Neutral Citation Number: [2024] EWCA Civ 567

Case No: CA-2022-001151
CA-2022-001151A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MOOR
[2022] EWFC 128

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2024

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE PHILLIPS

Between:

ANNA CATHERINE STANDISH	**Appellant**
- and -	
CLIVE THOMAS STANDISH	**Respondent**

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- -
- -

Richard Todd KC and Richard Sear (instructed by **Payne Hicks Beach LLP**) for the **Appellant**
Timothy Bishop KC and Thomas Harvey (instructed by **Stewarts**) for the **Respondent**

Hearing dates: 15 and 16 November 2023

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Approved Judgment

This judgment was handed down remotely at 14.00 on Thursday 23 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The wife appeals and the husband cross-appeals from the financial remedy order made by Moor J ("the judge") on 27 October 2022. The appeals concern the proper application of the sharing principle and, in particular, the manner in which the court identifies assets to which it applies. In broad terms, the parties agree that it applies to matrimonial property and does not apply to non-matrimonial property (or marital/non-marital property). They disagree as to what makes an asset matrimonial or non-matrimonial property and also as to the manner in which an asset which was initially non-matrimonial can be, what has come to be known as, matrimonialised; in other words, become an asset to which the sharing principle applies.

2. The total wealth, as found by the judge, was £132 million of which he determined that £112 million was matrimonial property and £20 million was non-matrimonial property (a farm in Australia called Ardenside Station "Ardenside"). Within the sum of £112 million were investment funds totalling £80 million which the husband had transferred from his sole name into the wife's sole name in 2017 ("the 2017 Assets") and a farming business ("Ardenside Angus", valued at £8.6 million) in which the wife had been given shares, also in 2017. Both of these transactions were part of tax planning schemes. As explained further below, the judge decided that, as a result of the transactions in 2017, these assets had been matrimonialised and that, accordingly, they were subject to the sharing principle.

3. The asset schedule attached to the judge's order shows that of the wealth of £132 million, roughly £81 million was in the wife's sole name (including the 2017 Assets worth £80 million at the time of the final hearing); £22 million was in the husband's sole name (including Ardenside of £20 million); and £29 million was in joint names and was divided equally between the parties in the schedule (the matrimonial home of £20.6 million and the shares in Ardenside of £8.6 million). The total in the wife's column was £95.7 million, and in the husband's was £36.9 million.

4. The judge decided that an unequal division of the matrimonial property of £112 million was justified principally because, at [81]: "To a significant extent [the 2017 Assets were] pre-marital and had only been matrimonialised towards the end of the marriage". He, accordingly, awarded the wife 40% (£45 million) and the husband 60% (£67 million) of the matrimonial property. Overall, therefore, the husband was awarded £87 million (66%) and the wife £45 million (34%) of the parties' total wealth. As can be seen, the effect of this was that the wife had to transfer assets valued at approximately £50 million to the husband.

5. In summary, both parties contend that, for different reasons, the division effected by the judge failed properly to apply the sharing principle.

6. The principal focus of the wife's case was that the judge had been wrong to decide that the 2017 Assets had been matrimonialised. Title was the critical factor and he should have decided that the 2017 Assets (and the wife's shares in Ardenside Angus) were her "separate" or non-marital property. They were not, therefore, subject to the sharing principle save for the fact that the wife had conceded that they, with the balance of the marital property (the former matrimonial home and Ardenside), should be divided equally between the parties because this was a "partnership marriage".

7. The principal focus of the husband's case was that the judge was wrong to determine that the 2017 Assets (and Ardenside Angus) had been matrimonialised. The source of an asset was the critical factor not title. The majority of the parties' wealth, including the 2017 Assets, continued to be the product of the husband's pre-marital endeavour rather than the product of marital endeavour and was, therefore, not subject to the sharing principle which applies to the latter and not the former. The characterisation of an asset as matrimonial or non-matrimonial property was not an end in itself but was for the purposes of reaching a fair outcome. This is not dependant on title but was determined by whether it was the product of marital endeavour because, in fairness, such property should be shared equally between the parties.

8. The wife advanced two Grounds of Appeal.

9. Ground 1: the judge had been wrong to decide, at [75], that the 2017 Assets and Ardenside Angus had "become matrimonial property". He should have treated them as the wife's "separate property" which would have given "respect for autonomy" and proper "effect to how the parties had chosen to hold their assets" which was "central to the wife's case". Although they were not marital property, the wife had voluntarily conceded that they should be treated as marital property and shared equally because she "accepted that the overall nature of their partnership meant that the total of the assets should be divided equally". Alternatively, if they were matrimonial property, there was no justification for an other than equal division. Further, the judge had been wrong effectively to award the wife 40% of the value of Ardenside Angus when she had a 50% shareholding.

10. Ground 2: the judge should have found that the property, Ardenside, was a matrimonial asset because, although it was owned by the husband before the marriage, the parties had holidayed there; it had been maintained and improved and "added to" during the marriage; and the gross value of the land had increased very substantially.

11. As summarised above, by his cross-appeal the husband contends that the judge should not have applied the sharing principle at all to the 2017 Assets or Ardenside Angus. This was because they were not matrimonial property but, both before and after the transfers into the wife's name, represented the husband's pre-marital wealth. The judge applied the wrong test when concluding that they were matrimonial property. Alternatively, it was submitted that, if they were matrimonial assets, the judge awarded the wife an "excessive" share of the family's assets, having regard to the "scale of the husband's unmatched contribution of pre-marital wealth".

12. The parties were respectively represented at this appeal, and below, by Mr Todd KC and Mr Sear for the wife and by Mr Bishop KC and Mr Harvey for the husband.

Background

13. The judgment below is reported as *ARQ v YAQ* [2022] EWFC 128, [2022] 4 WLR 112. It was reported in an anonymised form but, understandably, no application was made for the hearing before the Court of Appeal to be subject to reporting restrictions or for this court's judgments to be anonymised.

14. The background, which I take from the judgment below, is as follows. I will call the parties the wife and the husband for ease of reference.

15. The husband was born in the UK but moved to live in Australia in 1976. He is now aged 71. He had a very successful career in the financial services industry. He retired in October 2007, a relevant date because his marriage to the wife had taken place in 2005.

16. The husband married his first wife in 1979. Their home was in Australia throughout their marriage. They have three children. They separated in 2002 and were divorced in 2003. A consent financial order was made in Australia.

17. The wife was born in Australia. She is now aged 56. She married her first husband in 1988 with whom she had three children. They were divorced in 2004.

18. The husband and wife began their relationship in 2003. The same year the husband's employment required him to move to live in Switzerland. The wife and her children joined him there in 2004. The husband and the wife married in 2005 and have two children together.

19. When the husband retired in 2007, the family returned to live in Australia. In 2008, the parties purchased a home in England and they, with the wife's three children and their two children, moved to live here in 2010. The property ("the FMH") was purchased in the joint names of the parties. It cost approximately £9.6 million and very substantial sums (the wife said £7 million; the husband's figure was a sum in excess of £2.5 million) were then spent on renovating it. All the funds were provided by the husband (judgment at [9]).

20. The marriage came to an end in 2020. The husband and wife have remained living in England, the wife at the FMH.

21. When the parties married, the husband had accumulated very significant wealth through the financial rewards he had received from his employment. In broad terms, they comprised: (i) financial investments and funds in bank accounts; (ii) a farm and farm business in Australia which had been purchased outright in 2002 (Ardenside and Ardenside Angus); and (iii) a property in Melbourne which was sold in 2010. The farm had been purchased in the joint names of the husband and his first wife and was transferred to the husband as part of their financial agreement in 2003. The husband's case was that these assets were worth £57 million as at June 2004 and that, by the date of the hearing before the judge, if uprated "to today's values", would be worth £155 million.

22. The wife's resources at the start of the marriage comprised a property in Melbourne which she sold in 2011 and possibly some funds in bank accounts. The property was sold for AUS$5.6 million (with the husband having previously discharged the mortgage). The wife later inherited AUS$626,340 (judgment at [32]). Compared to the scale of the husband's pre-marital wealth, the wife's assets were very modest.

23. Two financial events at the centre of this case and of particular significance to the judge's decision took place in 2017, 14 years after the parties had started their relationship and three years before it ended. The first, and much larger, was the transfer from the husband's sole name into the wife's sole name of investment funds then worth approximately £77 million (the 2017 Assets). The second was the wife being issued shares in Ardenside Angus. I set out the judge's description of each of them.

> "[11] In 2016/2017, the Husband took advice from Mr P of Firm M as to tax planning. In particular, the Husband was concerned about Inheritance Tax as he was due to become deemed domiciled in this jurisdiction in April 2017. He was worried that, if he died here, his estate would have to pay approximately £32 million in UK IHT. The Wife, on the other hand, was non-domiciled due to her domicile of origin being [Australia]. He was advised that, provided he transferred his assets to the Wife before he became deemed domiciled, the assets would escape UK IHT. It is abundantly clear that he then intended, once a suitable period of time had elapsed, that the Wife would place the assets in discretionary trusts in Jersey. Indeed, a Jersey firm of professional trustees, was selected. Moreover, Firm M drafted trust deeds but the trusts were not established. The Husband says that he discussed whether it was time to do so with the Wife in April 2018 but nothing happened, either then or the following year. There are a number of issues surrounding this tax planning exercise. One such issue is whether the Husband would have been able to benefit from any such trusts once they had been established. In any event, pursuant to the scheme, the Husband transferred approximately £77 million worth of assets to the Wife in March and early April 2017. They are now worth just over £80 million."

The judge later concluded, at [61], that the husband had given the assets to the wife "without reservation of benefit" and that there was no evidence that the husband could have been made a beneficiary of the proposed trusts. As referred to, the trusts were never, in fact, established. It can also be seen that the funds were transferred to save a potential future tax, namely inheritance tax on the husband's estate if he died while domiciled in the UK. There was no current saving of tax so the transaction made no difference to the current value of the funds.

