Neutral Citation Number: [2019] EWCA Civ 2262

Case No: B6/2018/0380

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE FAMILY COURT
Sitting at The ROYAL COURTS OF JUSTICE
MR JUSTICE BAKER
[2017] EWFC 76

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2019

Before:

LORD JUSTICE UNDERHILL
VICE-PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

- -

Between:

XW	**Appellant**
- and -	
XH	**Respondent**

- -
- -

Miss L Stone QC and Mr D Brooks (instructed by **Stewarts**) for the **Appellant**
Mr L Marks QC, Mrs R Carew Pole and Miss G Howitt (instructed by **Sears Tooth Solicitors**) for the **Respondent**

Hearing dates: 26th and 27th June 2019

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Approved Judgment

Lord Justice Moylan:

Introduction

1. This court made a Reporting Restriction Order on 18th March 2019 which prohibits the publication of certain information as set out in that order. The terms of that order continue to apply. It is subject to a penal notice which means that any person who has notice of the order and does not comply with it may be held to be in contempt of court and subject to penalties which include imprisonment.

2. The wife appeals from the final financial remedy order made by Baker J (as he then was) on 21st December 2017. In simplified terms, he ordered that the wife should receive capital resources which, when added to her own assets, would give her approximately £152 million being roughly 29% of the parties' combined capital resources of £530 million. The bulk of the award comprised a lump sum of £115 million, being 25% of the growth in value during the marriage of the husband's shareholding in a company, based on the difference between the value at the date of the marriage (as given by an expert instructed in the proceedings) increased by indexation, and the proceeds of sale realised when the shares were sold at about the end of the marriage.

3. The underlying factual context of this case is that the husband's shares in the company, which he, with others, had established some years before the marriage, realised a very significant sum when the company was sold. By the date of the hearing below, the proceeds received by the husband from the sale of his shares had become worth approximately £490 million net, out of the combined total of £530 million.

4. In summary, the judge based his determination on four factors. They were:
   (a) that the parties had "to a very substantial extent kept their financial affairs completely separate during the marriage" which was "a matter of considerable relevance" to the extent to which the assets should be shared, at [238];
   (b) that the shares in the company, through which most of the wealth had been created, were the husband's "business assets"; the "nature and source" of this property, having been "created through the husband's business activity", were relevant to a fair division, at [239];
   (c) that there was "latent potential" in the company at the date of the marriage which was not reflected in the expert's valuation and, to "a not inconsiderable extent, the later success was built on these earlier foundations", at [240]. This meant that, while there was no "clear dividing line between matrimonial and non-matrimonial property", this significant "latent potential" should be taken into account when dividing the wealth by "a broad evidential assessment", at [241];
   (d) that the husband's contribution to the "growth in the value of his business assets during the marriage comes within the concept of special contribution", at [242].

5. The wife challenges each of the above factors. Ms Stone QC submits that, in differing respects, each of them is flawed and that they do not, either individually or collectively, support the wife being awarded only 25% of what, she submits, the judge determined was the "marital acquest" of £460 million, at [245/249]. In summary the grounds of appeal are as follows:

    (i) that any principle, that the manner in which the parties managed their financial affairs might impact on the division of the marital wealth, has no application to this case;

    (ii) that the husband's "business assets" created during the marriage were marital property which should have been shared equally between the parties;

    (iii) that the judge was wrong to find that the company had latent potential;

    (iv) that the judge was wrong to find that the husband had made a special contribution, in particular because he only considered the husband's financial contribution and did not balance this with the wife's contribution or consider the disparity in the parties' respective contributions when determining this issue;

    (v) that the judge failed to quantify how each of the above factors, in particular latent potential and special contribution, impacted on his award;

    (vi) that the judge's decision in respect of restricted stock units (RSUs) and stock options was flawed and he should have awarded the wife a share of these when received by the husband.

6. The wife does not seek a rehearing. It is her case that this court is in a position to determine the fair outcome which she submits would be to award her half of the marital property of £460 million, namely a lump sum of £230 million. In addition she should receive approximately 50% of the value of the husband's RSUs and options. The combined total she seeks is £235 million. If there were to be any departure from an equal sharing of the growth in the value of the shares, it is submitted that this should be only to a small extent.

7. The husband seeks to uphold the judge's order but submits that, if the wife's appeal succeeds in respect of latent potential value and/or special contribution, the case should be remitted for rehearing because, given their significance and nature, this court is not properly able to determine what alternative award to make. If the wife's appeal were to succeed only in respect of the other "smaller" points, Mr Marks QC submitted that this court would be able to determine what alternative award to make. The husband's case has been comprehensively argued, first in written submissions prepared by Mr Pointer QC with Mrs Carew Pole and Miss Howitt and, secondly, at the hearing at which Mr Marks replaced Mr Pointer.

8. I am very grateful for the submissions made by counsel which have set out their respective cases with considerable force and clarity.

Background

9. The background is set out at length in Baker J's judgment reported as *XW v XH (Financial Remedies)* [2019] 1 FLR 451. It was reported with some passages redacted and with specific details either omitted or made anodyne with the intention of preventing identification of the family. I propose only to set out a brief summary: paragraph numbers are as in the judgment below.

10. At the date of the judgment the husband was aged approximately 50 and the wife 48. They married in 2008 and the marriage broke down in 2015.

11. The parties have one child, AB, to whom the husband and the wife "are both totally devoted", at [30]. "Sadly, AB has a rare, life-threatening condition and also has significant disabilities. The vast majority of his care is carried out and arranged by the wife, although the husband plays an important role", at [3]. The judgment sets out a summary of the wife's account of "her role in caring for AB", at [34]. The husband described the wife as "an excellent mother who is totally devoted to the well-being of" AB, at [35]. The wife also acknowledged the husband's part in caring for AB, which is summarised in the judgment, at [35].

12. The husband worked as CEO of a company ("the Company") which, as referred to above, he had set up with others some years before the parties were married. During the marriage, "and in particular in a period of 3 to 4 years between 2011 and 2015, the Company … became hugely successful", at [4]. The Company was sold in 2015/2016. From the sale of his shares the husband received the then equivalent of approximately £370 million. By the date of the hearing the assets in which these funds had been invested were worth approximately £500 million gross (about £490 million net of tax), significantly because of exchange rate changes. The husband also owned some RSUs and stock options. Apart from these the husband had other, pre-marital, assets valued at £3.9 million.

13. When the parties met the wife was working as an artist. She is described in the judgment as being from a "very wealthy" family. Both "before and during the marriage her mother, who has established a series of family trusts, provided her with substantial financial support", at [2]. The judge found that the wife would benefit from the assets in one of these trusts, valued at £23.2 million. In addition, she had assets which she had acquired with funds provided by her mother and which had a combined value, after deduction of liabilities including legal costs, of £10.5 million, at [41]. As determined by the judge, the wife had net assets of just under £34 million, at [248].

14. The parties jointly owned a residential property valued at £3.7 million net. This property was transferred to the wife as part of the final order.

15. An accountant was instructed for the purposes of the proceedings to value the husband's shares in the Company as at the date of the marriage. During the course of his submissions to this court, Mr Marks commented that the valuation undertaken by the expert was entirely prospective in that it did not take into account the manner in which the Company in fact developed after the date of the marriage. It was based on historic data, taken as at the date of the marriage, namely assessed maintainable earnings (EBITDA) and a multiple based significantly on one transaction (selected from a "large number of transactions") which the expert considered best reflected the position of the Company. The expert had considered whether to apply "the concept of 'spring-board' value" which he took from family law cases, in particular *Jones v Jones* [2012] Fam 1 ("*Jones*"), as meaning "additional value which was present in the company at the valuation date, but could not have been recognised at the time and would only have become recognised with the passing of time". He decided that there were arguments for and against and did not, therefore, make any adjustment to his valuation.

16. The wife's case, as advanced at the hearing below, was that she should be awarded a sum equal to half the marital property which, she contended, included (and almost entirely comprised) the increase in the value of the husband's shares in the Company since the date of the marriage. She submitted that the non-marital element should be determined by applying the increase in the appropriate share index to the value given by the expert as at the date of the marriage. This would give the figure of £28.6 million for the non-marital value leaving approximately £460 million as the marital element.

17. The husband's case was that the wife was entitled to "at best a needs-based" award. She was not entitled to a share of the wealth for a number of reasons.

18. The first, and it would appear the most substantive reason, was that under the terms of a "deed of marriage" the parties had elected "the regime of separation of assets", at [87], rather than community of property. This was said to have the legal consequence that, under Italian law, the parties retained their respective assets when the marriage broke down and had limited financial claims. It was also said to have had the practical consequence that "pursuant to that agreement, the parties have maintained a separation of assets throughout the marriage". This issue was explored extensively during the hearing before Baker J. I deal with it further below, briefly, because the judge rejected the argument and there is no appeal by the husband.

19. The second reason was that the husband had "pre-marriage assets" which included his shares in the Company; "by reason of their pre-marriage existence and ownership, (they) constitute non-matrimonial property".

20. The third reason was that the husband had made a special contribution.

21. The fourth was the length of the marriage. This was advanced as a reason for reducing "the scale" of the wife's claim, based on *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 ("*Miller*"). It was submitted that Lady Hale's observations, about solely owned business assets not being amenable to sharing, "may apply fully to (this) case …

especially when considered in conjunction with" the fact that the company had been created and developed prior to the marriage and the marital agreement.

22. The fifth reason was that the wife had her own resources.

23. The wife contested each of the husband's arguments. As to the marital agreement, it was argued that it should have no impact on the wife's claims under the Matrimonial Causes Act 1973 ("the MCA 1973"). Under Italian law, the parties' personal relations were governed by English law, as also were their property relations in the absence of a written agreement to the contrary. The marital agreement did not expressly contain an agreement that their property relations would be governed other than by English law and none could be implied. In addition, the wife did not have a "full appreciation of its implications" as contended for by the husband and as required by *Granatino v Radmacher (Formerly Granatino)* [2011] 1 AC 534 ("*Radmacher*").

24. There was also an issue about the RSUs and the options. In the joint schedule of assets prepared for the final hearing, these were given a value of £14 million by the wife and just under £2 million by the husband. The wife's figure was said to include a 50% discount in respect of the RSUs, which were performance dependent, "to reflect the risk of missing targets in the absence of specific data".

The Judgment of Baker J

25. Given the comprehensive challenge made by the wife to each of the pillars on which the judge based his determination, I propose to address the judgment at some length including references to the parties' submissions.

26. The judge summarised the wife's case as being that she sought, as referred to above, "in effect, a half share of the increase in value of the husband's shareholding in the company during the marriage", at [5].

