Neutral Citation Number: [2024] EWFC 330 (B)

IN THE CENTRAL FAMILY COURT

B E T W E E N:

WW Applicant

- and -

XX Respondent

IMPORTANT NOTICE

This judgment was delivered in private. The judge gives permission for this version (but no other version) of the judgment to be published.

Mr William Tyzack (Counsel instructed by Kingsley Napley LLP, Solicitors) appeared on behalf of the Applicant wife.

Mr Alexander Thorpe KC (Counsel instructed by Teelan & Silwal Family Law, Solicitors) appeared on behalf of the Respondent husband.

Judgment of His Honour Judge Edward Hess dated 11th October 2024

INTRODUCTION

1. This case concerns the financial remedies proceedings arising out of the divorce between WW (to whom I shall refer as "the wife") and XX (to whom I shall refer as "the husband").

2. The case proceeded to a final hearing over 4 days on 7th, 8th, 10th and 11th October 2024.

3. Both parties appeared before me by Counsel. Mr William Tyzack (Counsel instructed by Kingsley Napley LLP, Solicitors) appeared on behalf of the wife. Mr Alexander Thorpe KC (Counsel instructed by Teelan & Silwal Family Law, Solicitors) appeared on behalf of the husband.

4. I am grateful to both Counsel for the helpful and clear way they have respectively conducted their cases – both parties have been represented before me at a first-class level; but it has, of course, come at a large cost. The wife has incurred a total of £286,941 in legal costs and the husband a total of £445,752. It should be noted that the husband has paid all the costs of all the experts, this being the main reason why there is a difference between the parties' totals. The husband has also paid the majority of the wife's legal costs so this has been an expensive exercise for him.

5. The court was presented with an electronic bundle running to a total of 1,517 pages, a supplemental bundle running to 67 pages, an authorities bundle running to 240 pages and a number of other documents have been exchanged during the final hearing. I have considered all the documents presented to me, in particular I have considered:-

    (i) A collection of applications and court orders.

    (ii) Material from the wife including her Form E dated 23rd January 2023 and her statements dated 7th February 2023, 21st March 2024 and 5th September 2024 as well as her answers to questionnaires and other disclosure.

    (iii) Material from the husband including his Form E dated 31st January 2023 and his statements dated 20th February 2023, 2nd April 2024 and 5th September 2024 as well as his answers to questionnaires and other disclosure.

    (iv) Material from various SJEs including Ms Fiona Hotson Moore, Mr Jon Dodge and Mr Paul Singleton (accountants), BB (a Country A Tax expert) and various real property valuations.

    (v) Properly completed ES1 and ES2 documents.

    (vi) Selected correspondence and disclosure material.

6. I have also heard oral evidence from the wife, the husband, Mr Jon Dodge and Mr Paul Singleton, all subjected to appropriate cross-examination.

7. I have also had the benefit of full submissions from each counsel in their respective opening notes and their closing oral (and partly written) submissions.

CHRONOLOGY OF EVENTS

8. The history of the marriage is as follows:-

    (i) The husband is aged 52, very nearly 53. He is a Country A citizen by origin and has two children from a previous marriage, the youngest of

whom is aged 17, and who live in Country A. He has lived in England since 2010 and now also has UK Citizenship. English is not his first language, but he is fluent in English and language has not been an issue here. He has had a successful business career in the manufacture of particular products, still owning and running a business which he started in Country A in 2004, and which now operates as Company Y in Country A which owns its UK subsidiary Company Z.

(ii) The wife is aged 38. She is a UK citizen and studied Events Management at University before having a career in that sphere, earning up to £50,000 pag. She gave up this career in September 2021 to pursue a competitive sports career. She has had some significant success in this career, but it has not provided her with an income, indeed it continues to be an expensive exercise. Instead, she has relied on financial support from the husband, initially given voluntarily, but unwillingly (and ultimately subject to court orders) since the separation. Her dream and aspiration (which appears not to be unrealistic) is to compete for Team GB in the Los Angeles Olympics in 2028.

(iii) They met in March 2010, started a relationship of cohabitation in September 2010, became engaged in September 2016 and married on 31st December 2017.

(iv) There were no children of the marriage.

