Neutral Citation Number: [2021] EWFC 14

Case No: BV18D26133

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of formal hand down: 10/02/2021

Covid-19 Protocol: This judgment was handed down by Mrs Justice Roberts remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be on Wednesday, 10th February 2021, at 10.30 am.

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

WX	**Applicant**
and	
HX	**Respondent**
and	
NX and LX	**Intervenors**

(TREATMENT OF MATRIMONIAL AND NON-MATRIMONIAL PROPERTY)

- -

Timothy Bishop QC and Katherine Cook
(instructed by Payne Hicks Beach) for the Applicant
Lewis Marks QC and Catherine Cowton QC (instructed by Katz Partners) for the Respondent
Edward Cumming QC (instructed by Farrer & Co) for the Intervenors

Hearing dates: 1st, 2nd, 3rd and 4th December 2020

- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Roberts :

1. This is an application by a wife, WX, for a financial remedy order. The other parties to the application are her husband, HX, and their two adult daughters, NX and LX. They were joined as intervenors in the litigation as a result of their status as beneficiaries of family trusts which have been the vehicle for holding a substantial element of the wealth which has been generated during the course of this long marriage. I propose to refer to the parties respectively as "the wife" (W), "the husband" (H) and "the children" notwithstanding that decree nisi was pronounced in December 2020. It is a convenient shorthand and I intend no disrespect to any of these family members in so doing.

2. This was a long marriage of some 33 years. H and W met in the early eighties and were engaged within six months of meeting. They married in 1985 when W was 24 and H 30 years old. Over the course of the next decade, they had four children. In what must have been a tragedy for the entire family, their second child, C, died as a result of a brain tumour when she was very young. That defining family event has left its legacy for each of her parents and her siblings. Those three children have grown into remarkable young adults. Two have already forged, or are forging, brilliant careers of their own in the world of finance and law. E, their only son, is now in his 30s. He has followed in the footsteps of his father and has enjoyed notable success in the world of banking and investment and is now independently wealthy in his own right. N, in her 20s, has qualified as a solicitor and is now working in one of the major City firms in central London. L, also in her 20s, graduated from one of the top US universities. These are the children of their parents who are rightly proud of all they have achieved, as they should be.

3. This divorce and its repercussions for the family have been described during the course of these proceedings as 'a tragedy'. It is a description which is apt for a number of reasons principal amongst which is the complete breakdown in the family dynamic. W is now all but estranged from her two daughters who appear to have aligned themselves with their father. It is not for this court to seek to understand why this has come about. From the evidence which has

been put before the court, it appears to be a situation which has been developing for some time and it has undoubtedly become worse since the issue of these proceedings in October 2018. None of that detracts from the very full contribution which W clearly made whilst these children were growing into adulthood. She described her role as their mother as the central achievement of her life. The current rift with her children has been a matter of much sadness to her and it is one which she hopes and intends to repair. However, the current estrangement between these adult daughters and their mother finds some resonance or reflection in the financial repercussions which now flow from the dissolution of this marriage and it is for that reason alone that I mention it at the outset of the narrative which underpins W's current claims.

4. There are several issues which separate the parties in terms of computation. I shall turn to these shortly. However, the headline figures are not in dispute. Depending upon how certain categories of assets and liabilities are treated, the wealth available for distribution at the end of this long marriage is, in broad terms, somewhere between £50 million (on H's case) and £60 million (on W's case). In fact, H has generated significantly greater wealth over the course of the last 30 years. There is a sum of c. US$50 million held in an offshore trust (the S Trust) in respect of which the children are now the principal beneficiaries. For a significant period during this litigation, those trust assets had been within the scope of W's financial claims. For reasons to which I shall come, she now accepts, on advice, that these funds are no longer 'resources' to which H should be treated as having access. This aspect of matrimonial computation was to have been one of the key live issues in the case since it is accepted by each of H and W that the wealth held within the S Trust has been generated entirely during the course of the marriage. Thus, whilst there remains wealth in the order of tens of millions of pounds which is available for division, a very significant element of what was historically treated as 'family' wealth is now agreed to be excluded from the dispositive powers of the court.

5. In terms of their respective open positions, H has offered to transfer to W his 50% interest in a jointly owned family home in South West London which has

an agreed gross (mortgage-free) value of £13.75 million. On the basis of his presentation of the matrimonial wealth, this would leave each party with roughly half of their combined wealth. W seeks the London family home together with an additional cash sum of £10 million which, on the basis of her proposals, is to be paid from H's personal offshore assets. On the basis of her approach to the resolution of this case, that would leave each with a half share of matrimonial assets worth some £20 million on the basis that her non-matrimonial inherited wealth of c.£14 million net[1] is ring-fenced and retained intact by her at the conclusion of these proceedings.

6. That sets the scene for the issues in relation to computation and distribution which I shall need to determine. Before turning to the detail of the parties' respective submissions and the law which I must apply in reaching my conclusions, I propose to set out the background to provide some context.

Background

7. Both parties will celebrate birthdays in the early part of this year. H will be 66; W will be 60. Whilst the marriage has not been without its difficulties over the years, most notably in 1991 and 2013 when W issued earlier divorce petitions, this has been a long marriage to which both parties have made a full contribution. As she accepts, W has suffered periods of ill health at points in the marriage. She was diagnosed with a bipolar / anxiety disorder and was at one point early on in the marriage hospitalised as a result of her illness. From the evidence which I heard, it appears that she remained relatively well throughout many years whilst the children were growing up. She looked after the family without help from a full-time nanny and I accept that, whatever nuance might have been expressed in H's written evidence, she played a full role as mother and homemaker to these children and to H. He was, and is, a wholly committed father to each of his children and the bond between them about which I heard and read was almost tangible.

[1] comprising c.£9 million held in trust and a further c.£5 million held personally in her sole name albeit deriving from inherited wealth

8. For his part, H has made a very significant contribution to the marriage in terms of wealth creation. He graduated from a US Ivy League University and, when he met W, he had already enjoyed several years as a successful junior banker. Whilst North American by birth, he has lived and worked in England for over forty years. He began his career with a major city bank and was asked by the bank to move to London in 1977 when he was 22 years old. Six years later, he became a partner and an equity participant.

9. Shortly thereafter, he and W met. W is a member of Y family which made its fortune several generations ago in the field of transport. Over more recent years, that industrial past and the wealth it generated provided the bedrock of a successful transition to investment management. W grew up in a financially privileged environment. Whilst still a young child, she had become a beneficiary of an offshore trust set up by her father. As a young woman, she received an income from that trust fund as the life tenant. A further trust fund was set up for her benefit when her father died some six years into the marriage. These are the two trusts which are now worth just under £9 million net. Over the years they have produced for her an independent income which, in the later years of the marriage, has been as high as c.£350,000 gross per annum (some £235,000 net). Whilst there is a power in the trustees to advance capital, she has always regarded these funds as "family money" which is to be preserved and passed down through the generations of Y family members. Over the years, she has been the beneficiary of some limited capital distributions which were used to discharge tax bills in years when she had spent the entire gross income generated by the underlying trust funds.

10. Both parties accept that H was well-qualified to manage these funds on her behalf. W herself would not claim to be financially sophisticated or to have any particular acumen in dealing with matters of a financial nature. Mr Marks QC has described her upbringing as something of an anachronism and it is a description with which I would not disagree. In her own written evidence, W describes how, in financial terms, she "moved from [her] father's care and control into [H's] care and control". She acknowledges that she knew that they were very wealthy as a family and lived in beautiful homes. She was

plainly aware that H was an extremely successful banker and financial investment manager and that he himself came from a wealthy and long-established North American business family. That family connection was in due course to provide him with a platform of independent wealth as he acquired shares in the family company. W was aware that she was a beneficiary of family trusts which provided her with an independent income. Over and above that basic level of understanding, she accepts that her knowledge of the specifics of their financial affairs was very limited. Having listened carefully to her evidence, I do not believe that her lack of knowledge or understanding was in any way the result of any wish on H's part to exclude her from financial discussions about their family position. It is clear to me that W simply had no interest in acquiring an understanding. She grew up as a young woman who had not been exposed to many of the educational and other influences which have rightly shaped her children's life experiences. She recognised and acknowledged very generously whilst she was giving her evidence that H was extremely good at his job and had provided for them handsomely as a family. She regarded herself as having a different role to play and, whilst I do not underestimate the task which presented itself to her advisers as they started to develop a presentation of her (and the family's) financial affairs when these proceedings commenced, I do not accept that there was any intention on the part of this husband during their marriage to keep her in the dark or deliberately side-line his wife over matters of a financial nature.

11. There is little doubt that the family's standard of living over the years was high. Both were living in homes in central London (SW3 and SW7) when they met and married. In 1986, some two years into the marriage, they pooled the sale proceeds from those properties to acquire their first jointly owned matrimonial home in M Street, South West London. Together with the sums they spent on refurbishing that property, they spent close to £1 million. That set the standard for an increasingly comfortable standard of living as the years went by. In 1991, some six years into the marriage, they acquired what was to become a much-loved family home in the country. In that year, H and W acquired a substantial country house in Oxfordshire ("the Oxfordshire property"). That property was bought for just over £1.1 million. It has been

valued for the purposes of these proceedings at £10.65 million gross and is mortgage free. It is where the family spent weekends and some of their holidays away from London. It was where they did their entertaining. It is where H still chooses to spend most of his time when he is not in London during the working week. Whilst W has not set foot in the property since she and H separated more than two years ago, it is the place which N and L regard as their 'family home'. As is clear from their written evidence, it occupies a very special place in their affections and they wish their own children to enjoy it as they did. Their brother, who is independently wealthy as a result of his own career in finance, has not filed any evidence in these proceedings and I am told that he now rents his own country home outside London. Whilst W now seeks to distance her affections for this property, I am satisfied that the family treated the Oxfordshire property as an important part of the fabric of their family life over many years.

12. Recognising his tax status as a non-domiciled UK resident, H was able throughout most of the marriage to make certain tax efficient arrangements in terms of his management of the family's wealth. When it came to the acquisition of the Oxfordshire property, he arranged for it to be purchased through the vehicle of an offshore trust. In March 1991, to coincide with the family's intended purchase, he set up the H Trust which was based in Jersey. Under its terms, he was, and is, both settlor and life tenant. W enjoys a successive life tenancy in the event of his death. The primary beneficiaries are their children and grandchildren. There is in place a professional corporate trustee which is based offshore in Barbados. SZ, H's cousin is a qualified lawyer, lifelong friend and financial adviser. He is now the protector of all the family trusts, including the H Trust.

13. For the purposes of these proceedings, H accepts that the H Trust is a variable nuptial settlement. It is included as a potential asset in the amended Form A which W issued in February 2019 albeit on the basis that she lays no claim to the Oxfordshire property or a share in it. She does not wish to live there and has confirmed that her claim relates solely to any remedy she may have regarding issues of enforcement. The issue of computation which arises in

respect of the Oxfordshire property and the legal ownership of it by the offshore trustee is the value which should be attributed to H's ability to remain there and enjoy the property for the rest of his life or, as Mr Bishop QC submits on behalf of W, the underlying reality of his de facto ownership.

14. There is no issue but that H used his own resources to fund the H Trust which in turn purchased the Oxfordshire property. With W, he had chosen the property as their country home. He had used the facility of the new non-resident trust to complete the purchase thereby avoiding the need to remit the purchase funds to this jurisdiction. That would have created a taxable event for which he would have been liable. The interposition of the tax wrapper (which is essentially what I find the H Trust was) provided the additional benefit of eliminating any liability for capital gains tax on a future sale of the property.

15. On behalf of their two daughters, Mr Cumming QC urges caution before treating the value of the property per se as matrimonial property which is available for division between husband and wife. He points to the potential damage to which such an approach would give rise in terms of the children's status as beneficiaries of the H Trust. He analyses this trust as a bespoke vehicle which was created some 30 years ago to put the three children at the heart of future financial and tax planning whilst allowing H and W to enjoy all the benefits of the trust asset which became a much-loved family home. He concedes that this was a prudent and fiscally sensible means of acquiring the property. However, he submits that the fact that it was placed into a tax wrapper does not, and should not, detract in any way from the rights thereby acquired by the children.

16. There is no doubt that the family thereafter treated the Oxfordshire property as a family home. It is agreed that it provided an idyllic backdrop to life away from the London lifestyle which absorbed them during the week whilst the children attended school. It was where they chose to entertain friends and family. It appears to be the property into which they invested time and love to make it a family home. From his days as a young bachelor, H had developed a passion for art. Whilst the precise value is a matter of some dispute, I am

satisfied that he had acquired some valuable pieces by the time of the marriage in the mid-1980s. Over the years, his collection increased as he purchased further works using both his personal and trust funds to finance acquisitions. Much of his art collection is displayed in the Oxfordshire property. He incurs a substantial cost on an annual basis to ensure it is kept safely and securely. As will be apparent given the size of the property and its environs, it is expensive to run and maintain. I am told that the annual cost to H is in the region of £350,000 per annum.

17. The underpinning of this family's life through fiscally efficient trust structures was not confined to the ownership of the Oxfordshire property. In 1999, two further trusts were set up by H or at his instigation. This step was part of a much wider and forward-looking tax and planning strategy. At this juncture in his life, H had left employment with the bank to work full-time in his family's international business. Leaving the bank's employment produced a significant cash injection for the family. In his written evidence he stated that, in addition to a bonus of c. US$ 5 million, he was able to sell a block of shares he had acquired (including his partnership shares) for c. US$19 million. He used this capital to expand his shareholding in the family business and took on a senior executive role on both the board and the executive committee. Given that these events occurred over 20 years ago, there is no clear financial trace of each of these transactions. However, I found H to be a fundamentally honest witness and I accept what he says in this regard.

18. Whilst these personal and professional developments were ongoing, H had been involved in ongoing and detailed discussions with Mr SZ about tax and estate planning for the longer term benefit of the family. H and W were, on any view, already wealthy by that stage. H was an astute and financially sophisticated individual whose entire professional life thus far had been geared towards the effective management and stewardship of wealth both on his own and his family's account and for the benefit of his individual clients and investors. His talent was obvious: it was in his blood and part of his professional DNA. Having now committed to the future of his family business, he had acquired a significant stake in its underlying equity. He was

keen to preserve the value of that capital stake not only for himself but also for younger generations of his family whom he hoped might take an interest in its future success.

19. For these purposes, H and Mr SZ sought expert professional advice. The product of that advice was a tripartite structure of three offshore entities which together formed a cohesive and interdependent means of minimising tax exposure.

20. The three parts of that structure were comprised of the following.

(i) *The A Trust*

This Bermudan-based trust was settled in May 1999. It was settled by H's late father although thereafter he took no further role in its operation. H and the children were, and are, the beneficiaries. Mr SZ was, and is, the Protector.

