OUTER HOUSE, COURT OF SESSION

[2019] CSOH 100

F72/18

OPINION OF LORD GLENNIE

In the cause

STEPHEN McCALLION

Pursuer

against

LORRAINE BANFORD or McCALLION

Defender

Pursuer: Hayhow; MacRoberts LLP
Defender: Ms Malcolm; DAC Beachcroft Scotland LLP

23 October 2019

Introduction

[1] This is an action of divorce at the instance of the pursuer (the husband) on the grounds that the marriage has broken down irretrievably, that being established by the fact that the defender (the wife) has behaved in such a way that he cannot reasonably be expected to cohabit with her. This is not opposed. The parties were married in April 2007. They separated on 28 August 2018, since when they have neither lived together as husband and wife nor have they had marital relations. On the basis of the evidence led before me, both orally and by affidavit, I am satisfied that the defender has behaved in such a way and that the marriage has broken down irretrievably. There is no prospect of a reconciliation

between them. I shall sustain the first plea-in-law for the pursuer and grant decree of divorce.

[2] There are two children of the marriage, aged 10 and 11. Since the parties separated in August 2018 they have been living with the defender, their mother, in the former matrimonial home. They have had frequent and fairly regular contact with the pursuer, their father, during this period. On the first day of the proof, having been made aware of the wishes of the children in respect of contact, parties entered into a joint minute (No 44 of process) making provision for contact in the future (including residential and holiday contact). I am satisfied that these arrangements are satisfactory and in the best interests of the children; and on the joint motion of both parties to this action, and in terms of section 11(2)(d) of the Children (Scotland) Act 1995, I shall grant decree in terms of that joint minute.

[3] That leaves for determination the dispute between the parties as to financial matters. The remainder of this opinion is taken up with a consideration of the various issues under this head.

Financial matters – relevant principles

[4] The relevant principles were not in dispute, but it is convenient to set them out before turning to consider the particular points in dispute.

[5] The statutory framework is contained within the Family Law (Scotland) Act 1985 as amended ("the Act"). In an action for divorce, either party may apply to the court for (amongst other orders) one or more of the following, viz an order for the payment of a capital sum and/or an order for the transfer of property and/or an order for the making of a periodical allowance and/or an incidental order within the meaning of section 14(2) of the

Act: see section 8 (1). Where such an application is made then, subject to sections 12-15 of the Act, the court shall make such order (an "order for financial provision") as is (a) justified by the principles set out in section 9 and (b) reasonable having regard to the resources of the parties: section 8(2). The term "resources" is defined in section 27 of the Act as meaning "present and foreseeable resources"; so that the lack of resources available or likely to be available to either party may be a factor for or against the making of an order for financial provision which might otherwise be indicated by the principles set out in section 9.

[6] Section 9 sets out the main principles which the court is bound to apply when determining the orders to be made. So far as is relevant, section 9 provides as follows:

> "**9. Principles to be applied**
>
> (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
>
> (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage…;
>
> (b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
>
> (c) any economic burden of caring
>
> (i) after divorce, for a child of the marriage under the age of 16 years ...
>
> should be shared fairly between the persons;
>
> (d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from
>
> (i) the date of the decree of divorce, to the loss of that support on divorce …
>
> (e) … [not relevant here]

(2) In subsection (1)(b) above and section 11(2) of this Act—

- "economic advantage" means advantage gained whether before or during the marriage … and includes gains in capital, in income and in earning capacity, and "economic disadvantage"shall be construed accordingly;

- "contributions" means contributions made whether before or during the marriage …; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family."

[7] Section 9(1)(a) was described by Mr Hayhow as "the bedrock provision". Section 10 sets out some of the principles to be applied in giving effect to that provision. So far as is relevant, section 10 provides as follows:

"**10 Sharing of value of matrimonial property**

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property … shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(2) … the net value of the … property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage…

(a) before the marriage so far as they relate to the matrimonial property … and

(b) during the marriage

which are outstanding at that date.

…

(4) subject to subsections (5) and (5A) below, in this section and in section 11 of this Act "the partnership property" means all the property belonging to the partners or either of them at the relevant date which was acquired by them or by one of them (otherwise than by way of gift or succession from a third party) –

(a) before the marriage for use by them as a family home or as furniture or as plenishings for such a home; or

(b) during the marriage but before the relevant date.

…

(6) In subsection (1) above "special circumstances", without prejudice to the generality of the words, may include –

(a) the terms of any agreement between the persons on the ownership or division of any of the matrimonial property …
(b) the source of the funds or assets used to acquire any of the matrimonial property … where those funds or assets were not derived from the income or efforts of the persons during the marriage …
(c) any destruction, dissipation or alienation of property by either person;
(d) the nature of the matrimonial property … , the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce…"

[8] Section 11 sets out other factors to be taken into account in applying the principles set out in section 9. It provides, so far as is relevant, as follows:

"**11 Factors to be taken into account**

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which –

(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and
(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property …

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to –

(a) any decree or arrangement for aliment for the child;
(b) any expenditure or loss of earning capacity caused by the need to care for the child;
(c) the need to provide suitable accommodation for the child;
(d) the age and health of the child;
(e) the educational, financial and other circumstances of the child;
(f) the availability and cost of suitable child-care facilities or services;
(g) the needs and resources of the persons; and
(h) all the other circumstances of the case.

(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to –

(a) the age, health and earning capacity of the person who is claiming the financial provision;
(b) the duration and extent of the dependence of that person prior to divorce …
(c) any intention of that person to undertake a course of education or training;
(d) the needs and resources of the persons; and
(e) all the other circumstances of the case.

…

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the person who is to make the financial provision to any person who he maintains as a dependent in his household whether or not here is an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage … unless

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account."

