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.

Neutral Citation Number: [2023] EWFC 187

Case No: BV20D07074

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2023

Before :

MR JUSTICE PEEL

- -

Between :

GA	**Applicant**
- and -	
EL	**Respondent**

- -
- -

Brent Molyneux KC and George Coates (instructed by **DMH Stallard LLP**) for the **Applicant**
Jonathan Southgate KC (instructed by **Vardags**) for the **Respondent**

Hearing date: 18 October 2023

- -

Judgment

This judgment was handed down remotely at 10.30am on 31 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

Mr Justice Peel :

Introduction

1. Before me is what is colloquially known as a **Daniels v Walker** application, made by the Wife ("W") at this Pre-Trial Review in financial remedy proceedings ahead of a 5-day final hearing on 6 November 2023 before Stephen Trowell KC sitting as a Deputy High Court Judge. It is opposed by the Husband ("H"). I observe that we are now under three weeks away from that fixture which has been diarised for many months.

Non-compliance with the 2016 High Court Efficiency Statement.

2. Contrary to the requirements of the 2016 High Court Efficiency Statement, counsel for W lodged a detailed position statement of 18 pages, and counsel for H lodged a position statement of 15 pages. The Efficiency Statement for High Court cases is crystal clear:

> "15. Skeleton arguments must:
>
> a. be concise and not exceed
>
> i. for the first appointment, or any other interim hearing, 10 pages (including any attached schedules)."

Permission was not sought in advance to exceed the page limit for this interim hearing. I have said before on countless occasions, in court and publicly, that breaches of the two Efficiency Statements (one for High Court allocated cases, and one for cases allocated below High Court Level) are wholly unacceptable.

3. Moreover, the bundle consists of over 600 pages (for a PTR, I remind myself), rather than being limited to 350 pages as required by PD27A 5.1. Permission was not given for the bundle to exceed the page limit. It was simply lodged.

4. I make no apology for speaking out in strong terms on this subject once again. Case management is a vital part of the financial remedies process, and legal representatives have a duty to assist the court in managing the cases efficiently and fairly. If counsel and solicitors are unfamiliar with these basic, essential requirements contained in the two Efficiency Statements (as seems to have been the case here), they should swiftly put that right.

5. All that said, I am very grateful to counsel for their submissions at the hearing before me, which were focussed and of the highest quality.

The background

6. The parties are in their early 50's. After a period of cohabitation, they married in 2007 and separated in November 2019. They have two children. In 2008, H and a business partner founded a software company which they held in equal shares. In 2014, H transferred 30% of his shareholding to W.

7. For some time after separation, the parties engaged in discussions about the finances, but neither pressed forward with much alacrity. From about April 2021 onwards, negotiations were underway for a potential sale of the business. The parties were able to agree a division of non-business assets, including transfer of the FMH to W, but did not reach agreement about the business interests.

8. In early 2022, the business was sold to private equity investors. H and W received a total of about £35m gross for their combined stakes, comprising a mixture of (i) cash, (ii) loan notes, and (iii) shares in the purchasing company.

9. In September 2022, W issued a Form A. The non business assets are, in the context of the case, relatively modest. It is the proceeds of sale of the business which has transformed the fortunes of the parties. This is a single-issue case which I frame as follows by reference to a three-stage inquiry:

    i) Did the value of the parties' business interests increase after separation?

    ii) If so, was that caused or contributed to by H's asserted post-separation endeavour?

    iii) If so, when undertaking the s25 exercise, should the assets be split unequally in H's favour (as he asserts) or equally (as W asserts)?

10. On 25 April 2023, upon H's application, a direction was made for a single joint expert report from Grant Thornton as to the value of the business upon separation in November 2019. The computational issue to which this goes is whether the business increased in value between separation and sale.

