Neutral Citation Number: [2020] EWFC 52

Case No: NT18D00651

IN THE FAMILY COURT
Sitting remotely

Civil Justice Centre
City A

Date: 29/07/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

OG	**Applicant**
- and -	
AG	**Respondent**

- -
- -

Sheren Guirguis (instructed by **IMD Solicitors**) for the **Applicant**
Christopher Sharp QC & Andrew Commins (instructed by **Morgan LaRoche Solicitors**) for the **Respondent**

Hearing dates: 8-17 July 2020
the hearing was conducted remotely by Zoom

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

This judgment was handed down in private on 29 July 2020. It consists of 102 paragraphs and has been signed and dated by the judge. The judge gives leave for it to be reported in this anonymised form as OG v AG**.** Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved. Breach of these conditions will amount to a contempt of court.

Mr Justice Mostyn:

1. This is my judgment on the parties' cross-applications for financial remedies. I will refer to the applicant as "the husband" and to the respondent as "the wife".

2. The wife is 53 and is a Polish national. The husband is 51 and is a German national. In 1994 they met in London and began a relationship. The same year they married. Their marriage was dissolved by decree absolute on 3 June 2019. This was therefore a long marriage of 25 years. There are two children, J now 25 and G now 10. J and G live with the wife at the former matrimonial home in City A.

3. A long time ago the husband's family had established a successful ducting business in Germany. Ducting is a flexible channel or tube to convey a liquid or gas to or within a building, machine or other structure. A classic example is the aqueduct. Modern-day applications have proliferated. There are obvious uses, for example, air conditioning, cars, aeroplanes, printers and vacuum cleaners. Users who need a bespoke product will need to go to a specialist operation which is able to design and manufacture the required ducting to the customer's specification.

4. The husband was born into, and grew up in, the world of ducting.

5. The parties do not agree on the extent of the husband 's involvement or success within his family's ducting business. It is yet one example of the inability of the parties to agree on almost anything during this acrimonious divorce.

6. In 1987 the husband intended to create a ducting business here in the UK. He caused X Ltd to be incorporated and in 1989 became a director of it. In 2001 its name changed to XD Ltd. I shall refer to it as X. In 2016 YD Ltd was incorporated. Its shares are equally owned by the husband and the wife. The shares of X were transferred to it by the parties. In 2016 another company ZD Ltd was formed. Its shares were transferred to YD Ltd. ZD is a dormant company with no value. No independent business is conducted by YD Ltd; it merely acts as the parent company of X and ZD. X is where the business is done and where the value reposes.

7. The wife states that the parties in reality started X from scratch. She became a director in 1996. No argument is raised on behalf of the husband that X is in any way non-matrimonial property. He is however anxious to emphasise that he has done ducting all his life; can only do ducting; and wants to do nothing but ducting. Although the husband acknowledges the equal contribution that the wife made, and continues to make, in taking charge of the administrative and financial side of X he does strongly feel that he is the technical brains behind X and that without him X will not be sustainable. This is in part because he states that 80% of X's business is through R&D i.e. researching and designing bespoke ducting. The wife points out that the husband has no formal qualifications in the design and manufacture of ducting and argues that she has herself built up considerable knowledge and experience in the field despite her formal training as a teacher.

8. It is the wife's position that she seeks to take full control of X to the exclusion of the husband. The husband for his part was prepared to sell X in 2017. At the final hearing the husband did not object in principle to the wife taking over exclusively X.

9. In 1997 the parties moved to City A to establish X in that city. City A was chosen because of the favourable conditions prevailing at the time; the local government was providing significant assistance to attract new industry and employers to the area. The parties do not agree who took the lead in obtaining this government assistance. Again, the dispute matters not.

10. Thereafter X did extremely well financially and grew to employ at least 50 workers. The husband described it as a money-making machine.

11. A significant part of the business of X is with customers sited in the EU and is presently transacted on a tariff-free basis. If no trade agreement is reached between this country and the European Union by 31 December 2020 then there will undoubtedly be adverse consequences for X.

12. The business afforded the parties a comfortable lifestyle including private education for their children though both agree they did not have a lavish lifestyle. It appears that in fact the parties focused so much on the daily operation of X that they amassed almost incidentally a great deal of wealth without knowing what to do with it. Both say there was no master plan about what to do with the money; rather unusually by the time of the SJE's valuation X had surplus assets of nearly £10m.

13. What the parties did do was acquire a domestic and international property portfolio both in their sole and joint names and in the name of X. This portfolio has produced rental income. The domestic properties comprise five flats in London. One of these was owned by the husband before the marriage, although he does not seek to argue that it does not constitute matrimonial property. The international property portfolio has consisted of three properties in Gibraltar and eight properties in Dubai. Despite the husband disavowing any real involvement in the financial side of X he evidently did take the lead in the acquisition and management of the Dubai properties. It is his conduct in relation to the Dubai properties that gives rise to some of the wife's allegations of misconduct. The situation has been made more complicated by the piecemeal fashion of the husband's disclosure in relation to the Dubai properties and other matters. He does now hold up his hands and apologises for this; the wife though argues that even now his disclosure is not full and frank.

14. In November 2017 the parties separated. The wife remains in the former matrimonial home in City A. It is agreed that she will remain there. The husband went first to live in rental accommodation in City A and later in Country S and Country T. He tells me that for tax purposes he is resident in Dubai.