(ii) *The S Trust*

Some four months later, in September 1999, a second trust was established in Barbados. The settlor of that trust was a Bermudan shelf company (itself an SPV for these purposes) called N Investments Limited ('N Ltd'). That company was (and is) a BVI entity which had been incorporated in June 1999 in anticipation of its role as corporate settlor of the S Trust. N Ltd was a wholly owned asset of the A Trust. Thus, whilst the beneficiaries of the S Trust were N Ltd and the children, H retained through N Ltd an indirect interest in the S Trust as a beneficiary of the A Trust.

(iii) *N Ltd*

In September 1999, H sold his shares in the North American family business to N Ltd for CAD$25 million. In return he received from the company a promissory note for just under £10.5 million. That sum was expressed to be interest free and payable on demand either in whole or in part. To complete the structure, N Ltd then sold the shares it had acquired

to the S Trust. In turn, it received a further promissory note for an equivalent value which reflected in US dollars the full value of the consideration it had paid by way of its earlier promissory note drawn in H's favour. N Ltd had already issued a special class of voting shares to H which enabled him to continue to control the voting rights attached to his original shares rather than having to relinquish these rights to the trustee.

21. Thus what was a capital asset belonging to H (the North American shares) was effectively converted into an income stream whilst the capital value passed tax free into one of the entities underpinning the structure. This structure thereby provided the "churn" which enabled H to extract value from his family shares when he needed access to funds guaranteed by the existence of the promissory note. The original intention had been to preserve the capital value of the family shares. Any funds paid out under the terms of the promissory note would be generated through the substantial accumulated dividend income which the shares produced. The manner in which the three entities had been set up allowed for the possibility of H being able to access capital in the future although the primary intention had been to place the increase in the value of the family shares outside the taxable parameters of H's estate thereby avoiding a charge to inheritance tax. The trust / loan scheme proved to be a very successful vehicle in terms of both its flexibility and tax efficiency. H retained full control of his voting rights in the North American shares and received full consideration for the value of his shares on a tax-free basis. Those repayments would 'wash through' the structure from the S Trust which was now the legal owner of the shares.

22. H maintains that he was advised at the time that these were properly constituted trusts and that he was alienating his personally owned assets (the North American shares) by transferring legal ownership to the trustee. He knew that there was a risk in taking this step. The significance for the purposes of this litigation is this: whilst there was an element of inherited wealth in the underlying value of the shares, it seems that the greater value in the price reflected in the promissory note for £10.5 million was consideration for blocks of shares acquired separately by H over the course of the marriage.

These were undoubtedly matrimonial assets to which W might otherwise have had a claim in these proceedings. That does not appear to be in issue between these parties.

23. I am satisfied on the basis of everything which I have heard and read that this step, taken by H over the course of 1999, was a legitimate attempt to protect the future capital value of family assets in a tax efficient structure which enabled him to extract value through a future income stream. Whilst any remaining value in the promissory note would remain taxable as part of H's estate were he to die whilst the debt, or part of it, remained outstanding, any increase in the capital value of the family shares would fall outside his estate. In the meantime, he was able to receive the substantial return represented by the loan repayments free of any income or capital taxes.

24. There was no suggestion at this stage that there were any difficulties within the marriage. There was no suggestion that the underlying trust asset of the family shares would ever be sold or realised. The parties had by then acquired family homes in central London and in the country on a mortgage free basis. H hoped and expected that the funds he was to receive under the terms of the promissory note would be sufficient to fund expenditure over the next twenty to thirty years and that he would not need recourse to further capital from the trust structure.

25. He accepts that he did not discuss these arrangements with his wife at the time. With due respect to her, I am satisfied that she had little interest in the way in which he was managing their family finances. As she accepts, she trusted him to continue to work for the future benefit of his family.

26. What H did not envisage at that stage was the hostile takeover bid of the North American company which was to occur some five or six years later. He resigned from the board of the family company and the merger was completed at the beginning of 2005. At that stage, he no longer thought it was in the children's interests for the S Trust to continue to hold the family shares when he was no longer involved in the management of the business. It was at this point that the entire direction and underlying composition of the S Trust

changed. After discussion with Mr SZ and the trustee, H secured their agreement to a wholesale disposal of the family shares for CAD$90 million (c. £52 million). This represented a significant increase from the value attributed to those shares in 1999 when they were placed in trust. There was thus no financial loss for the family at large or the beneficiaries (the children and N Ltd).

27. Having agreed a formal investment policy with the trustees, H thereafter became the de facto investment manager for the funds in the S Trust. The underlying portfolio held by the trustee, Amphora, now comprises some cash and investments worth in excess of US$50 million which includes artwork purchased on H's recommendation worth just under US$5 million. As is clear from the written evidence of Mr SZ:

> "[H] was a gifted investment picker and astute businessman, and throughout all major investments made by [the S Trust] were thereafter made at [his] suggestion and with his effective direction." (para 30)

28. The assets held by the A Trust at this point in time were purely nominal. It is thus this value in the S Trust which W contends has been excluded from the ambit of her matrimonial sharing claims. In March 2020 following the joinder of two of the children to these proceedings, Mr SZ, acting as Protector of the S Trust, executed a deed to which the trustee was a party. That step had the effect of excluding N Ltd as a potential beneficiary of the S Trust. It also operated as a formal and irrevocable release of the trustee's power to add H, W or any legal entity controlled by either as a future beneficiary. This step was taken according to the evidence of H and Mr SZ to ensure that the primary purpose of the S Trust remained the preservation and growth of capital held within the trust for the benefit of the children of this family.

29. On 4 May 2020, W's solicitors wrote to H's solicitors identifying a potential loophole in the deed which precluded W from providing an absolute concession that the assets of the S Trust were effectively "off the table" for the purposes of the forthcoming trial. They pointed out that there was no effective prohibition on the transfer by the trustee of assets to another trust of which the children were beneficiaries with those trustees then adding H to the class of

potential beneficiaries. That loophole was subsequently closed in June 2020 when Mr SZ and the trustee entered into a further deed of variation. As a result of these steps, W formally conceded at the end of July 2020 that H could no longer benefit from the S Trust and that the underlying trust assets were no longer resources available for distribution within the ongoing financial remedy proceedings.

30. Prior to the sale of the family shares in 2005, H had not made any call for repayment under the terms of the promissory note. He did not need the funds and the significant dividend income generated by the shares was rolled up as an accretion to the S Trust assets. With greater liquidity within the trust and the loss of the salary he had been drawing from the company following the 2005 takeover, H took the view that he could trigger a request for payment of the loan note without compromising the trajectory of capital growth.

31. Mr Bishop QC relies on the events of the next three years as evidence of the matrimonial nature and provenance of the funds flowing from N Ltd into the family's coffers. There is no issue between the parties in relation to the facts and figures underpinning the distributive process from the trust structure which followed or the application, in general terms, of the funds which were paid to H. Initially, a repayment schedule of £30,000 per month (£360,000 per annum) was agreed. However, in the early part of 2006, H and W took the decision to move from their London family home in M Street to a much larger property. They viewed the present family home in South West London and decided to make an offer. In the absence of a purchaser for their home in M Street, H approached Mr SZ with a request to accelerate the promissory loan note repayments. With the agreement of the trustee, a sum of £6.65 million was advanced from the S Trust through N Ltd for these purposes. The purchase was competed on a mortgage free basis in October 2006. Over the course of the next two years, the parties spent very significant sums improving and refurbishing their new London home to their taste and requirements. By this stage, the family's annual expenditure was increasing exponentially. With regular holidays to Mustique and the rest of the world and flights on private jets, H was obliged to request several further advances in respect of the agreed

schedule of loan note repayments. By early 2008, the promissory note had been repaid in full. The final payment of just under £1.15 million was paid to H in mid-February 2008. The proceeds of the M Street property, when it finally sold later that year, were ploughed into meeting the family's general expenditure requirements and the ongoing renovations being undertaken at the London property.

32. In 2006, the parties were presented with the opportunity to purchase a property which was situated at the end of one of the drives leading to the Oxfordshire property. B House was strategically placed to enhance security at the main house and it offered the opportunity to provide accommodation for one of the employees who looked after the property. The trustee of the S Trust agreed to advance funds of c.£573,700 to enable the acquisition to proceed. The property is now an asset of the S Trust along with some of the valuable art which it acquired at the suggestion of H and which is now hanging on the walls of the Oxfordshire property.

33. Thus by the beginning of 2008 the parties had relocated in London to a much larger home and the family was now living between London and the Oxfordshire property. H continued to secure the odd directorship which brought in additional income and he continued to manage the underlying investments of the S Trust.

34. However, the clear bright lines which have now been established in relation to the underlying beneficial interest in the assets of the S Trust were less sharp over the course of the subsequent years through to 2017. It is accepted that H continued to receive funds which derived from the S Trust. These were applied in the main to fund the general expenditure which the family was incurring in meeting the costs of maintaining their lifestyle. Over the 11 years between 2006 and 2017, H received a total of a further c.$33.57 million from the S Trust. It is common ground that from 2011, these payments were channelled to H from the S Trust through the A Trust (of which he was a beneficiary with the children). Mr SZ's evidence was that both sets of trustees had to be consulted in advance of these distributions which were also approved by the corporate protector of the S Trust. Mr SZ did not assume that

role until the end of 2017 and there seems to have been very little documentation produced throughout this period. All the sums distributed to H in this way were funded by dividends generated by the S Trust assets on the basis that the capital value was being preserved for the benefit of the children.

35. The final payment to H from the promissory note in March 2017 was US$23.3 million. This payment was expressed to have been authorised by the trustee as a payment "to provide funds to the [….] family for various living expenses in 2017". This was also a payment which was designed to utilise what H has described as the "one off opportunity" to benefit from the rapidly closing window imposed by the UK Government in terms of the previous tax breaks afforded to non-domiciled UK residents. The proposed tax changes would mean that, from April 2017, H would in future be heavily taxed on any sums which he received via N Ltd and the A Trust.

36. The solution which was settled upon by Mr SZ and the tax advisers who were engaged was for funds to be paid out to H which he would then lend to a new offshore SPV in much the same way as the N Ltd route had been deployed. At the end of May 2017 a new BVI company was incorporated (M Inc). A similar template was adopted by H and the trustees. Having received from N Ltd a payment of US$23.3 million in March 2017 just prior to the implementation of the tax changes, H loaned a sum of c.£9.285 million to M Inc in return for a five-year interest-bearing promissory note. Those funds were in turn loaned by M Inc to the A Trust ensuring the means of continuing payments out of the trust to H on a tax-free basis[2]. The value of that promissory note to H as his personal asset has been included by agreement in the asset schedule which has been produced for the purposes of this hearing.

37. I shall need to return to specific aspects of H's use of those funds in due course as part of the overall computation exercise. However, by this point in time there were clearly difficulties emerging within the marriage from W's perspective, if not from H's. By the summer of 2018 she had decided to proceed with a divorce and her solicitors wrote to him communicating her

[2] Mr Marks QC makes the point that this was now H's money and not the Trust's and that he was only able to benefit from those funds on a tax free basis because he did not remit the funds to the UK.

intentions in early September 2018. They formally separated later that month and this litigation commenced in October 2018 with the issue of her financial claims. Whilst he has continued to maintain a presence during the week in their London home, W has not visited the Oxfordshire property since the separation.

Specific issues re: computation

38. As a preliminary point, I make it clear that I am proceeding on the basis of the updating / valuation date which was specified in my case management order dated 4 March 2020, i.e. 18 September 2020 ("the valuation date"). That order, and its terms relating to the timetable for producing and agreeing an asset schedule, was specifically designed to avoid last minute alterations to the figures driven by volatility in the markets. I accept that the court must work on the basis of the valuation of the assets as at the date of trial. The valuation date which was agreed for these purposes was intended to reflect contemporaneous value whilst eliminating all the problems caused by constantly evolving asset schedules in the run-up to a final hearing. To the extent that H seeks to rely upon updated valuations beyond the valuation date, fairness dictates that W should not be prejudiced by these late changes. Just as there will have been fluctuations in the underlying trust assets on H's side of the asset schedule, so too will the value of W's trust assets have moved up or down. It was for precisely this reason that there was consensus in relation to the valuation date which was selected.

(i) The value to be attributed to the Oxfordshire property held within the H Trust

39. In terms of the parties' respective approaches to the resolution of this litigation, there has been a significant debate about how the value of the Oxfordshire property (owned by the H Trust) should be reflected in the schedule of assets. It is accepted by W that H will retain the property at the conclusion of these proceedings. H's position in this respect has changed in terms of his presentation for the final hearing. His concession that this trust constitutes a nuptial settlement which is susceptible to the court's powers

under s 23(1)(c) of the MCA 1973 remains undisturbed. However, despite previous iterations of wider concessions in relation to the underlying equity, H now seeks to argue that the court should not attribute to him the full value of the property since his interest is more properly reflected in the value to be attributed to the life interest he has in it.

40. The property has an agreed gross value of £10,650,000 (£10,330,500 after allowance is made for costs of sale). In terms of his consistent presentation throughout the course of these proceedings, H has acknowledged that the value of the Oxfordshire property should be allocated to him. He included the full value of the property as his asset in his initial financial presentation in Form E together with a corresponding liability for CGT. At a directions hearing in July 2019, Mr Marks QC accepted openly on his client's behalf that the property was "fully nuptial": *"He accepts the entire value is in the pot"* and that *"the assets of [the H Trust] … are resources … falling within the court's power"*. In H's substantive s. 25 statement (essentially his evidence in chief) sworn at the end of July 2020, he stated: *"I have accepted for the purposes of these proceedings that the trust is nuptial and its value can be attributed to me"*. The open offer which H made in August 2020 in the weeks leading up to the final hearing was predicated on the basis that each of the parties would leave the marriage with a share of the matrimonial assets of broadly equal value. For these purposes, H included the full value of the Oxfordshire property on his side of the net effect table he produced, albeit under the heading "Trust assets".

41. Mr Bishop QC urges me to look at the reality of the position. Whilst H's open offer made the point that he could not access the capital value of the property through sale or mortgage, he nevertheless conceded that, for the purposes of his offer and the court's assessment of its fairness in terms of outcome, no discount should be applied in terms of underlying value.

42. On 28 October 2020, the SJE provided an updated valuation report in which he expressed the view that the freehold value of the main house (without B House – separately valued at £650,000) was £10.65 million. As to the value of H's life interest in the H Trust, the SJE came up with a figure of £1.45

million. In reaching that figure, he assumed that H should be treated as having a tenancy of the property for the rest of his actuarial life expectancy at a market rent (being an income yield of 5% of the value of the freehold interest). Assuming a life expectancy of 19 years, he reached his figure of £1.45 million.

