SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 27

F619/14

JUDGEMENT OF SHERIFF T KELLY

in the cause

LRCB

Pursuer

against

AJB

Defender

Pursuer: Ogilvie, Solicitor
Defender: Hannah, Solicitor

GLASGOW, 15 July 2022

The Sheriff having resumed consideration of the cause appoints the sheriff clerk to fix a diet for the cause to call by order in order to finalise the court's interlocutor and as a hearing on expenses; appoints parties to lodge and exchange no later than 7 days before the date to be assigned written notes of any submissions they wish to make about the form of the court's final interlocutor giving effect to its findings in fact and in law.

Introduction

(1) This is an action of divorce with ancillary financial craves. The action is not defended on the merits. Before pronouncing decree of divorce I require to be satisfied as to the arrangements for the care and upbringing of the children of the marriage, L and A. The children were afforded an opportunity to state their views to the Court. In light of the

evidence on that issue, and having considered the views of each of the children, I do not require to intervene by way of making a formal order regulating either residence or contact in terms of section 11 of the Children (Scotland) Act 1995.

(2) The disputed matters concern financial provision on divorce. The primary disputed issue, insofar as the valuation of the matrimonial property is concerned, relates to the value of the parties' shares in a limited company - ABCL Limited - on the appropriate valuation date which was agreed to be 31 March 2020 (in terms of the joint minute of admissions number 43 of process). I heard evidence from competing experts on the valuation of the parties' shares covering, inter alia, the value of the heritable property owned by the company, the ownership of patient lists and whether, as the lease of one of the properties the dental practice operated from was about to be renewed, a modification had to be applied to the valuation.

(3) I then require to determine to a fair division of matrimonial property in terms of sections 8 - 14 of the Family Law (Scotland) Act 1985, primarily to consider the arguments advanced by the defender in terms of section 10(6)(b) and section 9(1)(b). The defender submitted that a departure from the principle of equal sharing was justified in terms of non-matrimonial assets introduced by him and the value of the dental practice accrued both prior to incorporation and after the relevant date. As against that the pursuer advanced arguments in terms of section 9(1)(b) and (c) of the 1985 Act.

(4) Having considered these competing submissions, I then required to determine whether the orders I propose to make are reasonable with regard to the parties' resources in terms of section 8(2)(b) of the 1985 Act. In light of the likely timescale for payment (which may be linked to the sale of the dental practice and will involve deductions for capital gains tax in respect of the disposal of the parties' shares) I have to decide whether the pursuer

should be awarded periodical allowance in terms of section 9(1)(d) of the 1985 Act for a reasonable period to enable her to adjust to the loss of support on divorce.

(5) I heard proof in this case over four days. The pursuer gave evidence together with her mother, Mrs GC and Mr Hugh George Campbell, Chartered Surveyor speaking to the valuations of heritage. Mr Paul Graham, a business agent with Christie & Company speaking to business valuations was led in evidence together with Mr Alan David Robb, a Chartered Accountant. The defender gave evidence together with a number of witnesses - EB, SM, WW and IM. Thereafter, a chartered accountant, Mr Scott Hallesy was led for the defender and evidence was concluded. Shorthand notes were extended and a (rather optimistic) date was assigned for a hearing on the evidence. The shorthand notes were not available for that diet. Instead, I heard parties at hearing for their respective submissions on the evidence. In advance parties were afforded an opportunity of lodging written submissions which I have carefully considered together with their oral submissions during the course of the hearing.

Findings in fact

(1) I find the following facts admitted or proved:

i. The parties were married at Glasgow on 9 June 2007.

ii. There are two children of the marriage L born x and A, born x and respectively.

iii. The children reside with the Pursuer in rented accommodation. The Defender has contact with them. There is no dispute between the parties as to the care arrangements for the children.

iv. LB attends K. AB attends a local state school.

v. The Pursuer is currently unemployed. She is and always has been the primary carer of the parties' children.

vi. The Defender is a Dentist.

vii. Following their marriage the parties resided together until 25 January 2013 which is the relevant date for the purposes of Section 10(3) of the Family Law (Scotland) Act 1985. At the relevant date the parties' matrimonial assets consisted of the following:-

viii. The matrimonial home at 27 CB, Glasgow, title to which is vested in the Defender's sole name. This property was purchased in March 2009 for £610,000. The price was funded in part by a loan from Nationwide in the sum of £457,500, secured over the property. The balance of the price paid in the sum of £152,269 was funded by loan funds secured over of the Defender's property at HR, Glasgow. The value of the subjects at 27 CB at the relevant date was £600,000.

ix. The Defender's National Health Service pension with a value as at relevant date apportioned for the period of the marriage of £87,366.

x. The Defender's private pension plan formerly with Scottish Equitable and now Aegon plan number 3143 with a relevant date value apportioned tor the period of the marriage of £9,660.14.

xi. The Defender's Nationwide account number ending 9187 with balance at the relevant date of £1,472.

xii. The Defender's Santander Savers Account number ending 7515 with a balance at the relevant date of £50.76.

xiii. The Defender's Santander account number ending 2449 with a relevant date balance of £600.

xiv. The parties' respective equal shareholding in ABCL Limited (registered number SC3*****) ("ABCL" or "the Company") having its Registered Office at [], Glasgow.

At the relevant date the parties' matrimonial liabilities consisted of the following:-

xv. An interest only loan secured over the property at 27 CR, Glasgow in favour of the Nationwide. As at 13th July 2009 the outstanding balance was £457,731.57 and as at 2nd October 2014 the sum of £459,503.42 was outstanding.

xvi. The Pursuers credit agreement with Blackhorse Finance Limited with £353 outstanding.

xvii. The debit balance in the Pursuer's Royal Bank of Scotland account number ending 0486 of £4.61.

xviii. The debit balance in the Defender's Santander account number ending 5586 of £787.

ABC Limited (registered number SC3*****)

xix. The Company was incorporated during on 4th March 2009. The Parties each own 50 ordinary shares in the Company. The Pursuer was appointed Director of the company on 4th March 2009, and company secretary on 1st October 2009. The Parties are the sole directors in the Company.

xx. The Company owns and operates two dental practices. The first a dental practice operating from leased premises at []. The second a dental practice operating from premises at 23 AR, Glasgow [].

xxi. The property at 23 AR, Glasgow was acquired by the company on 30 September 2010 for the purchase price of £760,000. The purchase price was funded in part by a loan secured in favour of the Royal Bank of Scotland in the sum of £532,000 and a loan from the defender's father in the sum of £85,000.00. The property was converted from residential use to a dental practice.

xxii. On incorporation both parties signed a personal guarantee in favour of the Royal Bank of Scotland for all obligations of the company including present and future actual or contingent to a limit of £180,000. The Pursuer was released at her request from her personal guarantee in 2018.

xxiii. The parties each receive a gross salary of £8,000 per annum from the Company by virtue of their appointment as Directors.

xxiv. Prior to the parties' marriage the Defender operated as a sole trader, practising from premises at []. It had a value though not stated in the accounts of ABCL upon incorporation.

xxv. The defender introduced funds to the company from his pre matrimonial property at HR.

xxvi. The Company employs dentists, a hygienist and other clinical staff who operate from the two practices.

xxvii. ln August 2019 Christie & Co, a specialist property adviser having a place of business at 6th Floor Miller House, 18 George Street, Edinburgh, EH2 2QU was appointed by the company to sell the property and the dental practice at 23 AR, Glasgow. Christie & Co valued the heritable property at £1,000,000 and recommended marketing the dental practice operating out of AR for offers over £370,000.

xxviii. An offer was made to purchase both the AR premises and business in September 2019 for the sum of £1,300,000. Of this sum £900,000 was offered for the property and £400,000 for the business. The purchase was not completed.

xxix. The pursuer has been economically advantaged by the defender's contributions in running the business.

xxx. There has been an advantage conferred on the defender by the pursuer by virtue of her support and encouragement, child care and running the family home throughout the period of the marriage and after the relevant date.

xxxi. The Defender pays interim aliment to the Pursuer each month.

xxxii. The Defender owns heritable property acquired prior to the marriage at [] and []. The Defender owns a property jointly with his sister in [], Portugal.

xxxiii. The appropriate valuation date in accordance with the Family Law (Scotland) Act 1985 on which to value the parties' shareholdings in the company ABC Limited is 31 March 2020.

xxxiv. The value of ABCL as at the appropriate valuation date was £1,604,246.

Finds in fact and law:

(1) The marriage of the pursuer and defender has broken down irretrievably;

(2) It is not better for the children of the marriage that either a residence or contact order in terms of section 11(2) of the Children (Scotland) Act 1995 is made than none should be made at all;

(3) Net matrimonial property is valued at £1,840,126.76.

(4) Fair sharing of the matrimonial property in this case will be achieved by dividing its total value in the proportions: 2/3:1/3 in favour of the defender.

(5) An order for the transfer of the pursuer's shares in ABCL to the defender will be made with a corresponding order for payment of the pursuer by the defender of a capital sum in the sum of within a stated time period subject to the submissions of parties.

(6) The orders for financial provision on divorce represent a fair sharing of the net matrimonial property in terms of sections 9 and 10 of the Family Law (Scotland) Act 1985 and are reasonable having regard to the parties' resources.

(7) I propose to issue a final interlocutor (subject to parties' final submissions as to its precise terms) in the following terms:

1. sustaining the first plea in law for the pursuer and granting decree divorcing the defender from the pursuer as first craved;

2. sustaining the defender's fifth plea in law and making an order for the transfer of the pursuer's shareholding in ABCL to the defender within a period to be stated with reference to parties' submissions;

3. sustaining pursuer's second plea in law and making an order for payment of a capital sum of £613,375.56 to the pursuer by the defender within a period to be stated with reference to parties' submissions;

4. Finding the pursuer entitled to payment of a periodical allowance of £1,000 payable monthly and in advance for a period of six months from the date of decree (or within such period to be stated with reference to parties' submissions);

5. Quoad ultra repelling parties' remaining pleas in law

6. Reserving all questions of expenses

NOTE

Divorce

[1] The parties separated on 25 January 2013. They have not cohabited since. This was confirmed in parole evidence. I am satisfied that the marriage has broken down

irretrievably and that there is no prospect of a reconciliation. I will pronounce decree divorcing the pursuer from the defender.

Children

[2] There are two children of the marriage - LB, born [] and AB, born []. Parties gave evidence that there was a routine of contact with the defender seeing the children on an agreed basis. At the conclusion of the proof their views were sought by way of Form F9 which they both completed and returned to the court. I discussed the children's views with parties' solicitors at the hearing of 18 February 2022. In light of the evidence about contact and what the girls say about that, an order is not required regulating contact between them and their father. I am satisfied that it would not be better for the children that an order was made than none (section 11(7)(a), Children (Scotland) Act 1995).

Financial Provision on Divorce

[3] The Family Law (Scotland) Act 1985 as amended ("the 1985 Act") provides a framework for the resolution of financial claims arising from divorce. Either party in action for divorce may apply for an order (listed in section 8(1)) for financial provision. If such on order is sought the court will make one that is justified by the principles enumerated in section 9 and reasonable having regard to the resources of the parties: section 8(2).