24. The share transaction was as follows:

> "[12] At the same time, accrued profits in the [Ardenside] farming business were causing tax difficulties in [Australia]. An ingenious scheme was devised whereby these profits could be used to acquire "A" shares in the business in the name of the Wife. This would avoid the profits being taxed. In consequence, the Wife was issued 9,1534,817 non-voting A shares in the business. The Husband retained 12 ordinary shares, which carry the entire voting rights. There had been a natural disaster in 2009 at [Ardenside]. In late 2019/early 2020, there was a second devastating natural disaster at the property. Unfortunately, large numbers of sheep died. The insurance claims have still not been fully settled. The farm continues in operation, operating over 6,005 hectares (14,788 acres). As at today's date, it has 4,405 commercial cattle; 511 stud cattle; and 5,790 Merino sheep. I will return to the valuation of [Ardenside] later in this judgment."

The judgment does not set out the amount of the tax saved as a result of the acquisition of shares by the wife but it is clear that it resulted in an immediate saving of tax.

Proceedings

25. The parties filed Forms E and a number of statements. As is required by the Forms E, the parties set out the real property and other assets which they respectively owned (legally and/or beneficially).

26. The husband "deposed to net capital of £22,856,538, which consisted, largely, of half the value of [the FMH] and the land at [Ardenside], albeit that the latter has since been valued at a much higher figure" (judgment at [14]). The husband had estimated the net value of Ardenside at £10 million and it was subsequently valued for the purposes of the proceedings at £20 million net. As referred to above, the husband said that his pre-marital wealth, as at June 2004, was in the region of £57 million. He also noted that, of his 35 year working career, only three took place during the marriage and asserted, at [30], that his pre-marital wealth "uprated to today's values, would be worth £155 million".

27. The husband's overarching contention was, at [22], "that, in effect, the entirety of the assets were pre-acquired by him and therefore not matrimonial". Accordingly, he proposed that the wife's "award should be formulated on the basis of her reasonable needs" which, at [42], were put at £8 million for housing and a Duxbury fund of £10.5 million. Although these totalled £18.5 million, the husband's offer was that the wife should receive £25 million with the balance of the parties' wealth being transferred to or retained by him.

28. The husband's case, as summarised by the judge, at [14], was as follows:

> "He says that the magnetic feature of the case is his "overwhelming and unmatched contribution by way of pre-marital wealth". He adds that there has been no material increase in his wealth since he retired in 2007. He said that the advice he received at the time of transferring his assets to the Wife in March/April 2017 was flawed and there was a fundamental mistake that the scheme would work."

29. In respect of the 2017 Assets, the judge summarised the husband's case, at [18], as follows:

> "[The husband] then deals with the transfer of assets in April 2017. He said that he was told that he could be added as a beneficiary of the trusts after they had been established and then benefit from them, although he accepts he could not have been a beneficiary at their inception. He says he was advised of this by Mr P in a telephone call, following an email from Mr P which merely says that "beneficiaries" can subsequently be added. He has not called Mr P to give evidence. He does accept that the Wife had to hold the assets for a "reasonable" period of time before they could be placed into trust to avoid him being deemed to be the settlor. He says that the Wife understood exactly what

> was to happen and they had jointly selected the trustees after a "beauty" parade. There was talk of setting up trusts again in May 2018 but nothing happened. The parties executed mutual wills to leave their respective assets to each other and the children but the Wife unilaterally changed hers to exclude him in early 2019 without his knowledge at the time. He ends the statement by saying that he had no intention to share the assets. He exhibits the file from Firm M that does make it clear that the intention was, in due course, for offshore trusts to be established to benefit the two children, X and Y."

30. The wife deposed to "net wealth at £83,039,015, which includes the assets transferred to her by the Husband" (judgment at [15]). She proposed, at [22], that "there should be a simple 50:50 division of everything and she would return to the Husband such proportion of the assets as would bring him up to equality but she wished to receive [the FMH] as part of her 50%" share.

31. The judge summarised the wife's case, first at [15], as follows:

> "the transfers to her in early 2017 occurred as a result of an estate planning exercise to take advantage of her non-dom status and she confirmed that there was discussion of establishing two offshore trusts … She says she contributed to the marriage by the proceeds of sale of her former matrimonial, albeit that the Husband had repaid the mortgage, and by reference to an inheritance she received from her parents, which she puts at [AUS]$626,000."

And then, at [19]:

> "[The wife] says that the marriage was entirely a relationship and partnership of equals. They could have executed a pre-nuptial agreement before they married, to protect the Husband's pre-acquired wealth, or a post-nuptial settlement at the time of the April 2017 transfers but they deliberately did not do so as the Husband agreed that "*what is mine is yours*". The estate planning exercise was entirely at the Husband's instigation. It was done for tax reasons and the lack of a post-nuptial settlement was a calculated decision. If his advisers were negligent in advising the Husband to undertake the scheme, his remedy should be against his advisers. She is clear that the Husband was advised that he should not be a beneficiary of the trusts. She asked, rhetorically, why he did not pursue the establishment of the trusts in 2018. He was only able to enter the plan due to her non-dom status. Her contribution was integral and essential." (emphasis in original)

And then, at [32]:

> "[The wife] repeats her case that the parties twice rejected nuptial agreements, both prior to the marriage and again at the time of the 2017 transfers, on the basis that it was a partnership

of equals. She denies that the 2017 transfers were solely a tax saving scheme."

32. The husband, at [21], "had formulated Chancery Division proceedings seeking recission of the transfers made to the Wife in March/April on the ground of mistake". The judge made plain that he "had real reservations as to whether such satellite litigation was justified, given that there is full power in the Matrimonial Causes Act 1973 to redistribute assets in accordance with what is fair and just". However, at [24], he subsequently directed, "by consent, [that] the Husband's application for mistake and recission should be listed for hearing as part of the final hearing".

33. In the event, at [25], the husband indicated that he would not "pursue his claim for mistake and recission but, rather, would advance his arguments solely in the context of the MCA 1973". This led to the wife submitting to the judge, at [25], "that it must follow that the Husband accepts that the transfers had the effect of gifting these assets to the Wife without any reservation. They therefore became her property as of right, albeit subject to any MCA claim for a lump sum in the Husband's favour".

34. We have been provided with the parties' respective written submissions for the final hearing below. The husband's case was that the "magnetic factor … is H's overwhelming unmatched contribution of wealth when the matrimonial partnership began in" 2004. It was argued that "all of the current assets … either comprise H's pre-marital property or derive from H's pre-marital property".

35. The wife's case, in opening, was that it was "a reasonably straightforward case of a 50:50 divide of assets. There can be no doubt that the funds have been mixed, mingled and are now matrimonial". This was because they were "either the Wife's or they belong to the partnership (as she readily concedes)". The wife's closing submissions argued that the 2017 Assets were the wife's "separate property" and were not "matrimonial property until *the Wife* brings [them] back into the partnership" (emphasis in original). This gave effect to what the parties had agreed "the financial nature of their relationship should be", namely a "fully sharing partnership", and also properly respected their autonomy "on *Radmacher* principles" (*Granatino v Radmacher (formerly Granatino)* [2011] 1 AC 534 ("*Radmacher*")).

Judgment

36. I propose to deal with the judgment below at some length because this very experienced judge's factual and legal analysis needs to be given careful consideration.

37. The assets as found by the judge comprised (in net figures): (a) the FMH, at approximately £20.5 million; (b) Ardenside at £20 million; (c) the 2017 Assets, at £80 million; (d) Ardenside Angus, at £8.6 million; (e) other assets, at £3.5 million. This made a total of £132.6 million of which, as referred to in paragraph 3 above, £95.7 million was in the wife's name and £36.9 million was in the husband's name (dividing the FMH and Ardenside Angus equally between them).

38. The judge summarised the husband's submissions, at [42]. As referred to above, it was submitted that "the magnetic feature in the case is the non- matrimonial wealth brought to the relationship by the Husband, which, they say, exceeds the current value of the assets if uprated for inflation". There had been "little change to the composition of the

assets" and the "money the Husband earned in the early years of the marriage was largely lost in the 2008 banking crisis". It was further submitted that the effect of changes in the exchange rate since the date of the marriage meant that the husband's "wealth has increased for that alone from £57 million to £94.3 million". Ardenside has "increased in value from £5.2 million to £29 million". The husband also relied on the fact that, apart from the FMH, he "had not transferred any assets until the deemed domicile issue arose".

39. It was submitted, at [42], that Ardenside was "clearly non-matrimonial as it was never placed in joint names, unlike when it was purchased in joint names with the Husband's first wife. It is a commercial farm and the properties there are barely habitable".

40. As for the 2017 Assets, it was accepted, at [42], that "the assets were effectively transferred but it is "manifest" that the Husband never intended to share ownership with the Wife". As to the shares in Ardenside Angus, they "were only given to the Wife as part of the tax planning in 2017". The advice the husband had received in 2017 was criticised but, in any event, the husband "had no intention to "matrimonialise" the assets but, if he did, that does not mean that the assets should be divided equally".

41. The judge set out the wife's case, at [43]. Her main submission was "that the marriage was a partnership marriage and the assets were matrimonial from the very outset". As for the 2017 Assets, it was submitted that the transfer of them to her "made those assets her separate property, as there could not have been any reserved benefit to the Husband". The effect of this was that the wife "could have done anything she wished with the money. She could have gambled it all away. If she had placed it in trust, there would have been no possibility of the Husband now seeking it back".

42. The balance of the wife's case for an equal division was summarised, at [43], as follows:

> "It is not disputed that the Husband had significant assets when the parties began to cohabit 18 years ago, but it is argued that the parties chose not to have a pre-nuptial agreement, which would have been binding on them in [Australia]. They add that this is the clearest possible evidence of a partnership marriage. Whilst their client could argue that £80 million worth of the assets are now her separate property to do with as she wishes, she accepts that the previous agreement for a partnership marriage means that the assets should be divided equally. They assert that such an equal division can only be departed from if there is something truly exceptional such as special contribution, which is not asserted by the Husband here. They add that arguments about provenance have long been consigned to history as discriminatory. The document makes much of the fact that the Husband has not called Mr P to give evidence, notwithstanding a warning from the Wife's solicitors that this would lead to a submission that adverse inferences should be drawn against him by this failure and, in particular, that the Husband could not benefit from the £80 million once he had transferred it to the Wife."

Then, at [44]:

> "They then assert that [Ardenside] was a much-loved family home. The Wife is a joint owner of the business. It would be entirely wrong to treat her less favourably as a joint owner than if she had been the Husband's mistress, when he could not have taken her shares or assets back from her. It is asserted that the Husband is rerunning old *Lambert* [2002] EWCA Civ 1685 arguments about his money-making being worth more than her role as homemaker. It is further said that the money has become very mixed and intermingled."