15. A problematic aspect of this case is the fact that the parties were directors and employees of X and as such continued to owe duties to X even when they no longer owed a duty of love and care to one another. That would cause a strain for most divorcing couples; it has caused difficulties in this case. It has given rise to cross-allegations of conduct. The fallout, one way or another, has caused actual or threatened civil proceedings and criminal investigations in three jurisdictions excluding these financial remedy proceedings.

16. It was not until 2019 that the husband stopped working for X. When he did so is in dispute. The husband resigned as a director of X in November 2018 (although he has remained a director of YD). Although he later tried to revoke his resignation this was

refused by the wife who later appointed J as a director after it was pointed out that the articles of association of X required at least two directors at all times.

17. Since September 2019 the wife has been running X single-handedly though she says she has been doing so in reality for significantly longer than this and in the face of deliberate obstruction and sabotage by the husband. This is denied by the husband who counter alleges that the wife's conduct made his life a "living hell" and his position in X untenable. The wife says he jumped; the husband says he was pushed. In justice to the wife I should note for completeness that she did obtain a domestic violence protection order against the husband on 8 November 2019. I have not been asked to take this into consideration in my judgment and there is insufficient information to be able to do so.

18. The evidence of the single joint expert instructed to value X does not suggest an appreciable drop in value on the wife's watch. As I say, the husband does not now in principle object to the wife taking over X.

19. On 21 August 2018 the husband filed his Form A. These proceeding have therefore been ongoing for almost two years and have involved a significant number of hearings. Whether there has been litigation conduct by either party is a matter for me to consider. Needless to say, both parties make cross-allegations of this nature.

20. On 27 February 2019 AB LLP ("AB") was incorporated in Country T. As its name proclaims, its business is in the manufacturing and distribution of ducting. Its shareholders are two close friends and the father of the husband. The husband seeks to distance himself from AB and says that his interest, and involvement, in it is only to the extent that his elderly father owns a 40% share in AB and he acts as an agent of his father and has a power of attorney. The wife strongly argues against this and says that AB is a façade many months in the making by the husband as a way to compete unfairly against X.

21. The wife points to similarities between X and AB; to the evidence of a private investigator she instructed; and to the alleged conduct of the husband. Of significance is AB's dealings with another company, incorporated in Dubai, namely TT Ltd ("TT") and, specifically, the significant sums of monies loaned to AB by TT. TT was made a party to these proceedings in the context of the wife's (now abandoned) set-aside application at the pre-trial review on 3 June 2020 but has declined to become involved. It is not very clear what TT's business is: the husband asserts it was a vehicle to obtain residency in Dubai. Elsewhere he indicates that TT is also concerned with property investment in Dubai. A key fact is that the husband has advanced and/or loaned monies to TT. At or around the same time TT has loaned equivalent amounts to AB. The husband's ability to make such significant payments/loans has been a result of his unilateral disposal of some of the Dubai Properties. The wife argues that the husband has siphoned off and warehoused the proceeds of sale from some of the Dubai properties to fund AB via TT.

22. The Dubai properties are:

    a. BN, purchased by the husband in November 2013 for AED 2,500,000 (not disclosed in the husband 's Form E);

b. BV, purchased by the husband in November 2013;

c. On 12th September 2019 the husband sold BV and received the first tranche of AED 50,000. This was not disclosed until March 2020.

d. MG, purchased by the husband in June 2014 for AED 1,785,000 (not disclosed until June 2019);

e. In February 2019 the husband contracted to sell MG. It was sold on about 18 March 2019 for AED 1,300.000. This was not disclosed until June 2019;

f. PO, purchased by the husband in October 2014 for AED 4,660,000;

g. On 19 May 2019 the husband sold PO for AED 2,900,000. This was not disclosed until June 2019.

h. BL, purchased by the husband in December 2014 for AED 3,900,000. Only AED 2,600,000 is declared on the registry title;

i. On 29th April 2019 the husband sold BL for AED 1,710,000. This was not disclosed until June 2019;

j. HV, purchased by the husband in April 2016 for AED 2,111,888 (not disclosed until June 2019);

k. SB, purchased by the husband in April 2018 for AED 2,796,888 (not disclosed until June 2019); and

l. GB, purchased by the husband in December 2019 for AED 3,507,888 (not disclosed until March 2020).

23. The relevant transfers and loan agreements are as follows:

a. 6 May 2019: the husband transferred AED 255,000 to TT;

b. 9-11 May 2019: the husband transferred AED 1 million to TT in four tranches;

c. 16 May 2019: the husband executed a loan agreement for AED 1,300,000 with TT;

d. 16 May 2019: TT executed a loan agreement for €1,000,000 with AB;

e. 16 May 2019: TT transferred US $349,945 to AB;

f. 1 July 2019: the husband executed a loan agreement for AED 1,000,000 with TT;

g. 3 July 2019: TT transferred €499,980 to AB;

h. 26 July 2019: the husband executed a loan agreement for AED 960,000 with TT;

i. 28 July 2019: husband transferred AED 1,200,000 to TT;

j. 16 September 2019: TT paid €309,980 to AB;

k. 4 January 2020: the husband wrote a cheque for AED 1,250,000 to TT;

l. 20 January 2020: the husband executed a loan agreement for AED 495,000 with TT; and

m. 11 March 2020: TT transferred €250,000 to AB.