[9] I should also mention sections 12, 13 and 14 of the Act. Section 12 deals with orders for payment of a capital sum or the transfer of property and provides that such an order may be made on granting decree of divorce or within such period as the court may specify. Subsection (3) makes it clear that the capital sum can be made payable by instalments. Section 13 deals with orders for periodical allowance under section 8(2) of the Act, and provides that the court shall not make an order for periodical allowance under that section unless: (a) the order is justified by one of the principles set out in paragraphs (c), (d) or (e) of section 9(1) of the Act; and (b) the court is satisfied that an order for payment of a capital sum or the transfer of property etc under that section would be inappropriate or insufficient to satisfy the requirements of that section: section 13(2). This makes it clear that the making of an order for a periodical allowance is very much a secondary remedy, only to be adopted

where payment of capital or a transfer of property would be inappropriate or insufficient to meet the requirements of fair sharing. Finally, section 14(2) sets out a list of orders which are referred to as incidental orders. They include (a) an order for the sale of property, (b) an order for the valuation of property, (d) an order regulating the occupation of the matrimonial home, and various other orders including (k) "any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act." The width of the power under section 14(2)(k) was emphasised in *Murdoch* v *Murdoch* 2012 SC 271.

[10] In the course of submissions I was referred to a number of authorities for certain general propositions. *Little* v *Little* 1990 SLT 785 was cited for the statement of Lord President Hope at 786L-787D who emphasised that the court had a wide discretion to do justice as between the parties so as to achieve a fair and practical result in accordance with common sense. *Whittome* v *Whittome (No.1)* 1994 SLT 114 at 126C-E was cited for Lord Osborne's remark that the underlying principle was that it was "the wealth acquired by the parties … or generated by their activity and efforts during the course of their life together" which was to be shared. That approach was endorsed in *R* v *R* 2000 Fam LR 47. *Jacques* v *Jacques* 1997 SC (HL) 20 dealt with the question of "special circumstances" under section 10(6)(b) of the Act, emphasising that the extent to which something was a special circumstance which might justify departure from an equal sharing of the net value of the matrimonial property was a matter for the discretion of the court: see page 24 per Lord Clyde and page 22 per Lord Jauncey. Reference was made to *Harris* v *Harris* 2013 Fam LR 122 for a review of the issues bearing on whether an allowance for special circumstances should be made. So far as concerned section 9(1)(b), which requires fair account to be taken of any economic advantage derived by a person from contributions made by the other and

of any economic disadvantage suffered by either person in the interests of the other or of the family, I was referred to the remarks of Lord Marnoch in *Wilson* v *Wilson* 1999 SLT 249 where the court made a broad assessment of the economic imbalance and on that basis made an order to correct that imbalance from non-matrimonial property. On the same point I was referred to the decision of Lady Smith in *Coyle* v *Coyle* 2004 Fam LR 2 at paras [37]-[39] where she emphasised the necessity under that subsection to demonstrate an "identifiable economic advantage which derives from an identifiable contribution by the other spouse" which it must appear to the court to be fair to take account of: see also paras [40] and [49]-[52]. *B* v *B* 2012 Fam LR 65 was cited as authority for the proposition that payment to reflect awards under section 9(1)(c) and (d) can be made as part of the order for a capital sum under section 8. There was no dispute about these principles and I have endeavoured to take them into account in reaching my decision in this case.

[11] In light of the provisions of the Act and the guidance offered by these authorities, it was submitted by Ms Malcolm on behalf of the defender that the court should first (i) identify the matrimonial property and assess its value; and then (ii) determine the appropriate division of that net value, having regard both to the presumption that a fair sharing is an equal sharing and also to arguments for a departure from that presumption based on factors set out in sections 9-11 of the Act. I did not understand Mr Hayhow to disagree with this approach and I propose to adopt it.

Credibility and reliability

[12] Before considering the evidence on the disputed items, I should say something about the credibility and reliability of the parties and other witnesses who gave evidence. The pursuer and the defender each gave evidence for at least two days, rather more in the case of

the pursuer. I did not find either to be wholly credible or reliable. The pursuer, on his own admission, had kept certain of his financial dealings secret from his wife. He had not told her about his receipt of over £1.7 million as a result of a settlement of a contractual claim against his employers. Nor had he told her that he had bought a flat in Leeds where he was working during the week. His explanation, that he kept these things secret because he wanted to pass assets on to his children by a previous marriage, and that his wife would have stopped him if she had found out, did not ring true. His failure to disclose to Her Majesty's Revenue and Customs ("HMRC") the gain made on the sale of certain shares, all as described below, when timely disclosure would have resolved one of the main issues between the parties, suggested to me that he thought he had something to gain by keeping his cards close to his chest. On the other hand, I was impressed by the fact that in the course of his evidence he did from time to time back down on allegations against his wife and would from time to time accept points made against him. The defender, by contrast, had no obvious big secrets. However I got the impression that she was always ready to criticise the pursuer and to undervalue the contributions he had made during the course of the marriage, for example by belittling the work he did in doing up various properties, the proceeds of which contributed to the purchase of the matrimonial home. She was unwilling to accept any suggestion which might assist or reflect well on the pursuer. She would sometimes insist on a line of evidence even when it appeared from the documents that there was no basis for it. When taking certain jewellery to be valued for the purpose of this litigation, she omitted a five diamond eternity ring given to her by the pursuer and only produced it for valuation after the pursuer had lodged certain documents showing that she must have had it. In response to the pursuer's claim to have bought her a diamond ring in Dubai, and the photographs of the ring produced by the pursuer as evidence of his purchase, she came out

with a story in her evidence about the pursuer buying and selling diamonds which had never been put to the pursuer in cross-examination – I formed the view she was making it up as she went along. On a number of other matters I formed the view that she was not being candid. One such was an incident where she became involved with the police in connection with an incident where she assaulted the pursuer and accepted a diversion from prosecution and agreed to attend an anger management course, all of which she denied despite there being evidence to the contrary. But having said all that, I did not consider that I could treat this case as one in which I should always prefer one side to the other. Rather I attempted to treat each issue on its merits and on the evidence which I heard, considered in the light of what seemed the more likely explanation in the particular case.