27. The husband's case, relying on the asserted nuptial agreement, was that the wife was "not entitled to any part of the proceeds of sale of his shares", at [5]. Alternatively, he argued that the wife's "claim in respect of his shareholding in the company should be rejected, or at least very significantly reduced … (1) because the increase in the value of the shares should be regarded as a unilateral, non-matrimonial asset; (2) because at the date of the marriage there was a latent potential in the company so that its true pre-marital value was higher than reflected in the formal valuation produced in these proceedings; and (3) because the increase in value … during the marriage was attributable to his own special contribution", at [5].

28. The husband's case in respect of the nuptial agreement, which clearly took up a significant part of the hearing below and which formed a very substantial part of the judgment, was (as I have said) rejected by the judge. He rejected the husband's argument because he did not consider that the agreement had the effect for which the husband contended. He concluded, at [142], that the parties had not agreed that "their property

relations would be governed by Italian law". Also, the parties had entered into a "civil law matrimonial property agreement" which has a very different "character and objective" from a "prenuptial agreement which seeks to abrogate or influence the right to invoke the statutory discretion to redistribute fairly (or equitably) all the resources of the spouses following their divorce", at [144]. The wife did not understand that it might have the wider effect for which the husband contended and it would be unfair "to hold the wife" to that interpretation of the agreement, at [153]. The judge also determined that the way in which the parties had conducted their finances was not based on the agreement or their having elected separation of property: "It was simply how they chose to lead their lives", at [152]. He, accordingly, gave the agreement no weight at all.

29. The balance of the judgment dealt with the other factors relied on by the husband.

30. In the section containing a preliminary overview of the legal principles, at [19] to [28], the judge made clear that he started from "the position that the matrimonial assets will be subjected to the 'sharing principle' and divided equally between the parties", at [23]. He then slightly reformulated the arguments relied on by the husband as justifying other than an equal division. They were:

> (a) That some of the wealth was not matrimonial property: "the assets generated by his business activities in the company, both before and during the marriage, were generated by his efforts and, given the relatively short duration of the marriage, the fact that the wife did not work outside the home during the marriage, and her own substantial wealth, this is plainly a case in which she is not entitled to share in the value of the company at all", at [26];
> (b) Alternatively, the husband argued that a "true valuation" of his shares as at the date of the marriage "would include a significant uplift to reflect its latent potential realised during the marriage", at [26]; and
> (c) That the husband had made a special contribution, at [27].

31. The above arguments were considered by the judge under the headings: (i) "Unilateral Assets", at [154] to [177]; (ii) "Latent Potential Value", at [178] to [205]; and (iii) "Special Contribution", at [206] to [235]. He then set out his conclusions, at [236] to [245].

32. (i) Unilateral Assets:
The judge's analysis of the issue of unilateral assets started with his understanding of the husband's case as being that the shares in the Company "should be regarded as a species of non-matrimonial property", at [154]. He then quoted from *White v White* [2001] 1 AC 596 ("*White*"); *Miller*; *Charman v Charman (No 4)* [2007] 1 FLR 1246 ("*Charman*"); and *Sharp v Sharp* [2018] 2 WLR 1617 ("*Sharp*").

33. The judge rejected the husband's case that "the duration of the marriage … and the fact that the assets were generated through the husband's business activities" meant that the shares "should be regarded as unilateral assets falling outside the sharing principle", at

[170]. He concluded that, although this was "a matter on which opinions may differ", while the marriage in this case was "not a long marriage" it could not be "characterised as 'short'", at [172]. He also pointed to an important distinction from *Sharp*, namely that "this was not a childless marriage".

34. The judge gave three reasons for declining "to extend the 'concept of unilateral assets' to the facts of this case and to exclude the husband's shares … from the sharing principle", at [172]. They were as follows.

35. First, the "consensus" of appellate decisions was "that the circumstances in which the fact that the assets have been generated by one party during the marriage justifies departing from the yardstick of equality are limited to a small minority of cases", at [173]. In support of this conclusion, the judge referred to what Lady Hale had said in *Miller*; to the Court of Appeal in *Charman* preferring "to keep the concept of unilateral assets 'closely confined'"; and to McFarlane LJ's (as he then was) judgment in *Sharp* as not providing "any support for the extension of the 'concept of unilateral assets' to a wider range of cases", at [173].

36. Secondly, that there was no authority which supported "the proposition that the scope for one party to acquire and retain separate property which is excluded entirely from the sharing principle extends to cases where there are children of the marriage", at [174]. In particular, Lady Hale's "rationale for allowing the departure from equality" in *Miller* was "as a reduction in the share to reflect the (short) time over which the domestic contribution has continued or will continue". This "manifestly does not apply in cases with children".

37. Thirdly, to exclude unilateral assets in a case such as this one, "would fundamentally undermine" the sharing principle "which now lies at the heart of the treatment of" financial remedy claims and "would, in short, be discriminatory", at [175].

38. Pausing there, the judge clearly rejected the argument that the shares were "unilateral assets" which should be excluded from the sharing principle. However, he went on to say that the fact that the wealth "was generated by the husband's business activities … cannot be ignored entirely" and that "the nature and source of the assets may, as Baroness Hale of Richmond said in *Miller*, be taken into account in deciding *how* it should be shared", at [177]. The judge returned to this at the end of his judgment when summarising his conclusions as set out below.

39. (ii) Latent Potential Value:
The judge referred to a number of cases including *Jones*; *FZ v SZ and Others (Ancillary Relief: Conduct: Valuations)* [2011] 1 FLR 64; *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313 - an appeal from this decision was dismissed after Baker J's judgment, *Martin v Martin* [2019] 2 FLR 291 (*"Martin*"); *Robertson v Robertson* [2017] 1174 ("*Robertson*"); and *Hart v Hart* [2018] 2 WLR 509 ("*Hart*").

40. The husband's case was that the court should not adopt "the narrow approach of subtracting the accountancy valuation as at the date of the marriage from the value at ultimate sale", at [201]. This would give insufficient weight to the early years of the business before it "takes off" which would be "unfair to the wealth creator" and would "bestow disproportionate reward upon (the wife), because it would ignore the true value of the endeavour made by one party entirely outside the marriage partnership", at [201].

41. In passing, I would note the effect of the husband's submission, at [201], that the court should adopt either Holman J's approach in *Robertson* or Mostyn J's approach in *WM v HM* when determining what part of the wealth is marital property. These would have respectively resulted in 50% or 46.6% of the value of the husband's shares being classified as non-matrimonial property. Applying these percentages, to the net value to which the proceeds from their sale had increased by the date of the hearing, of £490 million, would have resulted in between £245 million to £260 million being treated as marital property which, on a straight application of the sharing principle, would have led to an award of between £122 million to £130 million. To provide greater context for this comparison, I set out below brief summaries of the circumstances in *Robertson* and *WM v HM* when dealing with the legal approach to latent potential value.

42. The wife's case was that there was no "reliable evidence" that latent potential existed in this case, at [202]. She also relied on the accountant's "conclusion that there was no compelling case for finding a latent potential in this case", at [203].

43. The judge noted the "dramatic growth in the company during the marriage" as illustrated by a graph, at [200]. I set out the judge's conclusions in respect of this issue below.

44. (iii) Special Contribution:
The judge referred to a number of cases culminating with *Gray v Work* [2018] Fam 35. He then summarised the evidence he considered relevant to this issue, at [221] to [229]. This focused almost entirely on the husband's evidence as to his role in the Company and made only a very brief reference to the wife's contributions, at [229].

45. The husband's case was that "looking both at the nature of the contribution and whether it derives from an exceptional and individual quality, the contribution made by the husband … comes within the scope of the concept of special contribution", at [232].

46. The wife's case was that the husband had "exaggerated the quality and extent of his contribution", at [233], and that "the husband's contribution has to be seen in the context of the family and the wife's contribution to the family", at [234]. It was submitted that the husband had downplayed the extent of the wife's contribution and also that, if the husband had made a special contribution, then so had the wife.

47. It is interesting to note the husband's submissions in response, at [235]. It was argued that "if the wife is not claiming that she has made a special contribution herself, it is not permissible for her to seek to use those contributions as a shield"; that to seek to use "maternal contributions as a defence to a claim based on special contribution is quite

misplaced"; and that the "impression formed by … the court … as to the wife's role as a mother is not informative as to the answer to the question whether his own contribution was special". I have set these submissions out in full because, for the reasons given below, they do not reflect the effect of the decision in *Gray v Work*.

48. Conclusions:
The judge set out his conclusions in respect of each of the above factors, at [238] to [245]. I set out these conclusions in full, because, as I have said, they are each challenged by the wife. The judge's ultimate determination, at [243], was that these factors justified a significant departure from equal sharing. As will be seen the first factor is broken down into two elements, namely that the parties "kept their financial affairs completely separate", at [238], and that the most significant assets were "the husband's business assets", at [239].

49. After setting out his conclusion in respect of the nuptial agreement, the judge set out his conclusions in respect of the other factors referred to above:

> "[237] … For several reasons, however, I have decided that the fair outcome is one that departs from the sharing principle and leaves the husband with a significantly greater proportion of the assets. I reach that conclusion for the following reasons.
>
> [238] First, the parties have to a very substantial extent kept their financial affairs completely separate during the marriage. As Baroness Hale of Richmond observed in *Miller* at para [153] (quoted above), 'the nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared'. In this case, the way this couple chose to run their lives was to keep their financial affairs separate. This is, to my mind, a matter of considerable relevance. No doubt on occasions each party paid for things which benefitted the other, but when it came to managing their affairs during the marriage they largely kept their finances apart. In my judgment, that is a factor which the court should take into account when deciding the extent to which the assets should be shared now that the marriage has come to an end.
>
> [239] Secondly, the assets which grew so substantially in value during the latter years of the marriage were the husband's business assets. The case-law remains unclear as to whether such assets should be regarded as matrimonial or non-matrimonial. In the sense that the growth in value occurred during the marriage, they could be said to be matrimonial. On the other hand, the assets remained at all times in the hands of the husband. They were never pooled. In that sense, they can properly be described as non-matrimonial. Ultimately, the label does not matter. What is relevant, in my judgment, is that they were the husband's business assets. That does not mean that they should be excluded

altogether. To hold otherwise would be contrary to the decision of the Court of Appeal in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 and, as explained above, I do not interpret the more recent decision in *Sharp v Sharp* [2017] EWCA Civ 408, [2018] 2 WLR 1617, [2017] 2 FLR 1095 as providing any support for a change in approach. But the nature and source of the property is relevant to deciding how the assets should be shared. The fact that the enormous wealth at issue in this case was created through the husband's business activity is something which must be taken into account in reaching a fair decision.

[240] Thirdly, I am satisfied that there was a latent potential in the company not reflected in the conventional valuation conducted by Mr Kay. The ultimate phenomenal success of the company was due in part to developments and decisions taken in the business during the marriage, but it was also attributable to developments and decisions taken before the marriage – the creation of the company, the putting together of the team, the earlier activities of the company in its field, including the original product models, and the development of a marketing strategy. To a not inconsiderable extent, the later success was built on those earlier foundations. Mr Kay thought that this was not a significant factor in determining the value of the company at the date of the marriage because the subsequent growth in the business did not occur for several years after the marriage. In my judgment, however, the latent potential was there at all material times – it just remained latent for rather longer until the opportunities for growth arose.