24. On 26 November 2019 the husband also transferred AED 100,000 to Mr K, his property agent in Dubai.

25. In September 2018 the husband filed an application for maintenance pending suit. It was settled by consent, but the wife now says she compromised in complete ignorance of the husband's actions in relation to the Dubai properties and apparent facility to advance/loan to others significant sums of money which emerged within a matter of months. It has to be said the husband in his application painted a bleaker image of his finances than what has subsequently transpired. The court ordered an upwards variation of the interim order in March 2019 from £1,166.66 pm to £2,500 pm. The court also made a legal services payment order pursuant to section 22ZA of the MCA 1973 for £100,000. The court then did not know what I know now. The wife has not complied fully with the latter orders. The husband has not applied for enforcement. The wife has applied for a variation or discharge of these orders. It is pointless for me to deal with this application.

26. Unsurprisingly, both parties have put in statements recently dealing with the impact of the current global Covid-19 pandemic on X, if any. It is an issue novel to this court but one which will likely become a recurring feature in cases like this. The concern is an obvious one: X provides ducting to a wide range of customers in construction, transportation and other industries which will likely be adversely impacted during the immediate crisis and afterwards in a predicted recession. I am told that X has experienced a significant decrease in demand.

27. The husband's conduct inter alia in concealing a number of the Dubai transactions and the loans made to TT was not only dishonest but futile and frankly inexplicable. It was all bound to come out. As I pointed out to him during the hearing, he was hiding a sprat while at the same time making a claim for payment to him of his fair share of what was a very large shoal of mackerel under the control of the wife. His nondisclosure has meant that there has never been an effective FDR in this case, and that the parties have run up excessive costs. The overall costs in this case exceed £1 million. Of that sum a large amount must be referable to the husband's conduct. I asked the husband to explain himself, and he did not really have an answer as to why he had behaved in the way that he did. I inferred that it was pure bloody-mindedness engendered by the toxic aftermath of the breakdown of the marriage and the confrontational personalities of each of the husband and wife.

28. The husband's litigation misconduct has not only encompassed sustained non-disclosure but even extended to him altering an email to try to suggest that the wife agreed to sell the company, when she was saying quite the opposite. This litigation misconduct will lead to a significant penalty in costs which I will explicate below.

29. Although the wife has been more sinned against than sinning, she is not above criticism herself. Since the pre-trial review before me on 12 June 2020 (at the very

latest) the financial landscape has been sufficiently clear, and the wife has been in a position to negotiate reasonably. Yet her stance has been unreasonable. She proposes a division of the (heavily discounted) assets two-thirds to her and one-third to the husband. She says that this would be a just outcome having regard to the husband's conduct. The departure from equality would amount to a sanction on the husband of nearly £1.9 million. In effect, the wife seeks that the husband should suffer a triple jeopardy by reference to his conduct. First, she seeks heavily to discount the value of X (including its surplus assets) because the husband has set up the competitor business, AB. Second, she says that the heavily discounted assets should be divided so that she receives twice as much value as the husband. Third, she says that the husband should pay 93% of her costs totalling £617,127. This is untenable.

30. The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband's delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach.

31. It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.

32. Furthermore, the wife has herself been guilty of nondisclosure, although on a much lesser scale than that of the husband. She failed to disclose in her Form E bank accounts in her mother's name into which some of the rents of the London property had been paid. These rents have not been declared to HMRC. The tax debt is estimated at £44,000.

33. As betokened above, the wife has explicitly pleaded against the husband a case of conduct under section 25(2)(g) of the Matrimonial Causes Act 1973. The conduct that she relies on relates to the husband's nondisclosure of the Dubai transactions and his furtive establishment of AB to compete unfairly and unlawfully against X.

34. Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife's favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision.

35. The conduct under this head, can extend, obviously, to economic misconduct such as is alleged in this case. If one party economically oppresses the other for selfish or

malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.

36. Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M* [1995] 2 FCR 321 Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included starting completely unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.

37. In this case the sums loaned by the husband to TT will all be added back to the matrimonial pot at full value. The husband does not resist this.

38. Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

39. Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to summarise the relevant principles in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, which was generally upheld by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482. In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle.

40. I turn to the computational exercise.

41. The first question is whether I should draw an inference that the husband has undisclosed assets either in Dubai or elsewhere. Mr Sharp QC argues that the husband's disclosures remain opaque and there is reason to find that it is more likely than not that the husband has extracted money from X which he has squirrelled away somewhere. Similarly, Mr Sharp QC argues that the disclosures made in relation to monies in Dubai remain unsatisfactory and incomplete and that I should conclude that it is more likely than not that he has squirrelled away sums in that country. Mr Sharp QC does not seek to quantify these hidden assets. He says it is impossible to do so.