[13] The other evidence I heard was from experts in the field of tax advice and dealings with HMRC. I considered both to be credible and generally reliable.

Matrimonial property – assets and net value

[14] Matrimonial property is defined in section 10(4) of the Act (see above). The net value of that property is the value at the relevant date. Parties were agreed that the relevant date was 28 August 2018. In the course of the proof, parties entered into a joint minute (No 43 of Process) agreeing a number of items and their values. Some of the outstanding issues fell away in the course of evidence and final submissions. Both parties in the course of their final submissions submitted schedules of the matrimonial property and its net value, reflecting the agreed items and their rival contentions in respect of the disputed items. Attached to this opinion as Schedule 1 is my consolidation of those schedules, re-worked so as to reflect not only the agreed items but also my decisions on the matters in dispute. Values are rounded up or down to the nearest pound. Each item is numbered in the left

hand column. The second and third columns identify the item of matrimonial property and its value at the relevant date. The fourth, fifth and sixth columns identify who presently owns or controls the item (or in whose name the item is currently held). The disputed items (or items otherwise requiring explanation) are marked with an asterisk against the number in the left hand column. In the discussion which follows, I shall refer to the relevant items by number.

Item 2 – contents of former matrimonial home

[15] There is no dispute about the value to be attached to the former matrimonial home. The contents (furniture, pictures, etc) have been valued by independent valuers at £9,550. This valuation is now accepted by both parties. But that valuation includes a dining room table and chairs (valued at £250) which parties are agreed has belonged to the pursuer since before the marriage, is not to be regarded as matrimonial property, and will be returned to him whatever the ultimate disposal of the house itself, along with certain pictures or prints belonging to him which were not included within the valuation. In all other respects it is agreed that the contents of the house be divided equally. I have therefore deducted the £250 from the agreed valuation, leaving the remainder of the contents valued at £9,300 to be included within matrimonial property.

Item 4 – contents of Leeds flat

[16] The pursuer was working in Leeds for the last few years of the marriage. Unknown to the defender, who thought that he was renting somewhere to stay, he had bought a flat in Leeds and furnished it. It is agreed that both the Leeds flat and its contents are matrimonial property. Agreement has been reached as to the value of the Leeds flat (£345,000) and the

outstanding mortgage on it (£140,390), but there is a dispute about the value of the contents. The defender has not seen the contents and can give no evidence as to their value. The pursuer indicated that between January 2016 and August 2018 he spent £27,578 to furnish the flat, but has provided no indication of second hand value as at the relevant date. The pursuer suggests pro-rating the value of the contents of the Leeds flat by reference to the relative sizes of that flat and the matrimonial home, which would give a value for the Leeds contents of about £2,380. The defender on the other hand points to the fact that the Leeds flat was advertised as being furnished to the highest standard and the furniture was just about new at the relevant date. She suggests a value of £20,000, something over two-thirds of the new price. I consider that, as is often the case, the truth lies somewhere in between. I am aware that there is not a great market in second hand furniture; but equally some high-end modern furniture can sell for a premium. I consider that the pursuer's approach probably undervalues these items – because of their high quality and recent purchase – but the defender's value is much too high. I value the contents of the Leeds flat at the relevant date at £7,000.

Item 27 – the defender's jewellery

[17] The defender had certain items of jewellery which were accepted to be matrimonial property. These were independently valued at £3,550, and this figure is accepted for these items. Certain other items were possibly not disclosed for valuation, but with the exception of the two items mentioned below it has been agreed simply to ignore these or treat them as cancelling each other out.

[18] The two items referred to above, which remain in dispute, were: (a) a 3.01 carat diamond ring round solitaire which the pursuer alleges he purchased in Dubai in June 2015

for £48,000 and gave to the defender as a joint birthday and wedding anniversary present ("the Dubai ring"); and (b) a gold Rolex watch ("the gold Rolex") which the pursuer says that he purchased in June 2018 and gave to the defender as a "peace offering" after she received an anonymous message to the effect that he was having an affair with a friend of hers. The defender denies ever being given either item. In respect of these two items I prefer the evidence of the pursuer for reasons set out below.

(a) The Dubai ring

[19] The pursuer said that the ring had been intended to replace the defender's original engagement ring. He did not produce any documentation directly showing that he had paid for the ring. There was no invoice or receipt or other proof of payment. The pursuer explained that this documentation would have been in his study in the matrimonial home from which he had been excluded from the time they separated. Instead he sought to prove his case about the ring by producing (a) photographs of the ring and associated documentation in a jewellers shop in Dubai together with (b) two photographs of the defender with one of their daughters in which the defender can be seen wearing what he alleges to be the ring and (c) insurance documentation showing that a diamond solitaire engagement ring costing £48,000 was insured by the pursuer in February 2017, the insurers having required sight of evidence of purchase before accepting the risk. The defender queried when the photographs were taken, but it was established from the original photos on the pursuer's smart phone that the photographs were taken in June 2015, when the pursuer could be shown (by airline reservations) to have been in Dubai with his wife and children. The defender raised a question about the insurance documentation, since the ring was described in that documentation as 2.5 carat, not 3.1 carat. She suggested that this could