Family Law (Scotland) Act 1985, as amended

[4] The section 9 principles to be applied by the court when making orders for financial provision are 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) a person who at the time of the divorce … seems likely to suffer serious financial hardship as a result of the divorce …should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(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."

[5] When applying the section 9(1)(a) principle, the court is bound to apply section 10, which provides:

"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. …
…

"(3A) In its application to property transferred by virtue of an order under section 8(1)(aa) of this Act this section shall have effect as if—

(a) in subsection (2) above, for "relevant date" there were substituted " appropriate valuation date ";

(b) after that subsection there were inserted—

"(2A) Subject to subsection (2B), in this section the "appropriate valuation date" means—

(a) where the parties to the marriage or, as the case may be, the partners agree on a date, that date;

(b) where there is no such agreement, the date of the making of the order under section 8(1)(aa).

(2B) If the court considers that, because of the exceptional circumstances of the case, subsection (2A)(b) should not apply, the appropriate valuation date shall be such other date (being a date as near as may be to the date referred to in subsection (2A)(b)) as the court may determine."; and

(c) subsection (3) did not apply.

(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—

(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."

[6] Section 11 lists other factors to be taken into account as regards the remaining principles of section 9. It provides:

"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."

[7] The courts have recently (and repeatedly) outlined the general approach that is adopted, see, for example, *McC* v *McC* 2020 Fam LR 2 at [4] – [10] and *SCA* v *MMA* [2020] CSOH 54; 2020 Fam. L.R. 95 [(affirmed by the Inner House: [2020] CSIH 66; 2020 Fam. L.R. 139), including at [4] the observation that:

> "The issue of division of value is essentially one for the court's discretion and other decisions taken at first instance are simply examples that may be of little assistance without a grasp of the underlying factual matrix."

[8] In *Little* v *Little* 1990 S.L.T. 785 Lord President Hope at 786L-787D emphasised that the court had a wide discretion to do justice between the parties so as to achieve a fair and practical result in accordance with common sense.

[9] Parties were at one in connection with the approach to be adopted by the court in resolution of the dispute between them. It was agreed that the court is required to: (i) value net matrimonial property incorporating assets and liabilities, see section 10(2), Family Law (Scotland) Act 1985; and (ii) determine what a fair sharing of the net matrimonial property will be, see section 9(1)(a), Family Law (Scotland) Act 1985.

[10] The defender employs a number of arguments to justify a departure from equal sharing of the value of net matrimonial property; that is special circumstances justifying departure from the presumption in section 10(1) of the 1985 Act:

(i) He makes submissions about the operation of section 10(3A) of the 1985 Act;

(ii) He submits that in terms of section 9(1)(b) of the 1985 Act the pursuer has enjoyed an economic advantage and he a disadvantage; and

(iii) In terms of section 10(6)(b) of the 1985 Act he invokes a specific special circumstance (the source of funds or asserts used to acquire matrimonial property) to submit that in the circumstances fair sharing is not equal sharing.

Issue (i): Net Matrimonial Property

[11] The relevant date in terms of section 10(3) of the Family Law (Scotland) Act 1985 is 25 January 2013 (first joint minute of admissions, No 58 of process, para 6.) The appropriate valuation date in terms of section 10(3A) of the Family Law (Scotland) Act 1985 is 31 March 2020 (second joint minute of admissions, No 43 of process).

[12] The following valuations of matrimonial assets as at the relevant date were the subject of agreement:

27 CB, Glasgow	£140,000.00
Defender's National Health Service Pension	£87,366.00

Defender's Private Pension Plan with Scottish Equitable (now Aegon) no.xxx3	£9,664.00
Defender's Nationwide Bank Account no. ending 9187	£1,472.00
Defender's Santander Saver account number ending 58RU	£50.76.00
Defender's Santander account no ending 2449	£600.00
Total	£239,152.76

[13] The following matrimonial debts as at the relevant date were the subject of agreement:

Royal Bank of Scotland plc Account no. ending486	£4.00
Halifax Credit card no ending 0912	£2,128.00
Blackhorse Finance	£353.00
Santander Account no. ending 5586	£787.00
Total	£3,272.00

[14] The primary dispute between the parties concerned the valuation of their respective shareholdings in the company ABCL. They hold equal shareholdings in this company. They were agreed for the purposes of the value of their respective shareholdings that the appropriate valuation date is 31 March 2020. The pursuer led evidence from a chartered surveyor, Mr Hugh Campbell; a chartered accountant, Mr Alan Robb and a witness skilled in the area of business valuation, Mr Paul Graham.

The value of the heritage owned by ABCL: 23 AR, Glasgow.

[15] Mr Hugh Campbell, Chartered Surveyor adopted the terms of his report dated 28 July 2021 (5/12/10 of process). This was subsequently revised to confirm the date of valuation as at 31 March 2020 - the agreed appropriate valuation date. He was taken through the terms of his report. At 5.3.1, p 6 he confirmed that the value of the property at

AR was for use as residential as opposed to commercial use. This was due to its location in [] Glasgow and the healthy market for residential properties in that area. At paragraph 5.4, p.7, he listed his comparators. He arrived at a valuation based upon judgement and experience. It was not simply a matter of looking at sales near to the property but using one's experience and judgement and previous knowledge of the area over a considerable period of time.

[16] Mr Campbell had regard to other material which he had listed in his report. This included a report from J&E Shepherd dated October 2016 which valued the property at £625,000. A report produced at 5/7/2 of process from DM Hall valued the property at £800,000 in 2017. For loan purposes, in 2017 a valuation report had been obtained valuing that property at £900,000. Accordingly, from the various valuation reports on the property there was a range of values between £625,000 and £900,000.

[17] Mr Campbell in his report at paragraph 7.0, page 8 notes that "valuation is a matter of opinion determined after consideration of reliable evidence." He estimated the market value as at 31 March 2020 at £850,000. The ultimate value obtained was of course market dependant. If it were to be purchased for use as a residence there would be costs for refurbishment. That would be purchaser dependant, influenced by market conditions. In connection with the costs of refurbishment, Mr Campbell had sought out others in his company who could give a "ball park figure" in relation to what the likely costs would be.

[18] The market value as defined by RICS Valuation Standards is noted at 7.1 as:

> "The estimated amount for which an asset/liability should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing where the parties had each acted knowledgably, prudently and without compulsion".

[19] In cross-examination Mr Campbell noted the DM Hall valuation of £625,000 was for use not as a residence but as a dental surgery – it had built in costs of £175,000 to convert to a residential use. Mr Campbell thought that its optimum value would be as a townhouse, if someone would pay for residential use and refurbish. Mr Campbell said he was extremely surprised at the valuation of £625,000. He accepted it was not an exact science and the property was worth what it gets at market. The comparators used were all residential townhouses. He confirmed the ebb and flow of property markets but the [] of Glasgow remained generally healthy. His thought process was that the property would secure £925,000 to £950,000 and built into this would be a discount for refurbishment with a net value of £850,000.

[20] For the defender there was a limited challenge to the valuation of Mr Campbell. There was material put in cross examination suggesting that refurbishment costs would be incurred should the property revert to residential use and that those should be factored into the valuation. Ultimately Mr Campbell accepted that premise but had already factored that cost in to his valuation. There was no positive contrary evidence, by way of, for example a report from a chartered surveyor adopting the same or similar methodologies that called into question anything of substance in Mr Campbell's evidence.

[21] I accepted Mr Campbell's evidence and was impressed with the terms of his thorough report. He laid out a proper and sound basis for his valuation of the heritage at 23 AR, Glasgow at the appropriate valuation date. The point made in cross examination about costs of refurbishment costs was easily dealt with by Mr Campbell and did not in any sense cause me to pause or call into question his evidence as whole, the thoroughness of his approach and ultimately what matters: the valuation he ascribed to the heritage at 23 AR, Glasgow as at the appropriate valuation date of 31 March 2020 of £850,000.

The Valuation of the Business

[22] There were several areas upon which parties were in dispute about the valuation of the business. These were: (i) the overall approach to be adopted to valuation; (ii) abatement from, or modification of, any valuation figure for what was termed the "dental body corporate" issue, and (iii) whether the doubt about lease renewal should be reflected in a discount to be applied to the valuation figure. I propose to deal with these in turn.

(i) Approach to Valuation

Pursuer

[23] Mr Paul Graham confirmed his qualifications and expertise all as outlined in his affidavit, number 51 of process. He has 15 years' experience in business brokerage, assisting with appraisal, marketing and negotiations of selling business. He is a director and Head of Dental at Christie & Company. He deals with in excess of 600 sales yearly and has insight into the majority of those personally. He is aware that dental practices will have a mix between NHS and private patients, some solely private and some solely NHS. He was instructed in connection with this matter to sell the AR practice in the course of 2018. His terms and conditions were produced. A questionnaire was provided in connection with details of the practice. This was completed by Mr AJB, the defender. Mr AJB was asked to provide details of the property and income figures and the split between private and NHS patients. Mr Graham prepared a comprehensive report (5/12/19 of process).

[24] This report was emailed to all parties in August 2018 (see paragraph 5 of Mr Graham's affidavit). This document was put together on the basis of the information provided in the questionnaire and confirmed the key selling points. In connection with the

varied income, there was a majority of private patients and some NHS patients. At page 10 of Mr Graham's report he confirms that the property would be valued at around £900,000 and the practice in the region of £370,000.

[25] In connection with the property, a valuation report had been handed into his office from Pinders, produced at 5/12/9 of process, and valued the "freehold" at £900,000.

[26] At paragraph 12 of his affidavit Mr Graham confirms:

> "At the time of marketing, we had advertised that AB was producing around two-thirds of the aggregate clinical income of the AR practice. This was a clear indicator that AB was working and driving the income. He also stated that he was working 4 days per week at the practice."

[27] Mr Graham confirmed how EBITDA figure (Earnings Before Interest, Tax, Depreciation and Amortisation) was calculated. This gives an indication of the general profitability of a business such as the one under consideration. Mr Graham confirmed that the buyer profile would be corporate or semi-corporate or perhaps somebody looking to expand. The income is based upon internal calculations. At page 10 the report notes key costs in connection with owner operated EBITDA and associate led EBITDA. A fully associate led EBITDA would have higher labour costs and therefore the profit would be lower but this would be sustainable. There would therefore be a higher multiple applied to the EBITDA figure. In the marketing material produced by Mr Graham both were displayed – owner operated and associate led (see p 9). Both calculations bring out the same asking price. The material was emailed for review. It was accepted by the defender, Mr AJB. There was no objections stated by him in connection with the breakdown included in the figures. There was no suggestion, for example, that he could not sell his NHS list of patients.

[28] An offer was received of £1.3 million (see paragraph 14 of Mr Graham's affidavit) and the figure was broken down as (i) £900,000 for the heritable property and (ii) £400,000 for the business goodwill, fixtures and fittings and all equipment, with a date of entry in July 2019. Both Mr and Mrs LRCB indicated immediately that the offer was acceptable.