(v) Although the husband is a Country A national, throughout the period of the relationship the parties lived in England, always in London. This was always in rented accommodation, from 2016 to 2022 in a property in Northwest London. In Spring 2022, the husband purchased a property in his sole name in Berkshire and moved there himself and terminated the tenancy in respect of the rented accommodation. These events caused a good deal of ill feeling between the parties, as the wife wished to remain in London, and they have different accounts as to the extent to which the husband consulted the wife about these decisions; but I have not considered it necessary to make any findings about this in the context of my task. The long and short of it is that these events coincided with the breakdown of the relationship and the wife decided not to move to live with the husband at the new property and this was, in effect, the parties' separation.

(vi) After a period of staying with friends, the wife (later in 2022) rented her own accommodation in Berkshire (as it happens, away from London and not very far away from the husband's new home).

(vii) Divorce proceedings were commenced on 11th April 2022. Decree Nisi (Conditional Divorce Order) was ordered on 11th October 2022. Decree Absolute (Final Divorce order) awaits the outcome of the financial remedies proceedings and is not, in itself, controversial.

(viii) Although a number of niggling pejorative comments in each direction have found their way into the evidence, and it would have been better if they had not, I am satisfied that both parties are decent and honest and trying to do their best in a difficult situation, that the criticisms made are really no more than illustrations of a couple whose relationship had broken down and I am not inclined to make any adverse findings about either of them. In fact, it was comforting to hear that, despite this litigation, the parties have been able to be friendly to and cooperative with each other, at least in relation to the mutual care of their cats.

(ix) In assessing the 'duration of the marriage' for the purposes of my section 25 analysis below, I am satisfied that the relevant period is September 2010 to Spring 2022, some 11½ years. Mr Thorpe's suggestion that I should ignore or attach less weight to the period of pre-marital cohabitation between September 2010 and December 2017 was, in my view, not consistent with the established law on this subject, which perhaps had its first articulation by Mostyn J in *GW v RW* [2003] EWHC 611 (Fam): "*where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently*". Most authorities since have accepted this proposition without challenge, for example the House of Lords in *Miller v Miller* [2006] UKHL 24, and I accept this as the established orthodoxy and the law binding on me. If the duration of the marriage in this case was 11½ years then, whilst it may not be a very long marriage, that certainly does not place it in the 'short marriage' category for which different considerations sometimes apply.

9. The financial remedies proceedings chronology is as follows:-

(i) The wife issued Form A on 14th December 2022.

(ii) Forms E were exchanged in February 2023.

(iii) A First Appointment, and MPS/LSPO hearing, was heard by DDJ Fagborun-Bennett on 21st February 2023. As well as making a LSPO order, she imposed an MPS obligation on the husband of £7,952 pcm (£2,952 pcm net was anticipated to be paid via a notional employment with the husband's company).

(iv) A private FDR took place on 27th September 2023, with Mr Tom Carter as the tribunal; but sadly no settlement was reached.

(v) A post-pFDR directions and further MPS/LSPO hearing took place before me on 5th April 2024. I made a further LSPO order and declined to vary the MPS order made by DDJ Fagborun-Bennett.

(vi) A PTR hearing took place before me on 6th September 2024.

(vii) Narrative statements were exchanged in September 2024.

(viii) A final hearing has taken place before me in October 2024.

BASIC LAW

10. In dealing with the claim, I must, of course, consider the factors set out in **Matrimonial Causes Act 1973, sections 25 and 25A** together with any relevant case law.

11. Matrimonial Causes Act 1973, section 25, reads as follows:-

> (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
> (2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A or 24Babove in relation to a party to the marriage, the court shall in particular have regard to the following matters:-
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
> (d) the age of each party to the marriage and the duration of the marriage;
> (e) any physical or mental disability of either of the parties to the marriage;
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

12. Matrimonial Causes Act 1973, section 25A, reads as follows:-

> (1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(*a*), (*b*) or (*c*), 24 or 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

SECTION 25 ANALYSIS

13. Although the husband has a 17-year-old child in Country A from a previous marriage, there are no relevant 'children of the family' whose needs fall to be considered in this case and it has not been argued that the husband's children in Country A should have any impact on the outcome of this case.