43. The judge next addressed the legal framework, at [45]-[58]. He referred to s.25 of the MCA 1973 and reminded himself, at [46], that the "overall requirement in applying section 25 is to achieve fairness" and that "there is to be no discrimination in financial remedy cases between a husband and wife". He referred to *White v White* [2001] 1 AC 596 ("*White*"); *Miller/McFarlane* [2006] 2 AC 618 ("*Miller*"); and *K v L* [2012] 1 WLR 306 ("*K v L*").

44. The judge summarised the approach he would take to the determination of how the assets should be divided between the parties:

> "[50] … my main task, in this case, is to assess the matrimonial property generated by the parties during the marriage, to include any settled period of cohabitation that moved seamlessly into marriage. Unlike many cases, this is undoubtedly complicated by the transfer of assets to the Wife in early 2017. Once I have decided the extent of the matrimonial property, I must then decide in what proportions that matrimonial property should be shared. If the assets have been generated during the marriage, the likelihood now is that they will be shared equally, particularly as it is rightly not asserted in this case that there has been a special contribution. *The question, however, is how to deal with assets that were not matrimonial at the outset but have become matrimonialised as a result of the actions of the parties during the marriage.* It follows that, unusually, this will require a three stage process. First, I must investigate what proportion of the assets were acquired by the Husband before the marriage. Once I have done that, I must consider the extent to which they became matrimonialised. Finally, if they did become matrimonialised, I must decide in what proportions they should now be shared taking into account their provenance; the parties' approach to them; and the other relevant factors in this regard to be found in section 25." (emphasis added)

45. The judge next, at [51]-[53], "briefly consider[ed] the principles on which the courts have assessed quantification of the matrimonial property". He referred to *Hart v Hart* [2018] 2 WLR 509 ("*Hart*"); *Jones v Jones* [2012] Fam 1 ("*Jones*"); and *Martin v Martin* at first instance, *WM v HM* [2018] 1 FLR 313, and in the Court of Appeal, [2019] 2 FLR 291.

46. Finally, the judge referred, at [54], to "matrimonialisation". In this context, he quoted what Wilson LJ (as he then was) had said K *v L* at [18], which I set out below.

47. The judge, at [55], rejected Mr Todd's submission that, "once the matrimonial property has been identified, it really can only be divided equally unless one party can establish special contribution". He did not accept this because:

> "I am conducting a discretionary exercise and I must take into account all the relevant factors, including, in particular, the source of the funds and whether it can be said that there were unmatched contributions because some or all of the assets pre-date the marriage. This is not discrimination in favour of the money-maker as against the home-maker as I am not dealing here with money generated during the marriage. Mr Todd relied heavily on the lack of a pre-nuptial agreement but it is clear from the case of *Sharp v Sharp* [2017] EWCA Civ 408 that the failure to enter a pre-nuptial agreement does not result in a presumption of equal sharing."

In support of his conclusion, at [56], that "matrimonial property can be divided unequally, even in the absence of special contribution", the judge referred to *Vaughan v Vaughan* [2008] 1 FLR 1108; *S v AG* [2012] 1 FLR 651; and his own decision of *FB v PS* [2016] 2 FLR 697.

48. In the next part of his judgment, at [59]-[72], the judge dealt with "factual issues".

49. In respect of the transfer of the 2017 Assets, the judge accepted the wife's submission, at [61], that the husband "is now estopped from arguing that the money did not legally and beneficially become the property of the Wife. Equally, I am not going to make any findings that he acted under a mistake, given that he has abandoned the mistake/recission claim". There was "no evidence that the Husband could have been a beneficiary of the trusts" and the judge considered that if the wife" had transferred these assets to Jersey trusts, the money would have been gone forever" with the result that it was "perhaps very fortunate for these parties that she did not do so". The judge also set out, at [68], that the wife conceded "that the transfers to her were pursuant to estate and trust planning [and] accepted that this was the reason why the money went into her sole name and not into joint names".

50. The judge made no specific finding as to the scale of the husband's wealth at the start of parties' relationship. He found, at [63], the "documents … slightly inconsistent and confusing" but went on to say that "Mr Bishop has taken me through his client's detailed disclosure, which certainly appears to show that, on 30 June 2004, the Husband had assets of AU$139,648,065", the equivalent of approximately £57 million.

51. The judge also dealt, at [64], with the wife's case that the husband had earned a total of US$45 million in the years 2003/4 to 2007. The judge noted that this was a gross figure and referred to the husband's case that this did not take into account that "he was investing heavily in [UBS] stock, on which he said he had to pay 80% tax up front but which lost all its value in the financial crisis shortly after he" retired. The judge concluded that "these last years in [Switzerland] were likely to have been the Husband's best earning years of his career, given his promotion to such a position of importance. He lost a very significant share of his wealth during his first divorce and he would have been keen to have rebuilt his finances". However, he considered it "impossible to do

an audit" and limited his ultimate conclusion to there having been "marital accrual during this period".

52. The judge rejected the wife's case as to the effect of the parties not having entered into a pre-nuptial or post-nuptial agreement and also her case that it was a "partnership marriage". I deal with this further below when setting out the judge's ultimate conclusions. At this stage, I refer only to his rejection, at [62], of Mr Todd's submission that "the refusal to have a nuptial agreement is clear evidence that the parties were opting for a partnership marriage". And to the passage in the judgment, at [68], when the judge considered the wife's evidence about having changed her will in 2019.

> "[The wife] was then asked about changing her will to exclude him in early 2019. Given that the Husband had transferred the best part of £80 million to her only two years earlier, I do consider this was a very mean spirited thing to do, made worse by her not telling him. Mr Bishop, not unreasonably, asked her why she would not leave him half if this was, indeed, a partnership marriage where everything was shared. Her completely lame response was that the Husband would have contested it in any case so there was no point. I find that this action was completely inconsistent with her oral evidence, repeated on a number of occasions, that it was a partnership marriage from the very outset built on love and trust."

53. The judge firmly rejected the wife's case that Ardenside had been "matrimonialised". It was her case, at [66], that the property had been "matrimonialised because they stayed there during the marriage as a holiday home". The judge found the wife's "evidence in relation to Ardenside unsatisfactory." He concluded that the accommodation there was "extremely basic" and that the parties "did not go there a great deal during the marriage". Apart from spending "approximately 6-7 weeks per annum" between 2007 and 2010, when they were living in Australia, they only went there once when they were living in Switzerland and once since they have been living in England: "that is basically all".

54. Further, at [67], the judge concluded that "it is absolutely clear to me that this is a working farm. It is most certainly not a significant matrimonial home. Of the value of the land at a gross figure of [AUS]$55,180,000, I doubt the properties capable of occupation are worth more than tens of thousands of pounds." He then added that it "was purchased before the marriage and has, in essence, remained the same throughout the marriage".

55. The judge set out his "conclusions" from [73].

56. As referred to above, he rejected the wife's case as to the effect of the parties not having entered into a pre-nuptial or post-nuptial agreement *and* her case that it was a "partnership marriage". He said:

> "*The first thing that I need to deal with is the Wife's contention that this was a partnership marriage. I reject that suggestion as having no basis in fact or law.* This marriage was an entirely conventional second marriage in which the Husband brought

> significant assets to the marriage. The absence of a pre-nuptial agreement is not significant. We know from *Sharp* that the failure to enter a pre-nuptial agreement is not evidence of an intention to share. If this marriage had broken down six months after it had been celebrated, this court would undoubtedly have dealt with it on the basis of needs, albeit with additional consideration for what the Wife had lost in terms of entering the marriage. She could not possibly have mounted a claim to share equally in the Husband's pre-marital wealth. *Indeed, I am clear that this remained the position immediately before the transfers to her in early 2017.* After all, the Husband did not put assets in joint names, other than [the FMH]. Moreover, as the matrimonial home, [the FMH] occupied a central part in the marriage and it was entirely right that it was conveyed into joint names. Although the Husband paid for it, it became and remains matrimonial property." (emphasis added)

57. The judge, at [74]-[75], turned to deal with the transfer of the 2017 Assets. This, he considered, "changed the position" but he rejected the wife's case that they had become her "separate property". His analysis was as follows:

> "It is accepted that the Husband divested himself of his interest in the portfolio of assets that he transferred to the Wife, now worth some £80 million. There was no reservation of benefit as that would have defeated the tax saving scheme. The assets became the Wife's. The only claim that the Husband could possibly have to them, at least following the dismissal of his mistake/recission claim, is in the context of financial remedy proceedings following divorce. Moreover, that would have been lost if she had transferred the assets into trust. *I do, however, reject the suggestion that this money became the Wife's separate property, entirely free of any claim by the Husband other than on a needs basis. It has long been clear in this jurisdiction that you cannot benefit from keeping assets in your sole name.*" (emphasis added)

As to the last point, namely the effect of legal/beneficial ownership and the question of so-called separate property, the judge added:

> "The obvious example is the money-maker who generates significant assets during the marriage but keeps them in his sole name. *The home-maker's claim to share those assets is just as strong as if he had placed them in joint names. In the same way, if a money-maker transfers assets earned during the marriage into the name of the other, the money-maker can still make a sharing claim against those assets on marital breakdown. For it to be otherwise would be both discriminatory and entirely unfair*." (emphasis added)

58. The judge's conclusion in respect of the 2017 Assets, at [75], was that they had become "matrimonial property". His reasoning was brief:

> "As the £80 million transferred to the Wife did not become her separate assets, I must decide what it did become. Mr Bishop urges me to find that it did not become marital property. He cannot be right about that. The assets are not held by the Wife on trust for the Husband as he had to give up all interest in them for the tax saving scheme to work. The *only possibility is that they became matrimonial property*." (emphasis added)

This did not, however, mean that it had to be "automatically shared equally".