[29] Mr Graham's affidavit at paragraph 24 notes that he reviewed the report from Mr Alan Robb of 12 March 2021. The same multiplier had been applied by Mr Robb and this was essentially the same exercise that followed very closely the work done by him. In the A practice, the associate costs were high. This was remodelled but very little adjustment was required. The multiplier was slightly higher because there was a majority of NHS patients and this was looked upon very favourably in the market place.

[30] Alan Robb, Chartered Accountant, gave evidence and provided his professional qualifications. He is a member of the Institute of Chartered Accountants of Scotland. His specialism is taxation and expert testimony in valuations. He receives 25 to 30 instructions per year. He has never been instructed by the pursuer and defender. He prepared three reports - (i) dated 27 August 2021 (5/12/1 of process); (ii) dated 27 August 2021 (5/12/11 of process) and (iii) dated 12 March 2021 (5/11/1 of process) and a letter of 9 September 2021 (5/12/12 of process).

[31] The valuation was brought down to the agreed appropriate valuation date of 31 March 2020. The valuation of the heritable property at AR, Glasgow was taken as £850,000 per Mr Campbell's valuation (as opposed to his original assessment of £900,000). His report at 5/12/11 of process, at paragraph 1.6 lists the information that he had sight of including an extract of the profit and loss accounts for the 3 years, 2018 to 2020, for the AR practice. Three years profit and loss accounts in respect of the practice at A were used at

paragraph 2.8 of Mr Robb's report. Mr Graham recommended a calculation of a multiplier of 6.25 to the sale of AR and that was used again by Mr Robb.

[32] At paragraph 3.4 of his report, Mr Robb notes that the goodwill and equipment for AR had been valued at £400,000 based on an offer received. At paragraph 3.8 Mr Robb concludes the value of the company at 31 March 2020 as £1,604,246.00. Mr and Mrs LRCB each own 50 shares in the company and each shareholding can be valued at £802,123.

[33] The tax implications for the pursuer are calculated on the basis that she would transfer her shares to the defender. They would be valued at market value and a taxable capital gain would accrue. If earned during the tax year ending 5 April 2022 it would be payable by 31 January 2023.

[34] The defender operated the dental practice as a sole trader before incorporation. The operation of the practice as a going concern was transferred to the company. The question of whether any value should be ascribed to the goodwill element of the sole trader business arose. There are different methods of dealing with goodwill when a sole trader incorporates to a limited company. Goodwill was not recorded in the ABCL accounts. This may have been to minimise tax. There would be a potential capital gains tax on the increase in value of any goodwill element of the business at the point of sale.

[35] When the business is incorporated for shares, goodwill goes to the company and the company issues shares in exchange. There is no capital gains tax chargeable as the gain is held over in the shares. The shares are valued and any gain would be payable when the shares were sold. There was a nil value and it is held over by joint election. The benefit is that this avoids tax - it is deferred until the company is sold. The capital gains tax depends on the rules applicable at the time, 10 or 20%.

Defender

[36] Mr Scott Hallesy, a Chartered Accountant was led in evidence by the defender. He gave evidence over days 3 and 4 of the diet of proof and produced a report (6/1 of process). Mr Hallesy's approach to valuation was to take what was termed by him to be a hybrid valuation – an average between a valuation based on turnover and a valuation based on EBITDA. When arriving at a figure for turnover his approach was not as straightforward as calculating an average. Mr Hallesy said he took an average of turnover and applied a multiplier of 1.43: "that's from the Nasdal survey and goodwill prices based on turnover", at page 102, day 3. Nasdal data was not produced with his report to the court or to his opponent. In his oral testimony Mr Hallesy said that NASDAL was

> "a specialist organisation for Dentists and Accountants and Lawyers; National Association of Specialist Dental Accountants and Lawyers.
>
> Q. So, it is for the Accountants and Lawyers?
>
> A. Yes. We comment on all matters to do with Dental Bodies and Dental Bodies Corporate. That is the specialism.
>
> Q. You have advised the Association regarding matters including…?
>
> A. In the dental world, you find that Associates don't necessarily have contracts and there is always a move to have them quantified.
>
> Q. And you are involved in that?
>
> A. Yes, the British Dental Association and Scottish Dental Association as well. (pp.74-75, Day 3)

[37] When pressed upon why he adopted a "hybrid approach" Mr Hallesy stated: "When I prepared my report I thought it was appropriate to put in a turnover based valuation method because that's the way most dentist's look at a valuation" p.108, Day 3.

[38] It was put to Mr Hallesy that the pursuer's expert Mr Robb rejected Mr Hallesy's approach as being one that was not recognised. Mr Hallesy replied:

> "The dental valuation market is very unusual. If you ask a dentist what they think their Practice is worth, they talk about fee levels." p.98, Day 3.

There is reference to what the recipient of the valuation wants to see in the report as opposed to an objective basis for the valuation approach adopted by Mr Hallesy as an independent expert. Mr Hallesy was asked repeatedly to state what the difference in approach between his and Mr Robb's in relation to overall valuation was – see pp.100-102, Day 3. Mr Hallesy had difficulty articulating what the difference was. Eventually, in response to a series of leading questions, Mr Hallesy said this:

> "Q. Why then would we use a hybrid approach valuing the business currently or March of last year?
>
> A When I prepared my report I thought it was appropriate to put in a turnover based valuation method because that's the way most dentists look at a valuation." p.102, Day 3

[39] Mr Hallesy appeared to defer to the pursuer's expert, Mr Robb on these matters. He stated that there was not much between what he and Mr Robb had calculated "as you would expect because I respect what Alan Robb has come up with." p.100, Day 3. And later, at p.103 Mr Hallesy expressly endorsed Mr Robb's approach: "Alan Robb is quite correct, the EBITDA is the normal way of doing it, certainly with Christie & Co., but the turnover valuation method is like a check between…"

[40] Mr Robb's approach was the subject of questioning during examination in chief. Mr Hallesy was asked about Mr Robb's valuation which relied on an offer received for the AR Practice. Mr Hallesy said this:

> "Q.Is that a correct approach in your view?
>
> A It is an approach to take. I wouldn't do it myself, but Alan Robb is very well respected. I'm not going to second guess him. That's all I would say."

[41] Mr Hallesy said he did not take issue with the multiplier of 6.25 used by Mr Robb, see p.97, Day 3. In cross examination Mr Hallesy expressly accepted that EBITDA was the most appropriate basis of valuation, see p.7, Day 4.

[42] Mr Robb, was unable to reconcile figures in Mr Hallesy's report at p.27. When asked to work back figures given by Mr Hallesy, Mr Robb said he had tried to but could not reconcile what Mr Hallesy had given, p.51B-C, Day 2. Mr Robb's evidence was that a valuation based upon an average of EBITDA and turnover was not appropriate. Mr Robb based his valuation on EBITDA only. Mr Robb was consistent in this view.

[43] In cross-examination, when asked about the different methods of calculation, Mr Robb provided an explanation of the evolution of the methods of calculating the valuation of a business. There had been a move away from turnover to EBITDA. Mr Robb took some time to explain the different bases of valuation. Mr Hallesy gives a valuation of EBITDA and a valuation on turnover and averages these out. Mr Robb did not agree with this approach.

[44] Mr Robb summed up the difference between him and Mr Hallesy in this way:

> "In this calculation you adjust the EBITDA and then the multiple of 6.25 so, someone would buy the business... The valuation based on turnover is have a turnover fee to come and apply the multiplier to that figure. It isn't based on profitability and these two methods have been used. The first method values the business at 674,100, and the second method of basing it on turnover produces a valuation of 274,200 so, there is a difference of £400,000 between the two valuation methods. In my opinion the value based on EBITDA is following a neutral approach to a value of a business that a prospective purchaser is interested in, that they own it rather than just the turnover." p.54B-E, Day 2.

[45] Mr Hallesy referred on a number of occasions to dentists preferring to see his method of valuation. His selection of a multiple was not the subject of the adoption of any rigorous methodology. At base, it came to the assertion by Mr Hallesy of this differing approach and different multiplier. However, in cross examination he appeared to defer to

the approach of Mr Robb. Ultimately he gave no justification for adopting an alternative method to that employed by Mr Robb. I reject Mr Hallesy's approach to valuation of ABCL.

[46] The defender appeared to recognise in his written submissions at page 11 of 25: "That particular aspect of his evidence did not follow any conventional or recognised practice, and he may have departed from it to an extent in cross-examination".

Conclusion on Approach to Valuation

[47] I prefer Mr Robb's approach and his convincing explanation about why EBITDA is a sound basis upon which to value a business such as the one under consideration here. Mr Graham also supported that view.

(ii) Dental Body Corporate

[48] The limited company, ABCL, owned the dental practices. It owned all the assets of the dental practices save for dental lists. These are the lists compiled and kept by the practice, consisting of the NHS patients. An NHS patient is registered to an individual. Where this is a company, it is described by the NHS as a dental body corporate (DBC). The patient is still registered to the individual dentist. Every clinician has an NHS patient list. Either the company or the individual must be used - it cannot be both. If the DBC is registered with the NHS, then it receives the payment from the NHS.

[49] Mr Hallesy's evidence was that this ought to be reflected in an abatement of the valuation of the limited company amounting to 20%.

[50] It appeared to be accepted on both sides that this list remained in the name of the defender. The nature of the difficulty and the significance that it would present upon sale of the business was not properly fleshed out in the evidence. The evidential basis for the view

that Mr Hallesy took about this issue ought to have been made clear if it was a factor that justified the modification of the valuation to the extent contended for by the defender.

[51] Mr Hallesy considered that there was some doubt as to whether the defender would consent to the transfer of the patient list upon sale of the business. In his report at paragraph 4.4, page 7 he stated that

> "ABCL's NHS, and to some extent private business depends entirely on the assumption that the patient lists are registered in the name of ABCL. As stated above this has never been the case and so it is entirely possible that Dr [AJB] could refuse to transfer over the list to ABCL on sale of the company and start his own practices under another entity which he could then transfer the GDS list to." (Emphasis added)

He repeated this in the course of cross examination – see p.116, Day 3.

[52] This appeared to be firmed up. At p.9 of his report Mr Hallesy said that:

> "*It is certain that Dr AJB will demand the return of all NHS based earnings* passed through ABCL in the event of a forced sale. In our opinion this would be shown as a contingent liability to be noted in the statutory accounts." (Emphasis added)

[53] The conclusion of his report at paragraph 6.2 was unambiguous:

> "Please note that these values are entirely dependent on the assumption that Dr [AJB] would give his consent for the transfer of the dental lists to any purchaser of the shares. *It is undoubtedly the case that Dr AJB would not consent to the transfer of the lists* in the event of a forced sale…." (Emphasis added)

[54] Mr Hallesy was asked if the defender had told him this. To that Mr Hallesy replied: "He said that's what would happen if he was forced to sell."