[241] How should this latent potential be taken into account? To my mind, with great respect to both Holman J and Mostyn J, I consider that neither the approach in *Robertson v Robertson* [2016] EWHC 613 (Fam), [2017] 1 FLR 1174 (treating 50% of the value of the business at the date of sale as having been created prior to the marriage) nor the approach in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2017] EWFC 25, [2018] 1 FLR 313 (excluding the proportion of value in the business that was created before the marriage on a linear apportionment basis) is appropriate in this case. As Arden LJ noted in *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723, the court must try to look as far as it can at the reality of what actually happened rather than proceed on an artificial assumption of a straight-line growth from the date of foundation of the business up to the eventual sale. To insist on a linear or arithmetical approach would be to fall into the error identified by Moylan LJ in *Hart v Hart* [2017] EWCA Civ 1306, [2018] 2 WLR 509, [2018] 1 FLR 1283 of imposing 'constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome.' In this case, adopting Moylan LJ's approach, I

conclude that the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property and it is neither proportionate nor feasible to seek to determine a clear line. Instead, I propose to undertake a broad evidential assessment before deciding how the wealth should be divided. My assessment is that there was a significant, though unquantifiable, latent potential in the company at the date of the marriage which is not reflected in the formal valuation. The fact that there was such a latent potential in the company must therefore be taken into account when determining the extent to which there should be a departure from the sharing principle.

[242] Fourthly, and finally, I am satisfied in this case that the husband's contribution to the growth in the value of the business assets during the marriage comes within the concept of special contribution. The growth in the value of the company, and therefore of the husband's shareholding, was due in part to the latent potential that existed at the date of the marriage, but it was also due to developments during the marriage. On any view, the growth in the value of the shares during the marriage was spectacular. The increase in value was, in my view, on a scale sufficient by itself to bring this case within the concept of special contribution. But in addition I do consider that the husband's contribution to the business during the marriage was of a quality which can properly be described as special. I accept the evidence of his former colleagues, set out above, about the crucial importance of his role. Now that the Court of Appeal has removed the word 'genius' from this analysis, it seems to me plain that the contribution made by the husband in this case can be seen to be of a character to justify departing from the sharing principle. The nature of his contribution is such that it is very obviously inconsistent with the objective of achieving fairness for it to be ignored.

[243] Taken together, these four factors justify a significant departure from the sharing principle. But in coming to a final figure, I must of course check my preliminary views against the yardstick of equality. I remind myself that, when a marriage comes to an end, each partner to the marriage is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. I must be particularly careful not to undervalue the domestic contribution of the homemaker to the welfare and happiness of the family as a whole. In this case, the wife's enormous contribution to the welfare and happiness of the family, as the homemaker and principal carer of AB, both during and after the marriage, has been and will be incalculable. She has devoted herself to the day-to-day care of a child with special needs and by doing so has freed the husband to a very considerable extent to enable him to pursue the business activities which have generated the enormous wealth now available. These are important

> considerations when considering the extent of the departure from the sharing principle.
>
> [244] In *Charman*, the Court of Appeal stated that 'in an extreme case and in the absence of some further dramatic feature unrelated to it, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6%–33.3%'. In this case, I have found that there are other features unrelated to special contribution which justify a greater departure from equality.
>
> [245] In all the circumstances, I have concluded that a fair outcome would be to award the wife a lump sum equivalent to 25% of the difference between the husband's share of the proceeds of sale of the company in 2016 and the value of the husband's shares at the date of the marriage as assessed by Mr Kay, but increased to take account of passive growth applying the MSCI World Technology share index as proposed on behalf of the wife."

50. The judge undertook the specific calculation, at [249]. He determined that the "value of the growth in the husband's shareholding … during the marriage" was the difference between (a) the expert's valuation of the shares as at the date of the marriage increased by indexation, giving the sum of £28.6 million; and (b) the net value, as at the date of the hearing, of the assets acquired by the husband with the proceeds received by him from the sale of those shares, of £490 million. The difference was, approximately, £460 million. This led to a lump sum of £115 million, being 25% of £460 million.

51. The judge also transferred the jointly owned property, valued at £3.7 million, to the wife. These resources, when added to her own assets of £33.75 million, gave the wife a total of just over £152 million leaving the husband with £378 million.

52. The judge decided to make no additional award in respect of the RSUs and stock options because he accepted the husband's case that his ability to realise them was "dependent on future performance", at [247(3)].

Submissions

53. The parties' respective submissions are as follows.

54. The wife challenges the judge's conclusions in respect of each of the factors which were used by him to support the lump sum award. Ms Stone submits that each conclusion is flawed and that they do not support the wife being awarded a lump sum of £115 million. I propose to set out her submissions under the same headings as given in the judgment.

55. (i) Unilateral Assets:

As referred to above, in his conclusions the judge divided this factor into two elements, namely that the parties had kept their finances separate and that the wealth had been generated through the husband's "business assets".

56. Ms Stone's overarching submission is that any concept of unilateral assets, in respect of either of the elements referred to by the judge, is applicable, if at all, only to short childless marriages. Based on, what she submitted is, a proper analysis of *Miller*, *Charman* and *Sharp*, the "nature and source of the property and the way in which the couple have run their lives" (*Miller*, at [152]) are only potentially relevant when the "duration of the marriage may justify a departure from" equality because of the "period of time over which the domestic contribution has or will continue", *Miller*, at [152]. There is, she submitted, no principle as the judge seemed to consider that these elements are applicable more generally. Indeed, she submitted that the judge's decision in this respect ran contrary to the reasons he had given for rejecting the husband's case that the shares should be excluded completely, including that this would "fundamentally undermine" the sharing principle and would be discriminatory, at [175].

57. Ms Stone also submitted that, having rejected the husband's case that the parties had kept their finances separate *because* of the marital agreement, it was wrong for the judge to bring this back in as reflecting some kind of quasi-agreement, on the basis that this was how the parties "*chose* to run their lives" (emphasis added), at [238].

58. As to the issue of "business assets", Ms Stone submitted that, contrary to the judge's understanding, the law is clear as to whether such assets are or are not matrimonial property. In her submission, what property falls within the concept of matrimonial property is well-defined. In *Charman*, for example, it was defined as "the property of the parties generated during the marriage otherwise than by external donation", at [66].

59. She also submitted that the proposition, that wealth made through a business does not have to be shared equally simply because this was its source, would "subvert" the development in the law since *White*. It would run contrary to the core principle established by that case, as set out in the speech of Lord Nicholls, at p.605 E: "If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer". How, Ms Stone also asked, would this proposition fit with Lady Hale's comment in *Miller*, at [146], that it "had been made clear in *White v White* … that domestic and financial contributions should be treated equally". It would, she suggested, result in them being treated very differently and in a way which would inevitably be the cause, again, of discriminatory outcomes.

60. (ii) Latent Potential Value:
Ms Stone submitted that the evidence did not support the judge's conclusion that there was "latent potential" in the Company which was not reflected in the expert's valuation. The expert had specifically considered whether there was a "springboard" and had concluded that there was not. Based on the history of the development of the Company,

Ms Stone submitted that the effect of the judge's conclusion resulted in the value as at the date of the marriage being increased by reference to the husband's "activity" during the marriage, contrary to what Wilson LJ (as he then was) had said in *Jones*, at [42]. This flaw meant that the judge had not determined the right question which was the "real value" of the shares at the date of the marriage. This, she submitted, should be determined by reference to the valuation with appropriate indexation.

61. Ms Stone also questioned the absence from the judgment of any indication of the extent to which the judge's finding as to latent potential specifically impacted on the award. She submitted that this was an error of principle because a judge needs to make clear the extent to which his award is based on this factor. This is because, rather than a departure from equality, it amounts to a determination as to what part of the parties' current resources is not marital property. This, she submitted, needs to be separately identified.

62. (iii) Special Contribution:
The wife's core submission is that the judge failed to conduct the "mandatory balancing exercise" required when one party is asserting that they have made a special contribution. Although the judge had set out the guidance from *Gray v Work*, including the reference to "disparity" in contributions, Ms Stone submitted that there is "entirely absent" from the judge's conclusion on this issue, at [242], any reference to the wife's contributions, "let alone any analysis of any disparity" between their respective contributions. She further pointed to the absence of anything more than very brief references to the wife's "roles", at [229], when the judge was addressing the evidence on special contribution, at [221] to [229]. In her submission, it is not sufficient to "infer" that the judge did balance the parties' respective contributions. That the judge performed such an important element of this exercise needs to be clear from the judgment.

63. Ms Stone acknowledged that the judge did refer to the nature and quality of the wife's contributions, at [243], but, she submitted, this was *after* he had set out his conclusion that the husband had made a special contribution, at [242], and *after* he had concluded that a "significant departure from the sharing principle" was justified. In Ms Stone's submission, the judge's former conclusion, in respect of special contribution, can be seen to have been based *only* on an analysis of the nature of the husband's financial contribution. The reference to the wife's contribution was limited, as the judge expressly stated, to checking "my preliminary views against the yardstick of equality", at [243].

64. Ms Stone added some subsidiary submissions challenging other aspects of the judgment. These included the judge's decision that the growth in the value of the shares was "on a scale sufficient by itself to bring this case within the concept of special contribution", at [242], which she submitted was contrary to *Gray v Work* which made clear that the contribution must "derive from the 'exceptional and individual quality' of the contributor", at [91]. And that the judge's conclusions, including his additional conclusion as to the quality of the husband's contribution, were based on an insufficient analysis of, in particular, the oral evidence.

65. If, Ms Stone submitted, the judge had carried out the exercise properly, he would have concluded that the husband had not made a special contribution. Having regard to the judge's determination that the wife's contributions "had been and will be incalculable", at [243], he would have determined that there was not such a disparity in their respective contributions as to make it inequitable to disregard the husband's contributions when applying the sharing principle.

66. Calculation of the Award:
In respect of the ground set out under paragraph 5(v) above, namely that the judge failed to quantify how each of the above factors impacted on his award, Ms Stone submitted that this is a substantive flaw. In her submission, the court needs specifically to articulate how the award has been calculated. The judge's references to fairness having a broad horizon did not justify the judge's failure to set out how each of his conclusions "affected his overall calculation of the wife's award". I have referred above (paragraph 61) to further submissions made on this point.

67. RSUs and Options:
Ms Stone submitted that the judge was wrong when he concluded that the RSUs and stock options were dependent on future performance. Indeed, she submitted, this was not the husband's case. They remained largely unvested at the date of the trial but, Ms Stone submitted, because the husband had become entitled to them during the marriage, the sharing principle should have been applied to them. A significant proportion were not dependent on performance but only on the husband continuing to be employed by the Company. Others were dependent on performance but, as there was no evidence of what the targets were, the wife had proposed a 50% discount.