14. Although the majority of the figures in my asset schedule are agreed (and need no comment), there are a number of significant computational disputes in this case which fall to be considered under the heading "**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**". I propose to make the following comments and findings under this heading.

15. The only real property in the case (outside the company) is the husband's ownership of the property in Berkshire. This has an agreed value of £1,500,000. This is subject to an outstanding mortgage of £1,249,680, and an ERP of £37,813, so that applying notional costs of sale at 3%, the net equity is £167,507. Although purchased at the very end of the relationship in the husband's sole name, this was purchased with matrimonial resources and is plainly a matrimonial asset.

16. Mr Thorpe argues that I should include in my asset schedule a debt owed by the husband to the HMRC of £90,344. Mr Tyzack says I should not. In this respect Mr Thorpe relies on a letter from HMRC dated 29th July 2024 in which the liability is asserted, which letter was disclosed only as an exhibit to the husband's statement dated 5th September 2024. On the face of the letter, this liability arises from the

HMRC's assessment of benefits in kind taken by the husband in the tax y/e 5th April 2020, in particular the rent paid via the company for the rented accommodation in Northwest London and the use of a motor car by the husband. The letter notes that this assessment follows similar assessments for the two previous tax years. While there is no challenge to the legitimacy of the HMRC letter itself, what is missing from this disclosure is evidence of the husband's account with HMRC which would confirm whether or not the husband has paid all or some of this amount on account in advance of the assessment. He accepted that he had sold a property in Country A in 2021 and paid £275,000 to HMRC and the evidence is unclear whether this payment covers (in full or in part) the assessed liability of £90,344. The husband was a little vague about this in his evidence. Further, the witness statement itself says that the HMRC assessment "*is currently being challenged*", but no details have emerged of what this meant. In the circumstances, doing the best I can without best evidence, I have decided that the fairest thing for me to do here is to include a figure for half of this amount on my schedule, i.e. the figure of £45,172.

17. Mr Thorpe has argued that I should include a figure of £56,930 as a liability for Country A Tax. Mr Tyzack says I should not. On closer analysis, this is a liability which has not yet arisen (it is assessed as at 31st December 2024 and is payable on 31st July 2025) and may be an ongoing annual charge, at least until 2026 (there is a dispute as to whether the liability will cease five years after the husband ceased to be a Country A tax resident). Further, it seems likely (but no calculations have been put forward) that an assessed Country A tax would have to take into account any reduction in wealth caused by my ordering the husband to make payments to the wife. On balance I have decided that it would not be appropriate to include this figure in my asset schedule, which is intended to represent a current snapshot, though I note that the husband may have an ongoing extra tax liability in Country A which he will have to meet from his income, at least until 2026.

18. Mr Thorpe has argued that I should include a figure of £820,894 as a Company Z Director's Loan Account liability. Mr Tyzack has queried this on a number of bases. He has suggested that, on analysis of the Company Z accounts for y/e 31st December 2023, I should have doubts as to whether the payments made to the husband by that time (totaling £360,000) should properly be categorised as Director's loans, although I note that none of the instructed accountants have raised that doubt. He further challenges the increase in that figure to £820,894 in the course of 2024 by the production of a schedule of payments made in 2024, though there was no real challenge to the schedule itself which largely consisted of payments made for the costs of this litigation. On balance, I have been persuaded that this Director's Loan Account liability does exist, is a problem for the husband, and should be included in my asset schedule.

Company Y

19. The dispute between the parties which has really stood in the way of settlement here is the value to which I should attribute the husband's 100% shareholding in Company Y and the extent to which this figure should be treated as marital acquest subject to the sharing principle. On these issues, the parties (or in the first instance the

husband) have spent a substantial amount of money seeking the advice of various accountancy experts. Initially, Ms Fiona Hotson Moore of FRP, accountants, was appointed as the SJE. Subsequently, she parted company with FRP and another accountant from that firm, Mr Jon Dodge, stepped into her shoes as SJE. Later, Mr Paul Singleton was instructed by the husband after a successful *Daniels v Walker* application. The wife contemplated, but did not in the end pursue, her own *Daniels v Walker* application, which might have brought her shadow expert, Mr Roger Isaacs, into the fray. Although the court bundle included reports by Ms Hotson Moore, the principal sources of opinion on these issues before me were Mr Dodge and Mr Singleton.