42. It is true that even now the documentation produced by the husband remains in some minor respects incomplete. However, I am not satisfied that the husband's abysmal, and let there be no doubt, dishonest, presentation during the course of the proceedings, coupled with the remaining, and it has to be said minor, deficiencies in his disclosure should lead me to infer that he has squirrelled away substantial sums

stolen from X. I am satisfied that by 12 June 2020 the husband had, the question of his ownership of AB aside, made a clean breast and disclosed all relevant assets and that there are no other assets other than those appearing on the agreed joint schedule. The husband's own conduct belies the existence of substantial hidden funds. As explained above, in 2019 the husband sold two properties in Dubai, namely BL and PO, at substantial losses. He did this in order to channel start-up funds to AB via TT. It is inconceivable that he would have suffered these losses if he had either in Dubai or elsewhere substantial hidden funds which he could have deployed to pump-prime AB. He would surely not have sold the Dubai properties and sought to have weathered the economic storm. It is no answer to say that the husband could not have used the supposed secret funds for fear of exposure in these proceedings because at the relevant time the wife was virtually entirely in the dark about the disposal of the Dubai properties.

43. Further, we now know virtually everything about the husband's Dubai transactions. There is no obvious source from which substantial funds could have been leached out of the transactions and hidden.

44. Therefore, I decline to find that the husband has substantial secreted funds and I will proceed on the basis that the relevant assets are those stated on the agreed joint schedule[1].

45. The next question is whether the husband is the real owner of AB and that the official shareholders are acting as his nominees. In this regard the evidence is clear. The husband is unquestionably the real owner of AB. There is no evidence that any of the official shareholders contributed so much as a cent to the new business. All of the money derived from the husband, channelled via TT.

46. On 6 September 2019, the husband using the email address [Husband's middle name]@AB.com wrote an email to some potential customers in which he asserted that while he owned 50% of X he was "working on a massive new project manufacturing ducting in Country T due to Brexit and issues with the other owner of X my wife". This is the language of an owner of AB, not a mere employee or consultant.

47. On 15 October 2019 a private investigator hired by the wife attended the business premises of AB posing as a potential employee. In her report she wrote:

> "In the beginning, Mr. PS - lawyer in AB started the interview saying that the current owner, pointing his hand at Mr. OG, is moving his company from abroad to Country T."

There was no reason for the husband to have been identified as the owner if he was not in truth the owner.

[1] Following distribution of this judgment in draft I received from Mr Sharp QC a request for amplification. Specifically he invites me to find that the husband has retained in some unknown place accumulated interest deriving from the German investments in X's name, and further that there is a sum of €100,000 which was transferred to each of the parties in 2009 for three years maturing in 2012 and which he, unlike the wife, never returned to X. I would have thought that it was tolerably clear from what I had written that I rejected these arguments. For the avoidance of doubt, I reiterate that I am not satisfied there are any further funds squirrelled away and that all the assets are as stated on the agreed joint schedule.

48. On 10 June 2020, the husband signed a witness statement in the civil proceedings in City A launched by X against him for the return of company property in which he stated at paragraph 44:

> "It is true that I have another company in Country T, namely AB. I am not prohibited from opening another company. I have not signed any non-compete agreement with X. I am not using any of X's material or equipment. I am not poaching X's customers."

49. This is a clear admission of ownership of AB.

50. The husband's denial in his oral evidence of his ownership of AB was not credible.

51. I therefore find that that the husband is the true beneficial owner of AB.

52. There is no valuation of AB. Were one to have been prepared I am satisfied that it would have attributed no material value in these early days of this new business. The only value to be attributed to it would have been the funds supplied by the husband via TT. But those funds, characterised as "loans", have been added back to the husband in the agreed asset schedule and they cannot be counted twice.

53. I have no doubt that the husband will go on to create a successful business with AB which will supply him with a generous income and the ability to accrue value just as he did over a quarter of a century with X.

54. The agreed joint schedule divides the assets into three categories namely non-business non-pension assets; X; and pension assets.

55. The non-business non-pension assets are summarised in the following table:

Non-business non-pension assets	
UK Property	2,767,322
Dubai property	701,559
Gibraltar property (held by K Ltd)	32,538
London properties tax debt	(44,000)
K Ltd tax	(86,062)
Banks	589,760
Husband loans added back	849,227
X directors' loan accounts	(879,303)
unpaid costs	(250,592)
	3,680,449

The values of the seven properties in the UK, which includes the matrimonial home, are all expressed after notional costs of sale, and capital gains tax in the case of the wife. No capital gains tax is calculated in respect of the husband in circumstances where he told me that he is tax resident in Dubai where there is no such tax payable.

56. I turn to X. In this regard I was helped by two very clear and readable reports by the single joint expert, Mr Hatcher. His valuation was not challenged, and he did not give

oral evidence before me. He valued X in the range £13.78m - £13.95m. The median is £13,865,000. He calculated that of this figure the amount of £9,920,000 represented surplus assets. These surplus assets are held as cash and quoted investments. His value of the trading element of X, which he undertook on the conventional multiplier-multiplicand basis, was £3,945,000.

57. The single joint expert on tax, Ann Smith, likewise produced a very clear, helpful and readable report. She calculated the corporation tax payable on investment gains to be £44,458. She explained that by far the most fiscally efficient way of extracting the value of the husband's shares in the holding company is for that company to buy those very shares. I am satisfied that the technical requirements, explained by Ann Smith, for the company to be able buy the husband shares, will be met. She explained that a payment to the husband in respect of the purchase of his shares would not attract UK capital gains tax. As stated above, he would not suffer capital gains tax on that payment in Dubai.

58. Mr Sharp QC argues that two discounts should be applied to Mr Hatcher's headline median figure £13,865,000. First, he argues that a discount of 10% should be applied to reflect the effects of the economic downturn caused by the Covid -19 pandemic and the likely future disruption to be experienced on account of Brexit, particularly where there appears to be an appreciable risk that this country will not conclude a trade agreement with the European Union by 31 December 2020. Mr Hatcher agrees that a discount to reflect these risks is appropriate but declines to hazard a figure.