[55] The author of the statements gave evidence. He is a party to the proceedings. He seeks to take advantage of this issue. He was not asked his position. The defender's evidence did not deal with this issue at all. He was not asked whether he would refuse consent to the transfer of the list to a potential buyer.

[56] Several of the pursuer's witnesses considered this potential for difficulty ought to be capable of being dealt with at the time of the conclusion of the conveyancing formalities for

the disposal of the business. Mr Graham is a selling agent of many years' experience. He rejected the suggestion that this issue would hold up the sale or require a modification in valuation terms. This would be dealt with, according to Mr Graham, in what he termed the "legal underwriting" of the transaction, p.9C-D, p.13F; p.21B, Day 2. For Mr Graham this did not arise because in his view the patient base was linked to the practice not the practitioner – p.24E, Day 2.

[57] Mr Graham was asked whether there was any difficulty in a company not being listed as an owner with an NHS list:

> "Q. Can I ask you as a consulting agent and in your years of experience, is it a difficulty if a company doesn't have or isn't listed as the owner of the NHS list of patients?
>
> A. No difficulty at all.
>
> Q. Is it commonplace?
>
> A. It is commonplace and transactions between dental specialists, Accountants and Solicitors are presenting these details."

[58] Mr Graham said that would not need confirmation at the time of transfer to the new owner. The clinician would not need to give consent to the transfer to the new ownership. If a limited company sells, it is not necessary for the buyer to see that the company is registered as the DBC. Mr Graham suggested that the buyer would want to ensure that there was no drift. Mr Graham said that was up to the solicitors to secure that that happens - there may be a device in the missives to ensure the patients would remain with a limited company even though registered to the individual dentist. Mr Graham said that would not be a problem. The principal dentist who is selling would comply to make sure that the sale went through.

[59] Mr Graham said that at the time of completion these matters would be attended to. The patients who are registered to the clinician usually belong to the practice. In reality there is only one entity. The patient is registered either to the DBC or the individual. Mr Graham assumed that the transfer of the patients in this regard would take place at the time of the transaction. Mr Graham was asked about the interest of the buyer to ensure that patients remain and it was suggested that this would be important if there was another practice close by. Mr Graham said that if the practices were similar that may well be the case but there were differences between the two locations here and in relation to the patient demographic. According to Mr Graham this was not an issue that seemed to detain the market.

[60] At the court's intervention, Mr Graham confirmed that it may well be that the individual principal dentist would assign payment to the company. The individual mandates the money to the limited company. A number of scenarios were then put to Mr Graham in connection with the individual dentist needing to co-operate when the payment was mandated to a limited company. He said that that was dependent on the volume of NHS business. He was asked about a potential conflict between the individual dentist and the limited company where perhaps the sale was forced. Mr Graham said again that this depended on the volume and upon patient loyalty to the practice. There was very little loyalty to an individual dentist.

[61] Mr Robb, the Chartered Accountant led by the pursuer was "puzzled" as to how this situation could arise. As for its consequences for valuation, he envisaged little difficulty saying that it was "one of those things that needs to be tidied up", p 46C-D, Day 2, if the business was being sold. Later, in the course of his cross examination, Mr Robb clarified that this meant "by some form of negotiation on the point of conclusion and the contract itself",

p.66, Day 2. Mr Robb did not accept the premise because, for valuation purposes the assumption was a willing buyer and seller, p.58A, Day 2.

[62] Mr Hallesy also appeared to agree that his was capable of being resolved at the time of the transaction concluding:

> "Q. But this report is to value the shares in the company at 31st March 2020, assuming an open market sale with a willing seller and willing buyer and if I understand your evidence, Mr Halsey, in that situation whether it is the dentist or company which has registered the patient list, it would be a simple matter of a transfer document that would be completed to ensure the transfer?
>
> A. That's correct." p.117, Day 3.

Conclusion on DBC issue

[63] On the question of the patient list and the dental body corporate, I consider the defender was in error in submitting, at page 9 of 14 of his written submission, that the patient list did not belong to the company and was therefore not a matrimonial asset. If it did not belong to the company it belonged to the defender. It was a matrimonial asset on any view.

[64] On one view this issue may be resolved by application of the norm that skilled witnesses use, and the court applies, concerning valuation involving a willing buyer and a willing seller – as suggested by Mr Robb in his rejecting the approach of Mr Hallesy to this issue (Cf. *Sweeney* v *Sweeney* 2004 SC 372 at [15]). This certainly underpins the approach of the surveyors who have provided reports in this case: see DM Hall Chartered Surveyors report at 5/7/2 of process (p.25); Pinders report at 5/12/9 of process (at pp 21 and 24). The approach to valuation assumes willingness of both buyer and seller. For the purpose of the court's valuation this "quirk" or potential difficulty falls away.

[65] Furthermore, having regard to what Mr Robb and Mr Graham say about the issue of the DBC, I did not gain any sense that it was of such significance it could not be "tidied up" in the course of the negotiations to finalise the sale of the business. It is no more than a theoretical, potential difficulty and one capable of disappearing or being cured with the defender's consent. I do not consider that it has the potential for detriment that the defender contends for.

[66] The basis of the level of the discount to be ascribed to this "quirk" in the context of a prospective sale, and thus in the overall valuation of the limited company, was not dealt with in Mr Hallesy's report or expanded upon in his evidence. Mr Hallesy's selection of the figure of 20% (or between 20% and 30%) as a modification or discount to be applied had no clear justification or explanation. This came down to the assertion by Mr Hallesy that this was the percentage reduction in value to be applied. The court ought to know the basis of the selection of the figure in order to be able to assess the accuracy or otherwise of that figure. The court has not been furnished with any reasoning that would lead to an understanding as to why this amounts to a reasonable figure as opposed to any greater or lesser sum. This represents a separate reason to reject the defender's submissions on this point. There is no acceptable evidence to vouch for the figure selected as representing a modification to the valuation of the business.

(iii) Lease

[67] Mr Hallesy noted that the lease of the A property that the practice operated was due for renewal shortly and would have to be renegotiated. On that basis, Mr Hallesy concluded that there was some doubt about the practice continuing to be able to operate from the

premises there. This led Mr Hallesy to conclude that there should be a reduction of the valuation of the company – see paragraph 4.7 of his report:

> "The A practice lease is due for renewal next year and it is not possible to determine what effect the fact that the lease is not in the name of ABCL will have upon any renewal terms. It is likely to affect what a potential buyer will pay for the business, however."

[68] In cross-examination Mr Hallesy conceded that he had not sight of the lease and was unaware of the position in relation to its renewal. An abatement on this basis appears to have been suggested as appropriate without any enquiry as to the willingness of the landlord of that property to renew the lease. Mr Hallesy said that this abatement was based upon not knowing if the landlord would decide to lease the property again or not, see p.117, Day 3. Mr Hallesy appears to have taken a pessimistic view that this would lead to the business not being able to operate from that location.

[69] Mr Robb, the chartered accountant led in evidence by the pursuer, rejected this as a basis for modification of the valuation figure. For valuation purposes the assumption is: "that the business is going to continue as a going concern and if there are leases, they would be renewed unless there is information to the contrary" p.46, Day 2.

Conclusion on Lease

[70] I consider that Mr Hallesy's approach on this issue was unreliable. The effect that any doubt regarding renewal of a lease of premises may have upon the continued operation of the business from that location is, at best, speculative. That is not made out on the evidence. I prefer Mr Robb's approach on this issue.

Value of the Heritable Property owned by the company

[71] I have already provided my view of the impressive evidence of Mr Campbell, the chartered surveyor led in evidence by the pursuer. Mr Hallesy criticised the valuation of the heritage given by Mr Campbell. In his report at 4.13, Mr Hallesy proffered the following opinion on the valuation to be ascribed to the property at AR:

> "The property at 23 AR is assumed to be at a fair value of £800,000 for the purposes of the valuation as at 20 March 2020. This is partly based on the speculative offer above and the formal valuation by a member of RICS in October 2016. It is assumed that reasonable costs of converting the property back into a residential property would be in the region of £100,000."

[72] Mr Hallesy ventured an opinion on the valuation of the heritable property with reference to the terms of an offer received for the property and then discounted from this a sum to allow for conversion costs incurred in altering its use back to residential. Mr Hallesy repeated his view stated in the report that the valuation ought to be abated because there were conversion costs. Mr Hallesy appears not to have had sight of the chartered surveyor's report. Mr Hallesy is told this in examination in chief:

> "Q. Well, there is a Chartered Surveyor's valuation, albeit it valued the business with reference to residential comparators rather than a Dental Surgery. If you see an issue, tell us?
>
> A. It cost 150 to convert the property from a house of multiple occupation to a Dental Practice so, I would think if it was based on the Dental properties, it has a large valuation because you would have to convert it back, not just to an HMO, but a residential property.
>
> Q. The starting price was higher than £850,000 and it was reduced to allow for the conversion costs to a residential property?
>
> A. Yes.
>
> Q. Otherwise you don't take any issue with that?
>
> A. Yes, that's correct." see p.95, Day 3.

[73] The chartered surveyor who gave evidence, Mr Campbell, gave a clear and convincing account in relation to the basis of his valuation. He dealt with the issue of conversion costs and made express his view that his valuation had already factored these costs into his ultimate figure.

[74] This is a clear example of Mr Hallesy's stepping outwith his area of expertise. He is a chartered accountant. He accepted in cross examination that he was expressing a view on "matters not within [his] remit", see p.5, Day 4. Mr Hallesy possessed no qualifications to enable him stray into this area with any authority. He gave evidence that he had not sight of the chartered surveyor's valuation. When this was put to him and the proposed reduction for conversion costs expressed within it, in light of Mr Hallesy's lack of qualification and experience in this area, I would have expected him to defer to the expert with the necessary skill in this area.

[75] Mr Graham when asked about this very issue resisted any attempt to take him outwith his area of expertise, see p.29D, Day 2. Mr Robb, the chartered accountant led in evidence by the pursuer similarly made clear that he could not comment on property values, see p.47, Day

[76] At the very least, given Mr Hallesy did express a view, and appeared to adhere to it, I would have expected him to have provided a detailed explanation as to why (i) he felt able to opine on this subject matter; and (ii) why that opinion should carry weight over the chartered surveyor expert in the field and with experience in this particular location. He did neither. I was not satisfied that there was any basis for Mr Hallesy to express an opinion on this issue.

Valuation of ABCL

[77] The basis of the approach of Mr Graham and Mr Robb is logical. They gave their evidence in a considered and consistent manner. The points put to them in cross-examination were dealt with more than satisfactorily. Nothing contained in Mr Hallesy's report or in the manner in which points of dispute were put in cross-examination caused me to doubt that the approach they had adopted was anything other than sound. I am content to adopt it for the purposes of the valuation of net matrimonial property and in particular for the valuation of ABCL. The value of the parties' shareholdings in the company ABCL as at 31 March 2020 is £1,604,246.