20. I want to say at the outset that I found both Mr Dodge and Mr Singleton to be informed and persuasive expert witnesses, albeit with different styles, and I am entirely satisfied they were both giving their honest and best opinion on the matters arising with full and proper respect for their duties to the court. In so far as they differed in their conclusions, it seemed to me that these represented a perfectly unremarkable illustration of how competent professionals can take a reasonable position within a reasonable range of conclusions. In the end, I shall have to make some findings informed by their opinions, but this is an illustration of the well known caution which the courts have often expressed about company valuations. In the words of Lewison LJ in *Versteegh v Versteegh* [2018] EWCA Civ 1050: "*The valuation of private companies is a matter of no little difficulty. In H v H [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect*".

21. Further, in determining my findings in relation to the value of the business it is apposite for me to bear in mind the words of Peel J in *HO v TL* [2023] EWFC 215, where he said: "*I suggest that the reliability of a valuation will depend on a number of factors such as: (i) whether there are applicable comparables, (ii) how "niche" the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties' interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders' agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute."*

22. In addition to the usual complications involved in company valuations, we have the

additional complication of the Country A element. First, most of the figures produced for the holding company are expressed in Country A currency. Inevitably, the £ to Country A currency exchange rate moves around over time. For the purposes of my calculations, for mathematical convenience and the fact that the rate has been hovering around this figure, I propose to use the figure of £1 = 14 in Country currency. Secondly, there are some Country A tax issues which have an effect on our calculations.

23. Against this background, Mr Dodge and Mr Singleton, in their joint report of 2nd September 2024, reached the following conclusions as to the current value of the company:-

    (i) They agreed that in assessing the value of the husband's 100% interest in Company Y, the EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortisation) should be taken at Country A currency 33,650,000 = £2,403,571.

    (ii) They differed over the multiplier to be applied to that to calculate an earnings basis valuation figure. Mr Dodge said 8.5. Mr Singleton said 6.25.

    (iii) Applying the respective multipliers to the agreed EBITDA figure, this produced competing headline valuation figures of £20,430,357 for Mr Dodge against £15,022,319 for Mr Singleton.

    (iv) They differed (slightly) over the net debt figure to be deducted from the headline figure. Mr Dodge said Country A currency 67,000,000 = £4,785,714 and Mr Singleton said Country A currency 65,000,000 = £4,642,857.

    (v) Deducting the net debt figure from the headline figure produces rival figures of £15,644,643 for Mr Dodge and £10,379,462 for Mr Singleton.

24. These figures were produced before the very late company real property valuations were produced. After this, Mr Dodge, in a report dated 3rd October 2024, expressed the view that since the real property valuations significantly exceeded the equivalent figures in the company accounts, he would be minded to increase his valuation figure by Country A currency 26,480,000(£1,891,429) so that his valuation figure would now be £15,644,643 + £1,891,429 = £17,536,072. Mr Singleton, in a report dated 2nd October 2024, expressed the view that the new real property valuations made no difference to his figure of £10,379,462.

25. Both experts agreed that a proper calculation of the net value of the company would require a deduction for tax. If this was Country A Tax (which in my view is, on a balance of probabilities appropriate, taking a snapshot value now) this would result in a deduction of the Country A tax rate % of the value. This would produce a net valuation figure of £11,980,644 on Mr Dodge's figures or £7,091,248 on Mr

Singleton's figures. Even if it had been my conclusion that UK tax rates should apply in this context, I remind myself that an increase in these rates in the UK seems likely in the foreseeable future, even if the precise details are not yet clear.

26. So how should I determine the value of the company for the purposes of my task? I remind myself of the fragility of the exercise, and in particular the fragility of the assessment of the multiplier. I have listened carefully to a good deal of evidence of two very experienced professionals arguing with passion for this multiplier or that, backed up with numerous comparables which, as ever, have to be treated with caution in the context of the real world, where many factors come into play in fixing a sale price of a business. As often, there was a dispute as to which business sector was the most reliable indicator of multiplier selection. I could not say that I regarded one expert as having better answers to the many questions asked on the multiplier question. On a balance of probabilities I propose to take a multiplier between the two asserted figures, that is 7.25. I propose to use the agreed EBITDA figure and take the midpoint on the net debt dispute, i.e. Country A currency 66,000,000 = £4,714,286. I preferred Mr Dodge's view that a figure should be added for the late real property valuations, and I shall use his figure. I shall use the Country A tax rate. Accordingly, I make a finding that the husband's shareholding in Company Y is worth £(7.25 x 2,403,571) = £17,425,890 less £4,714,286 (net debt) plus £1,891,429 (real property uplift) = £14,603,033 less £4,626,241 (tax) = **£9,976,792.** This is the figure that I shall place in my schedule.