68. I also propose to summarise the submissions made on behalf of the husband largely under the above headings.

69. The first, general, submission is that the wife's appeal is significantly directed against the judge's findings of fact and his evaluation of the effect of those findings. So, for example, the judge's findings as to the nature and quality of the parties' contributions and his evaluation that the husband's constituted a special contribution. It is submitted that, applying well-established principles, this court will be slow to interfere with these elements of a judgment.

70. It is, likewise, submitted that unless the judge's award falls "well outside" the parameters of possible disagreement, such an exercise of discretion is something with which this court will not ordinarily interfere because a judge has a wide discretion when determining what award to make based on his assessment of the evidence. Mr Marks submitted that, rather than the judge's award being outside the bracket, it was an award which was "unsurprising and unobjectionable".

71. (i) Unilateral Assets:
In the husband's written submissions for this appeal, the manner in which the wife was said to have "fragmented" this issue into separate points – namely, the way the parties

ran their lives, business assets and unilateral assets – was challenged. It was submitted that this was not the way the judge had dealt with these considerations and that it is "wrong in law" to treat them as disparate. The husband's case was based on the submission that it was "clear" from *Miller* that the "nature and source" of the parties' property was a relevant consideration. However, having submitted that it was wrong to treat these points as disparate, no doubt out of an abundance of caution the submissions went on to deal with the "way in which the spouses ran their lives" and business assets. In respect of the former it was submitted that, based on *Miller* and *Sharp,* the fact that the husband had kept "close personal control of the shares" with very limited "overlap" in their financial affairs were "relevant to the division" in "short or short-ish marriages". In respect of the latter, it was submitted simply that they were "quintessentially unilateral assets", which was a factor which "should carry weight in the outcome". The judge had, therefore, been entitled to take these factors into account.

72. Mr Marks also submitted that the parties could be taken to have implicitly agreed that their wealth would not be shared. This, again, was based on the way in which they had chosen "to lead their lives" as referred to by the judge, at [152]. They both had their own wealth which they had kept separate and they were, therefore, like the "dual career family" referred to in *Miller*. These were all elements which would be likely to become less important the longer the marriage but the judge was entitled to decide that the "taper" had not yet come to an end.

73. (ii) Latent Potential Value:
The husband's case in response to the wife's submissions was, first, that when a judge is evaluating the importance of a company at the start of the marriage, it is legitimate for him or her to allow the latent potential value of the company to influence the outcome. By recognising latent potential value, the judge is doing no more than acknowledging that the "bald monetary value" of the shares, based on the accountant's "black-letter" exercise, does not fairly or fully reflect the weight that should be attached to the value of this contribution by the husband.

74. It was also submitted that the authorities, *Miller, Hart* and *Versteegh v Versteegh* [2019] 2 WLR 399, establish that the court has a broad discretion in arriving at an "allocation of this value" as between marital and non-marital property. The judge did not have to "adjust the size of the cake" but was entitled to reduce the percentage of his award. The judge had adjusted his arithmetic to reflect the importance of the shares.

75. Mr Marks also made the more general submission that a retrospective valuation of the shares, *with* the benefit of hindsight, would inevitably have resulted in a higher figure. I took this as a submission that this would have been an alternative evidential basis for determining what proportion of the value of the shares at the end of the marriage should be treated as marital property.

76. (iii) Special Contribution:
Mr Marks first commented on the manner in which this issue had been considered at the hearing below. He submitted that the concept of special contribution does not and should

not require a detailed forensic examination of the type which took place in this case. The evidence descended into what he submitted was excessive detail and "granularity". He pointed to the development of the concept of "gross and obvious" in the context of conduct and submitted that special contribution similarly should only require a high level of evaluation. In his submission, the immersion in detail, far from clarifying the picture, would be more likely to result in it being obscured.

77. It is the husband's case that the judge was well placed to distinguish between the parties' contributions and was entitled to conclude that the husband had made a special contribution. Further, the judge was not constrained by the bracket referred to in *Charman*, of 66.6%/33.3%, because the judge's award of 25% of the difference in value of the shares included other factors as referred to above. It was accepted, as set out in the husband's written submissions, that the court has to "focus on the *disparity* of the parties' respective contributions to the welfare of the family" but Mr Marks submitted that it "is just not maintainable" that the judge would have overlooked the considerable volume of evidence directed towards the wife's contributions. Further, he submitted that it can be seen from a number of references in the judgment that the judge was aware of the need to assess the disparity in contributions and that he had had regard to the wife's contributions: for example, at [171], when the judge was dealing with the parties' submissions on unilateral assets, and at [229] and [234]. Mr Marks submitted that the judge can be seen to have undertaken "the disparity" exercise at [242] and [243].

78. It was also submitted that the judgment contains a sufficient analysis of the evidence relevant to this issue. A detailed rebuttal was made to the wife's submission that the judge had not properly addressed the oral evidence and its asserted effect on the written evidence, through a table setting out passages from the oral evidence which were said to support what had been said in the written evidence.

79. Calculation of the Award:
As for the judge's approach, as set out in his concluding paragraphs, it was submitted that the judge was not required to state how each factor impacted on the calculation of his award; he did not need to give a numerical value for each factor. The judge took these factors into account when arriving at his award and he did not need "to attribute the different percentage shares to separate aspects" of the case. This, it was submitted, would be an undesirable fetter on the overall discretion of a judge.

80. RSUs and Options:
Mr Marks submitted that the judge was entitled to determine that the wife should receive no share of these assets. They were dependent on future performance both in the sense that the husband had to remain employed by the Company and, in respect of some, that they depended on performance results. In addition, the sums involved were, he submitted, not at a level which would justify this court interfering with the judge's determination.

81. In conclusion, Mr Marks submitted that, if this court decides the judge's approach to either of the issues of special contribution or latent potential value was flawed, then the

matter would have to be remitted to be reheard. This court is, he submitted, not in a position to substitute alternative conclusions on these issues. If, however, this court were to decide only that the judge's approach to the other, what Mr Marks described as, "smaller" points, namely the way the parties ran their lives and business assets, was flawed then, he submitted, this court would be able to decide the just extent of any departure from equality.

Legal Context

82. I deal below with the specific issues raised by this appeal but I propose, first, briefly to consider in more general terms the nature of the discretion given to the trial judge under the MCA 1973 given the husband's reliance on its breadth and this court's conventional reticence in interfering with a judge's discretionary determination.

83. As referred to in *Gray v Work*, at [26], Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360 at p.1370 H that:

> "Section 25(2) of the Act of 1973, while listing the various matters to which particular regard should be had, does not rank them in any kind of hierarchy. Which of them will carry the most weight must depend on the particular facts of the case."

This is the essence of what has been called the bespoke approach to the determination of financial claims. The tension that this creates, between the need for a sufficient degree of certainty and clarity in the exercise by the courts of their discretionary powers and the need for sufficient flexibility to meet the justice of the individual case, has been the subject of debate over the years. The breadth of the discretion also impacts on the well-established principle that a judgment must be sufficiently reasoned to explain the court's decision.

84. In *Scheeres v Scheeres* [1999] 1 FLR 241, Thorpe LJ said, at p.243 G/H:

> "It is very important in these ancillary relief cases, where the court exercises a very broad discretion, that the judge should carry out the s.25 exercise rigorously, in an attempt to inject some sort of clear rationality and principle to what otherwise could be said to be palm tree adjudication".

This decision, and specifically the need for the exercise to be conducted rigorously, was cited with approval by the Privy Council in *Ramnarine v Ramnarine* [2014] 1 FLR 594, at [10].

85. Having regard to the way in which the jurisprudence has developed since 1999, it is interesting also to note what was said in the 1998 Green Paper, *Supporting Families*. The court's "almost unfettered discretion" (para 4.45) was referred to as the backdrop to the Government's consultation on "measures which would offer divorcing couples

greater certainty and clarity as to what they might expect to receive on divorce" (para 4.48). This would be achieved by "an over-arching objective and a set of guiding principles". Briefly, the objective would be "to do that which was fair and reasonable" while, broadly, the guidelines proposed that after meeting needs and taking into account any written nuptial agreement, fairness would "generally require the value of the assets to be divided equally".

86. No further legislative progress, in fact, took place and the courts were left to develop guidance. It is, therefore, this guidance, combined with the statutory provisions in the MCA 1973, which provide the framework for, what Thorpe LJ identified as the need for, "clear rationality and principle". As part of this I would include, specifically in respect of financial remedy cases, the need for the judgment to explain with sufficient clarity how the award has been calculated. Without this, there would clearly be scope for a party to argue that the judgment is not sufficiently reasoned. As I have said very recently, and since the hearing of this appeal: "Every financial remedy judgment should clearly set out how the award has been calculated", *Moher v Moher* [2019] EWCA Civ 1482, at [114(ii)].

87. In terms of guidance, what Lady Hale termed the "great leap forward", *Miller* at [134], came in the decision of *White*. Although the core principles established by that decision, fairness and non-discrimination, are now firmly embedded in the jurisprudence, having regard to the submissions made in the present case, I propose to deal with the latter in a little more detail.

88. As part of this, I would emphasise that the important principles enunciated in *White* reflect, what was referred to in *Owens v Owens* [2018] 2 FLR 1067 as, "the relevant social norm which has changed most obviously during the last 40 years", Lord Wilson at [34]. This "related to society's insistence upon equality between the sexes; to its recognition that marriage is a partnership of equals". In *White* this "insistence" can be found in the speech of Lord Nicholls when he powerfully emphasised "one principle of universal application", namely that: "In seeking to achieve a fair outcome, there is no place for discrimination between the husband and the wife and their respective roles", at p.605 B/C. The effect of this principle was reinforced: "whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness *requires* that this should not prejudice or advantage either party when considering" their respective contributions, at p. 605 D (my emphasis); and (to quote again), "If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and child-carer", at p.605 E.

89. It is also relevant to note Lord Nicholls' reference to there being "greater awareness of the value of non-financial contributions to the welfare of the family" *and* "greater awareness of the extent to which one spouse's business success … may have been made possible or enhanced by the family contribution of the other spouse", at p. 605/606. He specifically identified the need to ensure that discrimination did not creep "in by the back door", at p.608 G. This applied, for example, to the manner in which the court

approached the division of "a valuable business" built up, "from scratch", by the parties' "joint efforts over many years, his directly in the business and hers indirectly in the home", at p.608 F/G.

90. It is clear from *Miller* that the House of Lords were not intending to depart from the key principles identified in *White*. Rather, they were building on them by setting out further principles, especially need and sharing, the application of which were clearly intended to support the court's powers being exercised in a way which was not discriminatory.

(i) Unilateral Assets

91. Having regard to the way this issue was advanced by the husband at the hearing below (paragraph 21 above) and on this appeal (paragraph 71 above), it is relevant to consider this issue from a broad rather than a narrow perspective which also includes the relevance of the length of the marriage.