not have been the alleged 3.1 carat Dubai ring, and may well have been her own original 2 carat engagement ring. But this explanation made no sense, since no-one had suggested that her original engagement ring cost (or had been valued at) anything remotely in the region of £48,000. The pursuer by contrast gave an explanation for the reference in the insurance documentation to the ring being 2.5 carats. He had made the first enquiry for insurance by telephone at a time when he did not have the documentation to hand and in error told the broker that it was a 2.5 carat ring. When he corrected this, the documentation on the broker's or insurer's end may not have been altered. I found this explanation much more credible. It was also submitted on behalf of the defender that it was unlikely in the extreme that the pursuer would spend that amount of money on a ring at that time, when they were stretched financially by the cost of re-building and doing up the matrimonial home; but having heard the pursuer give evidence I am not satisfied that he would have thought of it in this way. Despite the absence of any bank or visa account evidencing payment of that sum – and it was notable that neither party produced any credit card statements – overall on this point I prefer the pursuer's evidence and accept that he did purchase the Dubai ring and give it as a gift to the defender. That does not mean, however, that its value as at the relevant date should be accepted as its cost price of £48,000. I heard no direct evidence on this, but I did have the benefit of comparing the alleged cost price of other items bought by the pursuer with the values given by the independent valuers instructed by the parties. From that evidence, it seems to me to be likely that, if sold, the ring would realise somewhat less than its purchase price. I propose to value it at £35,000.

(b) The gold Rolex

[20] The gold Rolex was allegedly given by the pursuer to the defender as a "peace offering". He said that it cost £11,000, funded in part by the payment of £3,000 in cash and as to the balance of £8,000 by the taking out of a loan. He produced the loan documentation which clearly showed that the loan was to fund the purchase of a watch. There was nothing in terms to show that the watch was a ladies' watch and the defender suggested that the watch may have been a Rolex worn by the pursuer, which he described as "fake". Notwithstanding the lack of clear evidence on this point I preferred the evidence of the pursuer and accept that he gave the defender a gold Rolex watch for which he paid £11,000. Adopting the same process of evaluation as above, I would assess the value at the relevant date as £7,000.

[21] The amount entered in the Schedule for jewellery is therefore the agreed sum of £3,550 plus £35,000 (for the Dubai watch) and £7,000 (for the gold Rolex), a total of £45,550.

Item 34 – the loan for the gold Rolex

[22] On the basis that that gold Rolex was matrimonial property, the outstanding amount on the loan must also be brought into account. It is agreed that the sum outstanding on that loan is £7,055. That sum has to be reflected as a debit entry in the matrimonial property account.

Items 28 and 29 – VAT reclaim and "ring refund"

[23] It is agreed that as at the date of separation the sum of £25,933.18 was due from HMRC in respect of a VAT refund for materials purchased for the construction of the matrimonial home. That sum features as an item of matrimonial property as at the relevant

date. That sum was not paid until 30 October 2018, after the relevant date. It was paid into RBS account **271, a joint account to which the defender had access. It is a matter of agreement that on that same day the defender transferred that sum into her own account and that to this day she has retained £25,000 (from this sum) in her own bank account. Accordingly, although the sum of £25,933.18 appears in the "Held Jointly" column of Schedule 1, reflecting the fact that the debt from HMRC was owed jointly to the parties at the relevant date, that £25,000 kept by the defender has to be taken into account when calculating the final division of assets and funds.

[24] The so-called "Ring Refund" is somewhat mysterious, but the evidence established that the sum of £8,000 was paid into the parties' joint account (possibly in respect of a refund for a ring) and that the defender thereafter removed that sum from the joint account and kept it in her own account. On that basis this "Ring Refund" falls to be treated in the same way as the VAT reclaim.

Item 33 – capital gains tax liability to HMRC

[25] This is by far the largest item and requires careful consideration. The background is this. The pursuer is, amongst other things, an inventor. Before the marriage he had acquired and registered a number of intellectual property rights ("the IP Rights"). It is unnecessary to go into any detail about them. In 2009 he assigned these IP Rights to a company called Ulma Packaging Automation Ltd ("UPAL"), which was set up in 2009 as a joint venture between the pursuer, who was given 40% of the shares, and Ulma CYE ("Ulma"), who invested £1 million in UPAL and took a 60% shareholding. Although there is documentation showing that UPAL paid the pursuer £20 for the IP Rights, the reality is that this was his sole investment into the joint venture; and the real value of his IP Rights at the

time they were transferred to UPAL is to be gauged by the shareholding he received in return for the transfer when valued against the shareholding received by Ulma in return for its investment of capital.

[26] On 1 August 2009 the pursuer and Ulma entered into a Shareholders' Agreement regulating their relations as shareholders. Under clause 4.1 of that Shareholders' Agreement, Ulma granted the pursuer a put option in terms of which the pursuer could require Ulma to purchase all (but not part only) of his shareholding (described as "the Option Shares") at a Transfer Price defined in the Shareholders' Agreement. The pursuer exercised that option in June 2012. There was a dispute between the pursuer and Ulma about the price payable for the shares (there was also an unfair dismissal claim brought by the pursuer but that was compromised and is in any event not relevant to the present issue). The share price dispute gave rise to litigation in the High Court in London. It was eventually settled, after mediation, on 10 December 2015. A Settlement Agreement was concluded and payment was made at that time. After deduction of his own legal fees, the amount of which was the subject of a dispute between himself and his London lawyers, the net sum recovered by the pursuer from Ulma was just over £1,715,000.

[27] The relevant issue for present purposes relates to the amount of Capital Gains Tax ("CGT") payable on the gain. The particular point in dispute is whether HMRC would treat this disposal as occurring in the 2012/2013 tax year, when the option was exercised, or in the 2015/2016 tax year, when the parties settled their dispute, the price to be paid for the shares was fixed by agreement and the price was in fact paid. The relevance of this is that if the disposal was held to have occurred in the 2012/2013 tax year the pursuer would be entitled to claim Entrepreneur's Relief on the gain made by him on the disposal, and the gain would be taxed at 10%; whereas if the disposal took place in the 2015/2016 tax year the gain would

not be eligible for such relief and will be taxed at 28%. The difference is significant. Leaving out of account any question of interest and penalties, to which I shall return later, there is agreement between the parties and their experts that the tax due at 10% would be £170,478 whereas the tax due at 28% would be £477,198. Interest to the relevant date (28 August 2018) would take those figures to £193,234 and £498,440 respectively. Penalties are likely to be charged on top of those figures.