27. The experts did not have a very big disagreement as to the sustainable net income which the husband might expect to receive in the foreseeable future from this shareholding. Mr Dodge suggested £601,000 per annum net. Mr Singleton said £582,949 per annum net. I note in passing that the husband will probably have to meet from this sum a Country A Tax debt, at least for a period. He, of course, has his own debts to meet as well as his living costs and any provision ordered by me in favour of the wife.

28. In the context of reaching conclusions about the outcome of this case I need also to apportion the extent to which the husband's shareholding in Company Y is a matrimonial asset (the marital acquest, subject to the sharing principle) as opposed to a non-matrimonial asset (only usually to be invaded if needs are established). This exercise caused the experts to look at the business at the commencement of the parties' cohabitation in September 2010. It is common ground that the husband has held his shares in Company Y since 2004 and so the shares, on any view, existed prior to the relationship so have one characteristic of non-matrimonial property; but in so far as they have grown more valuable since 2010 by reference to factors other than passive growth, they will in part have acquired status as matrimonial assets.

29. The two experts were able to agree, mostly by reference to an analysis of the accounts in the period leading up to 2010, that the value of those shares in September 2010 was £1,250,000 before tax. That, of course, is a 2010 figure and (to produce a fair figure for a present calculation) a fair methodology needs to be identified for updating that

figure. This is sometimes referred to as the assessment of the 'springboard'. The arguments about how to decide on this issue have been traversed in leading cases such as *Jones v Jones* [2011] EWCA Civ 41, *Martin v Martin* [2018] EWCA Civ 2866, *XW v XH* [2019] EWCA Civ 2262 and *Hart v Hart* [2017] EWCA Civ 1306. My attention was particularly drawn to the analysis in the well-known judgment of Wilson LJ (as he then was) in *Jones v Jones* (supra), which seems to me to be apposite in the present case.

30. I have been persuaded by Mr Thorpe's analysis that, on the facts, and on the chronology of the development of Company Y, a very important event was the purchase by Company Y of a UK company called Company Z (based in the North of England). This event occurred in August 2010 (albeit that the full ownership was transferred a little later) which was before the parties' cohabitation began. This might be identified as something of a paradigm 'springboard' event because it can be seen from a detailed analysis of the group turnover figures that thereafter Company Y was moved on to a different level from which it has subsequently grown and developed. In these circumstances I have been persuaded that, in assessing the present day figure to be applied in this context, the fair way forward is broadly to follow the guidance of Wilson LJ in *Jones v Jones* (supra) by doubling the initial valuation figure and then applying an appropriate share index. I have decided to accept Mr Tyzack's suggestion by taking the average of the FTSE All Share Index, the FTSE 350 Index and the FTSE 100 Index of the period between September 2010 and the present, that is 1.54. Thus, I shall upgrade the 2010 figure from £1,250,000 to £3,850,000. From this must be deducted Country A Tax and I shall use the figure of 28% for this to reach the figure of £2,772,000.

31. The 'marital acquest' portion of the husband's shareholding interest I shall therefore assess at £9,976,792 less £2,772,000 = **£7,204,792.**

32. Having made these determinations, I am now able to set out my assessment of the assets and debts for distribution in this case.