59. I agree with Mr Sharp QC that this discount should be applied but I part company with him when he suggests it should be applied not only to the trading element but to the surplus assets as well. This makes no sense to me. There is no logic in applying this discount to the pile of cash and investments held by the company. Mr Sharp QC suggested that the pile of cash and investments should be separately discounted by reference to a downward movement in the FTSE since the date of Mr Hatcher's valuation. I have had no evidence that the actual surplus assets have suffered a decrease in value; on the contrary Ms Guirguis points out that the management accounts to November 2019 and April 2020 show that the net assets of the company have in fact increased since the last completed accounts on which Mr Hatcher based his valuation (year ended 30 September 2019).

60. In my judgment the 10% discount should be applied only to the trading element of the valuation.

61. Mr Sharp QC argues that a further discount of 40% should be applied to the value of X (including its surplus assets) to reflect the fact that the husband has set up a business in direct competition with X. Although the husband is not subject to a formal non-compete clause in his employment contract with the company, he unquestionably owes a fiduciary duty to the holding company as one of its directors. It is hard to see how setting up a business in direct competition is consistent with that duty. Therefore, if a discount is to be applied, I must ensure that its value falls solely on the husband.

62. Mr Sharp QC relies on the following paragraphs in Mr Hatcher's report:

> "8.5 In circumstances where one of two parties actively involved in the running of a business is not prepared to enter

> into a normal non-compete clause for a period following sale, this could, in my opinion, have a significant effect on the price a prospective purchaser might be willing to pay. I believe, in such circumstances, a prospective purchaser would seek a discount; however the extent of the discount would depend upon the purchaser's commercial assessment of the importance to the business of the party who is unwilling to sign the non-compete agreement. For instance, if the individual was heavily involved in dealing with suppliers, production/manufacturing and/or with customers, it is likely that the commercial risk to the potential purchaser might be considered to be greater and therefore attract a higher discount, than say an individual involved in finance and administration.
>
> 8.6 As the matter is a commercial decision for a prospective purchaser, it is difficult to provide a firm conclusion on the discount that might be applied, indeed some prospective purchasers may simply walk away if they perceive the risk is too great. If I was advising a client on a prospective purchase in similar circumstances, I would, if asked, suggest they consider a minimum discount of 10% - 20% for an individual not involved in the production/selling side and 20% - 40% for someone involved in those areas. These ranges are merely a rough guide as it is the perception of risk to the prospective purchaser which is of relevance and this might range from a willingness to take the risk without seeking a discount, to the risk being so great that the prospective purchaser withdraws from the process."

63. Mr Sharp QC argues that since the husband is clearly involved in the production/selling side the higher range should apply and that because the husband has behaved so shabbily in clandestinely setting up AB, the very top end of that higher range, i.e. 40%, should be taken. Mr Sharp QC again argues that the discount should be applied to the full value of X. including its surplus assets.

64. I agree that a discount should be applied but, again, I cannot see the logic of applying it to the surplus assets. It should only be applied to the trading element. I cannot see that it makes a difference to the scale of the discount whether the husband acted openly and honestly or whether he acted secretly and shabbily. In my judgment the appropriate discount to take is 30%, the median figure of Mr Hatcher's higher range.

65. It can be seen that Mr Sharp QC urges on me an aggregate 50% discount to the entire value of X. This would reduce the headline median figure to just under £7 million. Ms Guirguis points out that this is a completely unrealistic in circumstances where the net assets of the company according to the April 2020 management accounts are approaching £12.5 million. Why would anyone sell the company with those net assets for a mere £7 million? In those circumstances they would just liquidate it.

66. The value of the parties' interests in X is calculated in the following table:

X at SJE's median figure	13,865,000

of which surplus assets	9,920,000
of which trading element	3,945,000
discount for Covid/Brexit on trading element at 10%	(394,500)
discount for competitor business on trading element at 30%	(1,183,500)
adjusted value	12,287,000
costs of sale at 2.5%	(307,175)
	11,979,825
less corporation tax on investment gains	(44,458)
	11,935,367
less capital gains tax on the wife's shares	(1,200,955)
less stamp duty on purchase of the husband's shares	(26,769)
Net value of parties' interests in X	10,707,643

Again, I have allowed for capital gains tax (with entrepreneur's relief) on the wife's shares, but not on the husband's. I have calculated this capital gains tax on the basis that the company will purchase the husband's shares for £5,353,822 (see below) and will pay stamp duty on that purchase of £26,769. Thus, the gross value of the wife's shares will reduce to £6,554,776. I treat that as being all taxable gain apart from £50,000 being the price paid for the shares on issue. That gain is taxable at 10% on the first £1 million, and 20% thereafter.

67. The parties' pension assets are straightforward. Each has a SIPP. In addition, the husband has a German pension in payment. There is no CE value for this pension. Mr Sharp QC has capitalised this German pension in the sum of £110,000; that was not contested by Ms Guirguis. The following table sets out the pensions:

The wife's SIPP	991,761
The husband's SIPP	881,817
The husband's German pension	110,000
	1,983,578

68. The total assets are therefore as follows:

Non-business non-pension assets	3,680,449
X	10,707,643
Pension assets	1,983,578
	16,371,669

The wife argues that justice would be done if this were divided two-thirds to her and one-third to the husband to reflect his conduct. This would represent a departure from equality against the husband of one-sixth of the total, £2,728,612. While there will be some departure from equality a sanction of this scale is in my judgment completely disproportionate and untenable.