[28] The pursuer has not yet made a disclosure of the disposal of the shares or the gain resulting therefrom. It is accepted that he will have to do so. The question is: how will that gain be treated by HMRC? Will HMRC treat it as a disposal in the 2012/2013 tax year or a disposal in the 2015/2016 tax year? And in either case what, if any, penalties will be charged by HMRC for failing to disclose the disposal in the relevant return?

[29] Although the question of what is the correct tax year for assessment of CGT on the disposal is largely, though not entirely, a question of law, I was invited by both parties to treat the question as to how HMRC would treat the disposal in the circumstances as a question of fact. With some misgivings I am prepared to do that. I heard evidence from two accountants on the question and was shown the relevant documentation. Before answering the question raised in this action, I should set out some relevant facts.

[30] In January 2014, after the exercise of the Option, the pursuer submitted a tax return for 2012/2013. It did not include any reference to the disposal of the shares. For other reasons in November 2014 HMRC opened an enquiry into that tax return under section 9A of the Taxes Management Act 1970. HMRC made an assessment to tax. The pursuer, through his accountants, appealed against that assessment. By letter of 26 October 2015 HMRC gave their response to the letter from the pursuer's accountants and indicated that unless they received further documentary evidence from them by 4 December 2015 the

appeal would be deemed as settled by agreement under section 54 of the 1970 Act. Despite this, a further letter from HMRC dated 12 January 2016 gave the pursuer a further 30 days to reply, failing which the appeal would be regarded as settled. The inference is that until then the matter and, therefore, finalisation of the 2012/2013 return, was regarded as still open.

[31] The pursuer approached his accountants in August 2016 to deal with the question of how to disclose the gain on his shares. This was some eight months after the Settlement Agreement was concluded and the proceeds were received by the pursuer. I was told that his assumption at the time was that the disposal was to be declared in his 2015/2016 return, that being the tax year in which the transaction eventually concluded. However, on 19 December 2016 his accountants obtained "an informal legal opinion" to the effect that the exercise of the share put option in 2012 created an unconditional and binding sale and purchase agreement then, and that the disposal therefore fell to be declared in the tax year 2012/2013. On 31 January 2017 they submitted a tax return for 2015/2016 on the assumption that the disposal was made in 2012/2013. In other words, that tax return did not make any disclosure of the gain against the 2015/2016 tax year.

[32] On 13 February 2017 the pursuer's accountants requested a written opinion on the same point from Mr Keith Gordon, a tax barrister practising from chambers in London. He produced a written opinion on 20 February 2017 saying, in effect, that, "on balance", the disposal for the purposes of CGT was on 10 December 2015, during the 2015/2016 tax year. Without going into the full details of his opinion, which runs to 9 pages, his analysis was broadly to the following effect. Section 28 of the Taxation of Chargeable Gains Act 1992 ("TCGA") provides that the time of disposal under a contract is the first point at which the contract is unconditional. That might be thought to be the point at which the pursuer exercised his option to sell the shares under clause 4.1 of the Shareholders' Agreement.

However, it was arguable that until actual completion of the share sale there was no actual disposal. And, further, it was arguable that the Settlement Agreement created a new agreement under which the shares were sold, superseding in this respect the provisions of the Shareholders' Agreement. On balance, by one or other of these routes or both, he considered, on balance, that the date of disposal for CGT liability was 10 December 2015 and the disposal fell to be disclosed in the tax return for the year 2015/2016. This should have been done and the return should now be amended. He added an observation to the effect that there was a good argument to the effect that the 2012/2013 enquiry was not actually closed, but that it might be unfair (and therefore unlawful) for HMRC to proceed as if it were still open. (I interject here to observe that it would hardly be unfair for HMRC to proceed on the basis that the 2012/2013 enquiry was still open if this enabled the taxpayer to declare his gain in an amended return for that year and thereby save himself a considerable amount of tax – but I do not think Mr Gordon was provided with the full context in which his opinion was sought.)

[33] Following receipt of this opinion from Mr Gordon, the pursuer's accountants prepared an amended tax return for the year 2015/2016 and submitted it to the pursuer for his approval on 24 February 2017. The pursuer has not yet approved it or taken any action on it.

[34] A number of observations can be made.

(1) First, as indicated above, I have been asked to decide this part of the case on the evidence I heard from the two accountant expert witnesses. I therefore do not express any view as to the merits of Mr Gordon's assessment that, "on balance", the disposal will be treated as having been made for tax purposes on 10 December 2015 rather than when the option was exercised on 26 June

2012. Nor, standing agreement between the experts on this point, do I question their assumption that entrepreneur's relief will be available if the disposal can, even now, be treated as a disposal within the tax year 2012/2013, notwithstanding that it has not yet been disclosed at all.

(2) Second, I note that Mr Gordon appears to regard the matter as finely balanced. I take this not only from his use of the expression "on balance" but more generally from his discussion of the reasons for having come to that view. Mr Caine, who gave expert evidence for the pursuer on this matter, recognised in his report that "the position as to liability is not clear cut" and noted that counsel "has not been able to confirm the position unequivocally". He regarded the determination of the pursuer's liability as a "judgement call".

(3) Third, it follows from this that if the disposal had been treated as having occurred in June 2012, and declared in the tax return for the 2012/2013 tax year, it is quite possible that the gain would have been accepted by HMRC as having accrued during that tax year and entrepreneur's relief could have been claimed, meaning that the gain would have been chargeable at 10%. On one view, there was still time even after the Settlement Agreement was entered into in December 2015 to declare the disposal against the pursuer's 2012/2013 tax year, since that tax year was still regarded as open by HMRC until at least January 2016 and, according to Mr Gordon, there is an argument that the 2012/2013 assessment is still open.