33. The situation can be summarised as follows:-

REALISABLE ASSETS/DEBTS

Wife

Bank accounts in sole name	10,725
Credit card debts	-2,099
Outstanding Legal Costs [1]	-70,743
TOTAL	**-62117**

Husband

Property in Berkshire [2]	167,507

[1] This figure is based on a total of incurred fees of £286,941 less a total of fees paid of £216,198 = £70,743
[2] This figure is based on a value of £1,500,000 less outstanding mortgage of £1,249,680 less ERP of £37,813 less notional costs of sale at 3% = £167,507

Bank accounts in sole name	20,022
Credit Card debts	-2,941
UK HMRC Tax Demand	-45,172
Country A Tax liability	0
Interest in Company Y	9,976,792
Company Z Director's Loan Account liability	-820,894
Outstanding Legal Costs [3]	-71,280
TOTAL	**9224034**

PENSION ASSETS

Wife

L & G Pension CE	16,393
Crystal Pension CE	15,396
TOTAL	**31789**

Husband

Country A Pension CE	29,542
TOTAL	**29,542**

34. If I were to disaggregate the non-matrimonial portion of the assets (i.e. the non-matrimonial portion of the husband's interest in Company Y) from this table and then calculate what lump sum would exactly equalise the parties' share of matrimonial assets, the figures would look like this, requiring a lump sum payment of £3,255,952 to provide exact equality:-

	Wife	**Husband**
Own realisable assets	-62,117	9,224,034
Less non-matrimonial portion	0	-2,772,000
Own pensions	31,789	29,542
TOTAL	**-30328**	**6481576**
Plus lump sum of £3,255,952	3,255,952	-3,255,952
TOTAL	**3,225,624**	**3,225,624**

35. In relation to "**the income, earning capacity…which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire**"" I have the following comments:-

(i) The husband present and likely future income has already been discussed in the context of my analysis of Company Y (see above). Provided the company continues on its present path he should enjoy a substantial income for the foreseeable future, i.e. something approaching £600,000 per annum net, subject to the caveats expressed above. Some of this income is, of course, incorporated in the capital value of the business and I

[3] This figure is based on a total of incurred fees of £445,752 less a total of fees paid of £374,472 = £71,280

should be careful not to double count it.

(ii) The wife, until 2021, had an established earning capacity in the events industry at c £50,000 pag or c £3,000 pcm net. I am satisfied on the evidence that if she wished to return to that career she could fairly easily do so. She is well qualified for it with a good track record and has only been out of the business for a short while. She is young and in good health. That represents her earning capacity for the purposes of my task. If she chooses not to pursue her earning capacity and instead seeks to pursue her aspirations in the sports world then that is her choice and entitlement but she cannot, I think, expect the husband to fund this any more and my assessment of her needs must be carried out on the basis of that she maximises her earning capacity from now onwards in paid work, not on the basis of a potential sports career. In my judgment at the MPS stage in April 2024 I indicated that this would be the likely conclusion at a final hearing and I have not been persuaded otherwise at trial.

36. In relation to the "**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**" I have the following comments:-

(i) In this context, it is helpful to focus on the wife's needs because, on any outcome of the case, the husband will end up with more than her (he will retain his non-matrimonial assets).

(ii) Mr Tyzack pitched the wife's needs as follows. She has a housing need of £1,500,000 (in a house of similar value to that occupied by the husband) plus purchase and furnishing costs taking her housing need up to £1,750,000. He suggested she also needed a Duxbury Fund of £1,800,000, calculated on a whole life tariff on At a Glance Duxbury Table figures for the provision of £70,000 per annum (which he suggested would be needed on top of the £36,000 per annum the wife might earn. She would therefore have a need for a lump sum of £3,550,000.

(iii) Mr Thorpe suggested that the wife's needs could comfortably be met within the husband's open offer of a lump sum of £1,500,000 paid in tranches over five years (on the basis that she would continue to receive her salary of £2,952 pcm net from his company until all the lump sum was paid).

(iv) My assessment of the wife's needs should, in my view, take into account the **standard of living** that the parties jointly enjoyed during the marriage, the **ages of the parties** and the **duration of the marriage.**

(v) In this context I have seen pictures of the property in North West London, where the parties rented accommodation for much of the marriage. It is a very attractive detached house representing a high standard of living. I have also read of the expensive lifestyle the parties enjoyed during the

marriage, including some very good holidays, and this has to be factored into my assessment. The parties lived at a high level, though this is one reason there are few assets outside the company at the end of the marriage – the money was (perhaps unwisely) spent rather than invested.

(vi) I have also noted that the husband thought it appropriate to purchase a home for himself a £1,500,000 home at the end of the marriage and there is no obvious reason why his housing needs should be any greater than those of the wife, though it may be that his needs are for a less expensive house.