69. The question of conduct apart, this is a paradigm case for the application of the equal sharing principle. The marriage was long, and all of the property is matrimonial property. Unfortunately, in their evidence each party took the opportunity of seeking to denigrate the contribution to the business made by the other. The husband

proclaimed that he was not only the brains behind the business but that only he had the necessary technical expertise to create new products. He acknowledged that the financial and administrative side of the business was managed solely by the wife. Implicitly, he acknowledged that the wife also managed the domestic domain. The wife disagreed strongly with the husband's evidence and asserted that she was just as technically able as the husband. She said that their husband's confrontational and disorganised personality made the functioning of the business problematic and that she was always having to clear up behind him, figuratively speaking. These issues are quite sterile. In *Miller v Miller* at para 150 Baroness Hale said that "commercial and domestic contributions are intrinsically incommensurable". Different kinds of commercial contribution within a family business are equally incommensurable. It is impossible to measure them separately. As Scalia J memorably stated in *Bendix Autolite Corp v Midwesco Enterprises Inc* (1988) 486 US 888 at 897, admittedly in a completely different context, it is like "judging whether a particular line is longer than a particular rock is heavy".

70. Beyond allowing for the competitor discount, which will fall solely on the husband in my distribution, and a heavy penalty in costs, which I will come to explain, should the court form a moral judgment and additionally sanction the husband? I observe in passing, that were it to be imposed, the sanction in question would not devolve to the state but rather would represent an adventitious windfall in favour of the wife.

71. Time was that when the court exercised a discretion in relation to ancillary relief it formed first and foremost a moral judgment. Therefore, in *Constantinidi v Constantinidi and Lance* [1905] P 253 Stirling LJ held that "in the exercise of every discretion which is vested in the [Divorce] Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality". The moral judgment that was formed in those days was almost always about sex. I have not located any judgment in the old era where financial dishonesty was independently penalised.

72. But times have changed. The financial remedy court is no longer a court of morals. Conduct should be taken into account not only where it is inequitable to disregard but only where its impact is financially measurable. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct.

73. Therefore I firmly reject the submission that in addition to the competitor discount, which will fall on the husband alone, and the penalty in costs, there should be an additional substantial departure from equality to reflect the court's indignation at the way the husband has behaved in the course of the litigation.

74. In the light of these findings I now turn to the distribution exercise.

75. In relation to the non-business non-pension assets these should be divided so that the husband receives the following items:

Flat C	672,750
His share of the joint accounts	7,253
His bank accounts	462,421

Loan added back	849,227
Dubai properties	701,559
unpaid costs	(148,741)
Sum owed to X	(430,710)
	2,113,759

To achieve this division Flat C will be transferred to the husband and he will assume responsibility for the dispute with the freeholder which appears to be somnolent. The other properties will all be transferred to the wife. She will assume responsibility for the debt to HMRC in respect of the undeclared rents. I have reckoned the sum owed by the husband to X through his directors' loan account in this calculation although it will not in fact be discharged from these assets but rather deducted at source from his pay-out from the company, as explained below. I will be careful not to double-count this debt.

76. The table in paragraph 55 above calculates the total of the non-business non-pension assets as £3,680,449, of which 50% is £1,840,224. Therefore, the husband needs to pay to the wife a balancing figure of £273,535. This sum will be deducted from the payment that he will receive in respect of the purchase of his shares by the company.

77. I turn to X. In my judgment the company should buy the husband's shares for 50% of my calculated value of the parties' interests in X of £10,707,643. Therefore, the purchase price will be £5,353,821.

78. From this purchase price of £5,353,821 there will be deducted by X at source the sum of £430,710 owed by the husband to the company. There will then be deducted in favour of the wife the balancing figure of £273,535 mentioned in paragraph 76 above and 50% of the competitor discount calculated at paragraph 66 above, that is to say £591,750, so as to ensure that the entirety of that discount falls on the husband alone.

79. In addition, there will be deducted in favour of the wife a costs penalty of £278,020 which I will explain below.

80. Therefore, the sum that will be received by the husband is £3,779,808 calculated as follows:

purchase price of shares	5,353,822
less DLA deducted at source	(430,710)
	4,923,112
balancing payment to the wife	(273,535)
payment to the wife re competition discount	(591,750)
costs sanction (see below)	(278,020)
sum payable to the husband	3,779,808

81. If for whatever reason the company has not purchased the husband's shares at this price within two months (which period may be extended by agreement or by the court) then the husband's shares are to be transferred to the wife and forthwith following the transfer of those shares she is to pay him a lump sum of £3,779,808 and must additionally discharge his directors loan account in the sum of £430,710. This

would not be a fiscally efficient way of paying out the husband as the company would have to declare a dividend in order to pay the lump sum. Such a dividend would attract tax at 38.1%, in contrast to the low rates of tax were a share buy-back solution to be adopted.