(4) Fourth, it seems likely that if the disposal is disclosed in the revised tax return for the 2015/2016 tax year then HMRC will treat it as a gain falling within that

tax year. HMRC have no interest in challenging the submission by the taxpayer that the disposal should be treated in a way which results in a greater amount of tax paid on the gain. By the same token, if the pursuer disclosed Mr Gordon's opinion to HMRC, as I was told would be done consistently with an obligation on the taxpayer of full disclosure, the probability is that HMRC would be re-inforced in their view that they should not challenge the taxpayer's disclosure of the disposal as falling within the 2015/2016 tax year.

(5) Fifth, any decisions as to when and how to disclose the disposal and gain to HMRC were and remain to this date decisions taken by the pursuer, albeit sometimes on advice; and he must be held responsible for the failure initially to disclose the gain as part of his return for the 2012/2013 tax year, when Entrepreneur's Relief might well have been available, even at a late stage when that tax year was or might have been still open; and he must be held responsible for any interest and penalties charged or imposed by HMRC for late disclosure.

(6) Sixth, and last, I can see no rational basis for the pursuer's continued failure to disclose his gain even some two and a half years after an amended tax return was submitted by his accountants for his approval. He variously used the excuse that he had taken his eye off the ball because of the divorce proceedings and/or that his ability to pay the tax depended on the outcome of these proceedings. I did not accept either explanation. I conclude that either he does not intend to make that disclosure to HMRC at all, or that he intends, after my decision and contrary to the evidence given by his accountant and

expert witness, to attempt to persuade HMRC to treat the gain as falling within the 2012/2013 tax year with all the benefits that may entail.

[35] I have to decide this matter, ie what was the liability as at 28 August 2018, on balance of probabilities. There is no room at this stage for making a finding somewhere in the middle, to reflect the uncertainties inherent in any prediction. The question is how the gain would have been treated as at that date if it had then been disclosed. I conclude on balance of probabilities that if the disposal had been disclosed at that time it would have been dealt with as a gain within the 2015/2016 tax year. Entrepreneur's Relief would not have been available. The gain would have been taxed at 28%. The basic figure for CGT on this gain will therefore be £477,198. Interest up to the relevant date will amount to £21,242, giving a total liability in respect of tax and interest of £498,440. Having heard the evidence of both accountants on the question of penalties for delay in disclosing the gain – and they were substantially in agreement on this point – I consider that HMRC are likely to impose a penalty of approximately 25%, which would take the total liability to about £625,000.

[36] However, that is not the end of this aspect of the case. Although on Schedule 1 the liability falls to be treated as a joint liability, and the figure of £625,000 entered in that column for the purpose of assessing the value of the matrimonial assets at the relevant date, I propose to return to the question of the pursuer's conduct in this regard when deciding on the appropriate distribution of assets.

Summary of matrimonial assets

[37] As appears from Schedule 1, the value of the matrimonial assets net of liabilities as at the relevant date, 28 August 2018, was £1,438,588. Of those assets, £1,198,184 was "held" jointly, £130,387 was held by the pursuer, and £110,017 was held by the defender.

[38] An equal sharing of the net assets would involve both parties having £719,294. That would mean that from the jointly held assets there would have to be a transfer of £588,907 to the pursuer and £609,277 to the defender. That would inevitably involve the sale of the matrimonial property. The next question, therefore, is whether there are any grounds for departing from an equal sharing; and, if so, what adjustments fall to be made.

Arguments for departing from equal sharing

[39] A number of arguments were advanced to suggest that the principle of equal sharing should be departed from. They were put forward under reference variously to sections 9(1)(b), (c) and (d), as amplified and explained by section 11, section 10(1) and (6A) and sections 12, 13 and 14. Many of the arguments can be supported by more than one provision.

Economic advantage from use of parties' pre-marriage assets

[40] Arguments under this general head invoked section 9(1)(b) and section 10(1) and (6)(a) and (b) of the Act. It was argued on both sides that the parties had each contributed resources deriving from heritage and other assets owned by them prior to their marriage towards the creation of the matrimonial home and the support of the family. Similar arguments were advanced on behalf of the pursuer in respect of money and heritable property inherited from his mother. The evidence covered a range of properties forming staging posts en route to the purchase and re-building of the matrimonial property. In closing submissions, however, both sides were prepared to proceed upon the basis that each party had contributed what they could and to treat their respective contributions as broadly equal.

[41] There was, however, one particular dispute which was not covered by this approach. I have already referred (in the context of the CGT liability) to the Settlement Agreement of December 2015 as a result of which the pursuer received something over £1.7 million net of lawyers' fees. An account was put in evidence as to how this money was spent. The details do not matter. They showed that in January 2016 the pursuer transferred a sum of just over £600,000 to a joint account set up for the purpose of completing the re-building and/or re-furbishing of the matrimonial home. The pursuer asserts that this sum stems ultimately from his IP Rights which he established some years before the marriage. On this basis he contends that that sum is to be regarded as an input by him of non-matrimonial funds and that half of that sum, say £300,000, should be treated as conferring an economic advantage on the pursuer from his own pre-marital IP Rights.

[42] I reject this argument for two main reasons. First, it was accepted on behalf of the pursuer that his shares in UPAL were matrimonial property. Indeed it was on that basis that the pursuer has sought to bring in the potential liability for CGT on the disposal of those shares into account as a debit in the assessment of matrimonial property. Accordingly the £600,000, being part of the gain made on the disposal of the shares, must also be regarded as part of the matrimonial property. No benefit was conferred on the defender from non-matrimonial or pre-marital property. Second, it is clear that the large part of the value of the shareholding in UPAL arose from work done in exploiting the IP Rights after the marriage. It cannot therefore be said that any particular part of the proceeds of the sale of the shares represented pre-marital assets. No departure from the principle of equal sharing is justified on this basis.