11. It appears (so I was told by counsel) that the basis of the valuation was to be what I shall term a "present day approach" whereby the valuer would transport himself to November 2019 and reach a conclusion on the figures then available without reference to actual figures thereafter. That was confirmed in a letter from the valuer to the parties on 10 May 2023. It was not to be what I term a "hindsight approach" whereby the valuer would assess the value at November 2019 in the light of actual figures thereafter, rather than forward looking predictions. The "present day approach" was sanctioned notwithstanding the decision in **E v L [2021] EWFC 60** where Mostyn J expressly disapproved the former technique, and endorsed the latter technique as being realistic in family cases.

12. It seems, however, to have been assumed that questions would in due course be asked of the valuer about the "hindsight approach", so the door was not left completely shut.

13. The SJE report was circulated on 31 July 2023. As foreshadowed, it adopted a "present day approach". It is a comprehensive, 93-page report. Questions were raised in the usual way, and answers provided on 12 September 2023.

14. The expert concluded:

    i) In the main report, that the value of the parties' combined interests in November 2019 was about £14.1m gross on the "present day approach" (compared to £35m on sale a little over two years later).

ii) In Replies to Part 25 questions, that the value of the parties' combined interests in November 2019 was about £18.9m on the "hindsight approach" (compared to £35m on sale a little over two years later).

15. On 10th October 2023, W issued her Part 25 **Daniels v Walker** application, returnable at today's hearing. She has instructed her own expert from Longworth Forensic Accounting. In support of the application is a report dated 9 October 2023 which ascribes a value to the parties' business interests in November 2019, applying the "hindsight approach", of about £20.5m gross (compared to £35m on sale). It can therefore be seen that, comparing like for like on a "hindsight approach" basis, the difference between the experts is about £1.6m (£18.9m v £20.5m), which is a small percentage of the total assets in the case.

E v L

16. In **E v L (supra)**, at final hearing Mostyn J was faced with a similar issue about the historic valuation of a business. In that case, the issue was the value in 2016, when the parties had started living together. As identified at para 13 of the judgment, the husband took strong exception to the report of the SJE and was given permission to adduce his own accountancy evidence. The judge, for reasons of procedural fairness, then permitted the wife to adduce her own expert evidence. The consequence was that three experts produced reports and gave evidence at trial.

17. A feature of **E v L** was that two of the experts, including the SJE, stood in the shoes of a fictitious purchaser in 2016, and adopted future earnings predictions for their valuations rather than the actual figures which were by the time of trial known and matters of record; the "present day approach". That approach in 2016 disregarded what in fact transpired thereafter and with no application of hindsight. It led to an unreal calculation, for subsequent events demonstrated that the predictions were wrong. Mostyn J concluded that when undertaking an exercise such as this in the context of financial remedy proceedings, a realistic valuation exercise must be based on actual figures (the "hindsight approach") rather than the "present day approach" which adopts predicted figures and ignores subsequent events. His full analysis on this point is set out at paras 51 to 66, culminating in this conclusion at para 66:

> "I regard it as unreal, and a likely source of real injustice, for calculations to be undertaken to work out the scale of acquest (and thence the wife's award), on historic figures which with hindsight are shown to be completely wrong. It is not consistent with "a broad analysis of fairness".

W's case on the expert evidence

18. It is W's case that the SJE report is deficient in several respects. She asserts that the SJE adopted the "present day approach" rather than the "hindsight approach". The SJE did not input actual figures post 2019 in his main report. He made forward looking predictions. There were, so it seems, no, or very limited, forecasts and business plans available at that time. Thus, the SJE arrived at his own projections and assumptions about future growth based on previous year figures. By contrast, Longworth Forensic Accounting have applied the figures as they turned out to be after

2019; the "hindsight approach". Accordingly, says W, the SJE has fallen into the sort of error identified by Mostyn J in **E v L**, and produced a report which is artificial and unrealistic in the context of family court proceedings. The consequence, on W's case, is that the SJE's valuation was understated, because his projections undershot the actual figures in the next 2 to 3 years. This, it seems to me, is the heart of the challenge to the SJE report.