82. I turn to costs. The wife has incurred total costs of £617,126. Mr Commins has divided the accrual of these costs into two periods. First, he calculates the costs up to 12 June 2020. He argues that it was only on this date, shortly after the PTR, that there was sufficient clarity about the husband's financial position to enable, and indeed require, the wife to engage in reasonable open negotiations. I agree. It was only at that point that the husband made the final round of disclosure which enabled the financial landscape to be viewed with sufficient clarity to enable negotiations to take place reasonably.

83. In that first period Mr Commins calculates that the wife incurred costs of £411,807. He argues that had this case been conducted reasonably by the husband it would have been extremely simple. It would, assuredly he says, have been settled in 2019 as an FDR conducted by junior counsel alone. I am not so sure. I observed both these parties very carefully in the witness box and I formed the opinion that they were both difficult and confrontational characters. I do not believe that even if this case had been litigated reasonably it would have probably settled. Instead I believe it would have proceeded to a final hearing for which purpose I have little doubt the wife would have instructed Mr Sharp QC. There are plenty of cases which are litigated to a final hearing where neither party is guilty of conduct within the terms of FPR 28.3(6), and where, therefore, the normal rule in FPR 28.3(5) of no order as to costs, applies. Indeed, I would imagine that the great majority of such cases fought out at final hearings would fall into such a category.

84. I therefore do not agree with Mr Commins that the "normal" costs that should have been accrued in this period would be as little as £40,000. In my judgment the right figure to allow for normal costs in that period would be £100,000.

85. That is the first set-off that I allow against the headline figure £411,807.

86. The second set-off relates to the wife's section 37 application. This was issued on 27 February 2020 and sought to freeze the husband's Dubai bank accounts as well as the then remaining four Dubai properties. In addition, it sought to reverse the loans of AED 3 million which the husband had paid to TT in 2019, and to join TT as a party to the proceedings. The freezing order was granted by Judge Furness QC on 7 April 2020. I considered the set aside application on the pre-trial review on 3 June 2020. I explained, in line with binding authority (*Hamlin v Hamlin* [1986] Fam 11) that the application would only likely be granted if there was clear expert evidence that a set aside order would be reciprocated in Dubai. With that clear warning I joined TT to the proceedings. TT has played no part in the proceedings, nor has it complied with a disclosure order. The wife has since, no doubt following the receipt of evidence about Dubai law, decided not to proceed with her set aside application.

87. I have to say that I am not persuaded of the point of the section 37 proceedings. The total assets in Dubai, both property and money in banks, come to £1,163,980. The total assets, calculated by me and set out above at paragraph 68, are £16,371,669. The Dubai assets therefore represent 7% of the total assets. The remaining 93% were all

either under the control of the wife or effectively frozen by virtue of being in joint ownership. It is difficult to understand, therefore, why the wife took the steps that she did rather than simply writing through her solicitors a very carefully formulated letter warning the husband that an eye would be kept on the Dubai assets and if there were an unjustified disposition of any of them he would later face an add-back submission.

88. In my judgment these proceedings were unnecessary. I do not know precisely how much they cost the wife, but I would be surprised if it were less than £40,000, which is the figure I further allow by way of set-off against the headline figure.

89. The third set-off relates to the wife's own nondisclosure in this period to which I have referred above. Although it is minor compared to the delinquency of the husband it must be reflected, in my judgment. The message should go out that if you are guilty of deliberate non-disclosure, even if it is relatively minor, you will pay a penalty in costs. I therefore allow a set-off in this regard of £10,000.

90. The husband should pay the reduced sum on the indemnity basis. His conduct has taken the case quite out of the ordinary. On an indemnity assessment one would normally expect about 90% of the actual costs to be awarded. That is the figure I shall use. This leads to a liability in relation to the first period calculated as follows:

The wife's costs to 12 June 2020	411,807
less "normal" costs	(100,000)
less section 37 costs	(40,000)
less non-disclosure	(10,000)
	261,807
indemnity costs at 90%	235,626

91. Since 12 June 2020 the wife has incurred further costs of £205,319. Mr Commins argues that all of these costs should be paid by the husband to the wife. He argues that the normal rule of no order as to costs in FPR 28.3(5) should not apply notwithstanding that the husband has not been guilty of any litigation misconduct in that second period. Mr Commins argues that I cannot look at the second period in isolation. It is contaminated by the husband's misconduct in the first period which carries over into the second period. Further, the husband's misconduct continued in relation to his denial of his ownership of AB, as I have explained above. That extended to giving false evidence from the virtual witness box with the motive of trying to prevent the competitor discount of £1.2m from being applied to the trading valuation of X.

92. I agree. In my judgment the husband's conduct in this period also is such as to disapply the normal rule of no order as to costs. The husband's continuing conduct in relation to that important single issue, coupled with the carry-over of his prior conduct, in my judgment leads to the conclusion that he should pay 50% of the wife's indemnity costs for that period. This I calculate as £205,319 x 90% x 50% = £92,394. Therefore, the husband's liability for costs will be £235,626 + £92,394 = £328,020.

93. As I have stated above, it was from 12 June 2020 that the wife was able openly to, indeed expected to, negotiate reasonably. The fact that the husband was maintaining an untrue position in relation to the ownership of AB did not absolve her from that

obligation. However, her stance since then has been penal. As explained above, her open proposal has been that the husband should be heavily sanctioned over and above the competitor discount and the costs penalty. This is not reasonable and in my judgment PD 28A paragraph 4.4 clearly applies. In my judgment the figure of £328,020 should be reduced by £50,000 to reflect the wife's unreasonable and untenable open negotiation stance. I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs.