> "I have already set out the authorities that show that matrimonial property can be shared unequally. The source of the funds must and does remain a very significant feature. It could not be otherwise. The transfer cannot automatically give the recipient a half share without consideration of the section 25 factors. To do so would be just as wrong as allowing a money-maker to keep assets earned during the marriage without sharing them with the home-maker. I reject Mr Todd's arguments that this is a return to pre-*Lambert* days. The distinction is that, *at least in significant part*, this is money that was generated before the marriage, not money generated during the marital partnership to which *Lambert* applies. I further reject his submission that this cannot be right as it would mean that the Wife is in a worse position than a cohabitee. I have not considered whether the transferring money-maker in that situation would have any arguments pursuant to a resulting trust, assuming there was no need to divest oneself of the money entirely for tax reasons. The point is that very different financial considerations apply depending on whether you are married or you merely cohabit. In general, marriage protects the home-maker. The fact that it may be different in this case does not make it wrong. Whatever I decide, the Wife is going to leave this marriage in an infinitely better financial position than she entered it." (emphasis added)

59. Having decided, as set out above, that Ardenside was not matrimonial property, the judge concluded, at [76], that there was "absolutely no justification for sharing it". Conversely, he decided that the shares in Ardenside Angus had "become matrimonial as a result of the placing of "A" shares in the Wife's name". Although they were matrimonial property this did not mean, as with the 2017 Assets, that they should be shared equally. This was because "the source of the business, namely a pre-marital asset, is relevant, although, in the case of the shares, much of their value may well have been generated during the marital partnership".

60. The judge then, at [80]-[84], set out how the assets totalling £132 million should be divided between the parties.

61. He, first, at [81], deducted the value of Ardenside (£20 million) from the total giving the sum of £112 million.

62. Next, he set out his approach to the 2017 Assets (£80 million). At [81], he said:

> "I have found the transferred assets, amounting to some £80 million to be matrimonialised but *they are most certainly not matrimonial acquest in the standard sense as they were not all earned during the marital partnership. To a significant extent, this money was pre-marital and has only been matrimonialised towards the end of the marriage. I would not go as far as to say that the assets are only matrimonial as a result of a technicality because there is no doubt that the Husband intended to transfer them to the Wife and he could not reserve any benefit in them to himself. Equally, however, I cannot ignore what Mr Bishop calls "the magnetic feature", namely the pre-marital origin of most of this sum*." (emphasis added)

In addition, he said, at [82], that "*an element* of the sum of £80 million is not pre-marital" (emphasis added) in that at least a part of this figure was generated between the date on which the marital partnership commenced (June 2004) and the date of the husband's retirement (October 2007). Although the husband had "earned around US$40 million gross during that period … [the husband said that] he paid a great deal of tax in the period since 2004 and the shares granted to him lost their value in the banking crisis".

63. The judge concluded, at [83], that it was "almost impossible to say what proportion of the £80 million was earned during that period". Accordingly, whilst the wife "would be entitled to an equal division of [the money earned during the marriage], it is impossible to quantify it accurately". I would repeat, however, that the judge had concluded that, to "a *significant* extent [the 2017 Assets], were pre-marital", at [81]; that the "origin of *most* of this sum" was pre-marital, at [81]; and that it was only "an *element* [which was] not pre-marital", at [82] (emphasis added).

64. The judge decided, at [84], that the assets valued at £112 million should be divided so as to provide the husband with 60% and the wife 40%. He explained this division as follows:

> "In total, I have found the matrimonial assets to be £112,631,062 although this figure combines assets in two different categories, namely those that can be described as the matrimonial acquest and those that were matrimonialised by the tax planning exercise. I take the view that it would not be appropriate to divide the figure of £112,631,062 in two. This marriage lasted 15 years and 9 months. Whilst this is, therefore, most certainly not a short marriage, it is equally not a very long one. I simply cannot ignore the pre-marital assets brought to the marriage by the Husband, which I accept is an important feature. On the other hand, the total includes [the FMH]. It also includes earnings in [Switzerland] during the marital partnership and value generated in the [Ardenside Angus] business during the same period. I have decided that, overall, the appropriate division of the matrimonial assets is 40% to the Wife and 60% to the Husband. I propose to round the figure down very slightly so that the Wife will receive £45 million. The Husband will get £67,631,062 plus the land at BT worth £20,017,264, making a total of £87,648,326. On this

> basis, the overall split is 34% to the Wife and 66% to the Husband. As a cross-check, I am entirely satisfied that this is an appropriate division, taking into account all the section 25 factors. It is fair and just. It reflects both parties' contributions and all the other circumstances of the case."

65. Finally, I would note that, at [85], the judge said that he did "not need to undertake a needs assessment as it is quite clear to me that the Wife can live very well on a sum of £45 million".

66. I propose, at this stage, to consider the effect of the judge's award through a different perspective, adopting the approach taken by Mr Bishop when challenging the judge's application of the sharing principle in particular to the 2017 Assets of £80 million. The net effect of the judge's decision was to award the wife £45 million. On the judge's findings, excluding the 2017 Assets of £80 million, £32.6 million comprised matrimonial property (I have included the assets of £3.5 million within this). He found that Ardenside (£20 million) was not matrimonial property. On this basis, the wife was entitled to just over £16 million from the matrimonial assets (of £32.6 million). This meant that wife received 36%, namely £29 million, of the 2017 Assets of £80 million to make up the balance of her share of the matrimonial property. Put another way, this meant that, mathematically, the judge treated £58 million of those Assets (73%) as matrimonial property and £22 million as not being subject to sharing. This seems very far removed from the judge's conclusions, as set out in paragraph 63 above, for example that the "origin of *most* of this sum" was pre-marital, at [81].

67. In fact, in addition as referred to above, the judge found that, although the shares in Ardenside Angus were matrimonial property, "the source of the business" remained relevant although, at [76], "much of their value may well have been generated during the marital partnership". This would require some minor adjustment to the above analysis of about £850,000 if, say, 20% of the value of Ardenside Angus was treated as non-matrimonial, namely £1.7 million, increasing the wife's share of the £80 million slightly.

Submissions

68. The parties' respective submissions were as follows. I set them out at length because, in some respects, in particular as regards Mr Todd's submissions, they raised, what I would describe as, an array of disparate points.

69. Mr Todd acknowledged, indeed advocated that, in the determination of financial remedy applications, "achieving predictability" is desirable and an important policy objective. The question, he suggested, is how flexibility and certainty can be properly balanced to achieve fairness. I took it that he was also suggesting that the approach he was advancing, as set out below, would achieve the appropriate balance and would promote predictability and consistency in outcomes.

70. The wife's overarching case, as summarised by Mr Todd at the start of his submissions at the hearing of the appeal, was that title or ownership is *the* critical factor in the exercise of the court's powers under Part II of the MCA 1973 in the application of the sharing principle. It is not, as submitted by the husband, the *provenance* of an asset or whether it was "the product of marital endeavour which is important", but *ownership*.

This would give proper effect to the parties' autonomy, on "*Radmacher* principles" (*Radmacher*, at [78]-[79]) and would reflect and respect that "how they chose to own their assets is important". Mr Todd relied on Lady Hale's observations in Miller, at [153], and Lord Mance's, at [170], as set out below. This approach was also, he submitted, reflected in the decision of *Parra v Parra* [2003] 1 FLR 942 ("*Parra*"), in particular Thorpe LJ's observation, at [27], that:

> "As a matter of principle I am of the opinion that judges should give considerable weight to the property arrangements made during marriage and, in cases where the parties have opted for equality, reserve the exercise of the adjustive powers to those cases where fairness obviously demands some reordering."

71. Mr Todd submitted that there are three, and only three, types of property. They are: (i) the wife's separate property; (ii) the husband's separate property; and (iii) the marital property or, as he otherwise described it, the partnership property. The classification or characterisation of an asset will be as set out in the Forms E and the schedule known as ES2. He also submitted that there was no fourth category of matrimonialised assets and he invited this court "to remove it from the lexicon of the law of financial remedies"; or, at least, that this is not a helpful concept. This is because an asset either is or is not matrimonial. Once it is "in the partnership it falls to be distributed" equally, whereas the judge wrongly treated a matrimonialised asset as "a lesser specie of matrimonial" asset which was not subject to equal division.

72. During the course of the hearing, Mr Todd explained that separate property is property which is "legally and beneficially owned by one party" and was a term he used as a synonym for non-marital property. This is property which "has been kept out of" the parties' common endeavour and is not included in "the partnership". The most common example is "pre-acquired money *provided it has not been given away or mingled*" but it also includes inheritances and gifts. It is not subject to the sharing principle but can be "invaded in case of need/compensation".

73. Marital property, on the other hand, is "an asset which has come to be within the matrimonial partnership". There are two types or categories of marital property, namely (a) property which is expressly included within, or given to, the matrimonial partnership; and (b) property which can be inferred to be within the matrimonial partnership. The former would include, for example, jointly purchased property or a joint account. The latter is all the wealth generated during the marriage. The "defining feature" in respect of the characterisation of assets as marital property subject to the sharing principle is, on the wife's case, "not their provenance but that they were contributed to the common endeavour".

74. Mr Todd submitted that, once an asset is defined as matrimonial it is shared equally, unless one of the recognised grounds for departing from this is present. These comprise, needs; compensation; special contribution; and nuptial agreements. He also referred to liquidity but observed that this is taken into account as a factor in equal sharing rather than being a departure from it. Non-matrimonial property "will usually only be invaded in case of need or compensation".

75. Mr Todd criticised the judge's approach, at [51]-[58], to the "quantification of the matrimonial property" and its division. In respect of the former, he submitted that the

approaches the judge referred to as "broad-brush" and "a detailed calculation" do not reflect differences of principle. They are both "simply means to assessing what is matrimonial and non-matrimonial" and which one is appropriate in a particular case will depend on the evidence. If, for example, the court is unable factually "to distinguish between matrimonial and non-matrimonial assets (say, where there has been a high degree of mingling of assets), then the court is compelled to adopt a more holistic approach", as in *Hart*. Conversely, the evidence might enable the court to determine a clear dividing line, as in *K v L*.

76. In respect of the latter, namely the division of matrimonial property, Mr Todd submitted that the judge was wrong to consider that the cases to which the judge referred, and on which he relied, were examples of the unequal division of matrimonial property. Those cases (*Vaughan*; *S v AG*; and *FB v PS*) were addressing the identification of the "matrimonial element" in property which had a "mixed" character (i.e. part matrimonial and part not) rather than the distribution of property which had been identified as matrimonial.