19. That said, the SJE did, as I have remarked, provide an alternative valuation based on the "hindsight approach" which is in fact close to W's proposed expert's calculation.

20. Ultimately it will be the judge who determines the appropriate basis of valuation, i.e "present day approach" or "hindsight approach", but I would imagine that **E v L** will provide a steer. The relevant figures for the purpose of the dispute before me today are:

Value of interest on sale in 2022	£35m gross
Value of interest in Nov 2019	£14.1m gross (SJE)
	£20.5m gross (W's proposed expert)

In fact, the difference between the SJE and W's expert is much less pronounced if one takes the SJE's higher figure of £18.9 on the "hindsight approach".

21. Thus, in broad terms:

i) Per the SJE, the value of the parties' interests has increased by about £21m (£35m-£14.1m). But if one takes his "hindsight approach" it is **£16.1m** (£35m-£18.9m).

ii) Per W's proposed expert, the value has increased by about **£14.5m** (£35m - £20.5m).

22. These figures should be seen in the context of the parties' respective open positions:

i) W proposes an equal division of the proceeds of sale, i.e about £17.5m gross for each party (less tax to be apportioned equally).

ii) H proposes a division of 62/5%/37.5% in his favour. Taking a gross figure for the parties' business interests at the point of sale, that translates into:

a) Approximately £22m to H

b) Approximately £13m gross to W.

23. H's proposal on his own case does not equate to him retaining all the benefit of the increase in value on the "present day approach". Were that so, he would propose an award to W of about £7m gross (i.e 50% of the value at November 2019 on the SJE's "present day approach" figures). In fact, his proposal is that W receives £13m gross.

24. The point of outlining the effect on the figures of the various permutations is to demonstrate that H's proposal is not wedded to mathematical precision, and that the

difference between the valuers on the "hindsight approach" is not as significant or material as each party appears to think. It is clear to me that these mathematical approaches are likely at trial to yield to a much more holistic overview of the case.

The law on Daniels v Walker

25. The starting point for a **Daniels v Walker** application, it seems to me, is FPR 2010 25.4:

> **Control of expert evidence in proceedings other than children proceedings**
>
> 25.4—(1) This rule applies to proceedings other than children proceedings.
>
> (2) A person may not without the permission of the court put expert evidence (in any form) before the court.
>
> (3) The court may give permission as mentioned in paragraph (2) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings".

26. An application of this nature is to adduce expert evidence. It must therefore meet the test that it is "necessary to assist the court to resolve the proceedings". The fact that it is made to challenge a SJE report does not, in my judgment, alter that proposition, although I cannot find any authority directly on that point.

27. Sir James Munby P in **Re: H L (A Child) [2013] EWCA Civ 655** defined "necessary" as: "Lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable". Although those were children proceedings, I regard his dicta as equally applicable to financial remedy proceedings.

28. Whether the further expert evidence is "necessary" will be informed by the approach advanced in **Daniels v Walker [2000] EWCA Civ 508** and several subsequent cases including **Cosgrove & Anor v Pattison [2001] CPLR 177**, **Peet v Mid-Kent Healthcare NHS Trust [2001] EWCA Civ 1703** and **Kay v West Midlands Hinson v Hare Realizations Ltd.** From these authorities, I draw the following principles:

i) The party seeking to adduce expert evidence of their own, notwithstanding the fact that a single joint expert has already reported, must advance reasons which are not fanciful for doing so.

ii) It will then be for the court to decide, in the exercise of its discretion, whether to permit the party to adduce such further evidence.

iii) When considering whether to permit the application, the following non-exhaustive list of factors adumbrated in **Cosgrove & Anor v Pattison (supra)** may fall for consideration:

> "... although it would be wrong to pretend that this is an exhaustive list, the factors to be taken into account when considering an application to permit a further expert to be called are these. First, the nature of the issue or issues; secondly, the number of issues between the parties; thirdly, the reason the

