to resolve these proceedings by agreement.

LORD JUSTICE POPPLEWELL:

61. I agree.

LORD JUSTICE PHILLIPS:

62. I also agree.