92. The expression "unilateral assets" was coined by Burton J in *S v S (Divorce: Distribution of Assets)* [2006] All ER (D) 137, at [29], and was picked up in *Charman*, at [82], to describe "non-business partnership, non-family" assets as referred to by Lady Hale in *Miller*, at [150].

93. *Miller* was the case in which the expressions "marital acquest" and "matrimonial property" were adopted by the House of Lords (expressions used in the Law Commission's 1969 *Report on Financial Provision in Matrimonial Proceedings* (Law Com. No. 25), at para 49 n.6). Lord Nicholls was clear, at [22], that the expression "matrimonial property" included all the "property acquired during the marriage otherwise than by inheritance or gift". This was because such property was "the financial product of the parties' common endeavour". It was also his view that the same approach, namely that each spouse "is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary", should apply to short marriages as well as to long marriages. "A short marriage is no less a partnership of equals than a long marriage", at [17].

94. Lady Hale was more circumspect as set out in the section of her speech which has the heading, "*The source of the assets and the length of the marriage*". Debates, to which she had referred in preceding paragraphs (about conduct and contributions), provided "evidence of unease at the fairness of dividing equally great wealth which has either been brought into the marriage or generated by the business efforts and acumen of one party", at [147]. It was also "principally in this context that there is also a perception that the size of the non-business partner's share should be linked to the length of the marriage", at [147].

95. This led her to question whether in "the very big money cases, it is fair to take account of the source and nature of the assets, in the same way that some account is taken of the source of those assets in inherited or family wealth", at [149]. Reaching back to what Lord Denning MR had said in *Wachtel v Wachtel* [1973] Fam 72, 90 she asked whether matrimonial property consisted "of everything acquired during the marriage … or might

a distinction be drawn between 'family' and other assets", at [149]. She then said: "Prime examples of family assets of a capital nature were the family home and its contents, while the parties' earning capacities were assets of a revenue nature", at [149]. She added to these, assets which were "obviously acquired for the use and benefit of the whole family" and "family businesses or joint ventures in which they both work" because it was "easy to see such assets as the fruits of the marital partnership", at [149].

96. She then identified as being "(m)ore difficult … business or investment assets which have been generated solely or mainly by the efforts of one party" and which she called "non-business partnership, non-family asset cases", at [150]. Against this being a reason for "departing from the yardstick of equality" was the fact "that commercial and domestic contributions are intrinsically incommensurable". Accordingly, it could be argued: "If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise", at [150].

97. Lady Hale then set out, at [151], the counter argument, that "this is unrealistic", based on a number of factors: that we "do not yet have a system of community of property"; that there are different "perceptions of a fair result" based on some assets not being "family assets in the way that the home, contents and the family savings are family assets"; that the value of the former "may well be speculative or their possession risky"; also that it "simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, contributed to their acquisition"; and that "great wealth can be generated in a very short time … but domestic contributions by their very nature take time to mature into contributions to the welfare of the family".

98. Lady Hale sought to accommodate both arguments by stating, first, that they "are irrelevant in the great majority of cases", at [152]. She then said that the answer was "the same as that given in *White v White*", namely that the "source of the assets may be taken into account but its importance will diminish over time". This was further explained as follows:

> [152] … Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, "Comment on *GW v RW (Financial Provision: Departure from Equality)*" [2003] Fam Law 386, at p 388) rather than in terms of accrual over time (see Eekelaar, "Asset Distribution on Divorce – Time and Property" [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

> [153] This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home."

99. Lord Mance added his own observations about the different approaches taken by Lord Nicholls and Lady Hale to the question of what constitutes matrimonial property. He gave a number of reasons, at [169], why taking the shortness of the marriage into account "could enable a court to cut through some of these more intricate arguments", particularly arguments about "precisely what assets (other than family assets) were generated during the marriage". He continued that:

> "… to allow the duration of a marriage as a relevant factor, would cater for the considerations that, while some people may make a large amount of money in a short time, the nature of their work or other factors may mean that they do not do so at a consistent rate over their lives as a whole or for more than a short period of their lives, and furthermore, as Baroness Hale has pointed out, that there may be long-term risks in relation to non-business-partnership, non-family assets which remain with those directly involved in generating them. The longer the marriage, the less likely these are to be significant considerations. In a short marriage, the timing of which may or may not coincide with a period of significant increase in the value of non-business-partnership, non-family assets, such considerations argue in favour of some further flexibility in the application of the yardstick of equality of division. I see force in and would agree with the views expressed by Baroness Hale in paras 151–152 of her judgment to the effect that the duration of a marriage, mentioned expressly in section 25(2)(d) of the Act, cannot be discounted as a relevant factor."

100. Before leaving *Miller*, I consider it important to bear in mind that the observations being made were in respect of what were then the newly established principles of sharing, need and compensation. Inevitably, the House of Lords explored the way in which these principles might be applied in particular circumstances but, in some respects, they can be seen to comprise the exploration of arguments rather than the articulation of guidance. For example, in Lady Hale's use of the expression, "it might well be fair", followed by the caution that "one should be careful not to take this approach too far", when discussing "a genuine dual career family". This is understandable because the more detailed manner in which the substantive principles were to be applied would inevitably be worked out by the lower courts based on their experience of how these new principles should, in practice, be applied consistently with the overarching principles of "fairness and non-discrimination" as established by *White*, and as referred to by Lady Hale in *Miller*, at [136]. I would also refer to what I said in *Waggott v Waggott* [2018] 2 FLR 406 ("*Waggott*"), at [66], about the inaptness of undertaking a "detailed textual analysis of what has been said in some of the cases" as though they were statutes.

101. *Charman*, at [66], as referred to above, identified "matrimonial property" as being "the property of the parties generated during the marriage otherwise than by external donation". The court also dealt with a submission made on behalf of the husband that Lady Hale in *Miller* had "identified a category of cases in which property should in no way be subject to the sharing principle, notwithstanding that the principle allows in rare cases for special contribution". After setting out that Lady Hale had suggested that a distinction "fell to be made between 'family assets' and the fruits of a business in which both parties had substantially worked, on the one hand, and the fruits of a business in which only one party had substantially worked, i.e. unilateral assets, on the other", at [82], the Court of Appeal rejected the husband's submission:

> "[83] We hasten to correct a serious misapprehension at the heart of this submission. As we will show, Baroness Hale of Richmond put forward the distinction between unilateral assets and other matrimonial property for use in cases in which the marriage was short. And, although obiter she suggested an extension of it to another situation, namely that of the dual career to which we turn in para [86], below, she definitely did not commend the distinction for use in other cases. Its application in a case such as the present would be deeply discriminatory and would gravely undermine the sharing principle articulated, albeit embryonically, in *White* and emphatically developed in other parts of the speeches in *Miller* itself."

After summarising the facts of *Miller*, the Court of Appeal returned to the issue of the application of the sharing principle when the marriage had been "short" and to the concept of unilateral assets:

> "[85] Such was the context in which the House turned to consider whether the sharing principle applied to cases in which the property had been generated during a short marriage. It was in this area that the

members of the House were in substantial disagreement; and we cannot subscribe to the ingenious attempt of Burton J in *S v S (Divorce: Distribution of Assets)*, at paras [30] and [31], to reconcile their differences. We suggest with respect that, while the approach of Lord Nicholls of Birkenhead was perhaps the more logical, the approach both of Baroness Hale of Richmond, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls of Birkenhead, at paras [17]–[20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in *Miller* by reference, at para [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled, 'The source of the assets and the length of the marriage' Baroness Hale of Richmond, at paras [147]–[152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at para [158], her rationale for justifying departure from equality in *Miller*. Lord Mance, at para [169], powerfully stressed the practical value of Baroness Hale of Richmond's approach, namely that it would often obviate the need to address the argument, sometimes called the 'seed-corn' argument, raised in *Miller* itself, to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.

[86] The extension of the concept of unilateral assets, suggested by Baroness Hale of Richmond in *Miller*, at para [153], was expressly endorsed by Lord Mance, at para [170]. Although obiter, it clearly commands great respect. It relates to the 'dual career'. The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls of Birkenhead to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined. Lord Mance offered, at para [170], the following interesting rationalisation for the suggested extension:

> 'Once needs and compensation had been addressed, the misfortune of divorce would not of itself … be justification for the court to disturb principles by which the parties had chosen to live their lives while married.'

> Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed."

102. In *Sharp*, McFarlane LJ analysed the above cases for the purposes of deciding whether, in a short marriage, the marital property should be divided equally. More specifically it is, in my view, clear that the Court of Appeal in *Sharp* was considering the impact of the decision in *Miller* "in so far as it relates to short, childless marriages with potentially separate property", at [77]. It is also clear that the Court was *not* intending "in any manner to unsettle the clear understanding that has been reached post-*White* on the approach that should be taken in the vast majority of cases" having regard to the fact that "the decisions of *White*, *Miller* and *Charman* have to a great extent limited the potential for … parties fighting cases … and have increased the predictability of outcomes", at [74]. As McFarlane LJ then went on to say: "The focus of the present appeal, which is very narrow, is upon whether there is a fringe of cases that may be outside the equal sharing principle".

103. The conclusion reached was that, applying *Miller*, "departure from the equal sharing principle" was permissible "in the case of a dual career marriage which was short, and where the couple had kept their finances separate", at [107]. That the scope of the decision in *Sharp* is limited is, again, reinforced by McFarlane LJ's acceptance, as "right", the submissions made on behalf of the wife "that the combination of potentially relevant factors (short marriage, no children, dual career and separate finances) is sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness", at [114].