Dissipation of matrimonial property

[43] The pursuer invested substantial sums of money in companies without any real track record: BGM Energy UK Ltd (£184,990), Yellow Orchard Ltd (£35,148), Guardian Land (£32,650) and True PBX Ltd (£30,000). The money came from the proceeds of the sale of the shares in UPAL under the terms of the Settlement Agreement, which proceeds are agreed to be matrimonial property. He did so without keeping the defender informed either of the proceeds of the sale of the shares or of the proposed investments, and at a time when it was or ought to have been clear to him that he needed to hold on to funds to meet the impending CGT liability and to complete work on the matrimonial home. The defender argues that the pursuer invested recklessly and, in effect, gambled away matrimonial assets totalling nearly £283,000. She argues that this dissipation of assets which would otherwise have remained matrimonial property is a "special circumstance" justifying a departure from the principal of equal sharing: section 10(1) and 10(6)(c) of the Act.

[44] I do not accept this argument. To my mind it lumps together a number of disparate factors to create an impression of subterfuge and recklessness where none exists. There is in fact no basis for the defender's argument.

(1) First, it is true that the pursuer did not reveal the fact that he had received about £1.7 million net from the sale of his shares. There were other things which he did not reveal, such as his ownership of the Leeds flat. He gave an explanation, namely that he wanted to make sure that some monies were available for him to pass on to the children of his previous marriage. Whether that explanation is true or false does not matter for present purposes. His secrecy does not make the investments reckless.

(2) Second, the pursuer is self-confessedly an entrepreneur. He has built up businesses successfully and has no doubt had failures. The fact that some investments have failed does not mean that they were recklessly entered into.

(3) Third, there was no evidence to support the suggestion made by the defender that these investments were simply a sham, to enable the pursuer to hide his money to avoid detection in these proceedings and get it back when the proceedings were concluded.

(4) Fourth, the investment in BGM Energy was made only after advice from an accountant who had examined the business plan and was satisfied with it. It was a trading entity employing about 40 people. It had sales to July 2018 totalling nearly £200,000. It collapsed only when its largest customer terminated its contract. That was not and could not have been foreseen at the time of the investment. The investment was made with a view to profit. There is no basis for categorising it as reckless.

(5) Fifth, the investment in Guardian Land was in the form of loans to enable the company to invest in land for development and to produce kitchen gadgets. The company had been established for some 17 years. The pursuer was persuaded by someone he knew from another project to make the loans. He was told that security in the form of promissory notes was not available because of the delicate stage the deal was at. He accepted a private assurance that the loans would be repaid, but that assurance has proved unavailing. The company is now insolvent. But that does not mean that the investment was reckless.

(6) Sixth, the £30,000 loan to True PBX Ltd has been repaid in the form of an interest in heritage in Paisley. The pursuer accepts that this is a matrimonial asset and it appears as such in Schedule 1 hereto in the column for assets held by the pursuer.

(7) Seventh, the investment in Yellow Orchard was by way of the provision of share capital and a director's loan. The business of the company is to represent customers in their claims against insurance companies for the costs of housing repairs. The pursuer explained the difficulties which had faced him, largely due to the refusal – unjustified in his view – of insurance companies to deal with an intermediary. Although the company was not trading at the relevant date, and therefore valued at nil in Schedule 1, the pursuer was hopeful that it could still be made to work. He may or may not be right, but there is no proper basis put forward for the contention that the investment was reckless.

I consider that there is no basis for departing from the principle of equal sharing on this ground.

The pursuer's failure to minimise the CGT liability on disposal of his shares

[45] I have dealt with the CGT liability issue in paras [25]-[35] above. I have concluded that on balance of probabilities liability for the gain made on the disposal of the shares in UPAL will be assessed under the regime for the tax year 2015/2016, that entrepreneur's relief will not be available and that already by the relevant date, had the disposal been declared then, the pursuer would have been liable not only for the CGT at the 28% rate but also interest and penalties at, perhaps, 25%. Interest and penalties will now be higher.

[46] I attribute this outcome to the conduct of the pursuer. Had the disclosure been made soon after the exercise of the option, it is likely that HMRC would have treated the gain as falling within the tax year 2012/2013 and eligible for entrepreneur's relief. Very little interest would have been payable and probably no penalties. Even if the disposal had been notified in December 2015 or January 2016 when the Settlement Agreement was concluded and the pursuer received payment for the shares – as the accountants advised – it is, in my opinion, more likely than not that even at that stage the gain would have been accepted as a gain accruing within the 2012/2013 tax year and attracting entrepreneur's relief. Interest would have been payable and probably penalties at the rate of about 10%. As it is, the disposal has even now not been disclosed to HMRC. It is proposed to disclose it as a gain falling within the 2015/2016 tax year, attracting CGT at the rate of 28% with additional interest and probably penalties of about 25% (the experts were agreed that penalties might be this high or higher).

[47] I am satisfied that this depletion of the matrimonial assets by the pursuer amounts to a special circumstance falling within section 10(1) and 10(6)(c) of the Act justifying a departure from the principle of equal sharing. My attention was drawn to the terms of section 11(7) of the Act and its strictures that the court must not take account of the conduct of either party to the marriage, but there is in that sub-section an exception where the conduct complained of has adversely affected the financial resources relevant to the decision of the court on a claim for financial provision. It was also said that the pursuer was not personally culpable, since he had acted on advice. That may be true in part; but it does not explain why he failed to declare the disposal of the shares to HMRC by at latest January 2016; nor does it explain why even today he has failed to approve his amended tax return. Ultimately it does not matter whether the pursuer is culpable or not. I am satisfied that his

conduct has adversely affected the financial resources relevant to my decision on financial provision and should be reflected in a departure from the principle of equal sharing.