94. Therefore, the costs penalty that the husband will pay to the wife will be £278,020. That represents 45% of the wife's overall costs which in my judgment is a fair fraction for the husband to pay having regard to the parties' respective conduct. This sum includes any liability under any costs orders previously made.

95. The overall value to be retained or received by the husband is £7,316,094 calculated as follows:

Non-business non-pension assets	2,113,759
X	3,779,808
add back DLA to avoid counting twice[2]	430,710
Pension assets	991,817
	7,316,094

This represents 44.7% of the total assets of £16,371,669. The departure from equality is £869,741. This is the price that the husband has to pay for his conduct in setting up a competitive business and conducting the litigation so abysmally. It is a very substantial sum of money and I hope it will serve as a lesson to any future litigant who is tempted to behave in the same way. As explained above, the wife argues that the penalty should in fact be (on my calculations) £2,728,612. In other words, she says that in addition to the costs penalty, and the discount for setting up a competitive business, the husband should have meted out to him as a further arbitrary penalty to punish his conduct of £1,858,870. As I have said above, this is completely untenable and disproportionate.

96. As stated above, the husband will receive value of £7,316,094. The wife will be left with value of £9,055,575. It goes without saying that with such amounts the parties will amply be able to meet their respective needs. During the hearing neither party mounted any argument about needs.

97. Once all the payments and transfers have been made there will be a clean break between the parties. I would hope that this judgment will bring about closure to the conflict between these parties and that they will bring to an end the actual and threatened litigation on other fronts.

98. X has commenced a claim in the County Court at City A against the husband for the return of certain items of company property. I have heard evidence about these items and I will state my findings. They will not be binding on the County Court, as those

[2] This sum has been utilised in the calculation of the value of the husband's non-business, non-pension assets (see para 75), as well as in the calculation of the value of the sum to be paid to him by X (see para 80). Therefore, one of these amounts has to be added back at this point.

proceedings are between different parties to those before me, but I would like to think that they would be highly influential.

a. I am satisfied on the evidence that the second laptop computer was damaged and has since been destroyed and disposed of by the husband.

b. I am satisfied on the evidence that the husband did not remove a very large external hard drive (as big as a large suitcase according to the wife). The wife did not notice its absence for a period of two years, if it existed at all. I do not need to make a finding as to its whereabouts. I am satisfied that the husband does not have it.

c. In my judgment it is quite unreasonable for the wife to seek that the husband relinquishes his principal UK mobile phone number. It is true that this number was created originally under a contract with X. However, in 2016 the husband transferred the number to a personal contract in his name. At that point he would have been given a new Sim card which works with the original number. That is his property. The old Sim card, completely valueless, will have been disposed of at that point. I am very doubtful that a telephone number can be an item of property. If it is, then it is vested in the husband and it is quite unreasonable for the wife to seek that it is given up.

d. The husband says that he has disposed of documents which he removed from the company in a skip in City V. He did so at a time when he was about to move to Country T. I am prepared to accept that he no longer retains these documents.

99. The parties have been negotiating during the course of the hearing about a set of undertakings to enable them both to move forward in their respective ducting businesses. There is a great deal of common ground. As to the differences I make the following observations.

a. It is quite pointless for the discontinuance of the City A County Court proceedings to be on terms that the husband repays a costs order of £13,500 already satisfied by X. That would require me to rework a number of my calculations of the husband's resources and the surplus assets of the company.

b. The undertakings not to engage in any unfair or unlawful competition and not to misuse any confidential information should be mutual.

c. The husband should be permitted to retain the domain names [specified] and [specified]. In my judgment these are not obviously linked to X. The other domain names to be relinquished by the husband must be furnished along with their passwords.

I would hope that the parties will now be able to agree all the undertakings. If they cannot I will be prepared to rule on the differences, if the parties agree that I should do so.

100. I turn to the question of child support for G. I have jurisdiction to deal with this issue as the husband is not habitually resident in the United Kingdom. G's school fees are presently £12,000 per annum and will shortly rise when she moves to secondary

school to £14,100 per annum. There will be extras as well. The overall annual bill is unlikely to be less than £15,000. The husband should pay £7,500 per annum towards the school fees.

101. As to the general child support, I refer to my decision of *CB v KB* [2019] EWFC 78 where I suggested at paragraphs 47-51 that a useful starting point for gross incomes up to £650,000 is the statutory child support formula. Mr Sharp QC and Mr Commins argue that the husband's gross income is at least £130,000. However, that calculation is before the husband's receipt of the substantial pay-out for which I have provided above. I anticipate that the husband will invest his pay-out in his new business. I have already stated that I am satisfied that the new business will generate a generous income for him. In my judgment, a reasonable gross income to attribute to the husband is £200,000 per annum. This gives rise to a liability under the formula of £19,248. The overall child support liability is therefore £26,748, which I round up to £27,000 per annum or £2,250 per month. This will be payable monthly in advance starting on the first day of the month after the receipt by the husband of his pay-out from X. It will be indexed annually by reference to movements in the CPI. It will continue until the conclusion of secondary education. In tertiary education it will fall to 50% of the secondary education rate.

102. That is my judgment.