(vii) I think it would be reasonable for me to assess the wife as having an income need over her earning capacity, but not to the extent sought by Mr Tyzack. It is not obvious in any event that we should be looking at a whole life Duxbury fund anyway for somebody who is aged 38 (see the latest thoughts, for example, set out very recently in the interim report of the Duxbury Working Party).

(viii) Making a broad assessment, I have reached the conclusion that a needs-based assessment for the wife would be properly assessed at £2,000,000 – to include a housing fund and a Duxbury income fund. Plainly, if her sharing claim comes in at above this level then that will prevail.

37. I want to say something at this stage about **the sharing principle.** As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage.

38. In the words of Lord Nicholls in *White v White* [2000] UKHL 54:-

"…a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

and in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24:-

"This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals…The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

39. In the words of Mostyn J in JL v SL [2015] EWHC 360:-

"Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination."

40. Although I have received some submissions from Mr Thorpe to suggest that I might be influenced in this case by the Court of Appeal's decision in *Sharp v Sharp* [2017] EWCA Civ 408, whatever the merits of that decision I do not think the present case is in the category of cases which that court had in mind as likely to produce a different outcome on the basis of the principles set out therein. One obvious factor is the length of the marriage and there are other distinguishing features as well. I also share the views of Mostyn J in *E v L* [2022] EWFC 60 in relation to the dangers of elevating 'childlessness' to a feature justifying departure from equality.

OUTCOME

41. The wife's open position is as follows:-

    (i) There should be a first tranche of lump sum within 28 days of £110,000.

    (ii) There should be a second tranche of lump sum within three months of £1,957,987.

    (iii) There should be nine further tranches of lump sum over the next ten years bringing the total lump sum payable to £5,200,000.

    (iv) Spousal periodical payments should be paid at the rate of £11,000 pcm for four months, then £7,000 pcm for two years and then a clean break.

    (v) No order as to costs.

42. The husband's open position is as follows:-

    (i) There should be a first tranche of lump sum within 14 days of £100,000.

    (ii) There should be five further tranches of lump sum of £280,000 on 1st April 2025 and each year thereafter for the next five years bringing the total lump sum payable to £1,500,000.

    (iii) The existing salary received by the wife from the husband's company (at £2,952 pcm net) should continue until all the lump sum is paid off and then a clean break.

(iv) No order as to costs.

43. Plainly, these pitches are made with different views as to what a sharing claim based on half of the marital acquest might add up to. Having now made my findings on this, which come between the parties' respective positions, a starting point arising from the above findings would be a sharing claim by the wife requiring a lump sum of £3,255,952 to bring the parties to an equal position.

44. However, I need to go on to consider how that level of lump sum might be afforded and whether it is reasonable to make an adjustment in the shares to take into account the fact that, on a lump sum scenario, the wife would be receiving cash (or a copper-bottomed asset) but the husband would be left with shares, which may be significantly more risk-laden.

45. I remind myself on some of the law governing this territory, much of which was helpfully summarised by Peel J in *HO v TL* [2023] EWFC 215:-

"Fourth, in practice the choices for the court will be, per Moylan LJ in Martin v Martin [2018] EWCA Civ 2866 at para 93: (i) "fix" a value; (ii) order the asset to be sold; and iii) divide the asset in specie. The latter option (divide the aspect in specie) is commonly referred to as Wells sharing (Wells v Wells [2002] EWCA Civ 476).

Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party's non-marital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether Wells sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case.

Sixth, as was pointed out in Wells (supra), Versteegh (supra) and Martin (supra), there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. As Moylan said LJ at para 93 of Martin (supra):

"The court has to assess the weight which can be placed on the value even when using a fixed value for the purpose of determining the award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation

is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge".

Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

i) The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common where a party has a minority holding, or otherwise does not have overall control, and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an "accountancy discount".

ii) To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance. As Bodey J said in Chai v Peng and Others [2017] EWHC 792 (Fam) at para 140: "It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved".

It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be a termed a "court discount". Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets."