43. I agree with Mr Bishop QC that this figure is more or less meaningless. That much is accepted by the SJE himself who caveats his figure with this warning: *"This valuation is highly unusual and there is no comparable evidence in the market place, so the figure is theoretical"*. That was a view shared by Macur J (as she then was) in the earlier case of *WF v HF* [2012] EWHC 438. In this case Mr Marks QC agrees that this figure is no more than one way of approaching a discounted value which, depending on the circumstances of any particular case, could be anywhere on the spectrum from 0% to 100%. He argues that the figure cannot be 100% of market value on the facts in this case because H will not have the financial flexibility afforded to W through her unfettered ownership of the London property. Mr Marks QC is nevertheless realistic enough to include in his presentation on H's side of the asset schedule his client's interest in the trust assets of the H Trust – i.e. the balance of the value of the Oxfordshire property over and above the hypothetical value of the life interest attributed to H by the SJE.

44. H's position has been shored up by the representations now made by Mr Cumming QC on behalf of the parties' adult daughters. For these purposes, I have well in mind the likelihood test for the attribution to an individual of trust assets: see *Charman v Charman (No. 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 and *Whaley v Whaley* [2011] EWCA Civ 617, [2011] All ER (D) (May), CA.

45. The court has to be alive to the underlying reality of any situation where trust structures have been deployed during the currency of a marriage. That is so regardless of whether such deployment has been achieved for legitimate or illegitimate purposes. As I have said, I am quite satisfied that, in this case, the husband's motives in establishing the trust structures which have been deployed throughout most of this marriage were legitimate and in line with the wider interests of the family. He had generated, and was responsible for the

management of, considerable wealth. He had taken on that role with the blessing of W who I suspect would be the first to acknowledge that she did not have the financial skills or acumen which he brought to the role. Over the course of a number of years, this family had the very considerable tax benefits which flowed from this structure. In its component elements, it may have been expensive to set up and administer but it is clear to me, as it was to H, that these expenses were a small price to pay for the savings in tax which were achieved. Until 2017, there was no apparent restriction on H's ability to operate his financial affairs in this manner and these tax savings went a considerable way to enhancing the value of the funds available to this family in terms of its lifestyle choices. Those were valuable benefits but with those benefits came the burden of relinquishing formal ownership of (and thus a significant degree of control over) the underlying trust assets. It is clear from the unchallenged evidence of both H and Mr SZ that he was given a clear warning about the legal implications of alienating assets into the trust structures.

46. In relation to the H Trust, I bear in mind, as I must, that H set up this trust as the vehicle for the ownership of a specific property which was chosen and retained as a much-loved family home. None of the family members who value that home contemplates a sale of the property. H's concern is that to treat it as "cash" in his hands when he cannot realise that cash value without the cooperation of trustee, protector and his children would lead to an unfair result. However, to approach its value to him on the basis that he is little more than a tenant in that property for the rest of his life is, in my judgment, a flawed approach on the basis of the facts in this particular case.

47. When this arrangement was set up, H's eyes were on tax efficiency and the need to preserve family wealth from what he saw as the predations of tax. There is no issue that H's own resources were used to purchase the Oxfordshire property. It was purchased during the marriage as a family home. Their two elder children were under 5 years old when the purchase was completed and their two daughters who now intervene in these proceedings had not yet been born. Whilst I bear in mind that the first episode involving

the collapse of W's health occurred very shortly after the acquisition of this property, she recovered her health and the parties reconciled. I find on the balance of probabilities that there was no thought in H's mind when the H Trust was established as the means of acquiring the property that the asset might need to be secured or protected in the event of any future claims in a divorce scenario. For many years thereafter, and until the final separation, it was a home which was integral to family life. As H told me during the course of his oral evidence, *"The house is not just about money. It is part of who we are and what we want to do"*. Whilst he accepted that there had been some discussion many years before about moving to a country property with a shoot, that idea had long been abandoned.

48. Unlike the current position in relation to the S Trust, H has rights in relation to the Oxfordshire property as its life tenant. It is accepted that the property will be treated as part of his estate for the purposes of inheritance tax. H was transparent and, I find, honest in his oral evidence when he told me that he had been on a "significant learning curve" through the current divorce process. Until these arrangements became the subject of intense forensic scrutiny through the disclosure process, I am sure that H regarded himself as retaining a significant element of control over the structure of his family finances. Until the proceedings commenced, and for some time thereafter, these adult daughters apparently knew very little about the scale of the wealth which was sheltered for their benefit within the trust structures which H had set up. On one view, they were independently wealthy young women in their own right having received substantial benefits from the maternal and paternal sides of the family. They have, or anticipate acquiring, their own mortgage-free properties in central London and both can look forward to successful careers of their own. Neither H nor W had yet engaged in family discussions about estate planning and, but for the divorce, there is nothing to suggest that either of these parents would have commenced those discussions with their children at this stage of their lives. I had the impression that this is part of the 'tragedy' which H described to me when he was speaking about the family breakdown which flowed from the divorce. His current reality is that, with these arrangements now being scrutinised on a formal basis, he has less flexibility

within the trust structures than he might have intended when they were set up. The court proceedings have impacted not only on the financial security which his lifetime's work was designed to produce for his family; they have accelerated the point at which he and W have had to involve their children in these arrangements. That, in turn, has impacted on the flexibility which H once had to organise family wealth without the more formal constraints which now tie his hands as a result of the recent Deed of Exclusion entered into by the trustees.

49. During the course of his oral evidence H was taken to the terms of a memorandum which was prepared in 2003 for the purposes of providing W with some reassurance about her financial situation in the event of H's death. She told me that he was a very frequent flyer back and forth across the Atlantic and, with Mr SZ based many thousands of miles away in North America, she wanted reassurance that, if anything were to happen to H, she would have financial support and the flexibility to manage life going forward for herself and the children. Mr SZ prepared the 2003 memorandum which was provided to W and a close family friend who had volunteered to support her for these purposes. The memorandum provides a clear and comprehensive account of all H's assets and the structures within which they were held. As a 'road map' it is a very helpful document. Whether or not W absorbed its contents at the time, she retained the copy of the document she was given and has produced it for the purposes of these proceedings. That memorandum confirms that, under the terms of H's Will, she would become the outright owner of their London home. She would also own the contents of the Oxfordshire property. The balance of H's estate, including his interest as the life tenant of the H Trust, would pass to her. The memorandum contained a specific assurance that, if W wished to sell the property, the trustees would follow her wishes and she would receive both the income from the sale proceeds and, if she needed it, the capital as well. Subject to that, the capital value of the H Trust would pass to the three children.

50. The 2003 memorandum also set out details of the operation of the promissory note issued by N Ltd, the proceeds of which would be paid to W on a tax-free basis in the UK.

51. On behalf of W, Mr Bishop QC points to this document as clear evidence that the arrangement in relation to the Oxfordshire property is one which is susceptible to variation in circumstances where a consensus exists between H, Mr SZ and the trustee. He points to the clear lines of communication between all three in the past and the pattern of dialogue and discussion which has been opened and concluded whenever H has previously wished to utilise trust assets. He submits that the concessions which H has consistently made in the past in relation to the Oxfordshire property reflect the true underlying reality of the position. These were concessions which were made in the full knowledge of his daughters' views about the property. H was asked specifically about the unlikelihood of his daughters standing in the way of a sale if that should prove necessary or desirable at some point in the future.

52. H was very honest in his response to that question. He accepted that the position had changed from 2003 in that the trustee would no longer be looking at a situation where W had been left to run a substantial country property with very young children who needed her full-time care. He had told her in these circumstances she should just take a year before she made any important decisions about her future. He was confident that his close friend and trusted adviser, Mr SZ, would have been there to support whatever her wishes might have been. Turning to the current situation, H told me that he did not know how the trustee and Mr SZ would adjudicate as between the various interests of the beneficiaries. He wanted to believe that, if as a family, he and the children were to agree on a course of action, he could "try very hard for us to go forward together and any such decision would be a shared and mutually agreed decision". He recognised that he had a duty to do things properly and legally. He told me he was aware that Mr SZ and the trustee would be astute to balance and protect the interests of the beneficiaries were he to act wilfully or capriciously. He stressed that he was not saying to me that he believed that his daughters would prevent him from selling the property should he need to

take that course. This evidence was supported in terms by Mr SZ who confirmed that he and the trustee would be unlikely to stand in the way of a family decision were there to be a consensus that the property should be sold and capital advanced to H. As he said to me, if confronted in 2003 with a situation where the family wanted to sell the property, he would not regard these trusts as "locking the family in". In my judgment, the trustee and Mr SZ would not be likely to oppose a similar request were it to come in future from H and the children.

53. During the course of her evidence, W told me about a conversation between H and his elder daughter, N. It had taken place at the Oxfordshire property during a Saturday morning over one summer. There had been a discussion about the possibility of H leaving the country to establish residence elsewhere for tax purposes. W told me that N had encouraged her father to leave if this was a better course for him in terms of his tax position even if that were to involve the sale of the Oxfordshire property. She was not challenged in relation to that particular piece of evidence.

54. I accept that H and the girls have no wish to sell the Oxfordshire property. I understand and acknowledge the significant emotional attachment which all three have to the property. Equally, I acknowledge the very close bond which exists between this father and his daughters. Whilst W holds to the view that he has sought to influence their daughters' views, the reality of the situation is that their interests are very much aligned in these proceedings with those of their father. They have a common aspiration to continue to enjoy their family home in Oxfordshire and they have clearly determined to join cause with their father in supporting his position that he does not have an unfettered right to do as he wishes with the property. He, in his turn, has been both honest and fair in his evidence to this court that, were he and they to act together to present Mr SZ and the trustee with a plan which involved some different arrangement in relation to the Oxfordshire property, he had reason to hope that approach might be considered and acted upon. He was quite clear that his current aspiration was to continue to enjoy the property and all its amenities for the rest of his life.

55. I bear in mind, as I must, that N and L are now wealthy young women in their own right. They have already received just under US$4 million between them from their mother's side of the family and a further US$3 million each from their father in 2017 following the distribution by the S Trust to N Ltd. They are now beneficiaries of a trust which holds assets worth in excess of US$50 million. All of that wealth was generated in one way or another by their father during the subsistence of his marriage to their mother. Neither of their parents has any future claim on those funds. These are relevant circumstances which any professional trustee exercising fiduciary responsibilities would need to take into account in the context of some future approach on behalf of its life tenant and primary beneficiaries.

56. Mr Bishop QC points to the fact that the terms of the H Trust have been drafted in such a way as will enable H to override any future opposition from the trustees. The deed contains clauses which enable him to replace both the trustee and the protector. It makes specific provision which enables the trustee to ignore the interests of potential beneficiaries and release capital to the settlor. Mr Cumming QC makes the point that neither H nor W required either of their daughters to submit themselves for cross-examination in relation to the content of their written statements. He reminds me that, whilst H as settlor has reserved the power to appoint new or additional trustees, he does not have the power to remove the trustee and that the power of appointing new trustees is fiduciary in its nature: see *In re Skeats' Settlement* [1889] Ch 522.

57. On behalf of the adult children, he submits that in order for H to access the underlying value in the property, a number of steps would need to be undertaken. First, the trustee would need to be persuaded that it was in the best interests of all the trust beneficiaries for capital to be appointed out to H. Second, the trustee would need to secure the agreement of the protector. Third, and finally, the children would need to come on board with the arrangement and elect not to challenge the proposed course of action through the courts. He submits that circumstances have changed since the 2003 memorandum was prepared. Given the apparently strident opposition of the girls to a sale of the Oxfordshire property, the trustee would be obliged to

factor this into its deliberations although along with the fact that W, as H's successor to the life tenancy, was an independently wealthy woman in her own right.

58. Further, he submits that the H Trust cannot be regarded as what is often described as a "Dear Me" trust or, as he put it, "an oligarch's plaything in the Turks & Caicos Islands". Whilst H can expect to enjoy the resource of living in the property for the rest of his life surrounded by all the beautiful contents with which it has been filled over the years, the likelihood is that the property will remain a trust asset until his death. Save in circumstances where the court makes an order in these proceedings which leaves him in a position of having insufficient liquid resources to meet his ongoing needs, he is unlikely to see any direct financial benefit from the underlying trust asset which is represented by the Oxfordshire property. In this context, he submits that it cannot be seen as an asset which is likely to be available to H as a future resource pursuant to *Thomas v Thomas* [1995] 2 FLR 668. In that case at p. 68 Glidewell LJ defined these principles:-

> "(a) Where a husband can only raise further capital … as the result of a decision made at the discretion of the trustee, the court should not put improper pressure on the trustees to exercise that discretion for the benefit of the wife.
>
> (b) The court should not, however, be 'misled by appearances'; it should 'look at the reality of the situation'.
>
> (c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees."

59. This is not a case where it is suggested that trust assets may need to be invaded in order for a husband to put in place a suitable raft of financial provision for his wife and/or their children. As far as the children are concerned, that provision has been made on an inter vivos basis and all three surviving

children are now the beneficiaries of trusts which together hold assets worth many tens of millions of pounds. As I have said, that factor is something which the trustee and protector would be bound to take into account were they required in future to weigh and balance any combined approach by H and the children, or H alone, for some form of financial assistance. What this comes down to as a matter of practical application and fairness is the extent to which a division or sharing of the matrimonial property in this case which includes on H's side of the balance sheet the full value of the Oxfordshire property meets overall fairness in terms of financial value and flexibility. There is no issue that W will be free to do whatever she chooses with the London property. On her behalf, Mr Bishop QC submits that the court should draw no distinction between the two properties in the context of its approach to sharing.

60. In this context, none of the parties is asking the court to vary the terms of the H Trust pursuant to s 24(1)(c) of the 1973 Act. That power is undoubtedly available to the court given its nuptial character. The exercise of that power would enable the court, if satisfied that the order would be implemented offshore, to extract the Oxfordshire property from the trust and make outright provision in H's favour. I recognise that there are a number of fiscal and other reasons which make that an unattractive option. The court should not interfere with existing trust arrangements unless it is necessary to achieve an outcome which is fair to both sides and caution is required where the rights of innocent third parties (such as beneficiaries) will be adversely affected: see *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 per Munby J at para 290.

61. However, what is equally clear is that the court is enjoined to look at the underlying reality of the situation which presents itself in any given case. Over and above his life interest in the H Trust, H has no direct legal or proprietary interest in the trust property but I must ask myself whether this is a resource all or part of which is likely to be available to him either immediately or in the foreseeable future. As Lewison J (as he then was) acknowledged in *Whaley v Whaley* (above), no judge can make a positive finding about the

future. The best he or she can do is to assess likelihood: see para [113]. Representations put before the court at the behest of a trustee or protector (or even the expressed views of beneficiaries) are not determinative of the position. What is required in circumstances where the court is not being asked to deploy the mechanism of formal variation is what Mostyn J described in another case as "a deal of worldly realism": see *BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 at para 25.