> new expert is wanted; fourthly, the amount at stake and, if it is not purely money, the nature of the issues at stake and their importance; fifthly, the effect of permitting one party to call further expert evidence on the conduct of the trial; sixthly, the delay, if any, in making the application; seventhly, any delay that the instructing and calling of the new expert will cause; eighthly, any special features of the case; and finally, and in a sense all embracing, the overall justice to the parties in the context of the litigation'.

iv) For my own part, I would draw particular attention to the words "the overall justice to the parties in the context of the litigation" which seems to me to encapsulate neatly the court's task.

General observations about historic valuations

29. It is commonplace for issues to arise about the distinction between marital and non-marital acquest, a feature which may impact upon the court's overall exercise of its dispositive powers. In the case of businesses, the issue generally arises in one or both of two scenarios:

i) The extent to which the business was established, and already had a value, at the date of marriage or (if earlier) settled cohabitation. That pre-acquired value, if found by the court, may be relevant to the distribution of assets. I say "may" because of the conventional factors which need to be taken into account as part of the s25 exercise, including the length of the marriage/relationship when compared to the length of the pre-marital endeavour, the contributions by each party inside and outside the business, proportionality, whether the asset has been mingled in, or deployed to sustain, the family economy, and so on.

ii) The extent to which the business has increased in value since separation. If such an increase is found by the court to have taken place, that may be relevant to the distribution of assets. I say "may" because of, again, the various factors which will come into play in the s25 exercise, including the length of time between separation and trial, the reasons for any delay in bringing the case on, proportionality, the contributions of the parties post separation, the impact of market forces, the nature of the work undertaken by the person asserting post separation endeavour, whether the increase in value is a product of active or passive growth, and so on. It will be the court which assesses the specific contributions made by the party asserting that they were responsible for increase in value through their personal efforts, and/or that growth was the product of their active involvement.

30. I doubt whether in most cases a historic accountancy report will add much to these fact specific evaluations. The most that can be said, it seems to me, is that the value of a business at the date of (i) marriage/cohabitation, and/or (ii) separation, may be relevant to the sharing principle. But multiple other factors may reduce, or eliminate, the relevance of these features.

31. I would caution parties, and the courts, against commissioning reports in respect of historic values, whether in respect of the start or the end of the relationship. I say this

for the following reasons:

i) It has been often said that valuations are fragile. It is the experience of judges that they are a product of art as much as science, and must be approached with caution. For example,

a) In **Versteegh v Versteegh [2018] EWCA Civ 1050** Lewison LJ said this at para 185:

> "The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) (both decisions of Charles J)."

b) In **Miller v Miller; McFarlane v McFarlane [2006] UKHL 24**, Lord Nicholls said at para 26:

> "… valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility".

ii) The further into the past the valuer is asked to inquire, the less robust and more controversial any report is likely to be.

iii) Ultimately, it is for the court, not a valuer, to determine the extent of pre and post marital wealth in accordance with the approach articulated in **Hart v Hart [2017] EWCA Civ 1306**. Expert evidence may assist, but it is not conclusive. As Moylan J (as he then was) said in **H v H [2008] EWHC 935 Fam** at para 5:

> "I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation

> which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained."

iv) Obtaining a historic, black letter accountancy valuation is not the only way of approaching this issue. The straight-line approach adopted by Mostyn J in **WM v HM [2017] EWFC 25** received approval in **Martin v Martin [2018] EWCA Civ 2866**. Calculations by reference to approved indices might be of some utility. But beyond these tools, the court's approach might involve a more nuanced assessment reached after consideration of increase in turnover, number of employees, the genesis of inspirational business ideas, the actual work undertaken by the party, how such work drove the business and the like. Every case, every set of circumstances, is different, and as was explained in **H v H [supra]** the court is conducting a s25 exercise, within which valuations may assist the court, but are not the be all and end all. Ultimately, the court will need to weigh up a multiplicity of factors with the degree of generality or specificity it thinks fit.

v) The risk of satellite litigation is all too obvious, as this case demonstrates. If the historic valuation is not accepted, a **Daniels v Walker** application may follow. Issues will likely arise about the other party seeking expert evidence in rebuttal to the **Daniels v Walker** report. Legal costs will mount. In some cases, a final hearing may need to be adjourned.