Net Matrimonial Property

[78] The parties have agreed that matrimonial property other than ABCL amounts to £235,880.76, see paragraph 8 above. At the appropriate valuation date the company had a value of £1,604,246. Net matrimonial property is therefore valued at £1,840,126.76.

Issue (ii): Fair Sharing of Net Matrimonial Property

[79] Parties remained in dispute on the approach to be adopted by the court in dividing the net value of matrimonial property. The defender seeks to persuade the court to depart from the principle or presumption of equal sharing. Before canvassing the competing submissions, I propose to summarise the evidence that has a bearing on this issue. In the main this focussed upon a number of assets which form part of matrimonial property.

[80] There are three assets that the defender concentrates upon when submitting that fair sharing of matrimonial property necessitates a departure from equal sharing in respect that there are said to be special circumstances in terms section 10(6)(b) of the 1985 Act. I will deal

with the evidence in relation to each of these assets: (i) Flat 1, 11 HR, Glasgow; (ii) 27 CB, Glasgow; and (iii) 23 AR, Glasgow.

Flat 1, 11 HR, Glasgow

[81] There was undisputed evidence that the defender purchased the property at Flat 1, 11 HR, Glasgow ("HR") in March 2001. It was not a matrimonial asset. In his affidavit at page 2, paragraph 4(a) he states that the purchase price was £205,000. The pursuer moved to reside with the defender prior to their marriage, in or around 2005. After the parties were married in June 2007 they lived together there until they moved to 27 CB, Glasgow, in March 2009.

[82] In his affidavit at para 4(a) the defender says he borrowed £263,500. This sum, the defender says, represented a "re-mortgage" or advance of loan funds, secured over HR. The (undated) cash statement at 6/6/69 of process confirms a credit to the defender ("amount due to you") of £262,620.50. His bank or mortgage statement at 6/6/70 of process shows an advance of £262,500 on 9 August 2006. In cross-examination at p.108, Day 2, with reference to production 6/6/26 of process, the advance is stated to be £262,500.

[83] This advance of further loan funds secured over the defender's property was said in his affidavit to be used to fund the parties' "new lifestyle" (para 4(a)). In cross-examination, however, he accepted that these funds would not have been spent for that purpose. He said: "No, I wouldn't have spent all that." p.109B-C, Day 2 and "the money must have gone elsewhere" p.110D-E, Day 2.

[84] The defender also confirmed in cross-examination that part of these sums were paid back to the mortgage account, see 6/2/26 showing a payment out of £155,500 on 7 September 2006, a "borrow back" credit of £35,000.00, leaving a balance of £142,720.48 as at 31 October

2006. The defender accepted in cross-examination that the mortgage account was reduced during the parties' marriage by payments made in the course of that period, see p.111D-E and p.115D-E, Day 2.

[85] The property was sold in September 2010. The (undated) statement for settlement is produced at 6/6/51 of process, confirming the sale price secured was £350,000. The sum required to clear the mortgage account with Northern Rock was £246,614.81. The defender's affidavit at p.7, para 7(b) confirms these figures and refers to 6/6/74 of process for the redemption figure (being presumably sums paid to Norther Rock) on 13 September 2010. A balance fell to be paid to the defender of £102,594.38.

27 CB, Glasgow

[86] The defender in his affidavit at page 3, paragraph 4(b) confirms that this was bought in his sole name for the purchase price of £610,000.00 on 26 March 2009 (statement of sale at 6/6/75 of process). This property was bought for use a family home and is a matrimonial asset. Funds were secured from Nationwide Building Society in the sum of £457,500, see 6/2/37 and 6/1/11 of process. The defender said that the balance required to settle of £177,593.75 (undated statement of account at 6/5/54 of process) came from his funds and referred to a passbook (at 6/1/24 of process) confirming a balance of £138,000.00 at 30 November 2007 and a withdrawal ("TT out") of £177,593.75 in April 2009. This appears at odds with the joint minute of admissions no.58 of process – para 7(i) which confirms that the parties were agreed that the balance of £152,269 was funded by loan funds secured over property at HR, Glasgow.

[87] The defender accepted that the debits and credits through this account (shown at 6/1/24 of process) represented the ebbs and flows of payments in and out during the term of his marriage, p.114-116, Day 2.

[88] In respect of the purchase of 27 CB, Glasgow, the balance due to be paid by the defender as purchaser appears to have been withdrawn from the loan account. The defender accepts that the sums in that account form part of matrimonial property. The defender contends that because the property at HR in Glasgow was in his sole name and was purchased prior to the parties' marriage, sums secured over the property ought to be attributed to him when dividing up matrimonial property, in essence justifying a departure from equal sharing.

23 AR, Glasgow

[89] This property was purchased by the company ABCL, for £760,000.00 on 30 September 2010 (joint minute of admissions, No. 58 of process at para 10). A statement for settlement (undated) was produced at 6/6/52 of process. It shows the purchase was financed by loan funds secured over the property at £525,000 with sums required from the company of £253,270.00. The defender breaks this down in his affidavit at para 7(a), p.6. The sums obtained from the Royal Bank of Scotland, says the defender, were £532,000 and this is agreed between parties in the joint minute of admissions, No. 58 of process at para.10. A loan was obtained from the defender's father at £85,000, see 6/5/60 of process.

Defender's submissions on special circumstances

Section 10(3A)

[90] The defender seeks an order in terms of section 8(1)(aa) of the 1985 Act: for transfer to him of the pursuer's shareholding in ABCL. Section 10(3A) therefore has application. The defender's submission on this aspect of the case is to be found at pp 24-25 of 25 of his note. His submission outlines a rationale for the amending legislation bringing in to effect the terms of section 10(3A). He moves the court to elide its application because of the particular circumstances that he says apply here.

[91] The value of the shares in the company (the subject of the property transfer order sought by the defender under section 8(1)(aa)) have increased in value. Notwithstanding the terms of section 10(3A) - enjoining the court to have regard to the valuation at the appropriate valuation date in those circumstances - the defender submits that the: "Provision…does not in any way alter the general presumption towards the relevant date as being the point at which assets should be divided".

[92] The defender argues that because there has been an increase in the value of the company from the relevant date to the appropriate valuation date, and that increase is wholly down to the efforts of the defender, the court should, in the division of matrimonial property, reflect that by awarding to him what he terms the "further and significant economic advantage from that contribution" of the order of £526,228. The defender submits that it would be manifestly inequitable not to reflect the hard work and efforts of the defender during that period.

[93] The defender submits that the legislative change was to allow property to be valued at a date agreed between the parties and the purpose of this was to;

> "enhance[] the protection and fairness required by the Act to one party where, for example, the property was to be transferred to the sole name of one party but it had increased significantly in value between the relevant date and the date of transfer."

[94] The aim of the legislative amendment, so submitted the defender, could not be achieved here in light of the circumstances relied upon by the pursuer. There was a significant additional economic advantage to the pursuer arising from the lengthy period of separation and increase in the value of the Company during that period. The provision was aimed towards enhancing fairness by offering a degree of flexibility and discretion to the court but, according to the defender, that:

"does not in any way alter the general presumption towards the 'relevant date' as being the point on which assets should be divided".

[95] The pursuer made no contribution whatsoever yet stood to receive an income from the business and from the defender. During that period the pursuer had increased her crave for a capital sum.

[96] The pursuer contends that section 10(3A) has application because of the order sought by the defender for transfer of the pursuer's shareholding on ABCL.

Decision on the application of section 10(3A)

[97] I do not accept the defender's submission on this issue. It flies in the face of the provisions of the 1985 Act, as amended. I was given no authority to support this approach to application of section 10(3A). I also reject the defender's submissions in respect of this branch of his case because I do not consider that it is made out in the evidence. The defender seeks to attribute to him, and him alone, the increase in valuation of the business between the relevant date and the appropriate valuation date. More fundamentally however the defender's submissions on the application of the statute miss the point. The

factors pressed on the court are those which the court is entitled to have regard in the final division of matrimonial property. They do not form a sound basis for overlooking or ignoring the plain provisions of section 10(3A) of the 1985 Act.

Section 10(6)(b)

Defender

[98] The defender in his note at page 18 of 25, invokes section 10(6)(b) of the 1985 Act as a reason for departing from the principle of equal sharing. Reliance was placed upon the judgment of Sheriff Morrison in the case of *Harris* v *Harris* 2013 Fam LR 122. The defender sought to draw an analogy between his circumstances and the points enumerated by Sheriff Morrison at para [33] of his judgment.

[99] The marriage was short, funds were introduced by the defender at the outset of the marriage and a contribution was made within two years of the date of the marriage. The contribution was significant - a proportion of the total value of matrimonial property was readily identifiable as representative of the defender's business. For the defender the substantial asset was not the matrimonial home (as it was in *Harris*) but the business. The defender referred to his frugality, seeking to contrast it with the pursuer's approach to money. He referred to the valuation of the dental practice given by Mr Hallesy. Although not shown in the balance sheet of the company it ought now to be recognised. The defender introduced £102,000 from the sale of his flat in HR in Glasgow and introduced the sole trader dental practice.

[100] The matrimonial home at 27 CB, was purchased in March 2009 for £610,000. This was funded by an advance from the Nationwide of £457,500, with the balance by way of re-mortgage of non-matrimonial property (the defender's flat at HR). The defender

provided £152,000. There was an agreed valuation of 27 CB of £600,000. Because the account with the Nationwide was set up on an interest only basis, the sums required to redeem the security over the property remained unchanged. The defender submitted that the equity, representing the unsecured funds from, or free equity within, the matrimonial home at CR "comes entirely from the defender's non-matrimonial funds".

Pursuer

[101] The pursuer's submissions on section 10(6)(b) can be found at pp. 11-12 of her note. The matrimonial home at CB was purchased in March 2009. The re-mortgage of the property at HR took place in July 2009. However, the funds being available from HR were due to the mortgage over it being paid, and reduced, from income generated during the marriage until its sale in 2011. Since the parties' separation, the defender has had the benefit of residing solely in that property. He will retain the benefit of any increase in its value, the title having been taken in his sole name. The pursuer contended that this was not a special circumstance justifying a departure from equal sharing.

[102] The pursuer challenged the defender's assertion that £102,600 was realised from the proceeds of sale of HR and that sums were introduced to the company in 2011 to help it buy the premises at 23 AR. The defender's contribution introduced to the company is reflected in the Director's loan accounts. The defender has, since incorporation in March 2009, introduced and removed monies to and from the company. This is reflected in the Director's loan account. In the pursuer's submission, the defender had been repaid monies introduced to the firm. He owes the Company a substantial sum. The Director's loan shows that.

[103] In connection with the incorporation of ABCL and its acquiring the defender's dental practice, the pursuer's submits that no value was applied to the practice at that time. This was on the basis that the defender had taken advice. It avoided (or postponed) a capital gains tax liability. The defender was seeking to have it both ways by placing a retrospective valuation upon that practice. The valuation that is based upon Mr Hallesy's report is unreliable.