46. In this case, nobody has sought either an order for sale of the company or any kind of *Wells* sharing arrangement. I think that is perfectly sensible as the obvious solution here is to allow the husband to retain his shares, but to pay monies to the wife over time – the structure adopted by both parties in their open positions. There is, however, a real liquidity issue here and, in my view, since the value of the company represents the very dominant asset in this case, the common practice of allocating "*the resources in such a way as to reflect illiquidity and risk. Conventionally,…to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance"* is very much in play here.

47. We have investigated in the course of the evidence before me the possibility of extracting money from the company in different ways to fund a settlement for the wife. Options have included borrowing further money by the company against its real property or trade debtor figure, paying out from existing resources within the company and selling the company real property (for example to a commercial property investor) and leasing it back by some form of long lease which restricted any interference in the business itself by the purchaser, who would become the landlord (Mr Dodge felt that this should release significantly more than £1,000,000). Mr Dodge thought all these were realistic possibilities, though with obvious downsides to

the future of the business. Mr Singleton felt all these would be detrimental to the company, but (on this issue) my feeling was that he was articulating the likely reaction of a cautious business owner rather than addressing the court's task of balancing the needs of a wife to receive capital as part of her divorce settlement against the risks arising to a business owner. In the end it will be for the husband to decide how he can raise money, and he needs to be given time to explore these possibilities more fully, but in my view one of these ways forward should be possible and should be seen by him as a necessary downside of retaining his company. Equally, it would be wrong for me to impose a regime of payments which risked the very survival of the company and a fair balance has to be struck.

48. Having considered all these matters, I have reached the conclusion that the fair outcome to this case is as follows:-

    (i) There should be a first tranche of lump sum payable by 22nd November 2024 of £300,000.

    (ii) There should be a second tranche of lump sum payable by 1st May 2025 of £1,000,000. I am taking the view that there is, on a balance of probabilities, sufficient time between now and next May to identify a method of raising £1,000,000, whether by sale and leaseback or otherwise.

    (iii) There should be six further tranches of lump sum of £200,000 on 1st May 2026 and each 1st May thereafter bringing the total lump sum payable to £2,500,000. In order for these payments not to lose value against inflation, the figure will be uprated on 1st May 2025 and each 1st May thereafter by way of CPI inflation. The husband has liberty to pay them in advance if he so wishes.

    (iv) Interest will run at the Court Judgment rate in the event that these sums (or any part of them) are not paid on the due date of payment.

    (v) The existing salary received by the wife from the husband's company (at £2,952 pcm net) should continue until the first two tranches of lump sum have been paid off. This will be ordered by the mechanism of a spousal periodical payments order with credit given for any monies received under the employment so the husband has the option as to how these payments are actually made. Then there should be a clean break. There will be a section 28(1A) declaration to prevent the extension of this term.

    (vi) No order as to costs.

49. In this exercise I have reduced the 'equality' lump sum payment of £3,255,952 to £2,500,000 to reflect the difference between 'copper-bottomed' and 'risk-laden'

assets, as set out above. This creates an overall division of 38% to 62% (see the table below). In view of the general unavailability of assets other than the company I consider this to a reasonable departure from equality.

	Wife	**Husband**
Own realisable assets	-62,117	9,224,034
Less non-matrimonial portion	0	-2,772,000
Own pensions	31,789	29,542
TOTAL	**-30328**	**6481576**
Plus lump sum of £2,500,000	2,500,000	-2,500,000
TOTAL	**2,469,672**	**3,981,576**
PERCENTAGE	**38%**	**62%**

50. I am satisfied that this sharing-based solution provides more money for the wife than would a needs-based solution, so the sharing-based solution is the proper outcome.

51. I am satisfied that terminating spousal periodical payments in the way suggested above both meets her needs and meets the statutory test ("**whether it would be appropriate to require periodical payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party").**

52. This is my decision and, as discussed, I invite counsel to produce a draft order which matches these conclusions. The sending out of this judgment by email on 11th October 2024 represents the formal handing down of the judgment for appeal period purposes. I am hoping that it will not be necessary for me to convene another hearing, but if it becomes necessary I shall do so. I have no strong views as to whether this judgment should be published on TNA / BAILII and, if so, what anonymisations / redactions are sought, but I am happy to receive representations on the subject when I am sent the draft order.

HHJ Edward Hess
Central Family Court
11th October 2024