77. As a result of the above proposed approach, Mr Todd submitted that the effect of one spouse transferring, or "donating", an asset which is their separate property into the legal and beneficial ownership of the other spouse is to transform that property into the other spouse's separate property. The transfer had the effect that the latter then becomes the "source" of the property rather than the former. It was not then subject to the sharing principle because it was, and remained, "external to the marriage partnership". Mr Todd also submitted that when one spouse gave another spouse an asset, this occurred "independently of the marriage partnership". This meant that the 2017 Assets were not marital property but had become the wife's separate property and were not subject to the sharing principle. The husband's motives for the transfer were "unimportant". The transfer had "permanently alienated" those assets from the husband and had made them the wife's "absolute property". The judge had, therefore, been wrong when he decided, at [75], that they had not become her "separate assets" but "became matrimonial property".

78. The wife's case was, Mr Todd submitted, further supported by the fact that the "matrimonial property regime" in England and Wales is not "community of property" but "starts with the premise of separate property" (as referred to by Lady Hale in *Miller*, at [123] and [151]-[153]). How the parties "chose to regulate their finances should have been a starting premise". Mr Todd also submitted that to make it "a retrievable gift" would be "to condemn" a spouse as "inferior" to others from whom gifts could not be recovered. Surely, he postulated, this would be discriminatory and an improper use of the court's powers because it would place a spouse in a worse position than anyone else, including a cohabitee. The law would be "just an engine for confiscation" and, on the husband's case, would take the law back to "pre-*White* days" or, even further, to the time before the Married Women's Property Act 1882 which gave a married woman the right to hold "separate property". Why, Mr Todd also asked, should a spouse be "worse off simply by virtue of having been married"?

79. By way of concession, and despite his general submissions as referred to in paragraph 77 above, because the wife recognised that, in this case, "the transfer was done in the context of a marital partnership [and the] essence of that was equality", the wife was "prepared to allow for funds to be returned to [the husband] that would place him in a position of equality". But for that concession, Mr Todd submitted the court would have

been bound to exercise its discretion by excluding the 2017 Assets from the application of the sharing principle. As a result of that concession, the 2017 Assets became "part of the equal partnership matrimonial property". The court was obliged to divide them equally between the parties because there was no justification (such as special contribution) for any departure from the principle that matrimonial property is shared equally.

80. Mr Todd also relied, as referred to above, on respect for the parties' autonomy and submitted that the principles set out in *Radmacher* should apply to "any agreement including oral expressions and agreements". This extended to the way in which the parties "have decided" to hold their assets so that if they are held jointly they are to be shared equally but, also, if they had agreed an asset should "be taken out of marital property, [it] became separate property" which would not be shared. Mr Todd advanced the general proposition that, "when the parties have chosen to regulate their financial affairs in a particular way, the court should respect that absent good reason to the contrary". This was a very broad submission which, it appeared, might well require an evidential investigation into what the parties had said during the course of their relationship which might be said to constitute an "agreement" and/or lead to arguments as to whether the parties had, in fact, *chosen* how to "regulate their financial affairs" in a manner which should impact on the division of their wealth on divorce.

81. Mr Todd advanced a number of other propositions. These included that where "parties on their second marriage decide not to have a pre-nuptial agreement then that might (and we say it does here) indicate a willingness to share equally in money which is matrimonial (which would include money that has become matrimonialised)"; and that this was a "partnership marriage" (viz the mutual wills executed by the parties) and there was "no obvious good reason for marital partnerships to be treated differently from commercial ones".

82. Alternatively to the submissions made, as set out above, in respect of the 2017 Assets, Mr Todd submitted that, if the judge had been right to decide that they were matrimonial property or had become matrimonialised, there was "no good reason for departing from an equal division". It was suggested that, "[i]f the giving of those assets away to the other spouse does not either give them to the other party or *de minimis* [sic] make them matrimonial, then a spouse can never give away pre-marital property". It was said that the "inherent wrongness of" the husband's case was, thereby, exposed because this would mean that pre-marital property was "inviolable or incapable of alienation within the marriage".

83. Mr Todd also challenged more generally the judge's unequal division of, what he had found to be, the matrimonial assets in the husband's favour. This was unprincipled and unfair. The "very description of it as matrimonial property entails that H and W are entitled to share in it equally". The judge had also failed properly to take into account that part of the 2017 Assets, namely "at least $40 million, was earned in the matrimonial partnership". I note that, although $40 million was the sum suggested by Mr Todd, it is clear that this was a gross sum before tax (judgment, at [82]).

84. The judge's conclusions in respect of Ardenside and Ardenside Angus were also criticised. As to the former, it was submitted that the judge should have decided that it was matrimonial property to be shared equally between the parties. It was the farm from where the jointly owned business operated. Mr Todd submitted that the judge had

failed consistently to apply his comment, at [74], that "you cannot benefit from keeping assets in your sole name". The judge had applied this to the 2017 Assets and should also have applied it to Ardenside.

85. As to Ardenside Angus, it was submitted that, although the judge decided that it was matrimonial property, he did not properly factor this into his overall division. This asset should have been divided equally between the parties in accordance with their equal shareholding but, in fact, the wife was awarded only 40% of the matrimonial property.

86. Finally, Mr Todd submitted that, if the husband's appeal were to succeed, this court would not be in a position properly to determine any "needs-based" award. The matter would have to be remitted.

87. Mr Bishop's overarching case, in respect of the wife's Ground 1 and his cross-appeal, was that the judge was wrong to find that the 2017 Assets and Ardenside Angus had become matrimonial property. He submitted that, for the reasons set out below, they had not. Alternatively, he submitted that even if they had, *in part*, been matrimonialised, the ultimate division of the wealth under the judge's order was not fair as it did not properly reflect the extent to which the family wealth was the product of the husband's pre-marital endeavour.

88. Mr Bishop directly challenged the wife's primary case that title is the critical factor in the determination of financial remedy claims. He submitted that neither title nor autonomy are relevant to the application of the sharing principle in the manner proposed by Mr Todd. To introduce these factors in this way would be contrary to the law as it has developed since *White* and contrary to the court's objective of achieving a fair outcome. The sharing principle, Mr Bishop submitted, is founded or based on each party, in fairness, being entitled to an equal share of their matrimonial property, namely the "fruits of the partnership" or the wealth built up by the parties' endeavours during the marriage. The introduction of title or autonomy in the manner proposed by Mr Todd would, he submitted, undermine that principle and create obstacles to the court achieving a fair outcome.

89. Title is not relevant in the application of this principle because, Mr Bishop submitted, the court looks through title to determine whether wealth is matrimonial, as described above. This is because the parties are treated as having made equal contributions to *this* wealth because any other treatment would be discriminatory and not achieve a fair outcome. The purpose is not to give any asset a particular label but is to provide the court with a principled route to determining how to achieve a fair outcome. Title is not, he submitted, a significant factor in this exercise because it does not reflect whether an asset is or is not the product of the parties' respective endeavours. To adopt the approach proposed by the wife and exclude assets from the sharing principle on the basis of title or because, on the wife's case, they had somehow become her "separate property" would, he submitted, be inconsistent with and wholly undermine the sharing principle.

90. The court's focus when applying this principle must, therefore, be on the substance of the parties' contributions, namely the fruits of their common endeavour. Mr Bishop submitted that, as a result, the application of this principle would determine what was, and what was not, property which should be shared between the parties. This did not

mean that there was always a clear dividing line between matrimonial and non-matrimonial property. There was, he submitted, no such "straight jacket" because the extent to which this was possible or necessary to achieve fairness would depend on the facts of the case as set out in *Miller*, at [27], and *Hart*, at [85] and [94].

91. Mr Bishop undertook a tour of the authorities, starting with *White*, to support his submissions as to the "critical importance of contributions/marital endeavour" when the court is seeking to assess whether the assets available for division are subject to the sharing principle. He relied, for example, on Lord Nicholls differentiating between matrimonial and non-matrimonial property in *Miller*, at [22]-[23], on the basis that "there is a real difference, a difference of source, between" the two in that the "former is the financial product of the parties' common endeavour, the latter is not"; and on Lady Hale, at [141], referring to "*sharing of the fruits of the matrimonial partnership*".

92. As to the concept of matrimonialisation, Mr Bishop submitted that this arose from the courts recognising that, in some circumstances, in order to achieve fairness it would be "fair to reduce the weight given to pre-marital contributions" such that the "significance of the source of the wealth may diminish". The evaluation of whether an asset should be treated as matrimonial property, or matrimonialised, was an "exercise in fairness to consider whether circumstances exist which no longer make it fair to treat the asset as excluded from sharing". If they did, the result would be that property which was not the product of the parties' joint endeavours would, nevertheless, be treated as such and hence within the scope of the sharing principle. This again did not mean that there would necessarily be a clear dividing line; the court could "perform this exercise with the degree of particularity or generality as the assets and the facts of each case permit".

93. During the course of his oral submissions, Mr Bishop suggested that the court might consider whether this concept merits being maintained at all. His principal submission on this issue, however, was that, because it "constitutes a derogation from" the critical significance of actual contribution and endeavour, it should be applied cautiously and conservatively. This would be achieved if it was confined to the three examples given by Wilson LJ in *K v L* which, Mr Bishop noted, had not been added to since the date of that decision. He also submitted that it was significant that Wilson LJ had not included within those examples "the scenario of mere title of an asset being transferred between the parties with nothing more".

94. In addition, Mr Bishop submitted that, even if "there has been matrimonialisation of an asset", this does not mean that it must be divided equally as submitted by the wife. He submitted that the "correct analysis" which should be applied in respect of an asset or assets that had been matrimonialised was that set out in *Hart*, at [96], applying the formulation from *Jones*, namely the court would have to decide "what award of such lesser percentage than 50% makes fair allowance for [that asset or assets] in part comprising or reflecting the product of non-marital endeavour".

95. In support of his above submissions, Mr Bishop referred to a number of authorities including: *Vaughan*; *J v J* [2011] 2 FLR 1280; *S v AG*; *JL v SL (No. 1)* [2015] 2 FLR 1193; *JL v SL (No 2)* [2015] 2 FLR 1202; *FB v PS*; and *Hart*.

96. Mr Bishop submitted that the wealth available for distribution in this case was not the product of the parties' endeavours, "even as to the majority", but was the product of the husband's non-marital endeavour prior to the marriage. This, he submitted, should have

been the determinative factor in the manner in which the judge applied the sharing principle.