Decision on the application of Section 10(6)(b)

[104] Section 10(6)(b) is a statutory acknowledgement of a special circumstance logically justifying departure from the principle in section 9(1)(a), that the parties to the marriage should share equally in the fruits of their efforts during the period of the marriage. The provision allows for, but does not mandate, departure from equal sharing where the source of the funds used to acquire matrimonial property was not derived from income or efforts of the parties during their marriage.

[105] Section 10(6)(b) allows the departure from equal sharing where some source or asset was used to acquire matrimonial property because those sources or assets were not derived from the income or efforts of parties during the marriage. Lord Osborne in *Whittome* v *Whittome* 1994 S.L.T. 114; 1993 S.C.L.R. 137 recognised the underlying principle that "the wealth acquired by the parties …or generated by their activity and efforts during the course of their life together" was to be shared. That case concerned exclusion of gifted property from the valuation exercise by virtue of section 10(4) (as did *Cunningham* v *Cunningham* 2001 Fam LR 12).

Harris v Harris 2013 Fam LR 122

[106] Sheriff Morrison makes points of general application. He distinguishes the application of section 10(4), that is property acquired by gift or succession from another party, from section 10(6)(b) of the 1985 Act. Sheriff Morrison goes on to make a number of points derived from *Jacques* v *Jacques* 1997 SC (HL) 24; 1997 SLT 462. The existence of a special circumstance does not mean that an unequal sharing automatically follows. An unequal division must be justified by those circumstances, and remains a matter for the discretion of the court: per Lord Clyde (p.24) and Lord Jauncey (p.22).

[107] Relying upon *R* v *R* 2000 Fam LR 47, Sheriff Morrison observes that the broad policy underlying section 9(1)(a) is that equal sharing applies to the fruits of the economic efforts of the parties during the marriage. There may be a strong justification for an unequal division where matrimonial property:

"is to a large or substantial extent" derived from the funds of one party before the marriage…or remains outside the common wealth of the family".

[108] Whist the flatted property at HR was acquired by the defender prior to the parties' marriage, I have difficulty with the submission that the sums said to be realised from HR, by way of re-mortgage, are equivalent to funds he introduced and thus not derived from the income of the parties to the marriage during its term. The pursuer was correct in my view in her submission that the sums due to the security holder were reduced during the term of the parties' marriage up to the sale in 2011. Contributions were made to that account over the period of the parties' marriage. As the defender came to accept, the mortgage account relative to the sums secured over that property moved up and down during the parties' marriage. I consider that the defender was in error in moving from the premise that because

that asset was a pre-matrimonial asset any funds realised from its re-mortgage or upon its sale come within the ambit of section 10(6)(b).

[109] The defender similarly mischaracterises the position relative to the former matrimonial home at 27 CB. Because sums were obtained from the re-mortgage of the "non-matrimonial property at HR, Glasgow" then the equity within the property at CB, says the defender, "comes entirely from the defender's non-matrimonial funds". This was not made out. The fact of the property at the point of the parties' marriage being brought by him to the marriage as a pre-marriage asset does not imbue it with a ring of inviolability such that any funds from it – raised by way of further advance or sale - fall out of account for the purposes of section 10(6)(b).

[110] Insofar as the sale proceeds from HR and their application to the purchase of 23 AR, Glasgow and other matrimonial assets are concerned, I accept that the defender is entitled to some recognition under section 10(6)(b) for what he brought to the marriage and, in particular the property at HR. This does not entitle him to regard all of what was able to be obtained by way of funding from that property as his asset. It does not justify a wholesale departure from equal sharing in respect of all of the assets bought from funding obtained from sums secured over this property. I accept that funds were paid into the loan account and drawn from it over the term of the marriage. That tempers what may be fairly taken into account under this heading.

[111] Turning to the other asset invoked under this head - the dental practice operated by the defender at the time of the marriage and then transferred to ABCL upon incorporation, it appears that a positive decision was taken at that time of incorporation, and subsequently, not to show the value of that asset on the company balance sheet. In draft findings in fact submitted prior to the hearing on evidence, the defender submits that the defender's sole

trader practice had a value of £674,000 (see page 3 of 25). This is said to have been supported by Mr Hallesy's report (6/6/96 of process), paragraph 6.4, page 12. Mr Hallesy's report at page 29, appendix 6, states a value of £674,100.

[112] In his oral testimony (p.98, Day 3) Mr Hallesy provides an explanation in relation to this matter:

> "Q Because your earnings based valuation is in the order of £674,000? – Yes.
>
> Q. Whereas your turnover based is away down at £200,000 odd? – Yes.
>
> Q. So, what you do, perhaps unusually, is come up with a hybrid valuation. You take the average figure of the two? – Yes.
>
> Q. And come up with a figure of £474,000 for the sole trader Practice as at the date of incorporation? – Yes.
>
> Q. And Alan Robb took the view that a hybrid valuation wasn't really appropriate and it is probably better to stick with one or the other and in particular go with the industry norm which is an EBITDA valuation. Do you agree? – The dental valuation market is very unusual. If you ask a dentist what they think their Practice is worth, they talk about fee levels. Like everyone else, they think their property is worth more than it is.
>
> Q. The property valuation is based on earnings based EBITDA? – On every other occasion I would use EBITDA.
>
> Q. If you agree the hybrid approach is appropriate, that would increase the value of the pre-incorporated business that would belong exclusively to Dr AJB from 474 to 674? – Yes.".

[113] Mr Hallesy's evidence on this point was difficult to follow. His report at page 29, relying on an EBITDA based approach to valuation, values the sole trader dental practice of the defender at this point in time at £674,000. In the passage of his evidence quoted above a "turnover based" figure of £200,000 is given. Adopting a hybrid approach this is said to be averaged out to a figure of £474,000. Mr Hallesy was asked about the basis of the valuation, it being suggested to him that Mr Robb did not agree with this hybrid or average valuation approach. Mr Hallesy's method seemed to come to be based upon what dentists expect to

be told their practice is worth. Mr Hallesy appears to favour the use of EBITDA in his report. He then contradicted that by adopting a hybrid method. This is said to produce a valuation of £674,000.

[114] Mr Hallesy departed from the figure provided in his report and referenced in the defender's suggested findings in fact at page 3 of 25 of his submission. The extent to which he departed from that value, and the reason for such a departure, is not made apparent. Mr Hallesy's overall approach is one that I have already found to be unreliable. I did not accept his evidence for the reasons earlier stated. Notwithstanding that general lack of reliability in his approach, I have endeavoured to look at his valuation of this particular asset (dental practice pre incorporation). I am unable to divine the basis for his arriving at the figure in his report. I reject as unreliable Mr Hallesy's account of on the valuation of that practice.

[115] When Mr Robb was asked about this aspect of Mr Hallesy's report in cross examination he did not support the valuation ascribed to it by Mr Hallesy – see p.58 Day 2. Mr Robb carried out a valuation of the company at the relevant date – see 5/12/12 of process. The "desktop" valuation incorporated a sum for good will arriving at a figure at 25 January 2013 for the company of £551,790.

[116] On any view there was a value attaching to this business at the point of the parties' marriage. Regardless of the reason for not showing a value for that asset on the balance sheet of the company, ABCL, for the court's purposes in determining a fair split of matrimonial property, the defender is entitled to have some recognition under section 10(6)(b) for that asset as one he brought to the marriage. It is difficult in the absence of acceptable evidence about its valuation at that point in time to ascribe a precise value to it. The various figures provided vouch for its increase in value over the period between the

parties' marriage and the relevant date and then again between the relevant date and the appropriate valuation date. For the purposes of section 10(6)(b) the defender is entitled to recognition that this asset was brought to the marriage by him. It was not therefore derived from the income or efforts of the parties during the marriage and thus the defender is correct in his invoking section 10(6)(b) in this regard. The increase in value of that asset through to the relevant date and beyond is not covered by the application of section 10(6)(b) in that the value of that increase was attributable to the efforts of the parties during their marriage.

Section 9(1)(b)

Defender's submissions

[117] The defender submitted in terms of section 9(1)(b) of the 1985 Act that the court should take into account the economic advantage enjoyed by the pursuer at the expense of the economic disadvantage suffered by the defender and depart from the principle of equal sharing of net matrimonial property to reflect that. Reference was made to the definition of "contributions" in section 9(2) of the 1985 Act and *Coyle* v *Coyle* 2004 Fam LR 2. For the defender it was difficult to countenance a clearer example of a contribution. This was constituted by what was termed by the defender to be the "gift" of 50% of his (the defender's) business to the pursuer "at the moment of incorporation of the business on 4 March 2009". In the course of his written submissions on this aspect of the case, at pp. 21-25 of 25, the defender did not provide to the court a detailed analysis of the circumstances or context of incorporation, instead submitting that "it matters not". The defender contended that his motivations for incorporation, for example, the tax efficiency achieved, mattered not if there was an overall economic disadvantage arising from the loss of value to him – a decrease or diminution from 100% of the shares in the Company and a

reduction of the defender's income over the period of the marriage. This, it was submitted, operated to the pursuer's advantage.

[118] The defender submitted that his economic disadvantage mirrored the gains enjoyed by the pursuer. These were constituted as follows:

(i) **The capital gain, represented by half of the value of the business at incorporation on 4 March 2009.** This only fell to be considered under this branch of the defender's submissions if his submissions under the application of section 10(6)(b) were not upheld. Since I have held that some recognition is to be given to the defender under the foregoing head I say no more about it.

(ii) **Payments to the pursuer**. As a director she received a salary of £1,000 per month later moving to a division between salary and Director's loan. The payments to the pursuer continued beyond the parties' separation on 25 January 2013. During those times the pursuer had made no contribution to the business. That salary represented the economic advantage to the pursuer.

(iii) **Introduction of capital to purchase the AR Premises.** The court should recognise the pursuer's contribution at the time of the setting up of the AR practice and the funds invested from the defenders' resources to buy the premises.

(iii) **Director's loans**. A tax liability would arise from these payments made by the company to both of the directors. This would only arise or crystallise in the event that the court ordered sale of the shares. However, the defender sought a transfer to him of the pursuer's shares which the pursuer does not oppose.

(iv) **The increase in the value of the business post relevant date.** Reference was made to the evidence of Mr Hallesy that the business had increased in value between the date of separation 25 January 2013 and March 2020 from £551,790 to £1,604,246 a difference

of £1,052,456. Whist in terms of section 10(3A) of the 1985 Act, the property requires to be valued at the appropriate valuation date which the parties agreed that by way of joint was 31 March 2020, it was contended this should be regarded as a significant economic advantage conferred on the pursuer by the defender which should justify a departure from equal sharing of the matrimonial property.

Pursuer's submissions

[119] The pursuer characterised the defender's submissions as "novel". The defender sought to persuade the court that the shares in ABCL would not be matrimonial property but for the gift of 50% to the pursuer. Even if it were accepted that there had been an economic advantage accruing to the pursuer, there was also an advantage to the defender in incorporation. He wished to establish a company to reduce his tax liability.

[120] In the Closed Record of 2017, (5/12/2) the defender had averred that:

"the incorporation was carried out on the advice of [a named accountant] and was done principally for fiscal reason".