62. In her written evidence, NX acknowledges that her parents have accepted and agreed for the purposes of these proceedings that the H Trust is essentially nuptial in its character. She further acknowledges that the purpose of the trust structure was to try and keep the property in the family. She speaks of her feelings of "devastation" were the property to end up being sold. She and her sister (and, I will assume, her brother for these purposes) are aware that their mother is making no direct claim to this property in these proceedings.

Conclusions in relation to the Oxfordshire property

63. Standing back, as I do, and looking at this family scenario with the required degree of 'worldly realism', I have reached the following conclusions. There is no immediate or reasonably proximate threat to H's continued occupation of this property as a family home. The only crunch point which might come is at a time further down the road when his resources are such that he might need access to further capital to run and maintain his lifestyle. He acknowledges that the Oxfordshire property in terms of its age and size is expensive to run. The amenity which he enjoys of having his (and the S Trust's) art within the property represents a significant cost to him in terms of ongoing security. He will need to make a number of decisions, as will W, once my judgment is made available at the conclusion of these proceedings and each party knows where he or she stands. I shall have more to say about the respective needs of these parties in due course.

64. Given the evidence which is now before the court, I do not believe that either the trustee or Mr SZ would be likely to stand in the way of a joint approach from H and the children were they together to request some form of

restructuring in relation to these family trust assets (and for these purposes I exclude the S Trust). The order which I intend to make will leave each of H and W with a fair share of the available assets and I would not expect H to *need* to make such an approach to the trustee. Ultimately it will be a matter for him what he chooses to spend over and above meeting his ordinary day to day expenditure. These will be discretionary lifestyle choices and they will be made against the background of the standard of living which the parties enjoyed during the many years of their marriage, which I accept to be high. I bear in mind that H was able to access the funds held within the S Trust over a significant number of years as a result of the tripartite structure which was set up in 1999. He may or may not have anticipated that the very substantial distribution made to him in March 2017 was indeed the final benefit he was likely to see from this source. There were no divorce proceedings ongoing (or even contemplated) at that stage. He conceded in his replies to questionnaire that *"in extremis the trustee might theoretically consider him for further distributions"*. This avenue has now been closed by the exclusion last summer of N Ltd and H from any possible future benefit.

65. H was been well advised by his legal team during the course of this litigation. That team is well versed in the law and the approach which the court is likely to take against the background of the facts in this case. H has consistently accepted and acknowledged that "the entire value" of the H Trust falls into the pot for the purposes of the section 25 exercise which the court is enjoined to undertake. In his recent written statement, specifically prepared to address the s 25 factors which are engaged in the case, he accepted openly that the trust was wholly nuptial *"and its value can be attributed to me"*. The entire value of the trust is represented by the value of the Oxfordshire property: there is nothing else. H's open offer made in August 2020 properly reflected the full value of the property as an asset of his for the purposes of its net effect on their respective financial positions. It was a concession which was, in my view, properly made notwithstanding his formal status as the life tenant of the trust. Indeed, it was that status which was used to demonstrate to W and her advisers that this was a generous offer and one which she should accept.

66. The parties (and the SJE) accept that the value which has been attributed to H's life interest in the H Trust is purely notional and not a reliable indicator of true financial value now or in future. It seems to me that, absent any form of reliable evidence or agreed methodology, it would be both arbitrary and unfair were I to attempt to adjust the value of the Oxfordshire property by imposing some equally notional form of discount of my own. In my judgment the facts speak for themselves. There is little or no likelihood of a sale of this property in circumstances where H and the children wish to preserve it as a home for themselves and future grandchildren. Those children (and their children) are now the only beneficiaries of the S Trust which has assets of over US$50 million under active management. That trust already owns B House and much of the art which hangs on the walls in the Oxfordshire property. Given that each of the individual beneficiaries has independent wealth outside their interests in the trust as well as what is likely to be a substantial earning capacity going forward, I do not believe that their interest in retaining the property is likely to be appreciably damaged by attributing its value to H for the purposes of the computation exercise in these matrimonial proceedings. It reflects the entirely realistic stance which H has taken throughout these proceedings as well as what I find to be the underlying reality of the situation. These two family trusts now share the same trustee and protector. I find it difficult to conceive of circumstances in the future where these children would seek to stand in the way of a reasonable request from their father to join with him in an approach to the trustee/protector were he to find himself in a position where he needed additional funds to maintain himself or one of the trust assets (i.e. the Oxfordshire property). Mr Bishop QC has made the point that there are sufficient assets in the S Trust to enable the children at some point in the future to extract the Oxfordshire property from the H Trust through an arm's length purchase of the asset. Since H is now excluded from all and any benefit flowing from the S Trust funds, I can see that there may be an issue for the trustee and/or protector in applying funds from the S Trust for that specific purpose but I do not need to speculate about that. They have been ready in the past to harness expert professional advice in order to find legitimate and tax efficient solutions when situations affecting the family and/or the operation of the trusts have arisen in the past.

67. The fact of the matter is that this H has always accepted for the purposes of this litigation until very recently that, in terms of any sharing claims he may have, he should be credited with the full value of the underlying equity in the Oxfordshire property. Whether that value is reflected in presentational terms as an outright entitlement or as the combined value of a life interest enhanced by his concession that any residual value is matrimonial in its provenance, it seems to me that it would be wrong to proceed on the basis that he will not be retaining the benefit of the full value of what has been his family home for the last thirty years. I accept that he may not have the same degree of flexibility as W in terms of his ability to borrow against the property were he to approach a commercial lender. I am nevertheless satisfied that the structures he has set up, operated as they are, and have been, through the professional trustee and the protector, will afford him the opportunity with the cooperation of his children to enjoy the occupation of that property without the need to contemplate a sale. In my judgment it would be unfair to W at this late stage to proceed from the foot of a completely different case such as that which is now being advanced by H. It is clear to me that he regards the main threat to his ability to remain in the property to be W's claim for a lump sum of £10 million over and above the transfer of his interest in the London property. He regards such a claim as impacting very significantly on his remaining liquid resources and thus his ability to run his own domestic economy over future years in this jurisdiction. To the extent that there needs to be some adjustment to reflect these matters, I take the view that can better be done at the discretionary stage of distribution.

68. For these reasons, I take the view that the full value of the Oxfordshire property falls to be counted on the matrimonial balance sheet as an asset of H's.

(ii) B House and the art owned by the S Trust

69. Different considerations apply in relation to B House and the art which is owned by the S Trust. The value of the former has not been included in the valuation of the main family house in Oxfordshire. It was acquired separately several years after the purchase of the main house. Whilst it provides

accommodation for an employee who looks after the gardens and security at the main house, it provides no *direct* financial benefit for H over and above the general amenity value of being able to offer accommodation on site to one of his employees. In a similar way, whilst he has no doubt guided the trustee's purchases in relation to the art from the foot of his personal preferences as well as their investment value, he cannot sell the art and, other than through a wholesale rearrangement of the family trust structure, there is no prospect of him realising value for his personal benefit. Of course there is a benefit (and no doubt great pleasure) in having the art in his home. But to the extent that it is part of that home, it is equally a benefit which is available to the children (and, in due course, their children) who are also beneficiaries of the trust.

70. Thus, these assets of the S Trust will be excluded from the schedule of these parties' resources.

(iii) Chattels and art owned by the parties personally

71. Values have been agreed in respect of the art and valuable items which the parties own personally. An *in specie* division has been agreed on the basis that H will retain chattels worth c.£3.4 million out of a total value of just under £3.9 million. These figures include the general household contents.

72. In terms of general household contents, there is a disparity in the value which each party will receive under the agreed division. For these purposes the parties have adopted discounted insurance valuations and made an allowing for costs of sale. There was a divergence between them as to the value of the general contents which each will retain in the homes they will occupy at the conclusion of these proceedings. This is no longer an issue. H will retain general contents worth just over £630,000 in the Oxfordshire property and W will retain contents worth c.£327,000 in London. On W's behalf, Mr Bishop QC submits that these values should be included in order that allowance can be made in his client's favour for the imbalance. He points to the fact that general household contents have been included before in the parties' presentations and W had a legitimate expectation when she agreed the *in specie* division of the other contents that values would be equalised. He

reminds me of his client's oral evidence about the contents at the Oxfordshire property. She told me that the different sizes of the two properties and their respective functions as venues for entertaining friends and family over the years meant that they had been furnished and equipped very differently. I heard about four poster beds and two dishwashers which were needed at the Oxfordshire property whereas the contents of her own home in London had been purchased in the main from Peter Jones.

73. Given the extent of the resources in this case and those which will be retained by W at the conclusion of these proceedings, I do not propose to include in the asset schedule any allowance for general, as opposed to specific, household contents. W will have more than ample resources, should she so wish, to spend whatever she regards as reasonable to re-equip her central London home, assuming that is what she wishes to do. Given the allowance I have made for the full value of the Oxfordshire property on H's side of the balance sheet, I do not regard the absence of a full equalisation in respect of everything from beds, tables, white goods and Mr Marks' (perhaps predictable) "teaspoons" to be in any way unfair on the facts of this case.

(iv) Tax

74. There is an issue between the parties as to whether or not account should be taken of their individual liabilities in respect of tax.

75. These potential liabilities arise in the following context.

H's potential tax liabilities

76. H has offshore assets which total some £11.56 million. Aside from the value to H of the M Inc loan notes, there is some small residual value in the A Trust through both N Ltd and M Inc. I have explained earlier in this judgment the basis upon which H was able to extract funds representing the crystallised value of his shares in the family business on a tax-free basis when those shares were transferred into the S Trust. The loan notes issued by N Ltd were fully redeemed by the early part of 2008. Using the same structure (albeit with a different SPV), H is currently owed £9,285,770 by M Inc. Since M Inc is an

offshore entity which is wholly owned by the A Trust (itself registered in Bermuda), H will not pay any tax on realising these funds unless they are remitted to this jurisdiction. The main asset of the A Trust is an investment portfolio worth £10,318,326 (the Scotia portfolio). The funds invested in the portfolio derive from part of the distribution of US$23.3 million which H received in March 2017 from the S Trust. He accepts that these funds are matrimonial in terms of their provenance.

77. More or less the entire value of the Scotia portfolio is offset by the liability of M Inc to redeem the promissory note in the sum of £9.285 million. During the marriage H was able to remit the loan note repayments to this jurisdiction when he required funds since these were treated by HMRC as "clean" capital from the sale of his shares in the family business. Most of these funds were invested in the acquisition of the London property. On behalf of W, Mr Bishop QC contends that H will adopt a similar strategy with the funds which he is owed by M Inc. He submits that no allowance should be made for tax for three reasons. First, the funds will not be remitted so as to create a taxable event. If H finds himself in a position of needing funds in this jurisdiction, he will deploy a similar mechanism of interest free loans as he has done in the past. Secondly, on the basis of W's claim for £10 million over and above the transfer of H's interest in the London property, these funds will be absorbed almost entirely in meeting that lump sum claim. Since value can be delivered to W without incurring any tax liability if the funds are transferred to her offshore and then remitted by her to the jurisdiction, he submits on behalf of W that H should not be treated as having a potential liability in respect of tax on these funds when no such liability is likely to arise in practice.

78. In terms of quantifying the potential patriation tax, Mr Marks QC has calculated that, leaving aside any tax on the outstanding loan note, a straightforward distribution to H of the residual assets held in the A Trust is likely to be marginally less than £680,000 in round terms. There is disagreement between counsel as to whether, were he to remit funds received in repayment of the M Inc promissory note, such remittances would be taxed at 45%, i.e. a liability of some £4.178 million. Mr Marks QC submits that the

only way his client can avoid this liability is to move offshore, permanently, to a tax haven. He points to the fact that, even on the basis of his own offer which does not involve the payment of a lump sum to W, H will need to remit funds to the UK in order to fund his living costs in this jurisdiction. He says that if tax is to be allowed in relation to W's separate assets, I should be even-handed in my treatment of H's potential tax liabilities.

79. My conclusion in relation to computation of the tax on H's side of the balance sheet will follow once I have set out the position in relation to W's potential tax liabilities.

W's potential tax liabilities

80. W's largely inherited non-matrimonial assets are also pregnant with a liability in respect of tax. That liability would crystallise were she to seek to realise capital value in any of her funds. Her total exposure is c. £2.716 million which potentially reduces the value of those trust assets to £8,998,280. I shall need to say more about these funds in the context of H's argument in relation to his contributions over the years in managing these funds on her behalf and the extent to which those contributions have led to what Mr Marks QC refers to as the "*matrimonialisation*" of the funds.

81. However, in terms of the tax treatment of each of these categories of assets, I look again at the underlying reality of what is likely to happen in the aftermath of a financial decoupling between these parties. Before doing so, I need to say something about recent developments in relation to the law in terms of its treatment of matrimonial and non-matrimonial property and the proper approach in any given case to the tax treatment of such funds.

Law

82. In *K v L* [2010] EWHC 1234, [2010] 2 FLR 1467, Bodey J was confronted with a situation where a valuable portfolio of shares was brought into the marriage by a wife but never treated as a matrimonial asset. By and large she had had no dealings with the portfolio which remained offshore and intact. An issue arose as to the extent to which the portfolio should be treated as having a

reduced net value because of latent capital gains tax of some £10 million. The wife had argued in that case that CGT should be deducted in the conventional way because she should be presumed to be entitled to access her resources as and when she chose. The judge reminded himself about what was said by Lord Nicholls in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981, [2001] 1 All ER, 1 HL when he said, in relation to the attribution of potential tax:

> "Counsel submitted that the use of net values in this situation should be discontinued. I do not agree. As with so much else in this field, there can be no hard and fast rule, either way. When making a comparison it is important to compare like with like, so far as this may be possible in the particular case."

83. Bodey J took into account what he found to have been clear and compelling evidence from the wife that she had no intention of realising value in her non-matrimonial shares. That evidence, coupled with a finding that the couple had lived at a very modest rate, persuaded the judge that the likelihood of her ever being required to pay significant sums in respect of CGT was a very modest one. Whilst he did not ignore tax altogether, he limited tax to what he described as "an arbitrary £10 million worth of her shareholding" (out of a total holding worth £57.4 million) to allow for the possibility that she might wish to repatriate some of her wealth into this jurisdiction.

84. The need to look at the granular reality of the position in relation to the incidence of tax was re-emphasised by Mostyn J in the more recent case of *BJ v MJ* [2011] EWHC 2708 (Fam), [2012] 1 FLR 667. In that case the husband had successfully sold / floated a business, the proceeds having been invested offshore and protected within Jersey trust structures. An issue arose as to the extent to which the value of his trust interests should be discounted as a result of the tax which would be payable were he to remit funds to this jurisdiction. On the particular facts of that case, the judge decided that this was a "completely unreal" premise on which to proceed. "The whole point of the structure is to avoid paying tax, and H has never remitted any offshore income": para 69.