97. The fact that the husband had transferred £77 million to the wife in 2017 as part of a tax planning scheme (which was, in fact, never fully implemented) did not convert this wealth, of which only an "element [was] not pre-marital", into matrimonial property which was subject to the sharing principle. Mr Bishop submitted that the judge's very brief reasoning, at [75], that the "only possibility" consequent on the transfer was that the funds "became matrimonial property" was an insufficient analysis and, in any event, did not justify his conclusion. This analysis "confused … what had happened to the title of the assets with the assessment of whether it was fair to treat them as matrimonial". This was "surprising" because, at [74], the judge had, correctly, set out that title "was unimportant when considering the fair treatment of an asset within the process".

98. Mr Bishop relied on the fact that, "very broadly", these assets had remained in the same form between 2004 and 2017. The "endeavour leading to the generation of [this] wealth" remained the husband's and had been performed by him "to an overwhelming extent in the 32 years of his career prior to" the parties' cohabitation. The transfer into the wife's name did not affect this or change the source of this wealth. There was, therefore, no legal or factual merit in her submission that the transfers in 2017 had converted these assets into the wife's "separate property" or into a contribution by the wife.

99. Mr Bishop also submitted that, if the judge's analysis was a "very attenuated attempt to go through the *K v L* exercise", it was insufficient and flawed on the facts of this case. It was flawed because this case did not come within any of the examples given by Wilson LJ. The 2017 Assets had not been appreciably "mixed" with matrimonial property and there was no evidence to suggest that the husband had accepted that they should be treated as matrimonial property.

100. The judge had lost sight of the relevant factors when considering whether to classify the 2017 Assets as matrimonial, namely that they had been retained by the husband in his sole name until 2017, close to the end of the relationship; that the sole reason for the transfer was to protect the husband's estate from IHT; that the intention had not been that the wife would retain the assets but that they would be transferred into a trust, a scheme that was never implemented; and that, as referred to above, they "overwhelmingly comprised wealth which was generated before the marriage".

101. If the judge had properly taken these factors into account, and the similar factors in respect of Ardenside Angus, he would have concluded that both the 2017 Assets and Ardenside Angus were not matrimonial property. Applying the objective of fairness, Mr Bishop submitted that the circumstances of this case did not justify the wife receiving a *share* of this wealth.

102. Mr Bishop expressly challenged the concept of separate property, *if* the wife submitted that it meant anything other than non-marital property. It would then be no different to that of "unilateral assets" which had very limited application as set out in *XW v XH (Financial Remedy: Non-matrimonial Assets)* [2020] 4 WLR 22 ("*XW v XH*"). Similarly, he submitted that the wife's reliance on *Parra* was misguided as all that case decided was that when the parties had arranged their affairs so as to achieve equality

there was no justification for the court to interfere when, per Thorpe LJ at [26]. "the overwhelmingly obvious solution in this case was equal division of family assets".

103. As to the wife's reliance on the parties' autonomy, Mr Bishop submitted that this was equally flawed. The wife's claim that the transfers in 2017 were made as part of a pooling or sharing marital partnership had been rejected by the judge, at [73]. There had been no agreement that the wife would receive the assets as her property and, perhaps more importantly, no agreement as to what should happen in the event of a divorce. In any event, the suggestion that the courts should become embroiled in investigations into why an asset was held in a particular way or what the parties had or had not said would be to embark on "an arid and impermissible rummage through the attic of married life", adopting the expression used by Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, at [46], in respect of contributions. In the same way this would not assist parties "to achieve compromise" but encourage them "to indulge in [such] a detailed and lengthy retrospective" rummage. This was, Mr Bishop submitted, unnecessary in order to determine a fair outcome and would lead to delays and add to the expense and uncertainty of proceedings.

104. In respect of the judge's award, Mr Bishop submitted that, applying the analysis referred to in paragraph 66 above, the judge had effectively treated £58 million of the 2017 Assets as matrimonial property and £22 million as not being subject to sharing. This was because the wife's award included £29 million which was plainly referrable to these Assets. This was, he submitted, unjustified and did not fairly reflect their source as being the husband's pre-marital career.

105. As to the wife's Ground 2, Mr Bishop submitted that the judge's conclusion in respect of Ardenside was based on "numerous factual findings" including that it had been purchased before the parties' marriage; it was at all times a working farm and not a marital home; that the parties had visited it infrequently; and that the additional parcel of land which had been purchased during the marriage was inconsequential. The judge had been right to conclude, at [67], that it had, "in essence, remained the same throughout the marriage".

106. In conclusion, Mr Bishop put forward a number of methods by which the sharing principle might be applied and which, he submitted, provided a more intellectually rigorous and fairer approach than that adopted by the judge. The matrimonial home (£20 million) and the assets of £3.5 million would be divided equally (£11.75 million). Ardenside would be excluded in accordance with the judge's determination. The 2017 Assets of £80 million and Ardenside Angus (£8.6 million) would be shared in a manner which gave "fair allowance" for the fact that they comprised or reflected the product of non-marital endeavour. He adopted the approaches taken respectively in *Robertson v Robertson* (50/50 matrimonial/non-matrimonial); *FZ v SZ* (deducting £53.5 million being the value of the husband's wealth, excluding Ardenside, in 2004, although Mr Bishop noted that this made no allowance for even passive growth or currency changes since 2004); and *Martin v Martin* (straight line over the period of generation from 1972 to 2022). These gave various amounts between £34.2 million and £23.9 million although his ultimate submission was that an award of £25 million would be fair and would also be sufficient to meet the wife's needs.

107. Mr Bishop accordingly submitted that this court could determine the wife's award *if* the 2017 Assets (and Ardenside Angus) were, at least in part, to be treated as

matrimonial property. If, however, we found that they were not matrimonial property, he reluctantly acknowledged that the matter would have to be remitted because the judge had made no separate determination as to the wife's needs and this court was not properly in a position fairly to do so.

Legal Framework

108. I do not need to set out s.25 of the MCA 1973 but it is, perhaps, worth reiterating that it gives the court a broad discretion when exercising its powers to make financial orders while setting out the specific factors to which the court "shall in particular have regard" and stating that the court must give "first consideration … to the welfare while a minor of any child of the family who has not attained the age of eighteen". I would just mention that one factor, as set out in s.25(2)(a), is "the income, earning capacity, *property and other financial resources* which each of the parties to the marriage has or is likely to have in the foreseeable future" (emphasis added).

109. The issue at the heart of this appeal is the classification of property for the purposes of the application of the sharing principle; in particular, how and when property can change or move from being non-matrimonial property, to which it does not apply, and become matrimonial property, to which it does apply. However, given the breadth of the submissions made, in particular by Mr Todd, it is necessary to undertake a review of the development of the law starting with *White* which marked a fundamental change in the manner in which financial remedy cases are determined.

110. In *White*, Lord Nicholls gave the leading speech (with which Lord Hoffmann, Lord Cooke, Lord Hope and Lord Hutton agreed). He considered the statutory history and emphasised two important principles, fairness and equality. At p.604 H, he said:

> "*the objective must be to achieve a fair outcome*. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses." (emphasis added)

Then, under the heading of "Equality", he said at p.605 C/E:

> "In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles … 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 … There should be no bias in favour of the money-earner and against the home-maker and the child-carer."

Accordingly, at p.605 G, "equality should be departed from only if, and to the extent that, there is good reason for doing so".

111. Of particular relevance to the present appeal, Lord Nicholls addressed the issue of proprietorial interests. As is conventional, and indeed necessary, to explain the financial resources with which the court is dealing, Lord Nicholls set out, at p.601 E, the parties' "overall net worth" and what this "comprised", namely each party's "sole property" and their share of jointly owned property. Later, at p.611, Lord Nicholls

addressed a submission made by the husband that the Court of Appeal had given undue weight to the parties' respective proprietorial interests. He rejected that submission because he doubted that Thorpe LJ and Butler-Sloss LJ (as she then was) would have made such a simple error. Lord Nicholls was clear, at p.611 C/D, that it was well established that "*the parties' proprietorial interests should not be allowed to dominate the picture*" (my emphasis) even in cases where the "parties were in business together". This was because the need "to attempt to unravel years of matrimonial finances and reach firm conclusions on who owned precisely what and in what shares" had been "swept away in 1970 when the new legislation gave the court its panoply of wide discretionary powers".

112. In *Miller*, a range of views were expressed across the four speeches given by Lord Nicholls, Lord Hope, Lady Hale and Lord Mance. This is because they were addressing, in broad terms, the principles which underpinned the approach the court should take to the determination of financial remedy claims following, what Lady Hale described, at [134], as "the great leap forward" achieved by *White* with the establishment, at [137], of the overarching principles of "fairness, equality and non-discrimination". *Miller*, in turn, established the three guiding principles of need, compensation and sharing. The focus for the purposes of the present appeal is on the sharing principle, or the "equal sharing principle" as it was referred to by Lord Nicholls, at [20], and "equal sharing" as it was referred to by Lady Hale, at [144].

113. Having regard to Mr Todd's submissions as to the role of ownership or "title", I would first note the following observations in the speeches of Lord Nicholls and Lady Hale. The former said, at [9]:

> "In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. *It is not a case of "taking away" from one party and "giving" to the other property which "belongs" to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property.* The search is always for what are the requirements of fairness in the particular case." (emphasis added)

The latter said, at [124]:

> "The court is directed to take into account all of their resources from every source. *It is then given a wide range of powers to reallocate all those resources, be they property, capital or income*." (emphasis added)

114. The sharing principle was considered by Lord Nicholls, from [16]. He set out that, as "a partnership of equals", fairness required that each spouse was "entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary". He considered that this was, at [17], "applicable as much to short marriages as to long marriages". He also considered that this applied, at [20], to *all* assets which were "the financial fruits of a marriage partnership" and he identified "the nature and source of the parties' property" as being the relevant matters when determining "the requirements

of fairness". Then, at [21]-[25], he considered the terms "matrimonial property and non-matrimonial property".

115. At [22], after pointing out that s.25(2)(a) of the MCA 1973 refers to all "property and financial resources", Lord Nicholls said:

> "This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, *a difference of source*, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been." (my emphasis)

116. Lord Nicholls then dealt with non-matrimonial property in respect of which he considered, at [23], that the duration of the marriage would be "highly relevant". He commented, at [25]:

> "… Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie …"

117. He also referred to other relevant factors, again solely in respect of non-matrimonial property, one of which, at [25], was "the way the parties organised their financial affairs". He also noted that:

> "[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day …
>
> [27] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality

> appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case."