32. In my judgment, although there may be cases where the historical valuation exercise can be carried out relatively simply, and will clearly assist the parties and the court, I consider that there must be clear justification for this approach to be adopted before the court gives permission for expert evidence as to past values to be undertaken. It should very much be the exception, rather than the norm.

This case

33. I turn to this case. In my judgment the **Daniels v Walker** application fails for the following reasons:

i) It is brought too late in the day. That may not be entirely W's fault given that the SJE report was received on 31 July 2023. But the fact is that the **Daniels v Walker** application was not made until 10 October 2023, a matter of under three weeks before final hearing.

ii) Consequently, it is not possible fairly to accede to the application without jeopardising justice to H, and the justice of the case as a whole. H has very little time between now and the trial to mount a challenge to W's proposed expert report. He will not be able, realistically, to obtain, and seek permission for, his own expert. True, he might seek to rely on the SJE, but it seems to me to be unprincipled that he should be somewhat forced into that corner because the alternative is an unwelcome adjournment. And of course, the SJE is not his own expert, with whom he has been able to sit down and discuss the case in preparation for trial. The SJE might find himself in an uncomfortable position. By contrast, W and her chosen expert are fully aligned.

iii) It is not clear whether the experts would be able to answer questions, meet and prepare a schedule of areas of agreement/disagreement before the trial. The SJE has indicated he would not be able to.

iv) There is nothing to prevent W from putting to the SJE in cross examination the questions and issues which have been raised by her proposed expert who no doubt will remain in place as a shadow accountant to assist. For example, W's counsel will be able to explore the SJE's reluctance to adopt actual figures post 2019, rather than projected or predicted figures which turned out to be incorrect.

v) The historic valuation issue is just one factor among many for the court to consider. It may be relevant to, but is assuredly not determinative of, the issue of post separation accrual. W's case is that even if the value of the business has increased, it would be unfair for her not to receive a full 50%. She advances a number of reasons in her s25 statement which the judge at trial may, or may not, find persuasive. Her own post separation contribution may be relevant. So too will be the length of time since separation, the reasons for the delay to trial, and an evaluation of precisely what personal contributions H made which purportedly enhanced the value. W will argue that a contributory factor in the business's success was a roll out of various products from 2018 onwards, and expansion abroad. The impact of Covid may have enhanced the business profitability, as was commonplace in the tech sector generally. The court will be asked to consider whether any increase in value was the product of passive growth (driven by market forces and natural progression of the company) or active growth (driven by H's personal efforts), or even that the eventual sale price was achievable because the private equity group was a special purchaser.

vi) The difference in figures between the SJE and the proposed new expert is, in my judgment, relatively small (£1.5m on the "hindsight approach") and unlikely to make a material impact on the proceedings. That is particularly so given that the parties appear to agree there was a significant increase in value (they disagree about the reasons why), and H does not make a proposal based on a purely mathematical approach referable to the SJE report. As I have observed, his suggested division provides W with a greater sum than would be applicable even on W's own proposed expert's figures, if the court were to adopt a strict exclusion of all post separation growth. But H does not pursue that strictly mathematical approach, and I therefore see little purpose in more evidence on a somewhat theoretical point. Of course, whether there is merit in <u>any</u> departure from equality in his favour remains to be seen; there may be none. But as his case is presented, detailed accountancy evidence about sets of figures which both show an increase in value, but dispute the precise extent, is unnecessary.

34. For these reasons the application is dismissed.

MR JUSTICE PEEL
Approved Judgment