85. Turning to the facts of this case, I accept that H has been very successful in protecting his assets within offshore structures whose primary purpose has

been to mitigate his exposure to tax. Unlike the position of the non-matrimonial wealth in *K v L*, the structure deployed by H with significant expert advice has enabled him, at least until 2017, to maintain a fairly constant 'churn' of 'clean' funds.

86. I bear well in mind Mr Bishop QC's point that H's own presentation of his assets prior to this final hearing has not made specific provision for this tax. In his replies to questionnaire, he estimated the value of the family's assets to be between £64 million and £70 million depending on adjusted property values. No allowance was made in those calculations for the patriation tax which he now relies on in part to reduce his presentation of the global assets to £51.6 million. W's tax counsel has confirmed that H should be able to access onshore the underlying value in the remaining assets held within the A Trust (including the residue in N Ltd and its other wholly owned subsidiary entity, M Inc). She has calculated that the total liability for H on extraction of the residue of the A Trust / N Ltd assets will be no more than £23,365, a figure which is negligible in the overall context of the wealth in this case. On this basis, Mr Bishop QC submits that I should make no allowance for tax in respect of either the residual value in the A Trust and/or the future receipts due from M Inc in respect of the loan note. He maintains that H will identify the means for avoiding such tax, just as he has in the past.

87. Throughout the currency of these proceedings, tax has never been a central issue of contention. At an earlier hearing in September 2019 I made a direction that W's tax counsel should liaise with H's counsel in order to identify a list of issues and agreements in relation to the tax position of the two trusts. At a subsequent hearing on 4 March 2020 at which the children were joined as intervenors, I directed that tax counsel instructed in the case should liaise with any tax counsel instructed by or on behalf of the children in order that any tax issues which they wished to raise in relation to the trusts could be considered. At the PTR in October 2020, I made provision for any issues in relation to the computation of tax to be agreed.

88. The only evidence before the court in terms of input from H's / the trust's accountants is a letter dated 24 September 2020 from Dixon Wilson. That

letter was written to Mr SZ in response to his request for advice in relation to the likely UK tax consequences for H if he were to receive distributions from the A Trust and/or in the event of future receipt of loan repayments from M Inc. In relation to the March 2017 distribution, Dixon Wilson has advised that this was treated as an income distribution and, whilst the funds remain offshore, there will be no adverse tax consequences. If these funds or any remaining part of them are repatriated, they will be taxed as income on an arising basis. We know that a significant part of this distribution has funded the value now represented by the value in the loan note. Dixon Wilson confirm in their letter that the same tax treatment will be afforded to any funds which are brought onshore to the UK during any period whilst H remains resident in this jurisdiction. Tax will be paid at H's marginal rate of income tax and there is no time limit on the Revenue's ability to trace back into the provenance of the funds. A loan repayment received outside the UK will not attract any tax sanctions provided that the funds remain outside the UK. In terms of tax mitigation, Dixon Wilson has suggested that there may be a means of avoiding UK tax if H were to make a gift of funds to any one or more of his adult children. A subsequent transfer of those funds to the UK would not result in a UK tax liability for H provided that the gift recipient rules did not apply although there would be inheritance tax consequences were he to die within 7 years of making such gift or gifts.

89. Turning to H's approach to tax matters generally, in his first statement dated 18 September 2019, H accepted that one of the purposes of the trust structure which had been set up was to enable him to remit on the basis of a tax free income stream the value of the shares in his family business (see para 24(e)). That some of this income would be required in this jurisdiction to defray ongoing family expenses is evident from his reference later in that statement to the fact that he needed this income to replace the substantial salary which he had lost when he resigned as a board director. Initially it had been anticipated that the loan note payments would have been made over a 30 year period at the rate of £30,000 per month. There is no suggestion in H's evidence that those payments would have attracted a liability to tax. In a similar way, the substantial payments which H received until 2017 from the S Trust (through

the route of the A Trust) were paid as distributions of capital and were thus exempt from UK tax. He accepts that these payments were also made onshore and used in the main to meet family living expenses although that route is now closed. The substantial distribution which he received in 2017 was similarly extracted on a tax-free basis. H has confirmed in his written evidence that he anticipated at the time that the 2017 promissory note (which is now worth in excess of £9.28 million to him) would be used to meet the ongoing needs of the family without the need for any further calls on the assets of the A Trust in future.

90. In the new circumstances of the divorce, it is difficult to assess at this stage the extent to which H will be spending time outside the jurisdiction. It is implicit in my finding in relation to the Oxfordshire property that this is where he intends to spend most of his time and the base which he considers to be his permanent home. Intentions can, and do, change but I have to act upon the best information which is available to me. I regard H as a fundamentally honest and fair witness and I accept what he told me about the importance which he attaches to preserving this property as his home. Whilst it was not a particularly fertile area of cross-examination during the hearing, it was tolerably clear that his wish to purchase a base in central London for the purposes of his work in London was just that: a pied à terre rather than a second London home.

91. I can see from bank statements which H has produced that much of the 'overseas' expenditure to date has gone on holiday and discretionary expenditure such as villa rentals in Mustique, private Netjets flights and the like. Whilst neither of these parties is going to be anything other than wealthy individuals at the conclusion of these proceedings, each may well need to review the level of their discretionary spending in future. The 'lavish' lifestyle which each describes may well require some fine-tuning. These are not decisions for this court but it seems to me that it would be to ignore the facts if I were to assume that H will not in future need recourse to these offshore funds, or some part of them, to run his own domestic economy at the Oxfordshire property and generally in this jurisdiction. Further, it seems to me

that it would be wrong in principle to expunge any potential tax implications simply because it is Mr Bishop QC's case on behalf of W that £10 million of these offshore funds will be needed to meet a lump sum award in her favour. In terms of the computation exercise, that seems to me to be putting the cart before the horse notwithstanding the need to look, insofar as it is possible, at underlying reality.

92. I accept that there is no reliable evidence before the court that the trust structure set up by H has created any tax consequences over the previous years of its operation. The evidence which I do have from Dixon Wilson in relation to his future tax exposure is reasonably clear. Given that the M Inc revenue stream may be a resource to which he will need to look to meet his future income needs in this jurisdiction, it seems to me to be wrong in principle and unfair in practice to proceed on the basis that the entirety of his trust assets should be brought into account without any eye to future, as yet unknown, tax implications. In the final analysis I accept that he may decide to relocate his tax situs for residence purposes. That, in my judgment, is not something which is likely to happen in the foreseeable future. I do not know how H will choose to structure his financial arrangements going forwards. I am satisfied that he will take what steps he can to minimise his exposure to UK tax but he will be living in this jurisdiction and running his life here. I can only make a broad-based assumption as to what might be a fair allowance in the circumstances. I propose to make an allowance of 50% of Mr Marks QC's global tax calculation, i.e. a figure of £2,429,176[3]. In my judgment this makes an appropriate allowance for any contingent tax which he is unable to avoid. All the evidence suggests that he will take all the steps available to him to minimise tax exposure and I do not consider it appropriate to make any greater allowance on the facts as I find them to be. In my judgment that allowance provides a fair reflection of his potential tax exposure whilst giving appropriate weight to the very fair submissions made by Mr Bishop QC which look to the past to inform what is likely to happen in the future. In circumstances where he relies on a complete 'indemnity' in terms of W's potential exposure to tax in relation to her separate trust assets, it would not be

[3] [£4,178,597 + £679,755] = £4,858,352 x 50% = £2,429,176

fair to ignore altogether the tax which H may incur in repatriating funds on which he will need to live.

93. As to W's position, it is a fundamental aspect of her case to this court that she regards her Y-generated trust wealth to be dynastic in nature and of principal benefit to her only in terms of the income which it generates. Such capital as has been advanced to her over the years is minimal and has been used to meet tax on the income received where she has failed to make an allowance for the same. Because it is part of W's case that the court should ignore these funds entirely in its approach to the division of the available assets, the impact of tax does not have quite the same traction on net effect as it does for H. As I have stressed, the court is here dealing with the underlying realities in this case. The tax in respect of W's trust interests has been calculated, and agreed in terms of quantum, on the basis that it will be payable in respect of gains regardless of whether or not distributions are made. Whilst there was a disagreement between the parties as to the applicable rate of tax in relation to one of the Jersey settlements, that issue is not being pursued. Subject to H's arguments in relation to the 'matrimonialisation' of W's trust funds, it is accepted that this is non-matrimonial property in terms of its provenance. I accept that the trustees have a power to advance capital and I do not rule out the possibility that W may choose at some stage in the future to approach them on this basis. Nevertheless I accept what W told me about her intentions in relation to these funds. She regards them as being principally the vehicle for generating income after her death for the benefit of her own children and grandchildren. On the basis that these funds are likely to be used during W's lifetime to provide her with an income, I propose to proceed on the basis that the Y funds are primarily an income resource in her hands rather than a liquid capital asset which she is likely to realise as cash in the foreseeable future. For the purposes of computing an overall figure for the total assets which are available to these parties, I have included W's trust assets 'below the line' as non-matrimonial property. I will consider shortly the extent to which the existence of these funds in W's hands has any impact at all on overall distribution of the available liquid assets. For the purposes of *overall* computation I have included the Y-derived assets which W owns personally

outside the Jersey settlements notwithstanding that these, too, are said to be non-matrimonial property.

94. Thus, in terms of *overall* computation, the position can be summarised broadly in these terms :-

	Husband	*Wife*
Property		
London property (net)		13,337,500
The Oxfordshire property (net)	10,330,500	
Canadian property	29,012	
W Estate (1/24th)	63,334	
Surrey property (1/24th)		4,128
Bank accounts	1,007,517	159,609
Investments / Trust assets		
Credit Suisse portfolio	357,285	
Y shares	63,183	
Bank of Montreal	2,646,271	
	1,518,372	
M Inc / promissory note	9,285,770	
A Trust (residual value)	1,032,556	
N Ltd / M Inc (residual value)	1,248,118	
Less tax (assumed at 50%)	(2,429,176)	
Quilter Cheviot/Overstone (net)		4,974,536
Chattels (not general)	2,828,396	102,319
Less o/s legal costs/liabilities	(387,633)	(523,159)
Total	**27,530,171**	**18,118,267**
W's Trust assets		*8,998,280*
TOTAL	**27,530,171**	**27,116,547**

GRAND TOTAL : £54,646,718

95. This global figure excludes any residual value in the S Trust as it must following W's concession that these assets are no longer assets which are available to H.

(v) Premarital / non-matrimonial assets

96. The schedule which I have set out above includes assets which each of the parties claims to be non-matrimonial in terms of their provenance. In H's case, much of the value in his offshore bank accounts is a reflection of an inheritance which he received from his late step-father. In W's case, she seeks to discount completely any value in her inherited trust interests and any assets which she owns personally which derive from those inherited funds.

97. Some 30 years ago, each of these parties brought into their marriage the assets which they owned before they met. Perhaps not surprisingly, neither can say with complete precision what these were worth although it is not difficult to categorise what they were. In W's case, she brought the equity in her flat in C Gardens which she contributed towards the purchase of their first matrimonial home in M Street. In addition she had some shares in her Y family investment structure which appear to have been worth approximately £1.8 million. She was the beneficiary of a bespoke sub-trust set up by her father in 1972 which had been carved out of a wider discretionary family trust. She was, and is, the life tenant of that fund; the trustees have power to advance capital. When her father died in 1990 some five years into the marriage, she became a beneficiary under the terms of his Will. That inheritance, worth some £1.9 million at the point of receipt, is held within a UK based trust carved out of the main Will trust. W is the income beneficiary during her life and there is also a power in the trustees to advance capital. In terms of the issues to be determined in this litigation, part of that inheritance included some land on the W Estate, her late father's country estate. Whilst her 1/24th interest and ¼

interest held through her sub-fund within the Will Trust[4] would have been unlikely to have made any difference to outcome in this case had that land not become the subject of a planning application, there is now the potential for her to benefit pro rata from a windfall share in the value of an option agreement worth some £23 million granted to a provider of service facilities.

98. There is some disagreement about the extent of H's premarital wealth. He had his flat in O Gardens which became home to this couple for just over a year until they purchased the property in M Street. He also owned some valuable pieces of art and furniture. When he became a partner at the bank at the age of 28, he was awarded shares in the bank. He also owned shares in his family's business which he had inherited from his grandfather which he claims had a value of c. CAD$1.5 million when he married. Together with shares in his father's personal holding company, he claims to have brought wealth of some $10 million into the marriage.

99. Mr Bishop QC has challenged this figure. In terms of the shares which he claims to have inherited from his grandfather prior to the marriage, he points to the absence of any documentation and an inconsistent representation made earlier in the proceedings on H's behalf that these shares were acquired through purchase and not through gift or inheritance. That seems to be supported by the instructions which were given to the lawyer who advised H and Mr SZ in connection with the tripartite trust structure in 1999. It seems to me that if some of these shares were acquired before his marriage to W, it matters not whether they were inherited or purchased from other family members in terms of their description as pre-marital assets. In any event they formed only a small percentage of the shareholding he was subsequently to accumulate over the course of the marriage. What has been established is that H's accumulated shareholding in the family business was worth $25 million (£10.446 million) at the time the shares were transferred into the S Trust in 1999, some fourteen years into the marriage. The full value of those shares at that time was extracted through the N Ltd loan note by 2008. The residual value achieved by the sale of the shares in 2005 (some US$52 million)

[4] a total across both of 29.17% (or 7/24)

remains within the non-matrimonial structure of the S Trust for the benefit of the parties' children. Mr Bishop QC submits that the value of these shares has been churned, and churned again, throughout the years of the marriage and applied almost exclusively by H for the benefit of the family apart from a sum of about $4.4 million which he paid to his brothers to equalise the inheritance which he received from his late step-father. In this way he submits on behalf of W that H's wealth has been thoroughly merged into the matrimonial wealth in which each of the parties has an equal share.

100. In similar terms, Mr Bishop QC criticises the absence of any documentary evidence about the bank's shares which H says he acquired when he was made a partner. If they were worth $6 million when they were sold twelve years into the marriage, he submits that any initial premarital value was increased significantly by the work he undertook for the bank over the years of the marriage.

101. Whilst it is not possible for me make a specific finding as to the value of H's pre-marital wealth, it is perfectly obvious to me that H was financially established in life by the time he met W. He had clearly enjoyed considerable success in his career as a young banker and had benefitted from his family's wider wealth through gift and inheritance. He was paid well and he was certainly financially comfortable even if he was not as wealthy as he now claims.

102. The conundrum in this case as this very long marriage now ends is how the court should fairly reflect in its award the different ways in which the parties managed their wealth from the outset. It is accepted that W's inherited wealth has always been kept separate and outside the financial arrangements which were put in place to manage the family's domestic economy. Whilst she used the income which she received from the family trusts to meet some of the children's and her own personal needs (supplemented by an allowance she received from H), the underlying capital has never been mixed or blended with the family finances generally. For all intents and purposes her funds were ring-fenced.