118. Lady Hale, at [123], referred to the fact that "English law starts from the principle of separate property during marriage". The expression "separate property" featured prominently in Mr Todd's submissions but all Lady Hale was stating was that there is no community of property regime in England unlike other jurisdictions and that, as a result, first "Each spouse is legally in control of his or her own property while the marriage lasts" and secondly, from [137], there has to be some "rationale for redistribution". The third rationale she identified, at [141], was "*the sharing of the fruits of the matrimonial partnership*" (emphasis in original).

119. In a section headed, "*The source of the assets and the length of the marriage*", Lady Hale considered the relevance of the length of the marriage to the distribution, at [147], of "great wealth which has been brought into the marriage or generated by the business efforts and acumen of one party". This was based on "debates" which were "evidence of unease at the fairness of dividing equally" such wealth. The focus of her consideration was on the latter but she first referred, at [148], to *White* which she said had "recognised" the relevance of the "source of the assets" and which had "also recognised that the importance of the source of the asset will diminish over time". In her view, at [149]:

> "The question … is whether in the very big money cases, it is fair to take some 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 [or whether] the "matrimonial property" [is] to consist of everything acquired during the marriage."

120. Lady Hale's ultimate conclusion, at [152], in respect of "business or investment assets which have been generated solely or mainly by the efforts of one party", was that the arguments for and against these assets being treated differently would be irrelevant in "the great majority of cases". However, she considered that "in a very small number of cases" this might be a relevant factor in the same way as in respect of "premarital property, inheritance and gifts". In those cases "the duration of the marriage" or of the "domestic contribution" "may justify a departure from the yardstick of equality of division". She observed, at [153], that:

> "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."

121. It is of particular relevance to the present appeal that both Lord Nicholls and Lady Hale identified the importance of the *source* of assets, in particular whether they were the

fruits of the marital partnership or were "brought into the marriage", at [22] and [147]. They differed only in respect of the potential approach to "business or investment assets" generated by one party during the marriage, with Lord Nicholls considering that there should be no distinction while Lady Hale considered that there might be some scope for a difference of treatment depending, principally, on the length of the marriage.

122. Lord Mance referred to the difference in approach between Lord Nicholls and Lady Hale in respect of business assets, at [167]-[168]. It was, again, in that context, and more specifically in respect of marriages in which "both partners are and remain financially active and independently so", that he referred, at [170], to the manner in "which the parties had chosen to live their lives while married".

123. I pause there to note that the references to how the parties "run their lives" and "live their lives" were *not* said in the context of, or as providing a means by which, parties could more generally seek to limit the application of the sharing principle. It is obvious, as referred to in *Charman v Charman (No 4)* [2007] 1 FLR 1246 ("*Charman*") (see below), that this would "gravely undermine the sharing principle".

124. I next refer to *Charman* which was a judgment of the court (Sir Mark Potter P, Thorpe and Wilson LJJ). I would first note the judgment's comment, at [63], about being loyal to the "spirit as well as the letter of [the] guidance" in *White* and *Miller* but also the observation that those decisions had "left much for the courts to develop".

125. Next, again having regard to the repeated emphasis by Mr Todd on the issue of "title", it is relevant to note the court's reference, at [57], that as a consequence of the decision in *White* there had been a change of the court's focus in cases of substantial wealth away from needs: "As a result of the advent of reference to proportions, the focus has largely shifted to computation of *resources*" (my emphasis).

126. The judgment, at [66], identified "matrimonial property" as "*the property of the parties generated during the marriage otherwise than by external donation*" (my emphasis). The judgment also addressed an argument advanced on behalf of the husband about certain property being exempt from the sharing principle", based on Lady Hale's "suggestion, at paras [149]–[152], that … the fruits of a business in which only one party had substantially worked, ie unilateral assets" were not subject to the sharing principle". It is relevant to observe that this argument was about excluding one type of matrimonial property, so-called "unilateral assets", from the sharing principle. The response to this argument was as follows:

> "[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 …*" (my emphasis)

127. *Radmacher* dealt with the approach the courts should apply when dealing with nuptial agreements. It was not, therefore, dealing more generally with the court's approach to the determination of financial remedy claims. However, in the judgment given by 7 members of the constitution (Lord Mance gave a broadly concurring judgment and Lady Hale gave a separate, dissenting, judgment), consideration was given to aspects of the decision in *Miller*, including as to the sharing principle:

> "[26] A third strand was sharing. Lord Nicholls postulated that marriage was a partnership. *When a marriage ended each was entitled to an equal share of the assets of the partnership unless there was good reason to the contrary*, albeit that the yardstick of equality was to be applied as an aid, not a rule. One good reason might be the difference between "matrimonial property" generated during the marriage and "non-matrimonial property"—property brought by one party to the marriage or inherited by or given to one party during the marriage." (emphasis added)

It was then noted, at [27], that there "*was general agreement among the other members of the House with those propositions*, although not all agreed on the precise definition of "matrimonial property" nor on the relevance of the length of the marriage to the principle of sharing" (emphasis added). The difference related to "a sub-category of matrimonial property" which, as referred to above, related to business assets and *not* to the treatment of non-matrimonial property.

128. In respect of nuptial agreements, the Supreme Court decided, at [75], that:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

It can be seen that this is confined to an *agreement* and requires the parties to have "a full appreciation of its implications". As had been referred to previously in the judgment, at [69], this required "that a party is fully aware of the implications of an ante-nuptial agreement …. What is important is that each party should have all the information that is material to his or her decision, and that each party *should intend that the agreement should govern the financial consequences of the marriage coming to an end*" (emphasis added). I would emphasise that the form of the agreement being considered was, as set out in the Headnote:

> "an agreement, made between a couple prior to and in contemplation of their marriage, *as to the manner in which their financial affairs should be regulated in the event of their separation i*n circumstances where it was fair to do so …" (emphasis added)

129. It is clear, therefore, that the agreements being addressed were those, and only those, which expressly provided for the parties' financial arrangements on the breakdown of their marriage. The decision was not dealing with, and there is nothing to suggest that it extended to, the sort of arrangements, namely "how they chose to own their assets",

as advanced by Mr Todd in the course of his submissions. How parties choose to own their assets *during* their marriage is far removed from an agreement intended to "govern the financial consequences of the marriage coming to an end". The Supreme Court referred to the parties' autonomy in this specific context and not in respect of other arrangements. They said, at [78]:

> "[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. *The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated*. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future." (emphasis added)

For the avoidance of doubt, it is clear that the word "regulated" meant regulated in respect of a divorce. This can be seen, for example, from [1]:

> "When a court grants a decree of divorce, nullity of marriage or judicial separation it has the power to order ancillary relief. Ancillary relief governs the financial arrangements between the husband and the wife on the breakdown of their marriage. Sometimes the husband and wife have already made *an agreement governing these matters.* The agreement may have been made before the marriage ("an ante-nuptial agreement") or after the marriage ("a post-nuptial agreement"). Post-nuptial agreements may be made when the husband and wife are still together and intend to remain together, or when they are on the point of separating or have already separated. The latter type of post-nuptial agreement can be described as "a separation agreement". We shall use the generic description "nuptial agreements" to embrace both ante-nuptial and post-nuptial agreements." (emphasis added)

130. In *Jones*, the Court of Appeal (Sir Nicholas Wall P, Arden and Wilson LJJ) again considered the application of the sharing principle when a substantial part of the parties' wealth comprised the proceeds of sale of a company which the husband had started some 10 years before the marriage and had sold just after the end of the marriage. Wilson LJ agreed, at [33], with the approach adopted by Charles J at first instance to the application of the sharing principle, namely by first dividing the wealth "into the part reflective of non-matrimonial assets and that reflective of matrimonial assets" (without pursuing "precise division"). He then proposed, at [34], that:

> "we should test the result suggested by the adoption of Miss Stone's (mathematical) approach against application of Mr Pointer's (by-and-large) approach, namely by identifying, for allocation to the wife, such lesser percentage than 50% of the total assets as seems to make *fair overall allowance* for the husband's introduction of his company into the marriage." (emphasis added)

I would also just note that Wilson LJ acknowledged, at [46], that an increase in the value of a pre-marital asset through passive growth "was as much non-matrimonial as its value at the date of the marriage".

131. The next case, *K v L*, is important because Wilson LJ (with whom Laws and Jacob LJJ agreed) specifically addressed what has come to be known as matrimonialisation. The relevant feature of that case was that the wife owned shares which she had inherited over ten years before the parties began cohabiting and which were worth some £57 million at the date of the substantive first instance hearing. During the marriage, neither party had worked and, at [6], the "dividends declared on the wife's shares in S Ltd, occasionally supplemented by the proceeds of sales of shares, provided more than enough for the family's needs". The parties had, therefore, met the family's living expenses from the shares. As will be seen, this did not make them matrimonial property.

132. The husband argued on appeal that the judge should have applied the sharing principle rather than calculating the award of £5 million by reference to his needs. The husband relied on what Lady Hale had said in *Miller*, at [148], that "the importance of the source of the assets *will* diminish over time" (emphasis added). After quoting what Lord Nicholls had said in *Miller*, at [25], (see above) Wilson LJ said, and I quote the passage in full (emphasis in original):

> "[18] Thus, with respect to Lady Hale, I believe that the true proposition is that the importance of the source of the assets *may* diminish over time. Three situations come to mind: (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property. (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult. (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has - as in most cases one would expect - come over time to be treated by the parties as a central item of matrimonial property. The situations described in (a) and (b) were both present in *White v White. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth,* at all times ringfenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to grow in value." (emphasis added)

133. The husband's appeal was dismissed. Wilson LJ also highlighted, at [21], the difference in the application of the sharing principle to matrimonial property and to non-matrimonial property with "the ordinary consequence of the application to [the latter] of the *sharing* principle is extensive departure from equal division, often (so it would appear) to 100%—0%".

134. Briefly, in *Gray v Work* [2018] Fam 35, the Court of Appeal (Sir Terence Etherton MR, King and Moylan LJJ) re-emphasised what Wilson LJ had said in *K v L*:

> "34. The sharing principle is now firmly embedded and, in those cases where the resources exceed needs, the "ordinary consequence" of its application will be the equal division of matrimonial property: Wilson LJ in *K v L* [2012] 1 WLR 306, para 21."