This was now denied. However, the defender's tax liability immediately reduced from and after incorporation. A nominal salary was paid to the income tax threshold and the remainder of remuneration was by way of Director's loans. No personal tax liability arose for the defender. The Director's loan in the name of the pursuer would be repaid by her.

[121] The pursuer was asked by the defender to sign a personal guarantee. The effect of this was that she would be jointly and severally liable for the debts of the company from September 2010. She was released from this obligation in 2018 at her agent's request, see joint minute no.58 of process at paragraph 11. The pursuer had an active, creative role in the business operating from A and in the company from its incorporation until released around

the time the parties' second, AB, was born. When the parties separated the pursuer was not permitted to even enter the company premises. The defender sought to minimise the pursuer's role.

[122] It was not justified for the defender to place reliance upon the economic advantage enjoyed by the pursuer of an increase of the value of the company between the relevant date and the appropriate valuation date. The increase in value of the company was not due to the defender's efforts alone. Mr Graham in his evidence noted that there were three associates employed in the A practice and two in the AR practice. These employees generated income for the company. The value of the premises increased due to market forces. The loan secured over the property had decreased over time in terms of the secured borrowings. Profits have not increased substantively. The overdrawn Director's loan account as at 31 March 2020 and the corporation tax repayable to the company upon their repayment are listed in the company's assets.

[123] Esto the court considered that an economic advantage was conferred on the pursuer under this heading, that advantage required to be balanced with the corresponding economic advantages conferred on the defender by the pursuer during the marriage in running the parties' family home and both during the marriage and after the relevant date in being the primary carer of the parties' children.

Decision on the application of section 9(1)(b)

[124] Lady Smith in Coyle emphasised the necessity under the sub-section 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.

[125] The defender concentrated in this submission on the limited company in which the parties are equal shareholders, and focussed on the circumstances surrounding the incorporation of ABCL. At the point of incorporation, submits the defender, the pursuer became a 50% shareholder in the company as a result of a gift by the defender to the pursuer of the shareholding.

[126] It is somewhat curious of the defender in submissions to place such weight upon what the court should infer from that transaction, but to provide so little (other than by way of submission) to support why the court should make a finding to that effect. Indeed the defender came ultimately to submit that what happened at that point in time was of "no moment". The defender suggests that at the point of incorporation the court should not be interested in his motives.

[127] The defender's evidence in relation to the incorporation of ABCL was confused and at times inconsistent. The defender in his affidavit and in his evidence appeared to attempt to insinuate that there was some form of underhand or sinister conduct at work on the part of the pursuer, perhaps with the connivance of the accountant that she had identified, inveigling the defender into incorporation. In response to her promptings, according to the defender, the pursuer and the defender attended with that accountant and, according to the defender's affidavit:

"on his [the accountant's] advice I set up a limited company, [ABC] Ltd and I gave L a 50% shareholding in the new company".

[128] The company ABCL was incorporated on 4 March 2009. The paperwork vouching incorporation and the parties' respective 50% shareholdings was completed by the parties. I accept the submissions of the pursuer that the defender was not indulging in a selfless act. He did this for, among others, his own fiscal reasons. There was a tax efficiency created by

this arrangement. He took advantage of that state of affairs. It could not have been unknown to him. His tax liability drastically reduced. His method of payment or drawings or income from his business would have altered. A modest salary and director's loans were recorded in the company accounts. These would have been reflected in his tax returns in subsequent years.

[129] The defender's attempts in his evidence to deny that this was an efficiency in this arrangement were unimpressive. His tax returns (at 6/7/92 and 6/7/93 of process) clearly show that he benefited from the move. His tax liability was greatly reduced. I do not accept his evidence when he said this was not the case. His affidavit contradicts that position – p.10 para. 11, no.52 of process. I do not accept the defender's characterisation of what happened as being a gift to the pursuer.

[130] I accept that under this heading some level of economic advantage was conferred on the pursuer by the defender in respect of the introduction of his pre-marital capital to acquire the premises in AR and in respect of the goodwill element of the practice on incorporation, it is difficult to attribute these elements to a proportion of the valuation of the shares in March 2020. The defender I have held is entitled to some form of acknowledgment under section 10(6)(b) for the fact that his sole trader practice had a value that he brought to the marriage. It is difficult to be precise in assessing whether that will be materially different to the value to be ascribed to the good will of the practice upon incorporation. The defender accepted that he is not entitled to claim for the same principle under each head.

[131] The defender is on firmer ground under section 9(1)(b) in claiming that the pursuer has been advantaged by the increase in value of the limited company until the appropriate valuation date, but he overstates the position. Insofar as the submission that the increase in value of business, post relevant date can be attributed solely to the defender's efforts and

that, as such, an economic advantage has been conferred on the pursuer is concerned, that is an over simplification of the position. Whilst the defender is the principal director of the business and has been primarily responsible for running it during the marriage and after the relevant date, I do not accept that the pursuer's contribution to the limited company was minimal, as the defender sought to portray it. The defender sought to frame the payments that the pursuer received from the company as undeserved and, as I have said, incurring a financial disadvantage to the defender. I accept the pursuer's account in relation to what she did at the A and AR practices. I do not accept the defender's account. Where there is dispute between the accounts I preferred the pursuer's evidence.

[132] Of some moment is the contribution that she made to the purchase of AR. This has been to the company's advantage. She was insistent that this purchase proceed – even in the face of the defender's sister withdrawal from the process as a business partner in the venture. The company has benefitted over the years as the practices have increased in value. The defender seeks to attribute the company success to him and him alone. I do not accept that this is the case. The company is the business of the shareholders. The shareholders are the pursuer and the defender. The company employs a number of associate dentists and staff who have contributed substantially to the earnings of the business over the relevant period.

Conduct

[133] Submissions were made regarding the parties' general approach to the management of their finances. The defender sought to portray himself as someone who was careful with money. He had opened a bank account from age five. He was content to be described as "tight". There was curious chapter of evidence where a number of his friends,

acquaintances and relatives (EB, SM, and IM) gave evidence in the course of the morning of the third day of the proof diet to describe his general thriftiness and to seek to cast the pursuer in a quite different light. The defender joined in that characterisation of both himself and the pursuer.

[134] The defender and his witnesses' view of the financial outlook of the parties was neither relevant nor helpful. The 1985 Act provides little to warrant the court taking into account this sort of evidence. Section 11 provides:

> "(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 …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;"

[135] There was nothing in the evidence of the defender's sister, Mr Murray or Mr Mulholland that provided any basis for a finding that the pursuer had adversely affected the financial resources relevant to the court's decision. It was mostly in the level of generality. It consisted of each of the witnesses' overall impression of both parties' attitude and approach to financial matters. I did not find it particularly helpful for the ultimate decisions to be made about what matrimonial property was valued at and how that fell to be divided.

[136] In submissions on the evidence, the defender disavowed any reliance upon an argument based upon a dissipation of the parties' resources in terms of section 10(6)(c) of the 1985 Act. Accordingly I place no weight on this chapter of evidence in determining a fair division of the matrimonial property.

Resources

[137] Any award of financial provision on divorce must be reasonable with regard to the parties' resources in terms of section 8(2) of the 1985 Act. The term "resources" is defined in section 27 of the 1985 Act as meaning "present and foreseeable resources". 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.

[138] As the defender points out there was little evidence about his resources at proof (page 16 of 25 of defender's written submissions). For the pursuer there was nothing about the parties' respective resources which would preclude the making of an award which, on the face of the application of section 9 principles, was justified. Much of the parties' submissions centred on the treatment of the loans due to the company, representing the drawings or payments received from the company. This form of remuneration is tax efficient. For present purposes nothing turns upon the view to be taken by the HMRC of this arrangement.

[139] The defender seeks an order for transfer of the pursuer's shares in ABCL to him (under section 8(1)(aa) of the 1985 Act). The pursuer does not oppose such a course. That will have tax implications for her which she is able and ready to settle. I was not addressed on the detail or mechanics of this. Parties were agreed that I be addressed upon this aspect of the case after I issued my judgement.

[140] For the defender the matter is a little more complicated. Despite him seeking the order for transfer of the shares, he prays in aid the tax implications (for him) of the sums due by him to the company as being a relevant factor in the assessment of his resources. There are a number of ways that this may be dealt with by the defender. That will be for him to

choose when he orders his tax affairs. He will become the proprietor of the shareholding when the order he seeks is given effect to. The sums due by him (to the company) arise as result of his choices and the ordering of his affairs through the years. That will be a matter for him to reconcile. I was told there are a number of ways that may be done. I was not told which one was to be chosen by the defender. Perhaps that is because he has yet to decide and will do so with the benefit of advice. For the court's purposes it is impossible to know what effect that will have on his prospective resources. The defender does not know. I was not addressed on the timeframe for sale of the business, the net figure that will result following payment of the sale expenses and capital gains tax and the funds which will be at his disposal to meet the capital sum payable. The defender did not lead evidence regarding these aspects or make any coherent submission regarding the effect of the orders sought by the pursuer on his resources. He was not certain in his evidence as to what course would be followed in the event that a capital sum is awarded to the pursuer.

[141] As the pursuer points out, resources have not been put in issue by the defender (see page 14 of the pursuer's written submissions) as in some way presenting an obstacle to the court making an order for division of matrimonial property. Parties have agreed, in the joint minute No 58 of process, that the defender owns two properties in Scotland and jointly owns a property with his sister in Portugal. I am told nothing about whether they are encumbered or not. Title to the former matrimonial home is in his sole name with significant equity. The abortive sale of the business at AR is an indicator of the potential sums that asset represents in the market. There is nothing in the parties' respective resources which has a bearing upon what the court has determined to be a fair sharing of matrimonial property. Or, put another way, there is nothing in the defender's resources

known to the court which would render it unreasonable to make the award which on the face of it is justified by application of the section 9 principles.

Decision: Division of Matrimonial Property

[142] The parties contributed to the marriage in different ways. The basic policy underlying the 1985 Act is to share fairly between the parties the fruits of their labour insofar as created during the marriage and prior to the relevant date, or, where section 10(3A) is engaged, the appropriate valuation date. This has been repeated on numerous occasions. Lord Osborne in *Whittome* at p 126C recognised that principle:

> "As I understand the policy of that part of the Act of 1985 which relates to the making of financial provision on divorce, which includes the fair sharing of "matrimonial property", it is to the effect that, in general, the wealth acquired by the parties, subject to the statutory exclusion, or generated by their activity and efforts during the course of their life together is, in the absence of "special circumstances", to be shared equally"

[143] This relatively uncontroversial restatement of principle has echoes in Sheriff Morrison's observations in *Harris* at [33] about unequal division being justified where the source of funds "remains outside the commonwealth of the family". For all else, the principle of equal sharing applies where the matrimonial property is earned (or generated) by the parties efforts during the marriage. It is not their joint efforts which bring with it entitlement to sharing of the net value of matrimonial property.