103. In contrast, virtually all of H's premarital wealth, together with the wealth he went on to generate through the long years of this marriage, has been applied towards the support of his family and the acquisition of assets from which they have had the benefit. Even the wealth held within the S Trust which is now beyond the reach of the court was for many years available to the family through the trust structure which H set up with Mr SZ. Aside from those items for which W paid out of her trust income, H has met all this family's financial needs including the majority of the funds deployed in the purchase of their two homes. He paid for the extensive renovations which were undertaken at their London home. He has underwritten their increasingly opulent standard of living and continues to do so. Whilst he has no doubt seen this as his role in the marriage just as W regarded her role as wife, mother and homemaker, Mr Marks QC asks now on his behalf how W's proposals for settlement can be seen as a fair outcome. In terms, he submits, W is asking for half of everything generated during the marriage without any acknowledgement or recognition that she is already a wealthy woman in her own right. That she has been able to conserve those separate funds is no more than a reflection of the financial arrangements which were put in place whereby H agreed to fund everything (in part through the effective donation of his non-matrimonial assets) whilst leaving untouched his wife's inherited wealth.

(vi) H's case in relation to the "matrimonialisation" of W's separate property

104. On H's case, that unfairness is magnified when it is seen in the context of the very significant contribution which he made to the management of her independent resources. He maintains that this contribution resulted over the years in a significant increase in the value of W's funds. Regardless of the precise extent of W's underlying wealth, H maintains that he has injected value over the years not simply because of his astute financial management but as the result of a specific and strategic decision to extract W's funds from the structure within which they were originally held. He refers to this act as the "liberation" of those funds and their subsequent reinvestment. It came about in this way.

105. At the time of the marriage W's wealth was held within a privately-owned family trust company whose shareholders were members of the Y family. The assets of the trust company consisted of substantial cash sums and a minority shareholding in a publicly quoted company called ZZ plc. This was an investment company which held a wide range of investments in quoted and unquoted securities and other assets mainly in the banking and financial sectors. Because the family trust company was a private corporate entity with no external non-family members, there was a limited market for the shares. Share value from time to time was fixed by the board on the basis of an income or dividend yield. Since ZZ plc was a quoted company, the shares in the private family company were subject to a substantial discount in terms of the value available to an investor on the open market. In his written evidence, H has put that discount at some 60% to 70%. I have no way of knowing whether or not that is an accurate estimate and it matters not for the purpose of the exercise in hand although Mr CY supported those figures in his evidence to the court.

106. H became involved in the management of W's funds in 2000. At that stage there were moves afoot within the family towards a restructuring of the company with a view to eliminating that discount. He advised W that she would see a greater return on her underlying wealth if she were to diversify and reinvest her funds on the basis of a wider investment strategy. To this end, he represented her interests in what appears to have been an acrimonious and very public split amongst the Y family members and shareholders. As sides within the family were taken by those members wishing to leave and those wishing to stay within the family structure, significant sums were spent on hiring professional tax and legal advisers. After three years of what H has described as long and difficult negotiations, an agreement was reached with the "exiting" shareholders, including W. H's evidence is that the share value for those 'leavers' was more than three times what they had originally been offered when the dispute began. HMRC agreed that the 'leavers' would not have to pay tax when they cashed in their shares provided that the proceeds were invested in the new Cell Corporation which H had set up as an alternative investment vehicle for their funds. Those family members who

remained within the original Y scheme took the benefit of a separate deal which was struck with the Revenue which enabled them to leave with a zero cost base for CGT purposes.

107. H accepts that, in steering through this exit strategy, he acted as part of a small team with another family member and several professional advisers. Once out of the original family structure, each 'leaver' was thereafter able to take a much greater level of control over how his or her funds were deployed within the new structure which was put in place to manage their family wealth. This was achieved by incorporating an offshore vehicle which acted as a cell company. Thereafter, whilst subject to UK income tax, the individual cell owners were able to buy and sell assets within the confines of the corporate structure without paying tax on any capital gains made. H describes this undertaking as a huge commitment in terms of his time and effort over nearly four years. It was a commitment which he claims to have made not only for W but also for her fellow family 'leavers', each of whom benefitted financially to the same extent as W. H became a director of the new cell company overseeing its administration and running. Whilst he received a modest fee for doing so, he has undertaken this work over the last two or three years for no financial reward at all. It is accepted by W that since her funds were moved into the cell structure, H has been responsible for all investment decisions.

108. On behalf of H, Mr Marks QC maintains that it is the fact of this undisputed contribution over many years by H which matters and not the precise value of any increase in the financial return which those efforts produced. That said, he relies on his client's efforts as having produced greater flexibility and increased value for W as she leaves this marriage. Whilst he accepts that the wealth deriving originally from the Y family has been kept separate and apart from their own family funds, he maintains that it is impressed with a significant and valuable contribution made by H. He maintains that it is this contribution which blurs what might otherwise be a bright line between matrimonial and non-matrimonial assets.

109. In terms of the value to W of H's contribution, Mr Marks QC has produced by way of analysis a number of different representations which demonstrate, on his case, the accuracy of H's evidence that he achieved on her behalf a threefold increase in value on extraction. In terms of hard figures, he says that she received £5.4 million for her Y assets as opposed to their discounted value of £1.8 million within the family structure. I heard evidence on this aspect of the case from two Y family members. Mr NY filed a statement in support of H's case. He described H's role in the corporate restructuring as "pivotal". His narrative of the process supports much of the detail which H has provided in his own statement.

110. The chairman of the Y Trust Company, Mr CY, was called by W as a witness in relation to these matters. He told me during the course of his oral evidence that H was "corporate finance savvy and a natural leader" who was the "brains" behind the campaign waged by the six family members who wished to leave. In his written evidence he confirmed that since W and the others left, there have been no further family sales although shares had changed hands internally between family members on the basis of what he called "legacy disposals". He, too, provides a great deal of background to the circumstances surrounding the "departure" of the six family members and describes the significant level of acrimony which it produced amongst the wider family. He makes the point, which does not appear to be in issue as a fact, that the HMRC clearance which was secured in respect of the retention of the low base cost for the remaining family members was negotiated and agreed by professional advisers employed by the 'remainers' without input from H. Whilst there appears to be an issue in relation to whether or not the 'leavers' were required to dispose of all their shares in ZZ as the price for the Revenue's agreement that the price paid to the 'leavers' for their YTC shares would not reset the base value for the 'remainers', each of these two witnesses has recognised the extent of H's involvement in the extraction process.

111. Much effort has been put in on both sides of the case to demonstrate forensically the mathematical basis of H's claim in relation to the value he has injected and W's counterclaim that her separate funds would have performed

in the same way had they simply been invested and allowed to grow with minimal management. Each has deployed different FTSE indices in these endeavours. At the end of the day, Mr Marks QC submits that what W is claiming to be her exclusive non-matrimonial property is just money. It might have started out as Y 'family' money but it has long since been reinvested under H's direction and management. Whilst kept in what he describes as a 'separate pocket', it has been actively managed for the last 16 years on her behalf by H, a role she entrusted to him because of his skills – which she acknowledges – as an investor.

112. Before setting out my conclusions in relation to the 'matrimonialisation' argument advanced by Mr Marks QC, this seems to me to be an appropriate point at which to return to recent developments in the law. In this context I turn next to the principles which are now established in relation to sharing in the context of matrimonial and non-matrimonial property.

Law in relation to matrimonial and non-matrimonial property in the context of the parties' sharing claims

113. It seems to me that the following principles can be derived from the authorities which have been placed before the court:-

(i) The fact that property or assets owned by a party derive from a source outside the marriage (such as inheritance or pre-acquired wealth) does not *per se* lead to its exclusion altogether from the court's consideration of a fair outcome to both parties. Insofar as it represents a contribution by one of the parties to the welfare of the family, it is a factor which the judge should take into account: per Lord Nicholls in *White v White* (above).

(ii) The overarching principle which supports fairness to both parties is that of 'non-discrimination'. The court will treat the contributions made by each of the parties to the marriage as having a broadly equivalent value even though they be different in kind: *Miller v Miller;McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186.

(iii) Each case has to be considered on its own facts and the court's assessment of fairness in that particular case. The judge must consider whether the existence of such property should be reflected in outcome at all. This will depend on the extent to which it has been 'mingled' with matrimonial property and the length of time over which that 'mingling' has taken place: per Mostyn J in *N v F (Financial Orders: Pre-acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533. In other words, the way in which such property has been used over the course of the marriage has the potential to affect whether it remains 'separate' property: *Miller/McFarlane* (above) at para [25]. There may be cases where, over the course of a long marriage, the importance of the source of a significant element of one party's wealth, or even the entire wealth, has been maintained through ring-fencing in one party's name, kept safely and left to grow in value: *K v L* (above) at para [17] per Wilson LJ.

(iv) Assets or property which are matrimonial in character will be captured by the 'sharing principle' and divided equally between the parties. Matrimonial property is now recognised as being property which is the product of, or reflective of, marital endeavour or 'generated during the marriage otherwise than by external donation': *Charman v Charman (No 4)* (cited above) at para [66]; *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 1 FLR 1723 at para [33]; *Hart v Hart* [2017]EWCA Civ 1306, [2018] 2 WLR 509, [2018] 1 FLR 1283 at paras [67] and [85]; and *Waggott v Waggott* [2018] EWCA Civ 727, [2019] 2 WLR 297, [2018] 2 FLR 406 at para [128].

(v) The application of the sharing principle impacts, in practice, only on the division of marital property and not on non-marital property: *Scatliffe v Scatliffe* [2016] UKPC 36, [2017] AC 93, [2017] 2 FLR 933 at para [25] *Waggott* at para [128], and *XW v XH (Financial Remedies: Business Assets)* [2019] EWCA Civ 2262, [2020] 1 FLR 1015, para [136].

(vi) The application of the sharing principle will not always lead to an arithmetically equal division of the marital wealth. In appropriate

circumstances factors such as risk and liquidity may impact the means by which sharing is achieved: *XW v XH* (above) at para [136].

114. In *S v AG* [2011] EWHC 2637 (Fam), [2011] 3 FCR 523, Mostyn J said this in para [7]:-

> "Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in *N v F*). By contrast, it will be a rare case where the sharing principle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is commonplace, but as Wilson LJ has pointed out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs."

115. In *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, his Lordship emphasised the very limited circumstances in which non-matrimonial property will be invaded unless to meet needs. At para [22], he said this:

> "Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard."

116. Finally, in terms of the factual question which a court will need to determine in cases where there is an issue relating to whether or not non-matrimonial property has been 'mixed', 'merged' or 'mingled' with matrimonial property, the court will need to consider whether the 'contributor' has accepted that his or her property should be treated as matrimonial property. This element of 'merger' flows from para 18 of Wilson LJ's judgment in *K v L* (above) in which he posed three separate situations:-

> "(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.
>
> (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated

as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."

117. The classic example of this sort of situation is the use by one of the parties of his or her non-marital funds towards the purchase of a family home. Whether or not the title to that property is held in the joint names of the parties, it will invariably be treated by the court as a matrimonial asset for the purposes of any sharing claim. That example lies at one end of the factual spectrum. There are other more complex situations which fall into sub-categories (a) and (b) above where the court will need to analyse carefully whether the evidence will support a finding that property which was originally non-matrimonial has been treated, or dealt with, in such a way as to bring it within a sharing claim made by the other spouse. If the evidence leads the court to conclude that one of the parties has indeed through words, actions or deeds manifested an acceptance that it should be treated as such, it must then go on to determine the extent to which that property falls to be shared as between them.

118. Where on this spectrum do this wife's inherited assets lie? What evidence is there before the court which might justify a finding that any part of her inherited wealth has been used to acquire an asset for the wider benefit of H/the family or been mixed with matrimonial property in circumstances where she can be said to have accepted that it should be treated in whole or in part as a matrimonial asset ?

119. In this case W's inherited assets have remained wholly separate from the matrimonial assets at all times. They have remained throughout either within the family trust structures or, after 2004, in investment portfolios held in W's sole name. There is no suggestion by H that, following the extraction or 'liberation' of these funds (as he puts it), there was any suggestion, far less an intention, that they should be reinvested in their joint names as a result of his endeavours. The underlying capital held in these funds has never been used by W to meet housing or any other family needs. I do not regard W's use of

the income generated for the purposes of meeting some of her personal needs or those of the children to make any difference at all to the basis of that analysis. As H accepts, these are funds which have at all times over the last 35 years remained separate and segregated from the wider family finances. H accepted during the course of Mr Bishop QC's cross-examination that there had never been an understanding, far less an agreement, that the funds should be shared or that H should acquire any interest in them as a result of his management role. That was an honest concession on H's part and it was a realistic one. As I have found, W's genuine intention is that these assets should remain available for the purposes of providing an income for the future benefit of family members, her children, grandchildren and their issue. H confirmed in his written evidence that he had not thought it necessary to include W as a member of the class of beneficiaries when he set up the trust structure in 1999 because she had her own independent wealth. He did not ask her for any contribution towards the purchase or substantial renovation costs of the London property or the earlier acquisition of the Oxfordshire property. When, later in the marriage, there was some discussion about the possibility of acquiring property in Mustique, an aspiration with which they did not proceed, there was no suggestion that W would be required to use her own funds towards any purchase. W's evidence, which I accept, was that he produced some figures for her to show that they had sufficient family wealth available to make this possible. I accept his evidence that he believed that the trustees would have been unlikely to sanction a purchase in the Caribbean using trust funds to acquire a property costing in excess of $20 million. However, at no stage during these discussions was it suggested that W should make a contribution from her personal wealth. In this context I accept what W told me that at one stage H had suggested to her that their family wealth amounted to c. £100 million. Given that his exclusion as a potential beneficiary of the S Trust was not in place until last year, this was probably a fairly accurate assessment of the position at the time.

120. I regard it as significant that, when there were earlier problems in the marriage in 1991 when W's health broke down and the parties were separated for a brief period, her trustees agreed to make a contribution towards the purchase of the

property in S Avenue. This agreement was conditional on that property remaining a trust asset. There is no suggestion that, when the property was subsequently sold some 18 months later, the trust's investment was merged with the matrimonial assets.

121. What, then, should be the court's approach to H's case that W's separate funds should be treated as having been "matrimonialised" as a result of the significant contribution he has made over and above his role as the family's breadwinner. In this context, Mr Marks QC relies on these specific aspects of contribution:-

(i) the contribution of his pre-marital wealth into the matrimonial pot. This, he submits, neutralises the value of the family wealth which W held when they married in the mid-1980s;

(ii) the contribution he made in dealing with the practical division of her late father's estate thereby maximising her share and removing W's exposure to an over-valuation of the land and house retained by her sister and mother-in-law;

(iii) the 'liberation' of her funds from the family YTC structure;

(iv) his management of her investment portfolio for over 16 years;

(v) his 'pivotal' role in the negotiations with the provider of service facilities which resulted in the option agreement;

(vi) during periods when W's mental health has been fragile, he has made a substantial contribution towards caring for her. He says that the marriage survived as long as it did because this husband observed the vows he made to cherish his wife both in sickness and in health.