104. As part of his reasoning McFarlane LJ concluded, when addressing the different approaches taken by Lord Nicholls and Lady Hale in *Miller* to the application of the sharing principle to short marriages, that: "In so far as the judgment of this court in *Charman* at para [86] has been interpreted as expressing a preference for the opinion of Lord Nicholls on such matters, such an interpretation is, in my view, erroneous", at [80]. He explained this conclusion as follows:

> "[107] The distinction between the treatment of short marriages in para [152] and the (obiter) discussion about dual career marriages in para [153] in *Miller* was recognised by this court in *Charman* at para [83] and that distinction is carried forward in paras [85] and [86]. At para [85] the court addresses the issue of short marriages and accepts the majority view expressed by Baroness Hale at para [152] of *Miller*, while at para [86] they address the obiter example of dual career marriages. It was clearly unnecessary for them to do so, because *Charman* was not a dual career marriage. What is said at para [86] is therefore obiter comment on Baroness Hale's obiter comment on dual career marriages. The court appears to have been concerned that recognition of unilateral assets as falling outside the sharing principle in a long (or more than short)

> marriage could well produce an unfair result. For that reason, they wanted the notion of different treatment of unilateral assets in such marriages to be 'closely confined'. Baroness Hale had herself recognised the need for care and limitation in the last three sentences of para [153]. That issue, which does not arise on the facts of the present case, remains a matter for debate on another day. On that analysis of the key passages in the judgment in *Charman*, there is no impediment, in terms of possible conflict, for this court now to contemplate a departure from the equal sharing principle in the case of a dual career marriage which was short, and where the couple had kept their finances separate.
>
> [108] If Mr Southgate's submission to this court that, following *Charman*, the profession and judges at first instance have read *Charman* as requiring the courts to apply the equal sharing principle to unilateral assets even in a short marriage case (assuming needs are met) is right, that approach is plainly contrary to the decision in *Miller* and is not justified by anything that was said in *Charman*.
>
> [109] In his judgment Sir Peter Singer (para [48]) held that, save where parties expressly chose to opt out (or attempt to do so) of the sharing concept to which couples subscribe when they marry by making a pre-nuptial agreement, the speeches of Baroness Hale and Lord Mance, in so far as they contemplated unilateral finances in a short marriage, dual career, case, were not consistent with the principles developed since the decision in *White*. For the reasons that I have given, it was, with respect, not open to Sir Peter so to conclude. Baroness Hale, Lord Mance and Lord Hoffmann had expressed their concluded view that the law should entertain the possibility for departure from the sharing principle on this basis; as the majority, that view should have been followed. The obiter observations of the Court of Appeal in *Charman* at para [86], expressing a preference for the lone opinion of Lord Nicholls, should not have been taken as a determinative statement of the law. There is no ground in the judgment in *Charman* for holding that any exception is to be confined only to those cases where the parties have established a formal pre-nuptial agreement. To hold that Lord Mance's phrase as to the 'principles by which the parties had chosen to live their lives while married' looks forward to *Radmacher* and the different issue of enforceable pre-nuptial agreements, simply writes an unsustainable and unjustified meaning into Lord Mance's words. The judgment in *Charman*, upon which Sir Peter relied on this point, does not go so far as to limit the relevance of the arrangement of finances to cases of express pre-nuptial agreements."

105. I would finally note that, in *Waggott*, when rejecting the argument that an earning capacity is an asset to which the sharing principle applied, I said, at [128]: "The sharing principle applies to marital assets, being the property of the parties generated during the marriage otherwise than by external donation".

106. I set out my conclusions on the parties' respective submissions below but I would note that we were referred to no authority in the approximately 13 years since the decisions in *Miller* and *Charman* in which the concept of "unilateral assets", in other words, assets that *are* the product of one party's endeavour during the marriage, has been applied to support an unequal division of such assets beyond short, childless marriages. I appreciate, of course, that the facts of the present case are very far from the circumstances of almost all other families who are dealing with divorce. But, this does not diminish the need for what Lord Nicholls in *Miller,* at [6], referred to as "an acceptable degree of consistency" and which, as McFarlane LJ said in *Sharp,* has been significantly achieved since the decisions in *White*, *Miller* and *Charman* because, to repeat, they have "to a great extent limited the potential for … parties fighting cases … and have increased the predictability of outcomes", at [74].

(ii) Latent Potential Value

107. Although I have adopted the way the judge described this factor, which was the form it took in this case, I propose to consider the issue more broadly.

108. The issue which is engaged is the court's approach to determining what part of the parties' current wealth is to be treated as matrimonial property and what part is not. This is not limited to an assessment of whether there might be "latent potential value" not reflected in the valuation of the company or the shares as at the date of the marriage. It is a broader point.

109. I dealt with this issue at length in *Hart* and in *Martin* (which, as I have said, was decided after Baker J's judgment) and I do not propose to rehearse what I said in those cases. However, given the structure of the judgment below in this case, I make the further observations set out below.

110. Before doing so, as referred to above (paragraph 41), I set out brief summaries of the circumstances in *Robertson* and *WM v HM* in both of which the court had to determine what part of the value of the husband's shares in the business in which he worked was marital property.

111. In the former, Holman J rejected the wife's case that the non-marital element of the husband's shares valued at £141 million (net of tax) should be fixed at £4.8 million, being an "accountant's assessment of the net value of the shares [at the date when the parties began to cohabit] uprated for passive growth", at [6]. The relevant business had its origins in a company founded by the husband, jointly with someone else, some 6 years before the parties started cohabiting, with their relationship being "about ten to eleven years [in] duration", at [12]. Holman J decided that: "Much greater allowance must, in fairness to the husband, be made for the history in order, to borrow words from Lord Nicholls in *Miller* …, 'to reflect the amount of work done by the husband on this business project before the marriage'", at [62]. He concluded that "the only fair way to treat the … shares … is to treat them as to half as … non-matrimonial property", at [63].

112. In *WM v HM*, the relevant business had commenced in 1978, the parties began living together in 1986 and the marriage ended in 2015. Applying the same approach as that used by the accountant in *Robertson* "would give a non-matrimonial value of the company of £1.5m - £3.3m", at [17]. Mostyn J did not "consider that this low bracket begins to reflect fairly the true present value of what the husband brought into the marriage", at [18]. He took a straight "linear time apportionment" which reflected his "opinion of the true latency of the business" in 1986, at [20]. The result of taking this approach was that "the matrimonial element of the business" was £176.6 million and "the non-matrimonial element" was £44.5 million. This approach to the determination of the marital property question was upheld on appeal, as referred to further below.

113. In *Martin*, at [113], which I set out in full below, I dealt with the purpose behind the court's evaluation of whether part of the value of an asset should be classified as matrimonial or non-matrimonial property. I have set out the whole paragraph but the core perspective is that provided by Wilson LJ in *Jones* when he said that the approach taken by the court has the aim of making "fair overall allowance for the husband's introduction of his company into the marriage":

> "[113] In conclusion, a judge has an obligation to ensure that the method he or she selects to determine this issue leads to an award which, to quote Lord Nicholls of Birkenhead in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, at para [27], the judge considers gives 'to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case'. This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about 'fair overall allowance', at para [34]. This was why Holman J was entitled in *Robertson v Robertson* to reject the 'accountancy' approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the 'overall exercise of (his) discretion', at para [59]. Both of the latter cases concerned the development of trading companies and, in my view, these observations apply with particular force in such circumstances."

114. What is being undertaken is a *retrospective* analysis to determine, by making (to repeat) "fair overall allowance" or by giving the weight the court considers just, what part of the *current* value of the asset should be treated as marital property for the purposes of the application of the sharing principle. This is not to attribute value to what Wilson LJ called "the subsequent activity of the diver or gymnast" (*Jones*, at [42]) because that is the product of marital endeavour. However, because the analysis is undertaken with the benefit of hindsight, a court is not bound to adopt the mathematical route adopted in *Jones* based on a prospective valuation as at the date of the marriage (i.e. one that ignores later, known, events). It is well-recognised, but worth repeating, that although the court in *Jones* started with this valuation, the figure was then doubled because the judge had found that there was, what was called, "a springboard in place (which was) not reflected

in the valuation", at [41]. The doubling of the valuation by Wilson LJ was, as he acknowledged, "highly arbitrary", at [43].

115. In addition, having regard to the judgment below in this case, I think I need to make clear that, when I said in *Hart*, at [94], that the court can "undertake a broad evidential assessment" when there is a "complicated continuum" and "leave the specific determination of how the parties' wealth should be divided to the next stage", I did not mean that the court need not identify *at* the next stage, namely quantification of the award, how this factor impacted on the award. The "court does not have to apply any particular mathematical or other specific methodology", *Hart,* at [96], because, as I said in *Martin*, at [112], there is no "single route to determining what assets are marital". However, as I also said in *Hart*, at [96], "the court will have to decide … what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour". This can be a broad assessment, but when this is the *only* factor justifying a departure from equal sharing, the percentage division will inevitably make plain the court's decision (because, for example, by awarding the applicant 30% of the current wealth, it will be apparent that the court's broad assessment was that 40% of the wealth was not to be treated as matrimonial property). I return to this latter issue below.

116. I would repeat, as made clear in *Hart*, that this is not to impose a straitjacket. The degree of specificity required will, inevitably, vary from case to case and will also depend on what is possible. It may be for example, as in *Versteegh v Versteegh,* that the court is "unable to place a value on certain of the assets", at [99], and, therefore, "really had no option, but to give weight to the non-matrimonial assets in a more general way as part of the totality of his discretionary exercise", at [101]. Or because, as in *Moher v Moher*, non-disclosure prevents the court from quantifying the parties' assets. Factors such as these will necessarily impact on how the court arrives at and explains its award.

117. Finally, on this issue, *Martin* not only endorsed the approach taken by Holman J in *Robertson* but also endorsed the approach taken by Mostyn J at first instance (in *WM v HM*). He had been "entitled" to adopt a straight line apportionment to the value of the company when determining what element of its current value was marital property, at [125]. He was not "bound to adopt the approach adopted in *Jones* just as he was not bound to adopt the approach taken in *Robertson*", at [125]. It follows from this that, if Baker J had had the decision in *Martin,* I very much doubt that he would have rejected both the approaches as adopted in *Robertson* and *Martin* on the basis that to "insist on a linear or arithmetical approach would be to fall into the error identified (in my judgment in) *Hart*", at [241]. Contrary to Baker J's conclusion, these approaches were not examples of the "imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve a fair outcome", as referred to in *Hart*, at [97]. Rather, they are examples of the court undertaking the "broad assessment" endorsed by *Hart,* at [96] and can be seen to be consistent with the principle that there is no "single route to determining what assets are marital": *Hart,* at [93-96] and *Martin,* at [112].

(iii) Special Contribution

118. The issue of special contribution was extensively addressed in *Gray v Work*. It is, therefore, not necessary to address this issue other than very briefly.

119. As was identified in *Gray v Work*, at [102], the "focus is on disparity of contribution and whether there is a sufficient disparity to make it inequitable to disregard". The judge referred to this and the issue in this case is not one of principle but whether the judge properly applied the required approach.

120. However, I propose to deal with two additional aspects.

121. The first was adverted to by Mr Marks during the course of his submissions, namely the level of detail into which the investigation of whether the husband had made a special contribution had descended during the hearing below. I agree that it would be regrettable if a detailed investigation became a typical feature when this issue is raised because of the additional cost and other consequences. My concern mirrors the concerns expressed about the nature of the enquiry into conduct which led the courts to confine this issue to very narrow limits before section 25(2)(g) of the MCA 1973 Act was amended by the Matrimonial and Family Proceedings Act 1984 and the similar concerns expressed by the courts in relation to special contribution in cases such as *G v G (Financial Provision: Equal Division)* [2002] 2 FLR 1143 before this concept was also very narrowly confined. It would also be regrettable because a detailed examination of each party's contribution can lead, as became clear to me during the hearing of this appeal, to an unedifying spectacle as each party seeks to elevate their own contribution and, if not disparage, at least seek to diminish the other's contribution. This is especially so when, as in this case, both parties accept that the other has made and will continue to make very significant contributions to the *welfare of the family*.