[48] There are too many uncertainties to make a precise calculation, but I consider on balance that – though it would be possible to argue for a higher or lower figure – it would be right to treat the loss to the matrimonial assets as a result of this conduct as in the region of £300,000. Had the pursuer acted timeously and declared the gain against the tax year 2012/2913, the value of the matrimonial assets as at the relevant date would have been greater by approximately that sum. I consider that, consistently with the principle of equal sharing (or, if not, then applying the "special circumstances" approach), this additional sum should be split equally between the parties. That means that there should be a compensatory payment to the defender of £150,000.

Sums removed by the defender from joint accounts

[49] The pursuer complains that the defender has, after the relevant date (August 2018) removed certain sums from joint accounts and has retained them in her own accounts. As I understand it, part of such amounts are included within the defender's account **878, and nothing further required to be done in respect of this sum. But the defender withdrew sums from the joint account **271, leaving that account in overdraft to the tune of £8,000. This sum requires to be repaid.

[50] The defender also requires to make payment back into the joint account of the sums of £25,000 and £8,000 (VAT Reclaim and Ring Refund) taken by her from the joint accounts (see paras [23]-[24] above).

[51] These sums total £41,000. The proper approach, in my view, is to treat this amount as a part payment of the sums otherwise due to the defender in any final division of the

matrimonial property. For convenience the simplest way of dealing with this is to set it off against the £150,000 due from the pursuer to the defender in respect of the CGT issue discussed above, thereby reducing that sum due from him to £109,000.

Other matters

[52] The defender has put forward a claim for financial provision under section 9(1)(d) to reflect the fact that she has been dependent for financial support on the pursuer and has herself stopped working as a beautician for a number of years. She has begun a re-training programme at college, with a long-term view to move into teaching there while also working as a beautician. The pursuer says that there is no need for her to attend college. She could pick up now where she left off and soon resume earning at what she claimed to be her previous level, namely £35-40,000 a year. I consider the idea that she will go straight back into earning at her previous rate contains a significant element of wishful thinking on the part of the pursuer, but I do not accept that the pursuer will need support for the whole three year period covered by section 9(1)(d). In my opinion the best way of dealing with the matter is to include within the capital sum payable from the matrimonial assets to the defender an amount of £40,000 to reflect the time needed to build back up to what she was earning previously. If she wants to attend college and get extra qualifications she can do so, but there was no evidence that this was other than a new ambition, designed to place her at a level of income well above what she would have been looking to achieve had she not stopped working during the marriage.

[53] It is accepted that the defender should have the means to purchase a house for herself and her children in the area where she currently lives. I was shown printouts of properties recently sold and currently for sale. On the basis of that evidence I am satisfied

that a suitable property could be obtained for about £350,000. That does not mean that there should be an additional payment of that sum to the defender – simply that I should ensure that any sum going to the defender in the final division is adequate for this purpose. I have taken this into account in determining the order I should make.

[54] So far as the children are concerned, the pursuer will have the children with him for 43% of the time and the defender will have them with her for the balance. The pursuer has undertaken to meet the whole costs of childcare (food, travel, entertainment, clothing, etc) while the children are with him and has undertaken to meet the whole costs of their skating, about which they are passionate, totalling £600-650 per month. In that way he contends that the economic burden of childcare will be shared equally. The defender's argument involves the need for childcare while she is working or re-training and the need for a roof over their heads (ie purchasing a house). It seems to me that if these matters are taken care of, as they will be in accordance with the preceding two paragraphs, there is no need for a separate order under section 9(1)(c).

Proposed division

[55] On the basis of the various matters set out above, I am satisfied that in this case, in so far as there is to be a departure from the principle of equal sharing, and on one view it is not strictly a departure from that principle, that departure is limited to (i) the CGT issue referred to above, which requires a compensatory payment to the defender of £109,000 (net of certain cross-claims) and (ii) a capital sum of £40,000 in place of the defender's claim for periodical payment. That justifies a net payment of £149,000 from the pursuer to the defender.

[56] Taking full account of those considerations, the ultimate distribution of the matrimonial property should reflect the following principles:

Value of matrimonial property:	**£1,438,588**
Equal sharing (50% share):	**£ 719,294**
Adjusted as set out in para [55]:	
Pursuer's share:	**£ 570,294**
Defender's share:	**£ 868,294**

On the basis that the pursuer presently holds or controls assets to the value of £130,387 and the defender presently holds or controls assets to the value of £110,017, that results in a payment from the jointly owned/held matrimonial property/assets (valued at £1,198,184 as at the relevant date) of £439,907 to the pursuer and £758,277 to the defender. Of course if it turns out that the sale of the matrimonial property realises less than the values attributed in the Schedule then there should be a proportionate reduction in the sums due to each party. In the event that the sale of the matrimonial property raises more than the sums set out in the Schedule, then there should be a proportionate increase for each party.

[57] The above assumes that the matrimonial home will have to be sold. It is by far the largest of the matrimonial assets. It was clear, however, from the pursuer's evidence that he was very keen to keep the matrimonial home. There were good reasons for trying to accommodate this wish if at all possible. Certain work needed to be carried out before a completion certificate could be issued and the property sold – the pursuer knows what is to be done and can do it more cheaply than an external contractor. On the basis of the figures discussed in the previous paragraphs, it seems likely that the matrimonial home will have to be sold. But the pursuer suggested that if the property was transferred to him he would be able to raise money on the security of the property and thus ensure that the defender received her proper share. I do not know whether this remains a realistic possibility on the

figures contained in the last few paragraphs of this opinion, but I am prepared to allow the pursuer the opportunity of trying to achieve this if he still wants to try.

Disposal

[58] I have set out above how the matrimonial assets should be divided. As indicated during the hearing, I propose to put the case out by order to enable parties to formulate an order to give effect to this and also to allow time for the pursuer to indicate what he would wish to do, or is able to do, as regards the matrimonial home.

[59] Parties should also address the issue of confidentiality and anonymisation