122. In this context the question for the court is the extent to which W's separate property can be said to be an asset which is "partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external

to the marriage': per Moylan LJ in *Hart v Hart* at para [85]. In his analysis in that case, Moylan LJ went on to say this:-

> "….. When property is a combination, it can be artificial even to seek to identify a sharp division because the weight to be given to each type of contribution will not be susceptible of clear reflection in the asset's value. The exercise is more of an art than a science ….".
>
> "[93] … if the evidence establishes a clear dividing line between matrimonial and non-matrimonial property, the court will obviously apply that differentiation at the next, discretionary stage.
>
> [94] If, however, at the other end of the spectrum, there is a complicated continuum, it would be neither proportionate nor feasible to seek to determine a clear line. *C v C* was an example of such a case. In those circumstances the court will undertake a broad evidential assessment and leave the specific determination of how the parties' wealth should be divided to the next stage. As I have said, where in the spectrum a case lies depends on the circumstances of the case and is for the judge to decide.
>
> [95] The third and final stage of the process is when the court undertakes the s 25 discretionary exercise. Even if the court has made a factual determination as to the extent of the parties' wealth which is matrimonial property and that which is not, the court still has to fit this determination into the exercise of the discretion having regard to all the relevant factors in this case. This is not to suggest that, by application of the sharing principle, the court will share non-matrimonial property, but the court has an obligation to determine that its proposed award is a fair outcome having regard to all the relevant s 25 factors.
>
> [96] If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the s 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in *Jones*, what award of such less percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect 'overall fairness'. This accords with what Lord Nicholls of Birkenhead said in *Miller* and, in my view, with the decision in *Jones*….

123. Moylan LJ has provided further clarification of the approach he has described in *Hart*, above, in his more recent judgment in *XW v XH*. At para [128] of the latter, he has emphasised that, in relation to the need to conduct an assessment of matrimonial and non-matrimonial property without the need for 'any particular mathematical or other specific methodology':

> "I should perhaps have emphasised that, as I said in the next sentence, I was talking about a broad assessment as being a permissible *route* to the division of the wealth which would be fair and not that the ultimate effect of this determination need not be identified. As I have said above, the answer will be clear when the only issue is what proportion of the parties' wealth is marital, as it was in *Hart*. It will not be clear when there are a number of issues as in this case."

124. Thus it is clear that what is required of a financial remedy judgment is sufficient clarity to identify or explain how the court's award has been determined or calculated. The degree to which it will be possible to specify numerically the precise basis of the court's determination will depend upon the nature and quality of the evidence which is available for these purposes.

125. The first step in that process is to identify what property held by either of the spouses is matrimonial and what is not. In my judgment none of the factors relied on by Mr Marks QC which I have set out in paragraph 121 above operate to change the underlying analysis in relation to, or the fundamental nature of, W's separate property. What it amounts to in essence is a much broader submission that it would be wholly unfair (or 'grotesque' to use Mr Marks' description) were H's efforts to go unrecognised in terms of his role as a substantial contributor within this marriage. He maintains that this was a contribution unmatched by W. That is essentially what he has said in para 39 of his opening note in these terms:-

> "H does not dispute that the vast bulk of his premarital assets have been mingled in the domestic economy in a way which renders it now pointless to attempt to attribute separate value to them. That does not mean that the fact of his contribution of those assets ceases to be relevant as one of the circumstances of the case, or as a contribution unmatched by W."

126. In order to secure an entitlement to 'share' in W's funds through the route of bringing them into account on the wider family balance sheet, Mr Marks QC must demonstrate that they are, or have become, in whole or in part matrimonial property. It seems to me that what he is really saying to this court is that, given the extent of H's contribution and his willingness over many years to use his increasing wealth for the benefit of the family as a whole, it would be unfair at the discretionary stage of the exercise to leave him in a financial position where he is significantly less wealthy than his former wife. Were this the outcome, says Mr Marks QC, he would be unable to enjoy a similar lifestyle to hers over future years when his ability to retrench financially will be restricted. Insofar as his future needs are engaged in a case where the parties' combined wealth extends to almost £55 million, I consider these submissions have much greater traction on outcome.

127. Mr Marks QC's 'fall back' position is that, if I am minded to treat W's separate wealth as non-matrimonial, I should only 'ring fence' the value of those assets as at the date of the marriage. He acknowledges that, for these purposes, W can be treated as having brought into the marriage a sum of between £3 million and £3.1 million. That figure does not include the equity in her London flat which was used towards the purchase of M Street. He acknowledges that the significant increase in the value of those non-matrimonial funds over the years has a passive element of growth which falls outside any entitlement which H may have to share in the product of his contribution to the growth in value. He maintains that the overwhelming growth which has been achieved is a reflection of the investment decisions affecting the deployment of those funds whilst under H's management on W's behalf.

128. It is accepted that it would be a futile exercise for the court at this stage to attempt to determine what value could now be attributed to the non-matrimonial element of H's existing wealth. The residue of the recent inheritance which he received from his late step-father is now represented by the investments in his offshore bank accounts (just over £4 million). Mr Bishop QC's case on behalf of W is that it would be wrong to segregate these

funds as non-matrimonial assets because of the steps which H took in March 2017 to divert matrimonial assets towards the unilateral dispositions to his brothers ($4.4 million) and to the two children ($6 million). W was unaware of those dispositions and did not give consent to the use of those funds. Nevertheless, Mr Marks QC contends that at least $2.2 million or £1.7 million is entitled to be excluded as non-matrimonial and a fund in which W has no entitlement to share.

129. Thus I return now to answer the question which I posed in paragraph 121 in the context of where on the spectrum W's separate assets fall. Looking to the available evidence in this case in relation to the value of W's non-matrimonial assets, it is reasonably clear from the historic documentation which is available that she brought in c.£1.8 million at the outset and thereafter inherited a further £1.9 million when her father died in 1990. A formal valuation statement dated 22 October 1991 shows that her assets within the two trusts as at that date were worth £2,348,640. That was not a comprehensive statement of her net wealth at the time because it did not reflect the value of a number of other interests which she had inherited including her interest in the W estate and the retained land which has since become the subject of the option agreement with the provider of the service facilities. She maintains that, in the absence of any material capital distributions over the years, the assets she brought in as non-matrimonial property are now represented by her cash and her investment portfolio together with the underlying value of the two original Y family trusts.

130. The evidence in relation to the value which H injected as a result of his management of her funds is confined in the main to the forensic calculations which appear in counsel's opening and closing notes. There is no independent evidence, expert or otherwise, as to the extent of the value he added as a result of his management activities. That he has finely honed financial skills developed over a lifetime of operating at a very senior level in the world of banking and investment, I have no doubt. W herself has acknowledged these skills. That she trusted him as a very safe investment manager is also not in doubt. I am satisfied that this was not a situation where investment decisions

and strategies were discussed and agreed between them. W gave H *carte blanche* to invest her funds as he saw fit. However, it is far less clear the extent to which these skills enabled him to 'out-perform' prevailing market trends over the years when the funds were under his management.

131. Mr Marks QC accepts, as he must, that the court can and should make an allowance for passive growth. Principally he points to the value which was released to W and her fellow 'leavers' when the value of the YTC shares on an undiscounted basis was imported into their new investment vehicle, the PCC Guernsey 'Cell company'. By a table which he has produced in paragraph 64 of his opening note, he has calculated that the value of the YTC shares within the old family investment structure was increased threefold at the point of departure from £1.8 million to £5.4 million[5]. That gain was allowed to roll-up without crystallising a tax liability at that stage. Mr Marks QC accepts for these purposes that there is no way of telling whether the dividends she could have expected to receive had she left her shares within the old structure would have been more or less than the income generated by the investments which replaced her YTC shares. That, in my judgment, is a fair concession. There is no evidential basis on which the court can reliably assess or measure the impact of H's management of those funds in terms of income generation. It seems to me that what H relies on in this context is the benefit which his scheme produced for W in terms of unlocking the full capital value in the shares.

132. There is empirical evidence before the court in relation to the significant increase year on year in terms of dividends paid out to investors who remained within the family-structured Y arrangement. Information published on the company's website suggests that the dividend per share has increased from 25 pence per share in 2003 to 60 pence per share today. Using this tool, Mr Marks QC has calculated that, if the same discounted basis of valuation were applied today to the value of W's YTC shares in the two trusts as if they had remained within that structure, they would now be worth c. £4.3 million as opposed to the £5.4 million which she received in 2004 when she left. He also

[5] W's own section 25 statement suggests that the value of her original Y investments was £5.89 million at the point of extraction (para 71).

points to the fact that a dividend yield of 1.7% (which reflects the discounted valuation basis of the YTC shares) is unremarkable in terms of a return when viewed against returns achieved on each of the FTSE share indices.

133. On behalf of W, Mr Bishop QC contends that it is not clear from all the information which is before the court whether H has even beaten the market in terms of the performance of the investments he has managed on W's behalf. In terms of passive growth alone, he points to the *Jones* approach as entirely principled and well-recognised as a means to determine what value inherited assets should be assumed to have as a consequence of the fact they would always have grown in value in line with the time value of money. This, he submits, is especially so in this case where the underlying value of these assets has been preserved intact in the absence of material capital distributions. He has produced tables which show that a value of £2 million invested in the FTSE 250 in the year of the marriage would have increased to somewhere in the region of £25.2 million. A similar exercise in relation to the £1.9 million inherited in 1990 on her father's death would produce a value today of £13.9 million. In other words, a fair assumption for overall value if one were to rely on passive growth alone would suggest that the value of her separate non-matrimonial property might have increased to just under £40 million. It is clear from the face of the asset schedule that the underlying assets deriving from her non-matrimonial property are worth nothing like that sum. Whilst one could deliberate as to what difference it might have made had W been extracting and spending net income as opposed to gross income on an annual basis, this calculation would not have produced the sort of figures for passive growth which underpin the hypothetical exercise performed by Mr Bishop QC. That exercise in any event assumes that all the income generated on the funds has been taken out annually without any allowance for capital accretion by way of rolled-up income receipts.

134. Standing back as I do, it seems to me there is insufficient evidence in this case for me to make any sound assumptions, far less findings, that H's management of these funds from 2004 has produced a financially measurable uplift in value over and above any allowance for passive growth. I recognise that the

extraction of the shares and the loss of the discount to underlying value produced an immediate uplift in the paper value of the funds. This does not, in my judgment, amount to a conversion of these funds from non-matrimonial to matrimonial property. This is not in any way to diminish H's contribution as the steward over many years of W's separate wealth. Whilst I accept that he went into 'battle' with other family members on her account so as to extract her from the disadvantages of the discounted valuation straightjacket of the internal family 'market' for the YTC shares, I cannot on the evidence available conduct a reliable trace which produces significant uplift into the present value of W's non-matrimonial funds on that basis alone.

135. In summary, I conclude that (a) W's non-matrimonial property has throughout been preserved as her own separate property, and (b) it has not acquired a matrimonial character, either in whole or in part, as a result of H's activities as investment manager.

The W Estate

In much the same way as H took personal responsibility for the management of W's independent wealth, he also intervened on her behalf for the purpose of some discussions which were ongoing within her family in relation to her late father's country estate. Following her father's death in 1990, some five years into the marriage, there was a difference of opinion between family members as to the value of the main property. W told me that there were many family discussions at the time but I accept that H took the lead in identifying and instructing the valuers and selling agents. A solution was reached whereby it was agreed that W and her sister would take their share of the value of the estate in the form of shares in Y whilst her other sister and stepmother would acquire sole ownership of the estate.

136. H acted as the point of co-ordination for these arrangements. On W's behalf he instructed solicitors to draw up a formal agreement recording these arrangements. Most of the estate was sold but a parcel of land adjacent to a motorway was retained by the family. It was hoped that this land might have potential for residential development at some point in the future. As a result

of the family agreement, W became entitled to 1/24th of the retained land in addition to her ¼ interest held by her sub-fund within the Will Trust.

137. The estate was later broken up and sold off in parts. The sale did not realise the value which had been assumed for the purposes of W's "exit". She was thereby shielded from potential exposure to this loss and a share of the resulting inheritance tax, a contribution which H relies on in these proceedings.

The Service Facilities agreement

138. The retained land which was formerly part of the W Estate is now subject to an option agreement with a service facilities provider. If planning permission for the development of service facilities is granted, W stands to benefit to the extent of some £6 million. According to the expert evidence, the chances of achieving full value for her share in the option is slim but the chance is there.

139. Together with W's brother-in-law, I accept that H had a significant involvement in the instruction of various expert planning consultants and lawyers who were advising the family throughout in relation to the option agreement which was eventually signed in October 2016. The option has since been extended twice, most recently in the period after the parties separated.

140. Mr Marks QC relies on H's involvement in carving out the retained land and on his role in the negotiations leading up to the grant of the option as the basis for his claim to a share in anything received by W as a result of her (total) 7/24th interest in the retained land. I accept his evidence that the identification and instruction of the experts who were involved in the negotiation was a time-consuming process and one which required work and a certain amount of judgement on his part. It was a family initiative which was driven by H and his brother-in-law, the latter having originally identified the opportunity and approached H for assistance on behalf of their respective wives. H contends that any financial 'windfall' which flows in W's direction from the exercise of the option (should planning consent be secured) will owe nothing to her efforts and much to his. That submission by Mr Marks QC seems to me to ignore the

fact that she has this benefit as the result of the fact that she inherited a share of her late father's estate some thirty years ago.

141. I regard it as essential that a clean break is achieved between these parties and a solution to this litigation which sees them locked in what could be contentious satellite litigation is an outcome I would wish to avoid. Furthermore, as I shall explain, I intend to achieve for each of them an outcome which is fair given all the circumstances of this case. I recognise the efforts which H made in order to look after the financial interests of his wife in the context of the wider family disputes which I have identified. In acknowledging those contributions, I take the view that he was acting as any loving husband and committed partner would do. He was aware that W needed him to support and advise her in respect to these matters. He stepped willingly into that role and she was fortunate in having a partner who brought to the many years of this long marriage the financial acumen and skill sets which he needed to perform that role. The court has frequently stressed in this context that it is a futile exercise to 'rummage through the attic' in order to identify which party's contributions were more valuable than the other's. That is the whole basis of the non-discriminatory approach of the Family Courts to sharing. For these purposes I accept that each made an equal and significant contribution to their marriage but I reject the notion that particular aspects of H's contribution has somehow operated to 'matrimonialise' what remains essentially W's separate property. Thus, unless it can be said to be required to address any element of H's future 'needs' claim, I do not regard it as either necessary or appropriate to award him a share of the non-matrimonial property reflected in W's potential share of the option.