122. In my view, the search for and analysis of whether a special contribution is established should be undertaken through a relatively general, or broad, assessment of the evidence. This reflects what Lord Nicholls said in *Miller*, at [67], namely that: "Parties should not seek to promote a case of 'special contribution' unless the contribution is *so* marked that to disregard it would be inequitable" (my emphasis). The same approach can be seen in Lady Hale's observation, at [146], that it is only "if there is *such* a disparity in their respective contributions … that it would be inequitable to disregard [that] it should be taken into account" (my emphasis). To adapt what Lord Nicholls also said, a good reason for departing from equality is not to be found in the "minutiae".

123. The second additional aspect relates to the husband's submissions as referred to above (paragraph 47). Contrary to those submissions, it is of the very essence of special contribution that each party's contributions have to be balanced. The wife is not thereby using her contributions "as a shield". Nor does she have to claim that she has made a special contribution. In particular, contrary to those submissions, when the court is determining "whether there is sufficient disparity to make it inequitable to disregard" a party's contributions (*Gray v Work*, at [102]), balancing the wife's contributions including as a mother is at the very centre of this determination.

124. Finally on this issue, because it is relevant to other issues raised in this case, as set out in *Gray v Work*, from [58], following the identification of special contribution as a reason for departing from an equal division in *Cowan v Cowan* [2002] Fam 97, the courts became aware of the scope for this issue significantly to undermine the non-discriminatory principle. Rapid retrenchment followed in *Lambert v Lambert* [2003] Fam 103, *Miller* and *Charman*, confining the ability to argue special contribution to *very* exceptional circumstances.

Determination

125. In my view, the judge correctly set out the position from which he started, namely that "the matrimonial assets will be subjected to the 'sharing principle' and divided equally between the parties", at [23]. The issue raised by this appeal is whether the reasons he gave for departing from that position and providing for a different outcome were justified.

126. I first propose to consider the overall basis of the judge's award. As referred to above, the judge gave four reasons for departing from the sharing principle. His judgment does not seek to differentiate how each of these impacted on his award. Rather, he decided to give them a cumulative effect reflected in his decision to award the wife a lump sum equivalent to 25% of the growth in the value of the husband's shares based on the value given by the accountant with indexation. Does this approach, in this case, satisfy the need for a judgment to provide sufficient clarity as to how the award has been calculated? Or, as Ms Stone submitted, is the judgment flawed because it does not set out how each factor, in particular in respect of latent potential, "affected his overall calculation of" the award?

127. I have already referred to what I said in *Moher v Moher* (paragraph 86 above) about the need for clarity as to how an award has been calculated. This is what I meant, although (as referred to above) not as clearly expressed as it might have been, when I said in *Hart*, at [96], adopting what Wilson LJ had said in *Jones*, that the court will have to decide what "lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour". In this respect, I agree with Mr Marks' submission (paragraph 74 above) that the court has a choice when arriving at the allocation of value as between marital and non-marital property. As he submitted, the judge did not have to "adjust the size of the cake" but was entitled to reduce the percentage of his award. However, a judge has to undertake one or the other and, because of the approach adopted in the present case, it is not clear how, to repeat Mr Marks' submission, Baker J "adjusted his arithmetic to reflect the importance of the shares".

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128. *Hart* may also have created confusion when I added, at [96], that the court did not have "to apply 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.

129. I repeat again, as referred to above (paragraph 116 above), that I do not intend to create a straitjacket as to what is required to ensure that a financial remedy judgment sets out with sufficient clarity how the award has been determined or calculated. As I have said, the degree of specificity required will, inevitably, vary from case to case and will depend on what is possible having regard to the evidence. There will be cases where the relevant factors do not stand individually.

130. However, when applying the sharing principle, I would suggest that in most cases the court will be able to, and should, make clear at some stage what part of the value of the asset or assets the court has determined is non-marital property. I would also suggest that the same applies when special contribution has been established.

131. The difficulty with the approach the judge took in this case is that, as referred to by Ms Stone, sharing applies *to* the marital wealth and special contribution, as a factor, impacts on the division *of* the marital wealth and not on what part of the wealth is marital. In particular, I can see no reason, arising from the evidence or otherwise in this case, why the judge could not have set out what part of the current wealth he determined should be treated as marital property. Further, given my conclusion that the wife's appeal from the judge's determination in respect of special contribution (and unilateral assets) must be allowed, as set out below, it is not possible to determine separately whether his marital property determination is sustainable.

132. I propose to deal with the other issues in the same order as above, namely Unilateral Assets; Latent Potential Value: and Special Contribution.

(i) Unilateral Assets

133. The judge was, in my view, right to reject the husband's contention that the husband's shares in the Company should be excluded from the sharing principle, at [172]. I also specifically agree with the reasons he gave for rejecting this argument, at [173/175] including that this would be discriminatory. The issue, therefore, is whether he was right when he went on to determine that this issue remained relevant to how the wealth should be shared, at [177] and [238/239].

134. As can be seen from the way this issue developed during the hearing below, it has the potential to be somewhat diffuse. It includes: the length of the marriage; the source and nature of the property; business assets; the way the parties have run their lives. It also grew from a relatively brief reference in the husband's initial written submissions to the judge concluding that the way the parties "chose to run their lives" was a matter of "considerable relevance", at [238], as well as that he must take into account that the wealth was created "through the husband's business activity", at [239].

135. At the centre of this aspect of the appeal is the question, which was also addressed in *Sharp*, of how the courts should apply what was said by, in particular, Lady Hale in *Miller*. I appreciate, of course, that section 25 requires the court to have regard to all the circumstances of the case, which can vary very significantly, and that it must be applied so as to ensure that the outcome is fair. This could support a broad application of her observations which can be seen to be concerned not to close doors which should remain open to enable the court to achieve a fair outcome. However, in my view, having regard to the substantial practical experience the courts have acquired of the application of the sharing principle since *Miller* was decided and to developments in the jurisprudence since that decision, we are able further "to keep the room for application of the concept (of unilateral assets) closely confined" (*Charman*, at [86]) and thereby promote both the "acceptable degree of consistency of decision", referred to by Lord Nicholls in *Miller*, at [6], and the application of the sharing principle in a way which supports the overarching principle of "non-discrimination".

136. It is not necessary to embark on an extensive exploration of legal developments since *Miller*. One, referred to in the next paragraph, is that marital property is now recognised as being property which is the product of, or "reflective of", marital endeavour: *Charman* at [66], *Jones* at [33], *Hart* at [67] and [85], and *Waggott* at [128]. Secondly, that the application of the sharing principle impacts, in practice, only on the division of marital property and not to non-marital property: *Scatliffe v Scatliffe*, at [25], and *Waggott*, at [128]. Thirdly, that the application of the sharing principle does not necessarily lead to an arithmetically equal division of the wealth. Factors such as risk and liquidity can impact on the manner in which the division is effected. Another is that, as referred to above, in clarification of what Lady Hale said in *Miller* at [149], an earning capacity is not a marital asset, *Waggott*, at [121–128]. I would add to these, the enhanced emphasis on the limited scope for special contribution to be successfully deployed (*Gray v Work*) and recognition being given to marital agreements including that the court will give effect to them subject to the requirements set out in *Radmacher*.

137. More specifically, as part of our experience of the application of the sharing principle, in my view we are well placed to consider the extent to which the perceptions and arguments explored by Lady Hale in *Miller* continue to provide a cause for unease. I would first note that the "unease", referred to by Lady Hale, at [147], and echoed by Lord Mance, about the fairness of an equal division of "great wealth" which has been "brought into" the marriage, has been addressed by the approach which has been developed by the courts since *Miller* to the application of the sharing principle. I do not consider that this remains a cause of unease or concern because it is now established that such wealth will not be shared between the parties through the application of the sharing principle. The sharing principle, as referred to above, "applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation'", *Waggott*, at [128] quoting from *Charman*, at [66]. In this way, the "nature and source of the property" directly impacts on the court's award in the application of the sharing principle.

138. This leaves the second category Lady Hale identified, namely great wealth "generated by the business efforts and acumen of one party". It is the "nature and source of the property" which are the key features identified as potentially justifying the asset being "separate property" which is not "automatically … shared equally", at [153]. On this issue, I agree with the husband's written submission that this is not a fragmented issue. The manner in which the parties have run their lives, by for example pooling the asset or not, is a subsidiary element of the same factor which depends on there being property which, because of its nature and source, may potentially not be shared equally. It is subsidiary because it only relates to whether the way in which such property has been used in the marriage might affect the question of whether it remains "separate property". I would add that it would be far too vague as a freestanding factor and, in any event, would be difficult to apply as such given the manner in which the Supreme Court has set out in *Radmacher* the required circumstances before the court will give effect to a marital agreement.

139. In respect of this, second, category, I would suggest that the unease to which Lady Hale referred has also diminished. Some of the concerns expressed by Lady Hale and Lord Mance about the difficulty of applying the sharing principle to unilateral, business, assets have not materialised. As referred to above, the concerns expressed by Lord Mance, at [169], about the difficulty of determining what assets have been generated during the marriage, have been addressed by developments in the way in which the courts approach the issue of marital property. In addition, as also referred to above, the application of the sharing principle does not necessarily mean a numerically equal division of the assets. Factors such as "the nature of the assets", as referred to by Lady Hale in *Miller*, at [148], are relevant to the *how* the sharing principle is applied. The "nature of the assets" can clearly be highly relevant to the court's determination of how to effect a fair division of the wealth.

140. I do not suggest that parties do not continue to seek to find ways to avoid equal sharing of marital property. But, in my view, what Lady Hale described in *Miller,* as the post-*White* "search … for some reason to stop short of equal sharing, especially in 'big money' cases where the capital had largely been generated by the breadwinner's efforts and enterprise", at [146], has diminished because of the developed appreciation, based on many decisions especially at first instance, that the straightforward application of the sharing principle to the marital property achieves a fair outcome. This is what, in my view, Lord Wilson meant when he referred to the "proper approach" and the "ordinary" application of the sharing principle: *Scatliffe v Scatliffe*, at [25(x)].

141. Returning to *Miller,* in my view, the substantive focus of Lady Hale's observations, at [147] to [153], is short, childless, marriages. However, even if she left open that they *might* apply in other than such marriages, we can now see that to apply them in those cases would be discriminatory in the same way that special contribution initially risked being applied in a way which would have significantly undermined the progress made by *White*.

142. Whilst there may be elements within the above paragraphs in *Miller* which are capable of a broader interpretation, I am persuaded that they do not *require* this court to take that approach. I acknowledge, in this discretionary area, that it would be unwise to close doors to the notion that fairness might leave scope for the court to decide not to effect an equal division of marital assets because of a particular factor or combination of factors in an individual case. However, as a matter of general principle, I find it hard to envisage how, in other than short, childless marriages fairness would be achieved if the existence of "business assets" was the basis for justifying an other than equal division.