[144] I consider that the defender's submissions that the pre matrimonial property of the defender at HR, the introduction by him of the assets to the company at the date of incorporation of ABCL and his efforts which have contributed to the increase in value of the company after the relevant date have some merit ought to be reflected in the ultimate distribution of matrimonial property but not to the extent pressed by the defender.

[145] The defender's primary position is somewhat extreme. He submits that the pursuer is entitled to nothing having regard to the term of the marriage, the period of separation, the income and other economic advantage obtained by her as a result of the shareholding in ABCL and payments made to her as director.

[146] I reject the defender's approach because it ignores the pursuer's contribution, or at least minimises it to an extent not justified on the evidence. It misrepresents what happened at the time of incorporation and also seeks to elide the effect the pursuer's contribution has made to the business of the defender. This is significant. The pursuer spoke to the different ways she contributed to the business of the defender by her own efforts for the practices. I accept her account. The defender's submissions ignore the economic advantages conferred on him by the pursuer in relation to her contribution to the business, in running the family home and caring for parties' children.

[147] I also require to take into account the fact that the economic burden which has fallen and will continue to fall on the pursuer of looking after the children: section 9(1)(c) of the 1985 Act. Since the parties' separation the pursuer has had to look after the children as she has been the primary carer for them. She has moved between a series of leased flats whilst the defender has enjoyed the occupation of a four (or five) bedroomed home in CB. The defender says that he has discharged his obligations in relation to looking after the children because he has paid aliment, school fees and has made provision in the form of investments for his children. I do not consider that these contributions remove from the court's consideration a reflection that the majority of the prospective economic burden of looking after the children will accrue in the main to the pursuer. It does not alter the fact that the economic burden of looking after the children from and after the parties' separation has for the greater part fallen on the pursuer.

[148] The defender has ordered his affairs with the effect – intended or otherwise – that a minimal liability falls due by way of a child maintenance assessment by the Child Maintenance Service. The payments that he makes in respect of the school fees and investments are for the children and for the children alone. They do not touch upon – or impact only indirectly upon - the economic burden of looking after the children. The pursuer requires to fund a home for the children. She has had the day to day care of the children with all that entails. She has been unable to secure alternative employment such that a career can be pursued. Without the burden of child care, the defender has been able to work in his business. He has not had to turn out the children to school every day, he has not had to make sure that they are picked up from school. He has not had to supervise their homework, to make sure they are clothed and fed. He has not had to make sure that they are ferried around to the social activities that children of the age of LB and AB undoubtedly pursue.

[149] I asked for confirmation of the defender's submission in this regard as the rather peremptory manner which this was dealt with in his written submissions was somewhat stark. The defender did not depart from it. In this written submission the defender says this:

> "The Pursuer is the primary carer for the children. Neither that, nor the extent of the Defender's contact with the child has a bearing on the financial burden of looking after them. The Defender has shared in the financial burden of bringing up the children as submitted earlier. There is no question of that. The Pursuer has a home. She lives at the address given in evidence. She prefers to look to the Defender for a payment which might entitle her to buy a home outright, rather than go down the traditional route of getting a job and securing a mortgage. The Defender will continue to support his children. That is a reasonable inference from the evidence heard by the Court, and no evidence was led to suggest otherwise."

[150] I reject this submission. I do not accept that the pursuer as the parent with day to day care of the children is irrelevant to the economic burden of caring for them. The

defender fails to recognise the pursuer's contribution, in relation to the question of child care, and the economic burden this represents.

[151] The defender fails to recognise – insofar as his submissions do not record or reflect in any way - the contribution made by having a full-time carer for his children. He has written cheques (for investments in the children's names and for school fees). In his view that is sufficient to ensure that this factor is taken off the court's assessment as to the division of matrimonial property. He prays in aid the other contributions that he makes in respect of the children (of attending to exercise contact, picking them up from school and taking them on holidays) but for present purposes they fall outwith the scope of assessing where the economic burden of childcare falls.

[152] I was struck by how dismissive the defender's submissions were in relation to the contributions of the pursuer overall but particularly in relation to his business activities. I consider that the defender goes too far in dismissing the contribution of the pursuer to the business and in particular to the acquisition of AR. It was at the pursuer's insistence that the transaction proceeded defeating the defender's sister's insistence that what was being asked of the company was too great. It was clear that the defender on his own was taking cold feet and the pursuer considered that was a positive choice to be made and that the transaction should be proceeded with. That has proved to be the correct decision. The company has benefited greatly from it. It is but one example of the pursuer's contribution having a significant effect on the parties' assets. The pursuer contributed to the company in tangible and intangible ways. Her payments or contributions from the company are not undeserved. They are not gifts.

[153] The court is asked by the defender to find that the assessment of matrimonial property is too difficult having regard to the various issues thrown up by the defender in the evidence. The matter is put thus:

> "The question of what the court should do, if it is not satisfied on the pursuer's evidence, as to the value of the business arises. The authorities make it abundantly clear that the court has a significant degree of discretion in the way it applies the principles set out in Section 9 of the Act. The court, in this case, is invited to take a 'broad brush' approach to the case. There is ample authority for that approach. In cases where the matrimonial home had not been sold as at the date of proof, and the courts could therefore not make a finding in fact as to the global value of the matrimonial estate, it preferred in the circumstances to make a percentage award in favour of each party. In seeking to achieve a fair result, it is submitted that the court could adopt a similar approach here making an award of a capital sum in favour of the pursuer having regard to the whole and relatively complex circumstances of the case."

[154] The approach advocated by the defender is for the court to adopt a broad overview of the evidence. The broad brush advocated by the authorities does not preclude consideration of the evidence nor does it justify deflecting the court's attention from what ultimately the statutory scheme envisages the court should do: determine what a fair sharing of matrimonial property ought to be by balancing the various section 9 principles.

[155] In the final analysis what the defender submits is that a capital sum should not be granted in favour of the pursuer in light of the various difficulties that he has thrown up. The defender has not submitted schedules of matrimonial assets or matrimonial liabilities. The defender has not drawn up competing schedules to seek to justify a particular or precise division of matrimonial property. Rather, the defender has taken his stance upon the valuation of ABCL. The court has reached a concluded view upon that valuation. The court must now deal with the defender's arguments regarding the distribution or division of matrimonial property.

[156] In the course of the hearing on submissions Mr Hannah's primary position was that the pursuer was entitled to nothing. Upon being pressed for an alternative award, the most the defender was prepared to acknowledge was that there may be justification for - perhaps depending on the court's view of the evidence - was a payment of a capital sum of £200,000 to the pursuer. Despite Mr Hannah being given every opportunity to justify or explain that conclusion I was unable to ascertain what the basis for that alternative submission was.

[157] It is clear, however, the basis upon which the defender submits that the pursuer is entitled to nothing. That is on the basis that the defender has contributed everything responsible for any increase in the value of any assets and the pursuer's contribution amounts to nothing. The court's division of matrimonial property should reflect this. I reject that view of the evidence and of the parties' marriage.

[158] The court must strive to achieve a balance that is fair and reasonable having regard to the evidence. In pursuit of that end, I have taken into account the evidence and submissions about the parties efforts during the marriage and the sources of the various matrimonial assets and sought to take into account, where I think fair to do so, of the special circumstances that allow for a departure from the presumption of equal sharing.

[159] On the one hand the defender is entitled to due recognition for his efforts pre-marriage and the assets that he brought to the marriage as a result of these – the dental practice and the pre matrimonial property at HR. He is entitled also to recognition for the increase in value of the limited company. This is tempered by the application of section 9(1)(c) to reflect the economic burden to be borne by the pursuer for looking at the children of the marriage. I have regard also to the relatively short duration of the marriage and the lengthy period of separation.

[160] Fair sharing of the matrimonial property in this case will be achieved by dividing its total value in the proportions 2/3:1/3 in favour of the defender. The net value of matrimonial property I have found to be valued at £1,840,126.76. The capital sum therefore due to the pursuer I calculate at £613,375.56.

Periodical Allowance

Pursuer

[161] The pursuer sought an award of periodical allowance. She outlines her present financial circumstances and submits that this should continue in the short to medium term. She recognises that she requires to set upon her own independent financial course.

Defender

[162] The defender accepts that periodical allowance would be appropriate "in the event of payment being deferred". The defender adds to his submission a number of points of admonition to the pursuer regarding employment and after school services. These are unhelpful in the context of assisting the court in making its determination on this issue.

Decision on Periodical Allowance

[163] An order for the making of a periodical allowance is one of the orders for financial provision available to the court in terms of section 8(1)(b) of the 1985 Act. Section 8(2) of the 1985 Act provides that:

> "(2)Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
>
> (a) justified by the principles set out in section 9 of this Act; and

(b) reasonable having regard to the resources of the parties."

[164] The pursuer seeks an order for periodical allowance in terms of section 9(1)(d). This provides:

> "(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"

[165] Section 13 provides:

> "(2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—
>
> (a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and
>
> (c) it is satisfied that an order for payment of a capital sum or for transfer of property, or a pension sharing order or pension compensation sharing order under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2)."

An award of periodical allowance may only be made in the event that the conditions laid down in section 13(2) are satisfied, see *Mackin* v *Mackin* 1991 SLT Sh Ct 22 at 24).

[166] It is likely that the court will defer payment of the payment of the capital sum. Parties wish to address the court upon the practical aspects of its final interlocutor. It is unlikely that the court will be asked to give immediate effect to its interlocutor. I am therefore persuaded that the course suggested by the pursuer is appropriate and this was not opposed by the defender. I will make provision for an award of periodical allowance in the sum that is equal to that paid by way of interim aliment from the date of any decree to follow heron until payment of the capital sum to the pursuer by the defender. The precise term will be dependent upon the period within which the capital sum will be paid.

[167] It is that matter upon which parties wish to address me. Although that course is not specifically sanctioned by the Ordinary Cause Rules, I am content to adopt it as I have

issued in this judgement my findings in fact and in law: OCR 12.4(2)(a). It is the precise terms of the court's interlocutor which will be the subject of submissions – depending upon the practical application of the court's findings for parties. I am content to fix a hearing for that purpose as invited to do so by parties because that information is not known to the court (because in turn it was, and remains unknown to parties).

Conclusion

[168] Parties were agreed at the conclusion of the hearing on submissions that the case ought to call in open court in order that consideration could be given to the terms of the court's final interlocutor. A date will be assigned for that purpose. At that point in time it would be efficient to deal with all matters including expenses and any other motions parties may have.

[169] I shall appoint parties therefore to submit written notes of their submissions together with any supporting authorities no later than 7 days in advance of the diet to be assigned by the sheriff clerk. The notes should incorporate what each party proposes in relation to the payment of the capital sum and periodical allowance. I would expect any motions to be intimated in the normal way in advance of that diet in order that all matters can be concluded then. I would also welcome parties' views regarding anonymisation of this judgment. I will be in a position to correct any clerical or arithmetical errors at that point. I would expect parties to communicate in advance of the diet to identify areas of agreement in this regard.

[170] I reserve all questions of expenses.