Determination and conclusion

142. At paragraph 94 above, I have summarised the position in terms of my conclusions in relation to *overall* computation. I turn now to look at the net effect for each of these parties in the event that each receives 50% of the available matrimonial assets.

143. In the light of what I have said above, the matrimonial assets can be summarised as they appear below. For these purposes I have discounted the full value of the balance of H's inheritance from his stepfather by the sum of the gifts which he made from matrimonial funds. W does not seek to run an argument that the significant sums paid out to the two children and to his brothers should be reattributed to the balance sheet. She does submit, with some justification in my judgment, that his unilateral decision to deploy joint matrimonial funds in this way without any prior consultation with her was inappropriate. In relation to the decision to advance $6 million to the girls, I agree with Mr Bishop QC that this was a parental decision as well as a financial decision. They were, as I have explained, already wealthy young women in their own right. I understand H's wish to utilise what he regarded as a last 'mega-dividend' from the trust structure before the tax loophole was closed for the wider benefit of the family members and for the children in particular. W might well have agreed, although she was not given that opportunity. These were plainly matrimonial funds which came out of the A Trust, a wholly nuptial settlement. In similar terms, I do not criticise H for taking a wholly understandable stance in relation to ensuring that his brothers were not disadvantaged by the testamentary intentions of his late step-father. It was an entirely honourable course which he took. But he took it without any attempt to explain to W what he was proposing to do. I recognised the very real anguish he felt at the end of his oral evidence when he attempted to communicate to me the full extent of the difficulties he had in communicating with W about matters of a financial nature. I accept that he had long since abandoned any attempt to involve her in discussions about money. However, she was fully invested in her role as the girls' mother and she was entitled to be consulted in that capacity. In the same way, the disposition to his brothers using matrimonial funds was clearly affordable given the wealth which the family then held but it brought no corresponding benefit for W. That said, these inherited funds are plainly non-matrimonial in terms of their provenance. They fell in towards the end of this long marriage. It seems to me that I would be discriminating against H in an unjustifiable way were I to include the balance of these funds as matrimonial assets in which W was entitled to share without making that adjustment.

144. In relation to the S Trust funds, I accept that these are now off the table as far as these financial remedy proceedings are concerned. This is not an issue which I am being asked to determine. Mr Bishop QC accepts that I cannot be required in the current circumstances to make any finding as to whether or not the funds held within the S Trust were resources which would have been attributed to H prior to their alienation. I need say no more about the ownership of these assets because W has conceded that they are not assets which are captured as specific 'resources' which are available to H for the purposes of the s 25 exercise in hand.

Summary of matrimonial assets

145. What appears below is a summary of those assets which I am treating as matrimonial assets in which these parties have an entitlement to share.

	Husband	*Wife*
London property		13,337,500
The Oxfordshire property	10,330,500	
Bank accounts	1,007,517	159,609
Credit Suisse portfolio	357,285	
Y shares	63,183	
Bank of Montreal	4,164,643	
Less allowance for NMP	(1,700,000)	
Net value promissory note	6,856,594[6]	
Residual value A Trust	1,032,556	
Residual value N Ltd / M Inc	1,248,118	
Chattels	2,828,396	102,319
Less legal costs	(387,633)	(523,159)
	25,801,159	**13,076,269**

[6] assuming a 50% allowance for tax on remittance (as above) in relation to repatriation of the loan note repayments (including an allowance for any tax payable on realisation of the residual assets in the A Trust including N Ltd and M Inc).

TOTAL: £38,877,428 (50% of which = £19,438,714)

146. On the basis that W will retain the London property and the matrimonial assets which she currently holds, a 50% share would require a lump sum payment from H to W of £6,362,445. On the basis that I intend he should retain the Oxfordshire property as his home, a payment at this level would leave H with that home and assets (including the art) worth just over £9 million[7] plus the residual value of his non-matrimonial inheritance. Although I have made an allowance for some tax in relation to the patriation tax on the M Inc loan notes, I accept that a lump sum of £6,362,445 could be paid to W offshore without incurring a tax liability for either party when she remits the funds (or part of them) to the UK. However, I do not propose to adjust that allowance since, as I have said, H is going to have to make arrangements for his own living costs in this jurisdiction out of whatever funds he retains.

147. That is the net effect position if W receives a full half share of the matrimonial assets. I now must stand back for the purposes of the third stage of the process and consider whether that outcome represents a fair outcome for each of these parties taking into account all the facts as I have found them to be on the basis of an application of all relevant s 25 criteria.

148. Such an outcome would provide W with a mortgage free home in respect of which she will have unfettered room for manoeuvre both now and in the future. In terms of net effect, a lump sum of £6,362,445 would leave W with liquid cash funds of just under £11 million (including her lump sum and her non-matrimonial property outside the trusts). She will have a secure and more or less guaranteed income stream from her trust funds of c. £340,000 to £350,000 gross per annum (c. £235,000 net) without touching the underlying capital of c. £9 million net. For these purposes I have not included the value of the chattels she will retain. In addition, she will retain her interest in the Surrey property and the interest which she has through her sub-fund of the Will Trust in W Estate with the possible windfall which that might provide further down the line if the option is exercised.

[7] For these purposes I have ignored the capital represented by his ring-fenced inheritance (£1.7 million) in the same way I have excluded W's non-matrimonial property.

149. H, in contrast, will have the security of the Oxfordshire property, albeit without the immediate financial flexibility which W's home affords her. Leaving aside his chattels and art, having paid that lump sum, he will be left with cash/investments of just less than £8 million including the residual value can be extracted from the A Trust and the two SPVs (c£2.28 million) and his inherited non-matrimonial property (the £1.7 million which I have determined to be non-matrimonial). If I deduct his inherited funds from that figure, it reduces to c.£6.28. Whilst I appreciate that there may be arguments that he will be in a position to liquidate some of his art through a sale to the trustee or an arm's length third party purchaser, his position in terms of his future financial security and likely standard of living over the coming years of his retirement stands in sharp contrast to W's. In the absence of pension funds from this case, he is likely to be dependent upon what he retains after these proceedings (matrimonial and non-matrimonial) to fund his living costs into retirement. W's trust income will not be sufficient to meet her income needs in full and I accept that she will need to supplement that income from her own capital resources. H will be entirely dependent on the resources he retains at the end of these proceedings together with whatever he is able to earn over the next few years.

150. It is no answer to this case in my judgment to bring into account even tangentially the value which remains available for the children in the S Trust. Of course human nature dictates that these children are not going to see *either* of their parents in a position of real financial difficulty when they are themselves the beneficiaries of trusts funded by their parents worth many millions. But that, without more, does not make the underlying trust funds a *Thomas* resource nor does it provide any legal basis for some form of 'back door' entry which entitles me to conclude that H will benefit from those funds in the future. The terms of the legal arrangements which are now in place in relation to the S Trust prevent any further benefit flowing to H from that source.

151. Both parties have made different presentations in terms of their budgets. W has asserted an annual net need of just under £785,000. H's Form E budget is

put at £435,000 per annum. Those figures have to be seen against the background of what appears to be a common acceptance that it was costing in the region of £1 million per annum to run their lifestyle between London and the country. W's current budget would be difficult to justify on any basis unless that was a more or less accurate figure. Because economies of sorts are likely to have to be made (although 'economies' is probably not the right word in a case where the asset base is in excess of £50 million), it is reasonably safe to assume that both (future) budgets are likely to be inaccurate to a degree. Mr Bishop QC points to the fact that H currently has a gross annual salary of £253,000 for a directorship. He asks me to consider his needs on the basis that he will be "a single man of 65 in one home". He suggests that he may be in a position to draw income from his management of one of the equity funds owned by the S Trust. In my judgment neither is likely to provide an income stream in the foreseeable future given the scale of the past losses. Mr Bishop seeks to meet H's future income needs from the foot of a *Duxbury* calculation which assumes that H's director's salary will remain available to him throughout the remainder of his actuarial life expectancy. That is plainly a flawed approach. If that income were to cease in the next two or three years, as it well might, H may be dependent upon his remaining capital to meet all his future needs. Whilst capitalised maintenance calculations will vary depending upon the underlying assumptions which are made, a simple amortised calculation reveals that H would need in excess of £5.3 million to fund an income for life of £350,000. Even Mr Bishop does not seek to suggest that is an overgenerous allowance as a base line and, realistically, how could he in the circumstances of this case ? An income requirement of £500,000 per annum for life would require a capital fund of just under £7.8 million.

152. In the circumstances of this case, fairness as a concept requires the court to eliminate any element of discrimination as between the respective future needs of both these parties. Each has made a very significant contribution to this marriage over the course of more than three decades. No one in this case pleads a 'special contribution'. I agree that the term, as it is recognised in the field of financial remedy claims, has no application in this case. Notwithstanding that I have not been able to find that H augmented W's

separate resources to the extent of over £8 million as he has suggested, there is no doubt in my mind that his contributions, as hers, have been of a magnitude and value which require reflection in outcome. In this context I can see no possible basis in this case which would justify either being left in a position where their reasonable needs going forward, informed to the extent possible by the standard of living they enjoyed over a very long marriage, were not met in full. There are sufficient resources in this case to ensure that outcome.

153. I regard it as entirely reasonable to proceed on the basis that each of these parties is likely to need c.£500,000 per annum to fund their ongoing income needs. In terms of overall fairness H is entitled to expect more from the court than a budget which barely covers the running costs of the home which I have determined he should be able to enjoy for the rest of his life. If W believes that she requires a budget of over £780,000 per annum to meet her ongoing needs, it is difficult to see why H should not be entitled to the security of wealth which will enable him to spend at least £500,000 per annum (i.e. 50% of their previous joint expenses).

154. As I have explained in paragraph 149 above, an equal division of the matrimonial property in this case will leave H with residual cash funds of just under £8 million which sum includes an allowance for his own non-matrimonial property (£1.7 million). In addition he will have the valuable art collection which he owns outside the ownership of the S Trust. As against that retained value, I have assessed his income needs going forward to be c.£7.8 million. I have not sought for these purposes to refine the capitalised income requirements by making assumptions as what he might earn from non-executive directorships and the like over the next two or three years. In a similar way I have not sought to accommodate any form of 'step down' in terms of needs in later years. All the facts of this case (including the length of the marriage and the extent of the parties' respective contributions) require me to paint with a slightly broader brush.

155. Is it fair in this case for the court to make an order which leaves in H's hands no more than the capital which I have assumed he will require to meet his

future income needs in circumstances where that capital includes non-matrimonial property of some £1.7 million ?

156. I bear in mind that he will also retain art and chattels worth almost £2.8 million. I recognise that there may well be scope, as there has been in the past, for the realisation of value through a sale of the art (or some part of H's collection) to the trustee of the S Trust. The benefit of such a sale is that he will doubtless retain the full amenity value of any pieces sold, particularly if the children support that course as I find they are likely to do.

157. Having eliminated from my findings in relation to computation any future benefit to H from the S Trust, I ask myself whether its existence has any relevance at all in outcome in this case. It was plainly funded almost entirely with matrimonial assets. The parties enjoyed considerable benefits from that source through the tripartite structure set up during the marriage. Does what Mr Bishop QC has referred to as "the loss of an opportunity to seek a share of $50 million of matrimonial money" come into play in this final distribution stage as part of "all the circumstances of the case" ? Whilst I have found that these arrangements were put in place in 1999 for entirely legitimate reasons (albeit unknown to W until 2003), the trust which was designed to promote capital growth and trust efficiency for the wider family's benefit now stands between W and what might have been a significantly greater award in these proceedings. H's actions were not, in my judgment, 'conduct' for the purposes of s. 25(2)(g) of the 1973 Act and, to be fair to Mr Bishop QC, he does not seek to say that they were.

158. The equal sharing of the available matrimonial assets will result in an overall financial disparity in the parties' positions. That disparity has arisen in part because of the financial landscape which the alienation of the funds in the S Trust has produced. Each of H and W will be free to deploy their assets as they see fit. In my judgment each will have sufficient capital to decide in future whether second homes are an appropriate use of those resources. Whilst I have proceeded on the basis that the Oxfordshire property should be regarded as matrimonial property and allocated to H, there are more than sufficient resources available in the S Trust to purchase a London pied à terre

for his use. He would clearly need to pay a commercial rent for any use which he made of that property and the trustee/protector would need to be persuaded that it was a sound investment. There is sufficient flexibility in the notional budget which I have factored into a calculation of his ongoing needs to allow for this expense and, in addition, for so long as he is in remunerative employment of one sort or another, he will have additional income which could be used to cover all or part of this cost. I am persuaded that each of these parties will retain a degree of flexibility in terms of the manner in which they reorganise their lives going forward. Mr Bishop QC accepts that W cannot be said to *need* a second property when she has nearly £13.5 million tied up in her principal home. However, she, too, will have the flexibility to consider the purchase of a second home were that something she wished to consider as an option for the future.

159. With H's needs met in full, I have reached a clear conclusion that W should be entitled to the full value of her share of the joint matrimonial assets. The lump sum payable by H will be £6,362,445 million. In order to mitigate the tax consequences of that payment, it will need to be paid offshore and the timing of the payment will therefore need to be considered and reflected in the order which will flow from this judgment.

160. Of the remaining issue, I can dispose of this shortly.

The pension for M

161. Both parties will share equally the responsibility for providing their elderly and long-serving housekeeper with a pension and for any liability arising in respect of tax owing to HMRC in respect of employment. I regard H's proposal of £12,500 per annum (c. 50% of her current pay) as being entirely reasonable. The responsibility for putting these arrangements in place will be H's on the basis that W will thereafter make a contribution of 50% of the costs involved. I do not propose to be prescriptive in terms of how these arrangements will be reflected in a final order. I accept that W, through her advisers, will need to be involved peripherally in terms of the final cost if she is to be liable for her half share of the cost.

162. In summary, my order will provide in terms as follows:-

(i) H will transfer to W his legal and beneficial interest in the London property and the private roadway rights.

(ii) At the same time as the transfer of the London property, H will pay to W a lump sum of £6,362,445. The payment will be made on the basis of the well-recognised route which I have identified earlier in my judgment. W must co-operate in ensuring that maximum tax efficiency is achieved so as to ensure that there are no adverse tax implications for H.

(iii) Chattels, including the art, will be divided in accordance with the agreement which has already been reached.

(iv) Save as provided for, the parties shall each retain the assets and liabilities in their sole names.

(v) There will be a clean break in life and death. W's application in respect of a variation of the H Trust will stand dismissed on payment to her of the lump sum in (ii) above.

(vi) There will be no order as to costs.

Order accordingly