143. When, during the hearing of this appeal, Mr Marks was asked to explain what principled difference there might be between "business assets" and wealth generated by other means (say, earned income) to justify differential treatment, he could not. I would suggest this was because there is none as most wealth will invariably have been or could be said to have been "generated solely or mainly by the efforts of one party". I am confident that, if business assets were potentially treated differently, we would also be right back into the "conduct debates" referred to by Coleridge J in *G v G (Financial Provision: Equal Division)*, which was so influential in special contribution being "heavily" circumscribed, Wilson LJ in *Charman*, at [79], because the other spouse would seek to argue that they had, indeed, made a contribution to those assets or that they were part of the marital wealth for other reasons.

144. I also do not see how this approach to business assets would sit with the way in which the issue of special contribution is applied, namely the *very* limited scope for a party to be able successfully to advance a case of special contribution. Indeed, I consider it would be inconsistent because it would provide a party with an easy way of avoiding the restrictive approach to the issue of special contribution.

145. Accordingly, it is evident that a broader application of a different approach to a marital asset merely because it was a "business" asset would be, as was identified in *Charman*, at [83], "deeply discriminatory" and would, therefore, "gravely undermine the sharing principle". The effect would be the same whether property is excluded from the sharing principle, because it is not treated as marital property, or whether the sharing principle is not applied to such property so as to divide it equally. Indeed, it would seem to me likely to be rare for sufficient wealth to have been generated other than through "business efforts and acumen" for the determinative principle to be sharing rather than need. This is why I have concluded that the application of a different approach to business assets, in other than short, childless marriages, would result in the sharing principle being undermined in the same way identified in *Charman* and, accordingly, that the judge was wrong to take this factor into account, at [239].

(ii) Latent Potential Value

146. The judge was plainly entitled to decide that part of the wealth in this case was not marital property. However, contrary to Ms Stone's submission, I do not consider that the judge made an express determination as to the "marital acquest". I appreciate that, at [249], the judge set out his calculation of "the value of the growth in the husband's shareholding

during the marriage" and arrived at the sum of £460 million. However, if this was such a determination, it does not sit with his decision that the wife should receive 25% of this sum which was based on *all* the factors set out in his conclusions, *including* latent potential value. Further, as the judge had decided that there was a significant latent potential *not* reflected in the formal valuation, this element would have to have been, and was not, part of his calculation, at [249], if this was to comprise a determination of the extent of the marital property.

147. Indeed, it is clear that the judge did not, at least expressly, separately determine what proportion of the value of the shares, as reflected in the husband's assets as set out in [248], was matrimonial property and what was not. He undertook "a broad evidential assessment before deciding how the wealth should be divided". Although this was, in my view, a legitimate approach for the judge to take as a route to his ultimate determination, applying *Hart* and *Martin*, he did not go on to identify how this element impacted on the award.

148. The judge was also, in my view, clearly entitled to decide that the extent of the non-marital proportion of the sale proceeds of the shares was not confined to the sum arrived at by taking the formal valuation and increasing this by indexation. His conclusion that the latter approach did not give sufficient weight to the husband's ownership of the shares at the date of the marriage was open to him and, in my view, is not susceptible to challenge, as a matter of principle.

149. I should add that the fact that the accountant in the present case referred to arguments for and against making an adjustment for "spring-board" value, before deciding not to make any adjustment does not, in my view, mean that the judge was not entitled to take a different approach. As Mostyn J said in *WM v HM*, as approved by me in *Martin*, at [126], this exercise is not "confined to a strict black-letter accountancy approach". It is, as referred to above, a retrospective analysis which the *court* undertakes. I emphasise the court, because I expressly do not want to encourage either a detailed analysis of how a company has developed nor the instruction of experts to undertake a retrospective valuation (whatever that might entail).

150. However, although the judge was entitled to come to this conclusion, again absent him setting out the specific effect of this factor on his proposed division of the current wealth, it is not possible for this court to assess whether his ultimate determination would be susceptible to challenge. I return to this issue below.

(iii) Special Contribution

151. I acknowledge that the judgment, at [206] to [220], set out a detailed analysis of the law relating to special contribution. The issue is whether the judge adopted the right approach as set out in his conclusions, in particular at [242].

152. I have come to the conclusion that the judgment does not make clear that the judge applied the right approach and, that, as submitted by Ms Stone, this court cannot infer that he did.

153. This is because, although I also acknowledge that the judge did refer to the wife's contributions in the course of his judgment, and in particular at [243], in his critical assessment, at [242], the judge refers *only* to the husband's financial contribution. That his focus is only on this, and not on the extent of any disparity in the parties' respective contributions, can be seen from the following extracts: "The increase in value (of the shares) was, in my view, on a scale sufficient by itself to bring this case within the concept of special contribution"; "I do consider that the husband's contribution to the business during the marriage was of a quality which can properly be described as special"; and, the "nature of his contribution is such that it is very obviously inconsistent with the objective of achieving fairness for it to be ignored".

154. There is no balancing of the parties' contributions and, indeed, no reference to the wife's contributions at all. It is only in the next paragraph, [243], that the judge refers to the wife's contributions as "incalculable" and this is in the context of an overall assessment of fairness not in the specific context, as required, of special contribution.

155. I would also add that the issue of special contribution is context specific. As Mr Marks rightly accepted during the course of the hearing, the smaller the amount of the marital wealth the harder it would be for a spouse to rely on it as supporting the conclusion that he or she had made a special contribution. That is why, to repeat, when both these issues are raised, the court needs to state its conclusion as to the extent of the marital wealth to which the issue of special contribution is being applied. For example, in the present case, if the marital wealth was at the level determined by the application of, what I will call, the *Martin* approach, it would seem significantly more difficult for the husband to be able to argue that he had made a special contribution particularly having regard to the judge's determination as to the quality of the wife's contribution.

Conclusions

156. I propose to summarise my conclusions as follows, again following the headings as above.

157. (i) Unilateral Assets:
In my view, for the reasons given above, the judge was wrong to decide that the fact that the "assets which grew so substantially during the … marriage were the husband's business assets", at [239], was relevant to the division of that wealth between the parties. In so far as they were the product of endeavour during the marriage they were marital assets which should be shared equally between the parties absent other factors. In addition, his separate determination that the way the parties ran their lives, at [238], cannot stand because, as explained above, this is not a distinct factor which stands on its own.

158. (ii) Latent Potential Value:
Again for the reasons given above, I consider that the judge was entitled to find that part of the proceeds of sale of the shares was non-marital property to which the sharing

principle did not apply. He was also entitled to determine what proportion was not marital property other than by applying the expert's valuation increased by indexation. It was open to him to undertake, as he said, "a broad evidential assessment" and to conclude that there was significant value not reflected in the formal valuation, at [241]. However, because the judge did not set out his determination of the extent of the marital property in this case, this court is unable to separate out this aspect of his decision for the purposes of deciding whether or not to uphold it.

159. (iii) Special Contribution:
The judge failed to undertake the required assessment, namely to consider whether there was such a *disparity* in the parties' respective contributions to the welfare of the family that it would be inequitable to disregard. His finding in this respect must, therefore, be set aside.

160. Outcome:
Ms Stone has invited this court to substitute its own decision as to the fair award. Mr Marks has submitted that we are not in a position to do so. Is a rehearing required to address the issues of marital property and special contribution or can we fairly determine those issues on the material available to us? Clearly, there would be considerable advantages consistent with the overriding objective if we were able to do so.

161. The first issue is whether we can determine the marital property question. The key question, as framed in *Martin*, at [96], is whether we can decide how to make "fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour".

162. The unpublished version of the judgment contains a detailed factual account of the history of the company. The judge also considered, and rejected, applying the accountant's figures. He determined, I repeat, at [240]:

> "The ultimate phenomenal success of the company was due in part to developments and decisions taken in the business during the marriage, but it was also attributable to developments and decisions taken before the marriage - the creation of the company, the putting together of the team, the earlier activities of the company in its field, including the original product models, and the development of a marketing strategy. To a not inconsiderable extent, the later success was built on those earlier foundations. Mr Kay thought that this was not a significant factor in determining the value of the company at the date of the marriage because the subsequent growth in the business did not occur for several years after the marriage. In my judgment, however, the latent potential was there at all material times – it just remained latent for rather longer until the opportunities for growth arose."

The judge decided that the evidence did not establish "a clear dividing line" but that there was a "significant, though unquantifiable, latent potential on the company at the date of the marriage which is not reflected in the formal valuation", at [241].

163. I consider that we are in a position to undertake the "broad assessment", as explained in *Hart*, required in this case to determine the "fair allowance" (referred to above). It is clear that, as in *Robertson*, the Company had its roots in a business started some years before the marriage, as reflected in the graph in the judgment, at [200]. I would also note that the graph of the Company's progress in terms of turnover appears to be similar in shape, a J, to that of the company in *WM v HM*, at [18]. Applying the judge's determination that the ultimate success of the Company was attributable to "a not inconsiderable extent" to its pre-marriage "foundations" and that they remained a "significant" factor, I consider that it would be fair to both parties to treat 60% of the wealth derived from the shares, of just under £490 million, as matrimonial property and 40% as non-matrimonial. This gives a figure of £293 million for the former and £195 million for the latter. If the former was shared equally between the parties, the wife's share would be £146.5 million.

164. The second issue is whether there should be other than an equal division because the husband has made a special contribution. Again, I consider that we are in a position to decide this issue fairly to both parties. It requires a broad assessment of the parties' respective contributions rather than an analysis of the "minutiae". Having regard to the judge's determination that the wife's contribution "has been and will be incalculable", at [243], I cannot see how a proper application of the legal principles applicable to this issue could lead other than to a determination that there was *not* such a disparity in the parties' respective contributions that it would be inequitable to disregard them when deciding what award to make. Although I acknowledge that the husband's contributions have clearly been very significant, the necessary disparity is not present in this case.

165. Finally, although the judge dealt with the RSUs and options very briefly, I have not been persuaded that he was wrong to decide that they were "dependent on future performance" and should, therefore, be "disregarded". This was a decision which he was entitled to reach and takes them outside the scope of marital property.

166. Before setting out my decision as to the fair award in this case, it is necessary to consider whether there are any other relevant factors which might lead to the conclusion that an equal sharing of the marital wealth would not be fair. In my view there are none. However, this means, although it leads only to a very small adjustment, that there is no reason why the net value of the jointly owned property (£3.7 million), which was awarded by the judge to the wife, should not also be divided equally between the parties.

167. An equal division of the total marital wealth of £296.7 million (£293 million + £3.7 million) leads to the wife receiving a lump sum of £145 million (in place of the judge's award of £115 million) and the jointly owned property worth £3.7 million. The effect of this is that the wife would have approximately 34.5% (£182.45 million) of the parties'

combined wealth and the husband would have 65.5% (£347.55 million) rather than the division of 28.75% and 71.25% effected by the judge's award.

Lady Justice King:
168. I agree.

Lord Justice Underhill:
169. I also agree