135. In *Hart*, in a judgment with which Lloyd-Jones LJ (as he then was) and Beatson LJ agreed, I set out, at [2], a summary of the definition of matrimonial and of non-matrimonial property, based on *White*, *Miller* and *Charman*. In respect of the former, I quoted from *Miller* ("the financial product of the parties' common endeavour" and "the fruits of the matrimonial partnership"); and *Charman* ("the property of the parties generated during the marriage otherwise than by external donation"). In respect of the latter, I said:

> "Non-matrimonial property can, therefore, be broadly defined in the negative, namely as being assets (or that part of the value of an asset) which are not the financial product of or generated by the parties' endeavours during the marriage. Examples usually given are assets owned by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse from, typically, a relative of theirs during the marriage."

Later, at [85], I referred to these concepts as being legal constructs and also stated that they were "not always capable of clear identification". This was because:

> "an asset can be comprise both, in the sense that it can be partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage. I have added the word "reflective" because "reflects" was used by Lord Nicholls in [*Miller*], at para 73 and "reflective" was used by Wilson LJ in the *Jones* case [2012] Fam 1, para 33. When property is a combination, it can be artificial even to seek to identify a sharp division because the weight to be given to each type of contribution will not be susceptible of clear reflection in the asset's value. The exercise is more of an art than a science."

I would emphasise, as I said at [94], that when there is not a clear dividing line between matrimonial and non-matrimonial property, the court is *not required* to enter into an investigation or analysis which is "neither proportionate nor feasible" but can undertake a "broad evidential assessment". It may not happen often but I have had experience of some cases in which this would seem to have been overlooked.

136. I would finally quote from *Hart* what I said, at [96], about the approach the court should take when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property:

> "If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties'

> wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in *Jones*, 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. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness". This accords with what Lord Nicholls said in *Miller* and, in my view, with the decision in *Jones*."

137. The final Court of Appeal judgment to which we were referred was *XW v XH*, another case which addressed the application of the sharing principle. My judgment, with which Underhill and King LJJ agreed, considered a number of issues in the application of this principle including the meaning of matrimonial property, the relevance of "the way the parties had run their lives" and the quantification of the court's award.

138. The judgment set out, at [136], that:

> "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 para 66, Jones [2012] Fam 1, para 33, *Hart* [2018] Fam 93, paras 67 and 85, and *Waggott* [2019] Fam 479 [*Waggott v Waggott* [2018] EWCA Civ 727], para 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* [2016] UKPC 36; [2017] AC 93; [2017] 2 WLR 106; [2017] 2 FLR 933, para 25, and *Waggott* at para 128.

139. The judgment addressed the relevance of the way the parties had run their lives, namely by keeping their financial affairs separate, and the relevance of business assets, at [138]-[145], in a section dealing with "unilateral assets". This was because the first instance judge in that case had relied on these factors as justifying an unequal sharing of matrimonial property, basing his conclusions on Lady Hale's observations in *Miller*, at [147]-[153].

140. For reasons set out at length in *XW v XH*, the judge's reliance on these two factors to justify an unequal sharing of matrimonial property was disapproved. Further, and perhaps more relevant to the current appeal, the judgment addressed non-marital property and the "unease" expressed by Lady Hale in *Miller* about the sharing of such property. It was noted that this was no longer an issue because of the way in which the law had developed since *Miller* in that:

> "[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 Baroness Hale in *Miller* continue to provide a cause for unease. I would first note that the "unease", referred to by Baroness Hale, at para 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 para 128 quoting from *Charman* [2007] 1 FLR 1246, para 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."

141. This last observation ties in with Wilson LJ's comment in *K v L*, at [18], that "the importance of the [non-marital] source of the assets *may* diminish over time" and his example, at [18(b)], namely when "non-matrimonial property … has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property".

142. As to the quantification of the court's award, I referred, at [114], to the court undertaking "a *retrospective* analysis to determine, by making … "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". As referred to in the cases quoted above, the extent to which there is a clear division between matrimonial and non-matrimonial

property will depend on the circumstances of the individual case. In some, perhaps many, the evidence will establish a clear division; in others it will not. In the latter situation, there is no prescribed methodology or single route to determining what assets are marital (e.g *Martin v Martin* [2019] 2 FLR 291, at [112]). However, as referred to in *XW v XH* at [115],

> "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)".

This analysis underpinned Mr Bishop's submission as to the effect of the judge's award, as set out in paragraph 66 above.

143. We were also referred to a number of first instance decisions which I only refer to briefly.

144. In *J v J* [2011] 2 FLR 1280, the majority of the family's wealth derived from a company founded by the husband's grandfather. However, in order to take advantage of the wife's non-domiciled status, a significant part of the wealth had been transferred to her such that, at the date of the hearing, 60% of the total was held in her name. At the hearing before me (at which both parties were represented by extremely experienced financial remedy silks and juniors) this was not raised as being relevant to the determination of the wife's award which was determined by application of the needs principle which, as it happened, gave her approximately 46% of the wealth. I expressly decided, at [74], that an award determined by application of the sharing principle would have been lower.

145. In *S v AG*, Mostyn J decided that, although it was to be treated as matrimonial property, the matrimonial home should not be shared equally for the reasons given in his judgment (essentially, because the source of the purchase monies were, in his view, non-matrimonial property and the fact that the property had been purchased near the end of the marriage). He also made reference to the concept of "mingling" by which non-matrimonial property might become treated as matrimonial property and, therefore, subject to the sharing principle.

146. In *JL v SL (No. 1)*, the wife had inherited £465,000 towards the end of the marriage, of which £190,000 had been placed in an account in the husband's name, at [14], "almost exclusively" because of the better rate of interest it would obtain. The District Judge had decided that all the inheritance should be treated as matrimonial property. Mostyn J decided that the District Judge had been wrong because, at [18], the evidence did not support the conclusion that this wealth "should have the same character as those assets built up by their joint endeavours during the marriage, with the consequence that they should be shared equally on divorce". He considered, at [19], that the fact that "some of the moneys had been placed in the husband's name" did not mean that the "non-matrimonial source of the moneys in question is destroyed as a relevant consideration; far from it".

147. In *FB v PS*, Moor J decided that the matrimonial home should not be divided equally because, although it was matrimonial property, it had been the husband's family's home for many years (16) prior to it becoming the parties' matrimonial home (for 15 years). Moor J deducted the bulk of the value of the home from the total assets before dividing them equally.

Determination

148. I propose, first, to deal with the parties' respective overarching cases as to the application of the sharing principle, namely the wife's case that ownership or title is the critical factor and the husband's case that the source of the asset is the critical factor.

149. In my view, it is clearly established that, in the application of the sharing principle, the source of an asset is the critical factor and not title. It can be seen from the cases cited above that title does not feature as a significant factor in contrast to the "source" of an asset which features prominently in explaining the court's approach to the application of the sharing principle and, in particular, the different approach to an asset which is the product of the parties' endeavours, namely matrimonial property, and property which is not. As submitted by Mr Bishop, the sharing principle is founded or based on each party, in accordance with the objectives of fairness, equality and non-discrimination, being entitled to an equal share of their matrimonial property, namely the "fruits of the partnership" or the wealth built up by the parties' endeavours during the marriage.

150. With all due respect to Mr Todd, when he was asked during the hearing to explain the relationship between the source of an asset and ownership for the purposes of the application of the sharing principle, he found it difficult to give a clear answer. He first said that "ownership is the critical part of the process". This was the "foundation stone" on which financial remedy cases are determined. In contrast "provenance or source is not *terra firma*, it is quicksand". He even, with perhaps a hint of hyperbole, described the concept of determining the "generation" of an asset as an "extraordinary nightmare". He then proposed that the source of an asset and its ownership have to be "balanced" although how this was to be achieved was not entirely clear before reverting to submitting that ownership is "determinative" because this indicates the source of the asset. He submitted, accordingly, that, by reason of the transfer of the 2017 Assets into the wife's name, she became the "source" of this asset for the purposes of the sharing principle. His final submission in reply was that either they were the wife's separate property or they were matrimonialised when she received them.

151. It is clear to me that the approach proposed by Mr Todd not only runs counter to the principles established since *White* but it would also undermine the attainment of a fair outcome because it is based on ownership which is not a good guide to fairness. As the judge said, at [74]: "It has long been clear in this jurisdiction that you cannot benefit from keeping assets in your sole name". Further, with all due respect to Mr Todd, his submissions, as referred to above, lacked cohesion perhaps because they looked at the court's powers from a very narrow perspective, namely the perspective of the facts of this case. I am confident that he would not be making the same submissions if, for example, all the assets were in the husband's sole name.

152. Looking at it more broadly, I agree, as the judge noted at [74], that to adopt the approach proposed by Mr Todd would be "both discriminatory and entirely unfair". It would be

to return to the pre-*White* days and, as the judge also noted at [74], contrary to the clearly established approach that the sharing principle will apply with equal force to an asset in the sole name of one spouse as it does to an asset in joint names. The discriminatory effect of the wife's proposed approach is, in my view, self-evident. It would place undue weight on legal and beneficial title when this is unlikely, or at least may well not, reflect whether the wealth has been generated during the marriage because experience shows that such wealth will often be largely or significantly in the name of the "money-maker" who remains much more likely to be the husband than the wife. To adopt what was said in *Charman* in respect of what were called "unilateral assets", to base an award on title "would be deeply discriminatory and would gravely undermine the sharing principle".

153. In addition, the matters relied on by Mr Todd in support of his case as to the significance of title are without substantive merit. He submitted that, to base an award on title, would give proper effect to the parties' autonomy, on *Radmacher* principles, in that it would reflect and respect "how they chose to own their assets". This, he also submitted, should be applied to "any agreement including oral expressions and agreements". These submissions would require a very significant extension of the principles identified in *Radmacher* which, in my view, would be contrary to the objective of achieving a fair outcome and would be likely to lead to significant additional cost and uncertainty.

154. As referred to above, *Radmacher* dealt with nuptial agreements which expressly sought to *regulate* the parties' financial affairs on the *breakdown* of their marriage. The agreements being addressed clearly needed a sufficient degree of formality to constitute an agreement to which the court would potentially give effect. This required, for example, that each party: had "all the information that is material to his or her decision"; was "fully aware of the implications of" the agreement; and intended "that the agreement should govern the financial consequences of the marriage coming to an end". There was no suggestion that the same approach would apply to conversations or oral discussions which might have taken place either before or during the marriage. Nor, of more relevance to Mr Todd's submissions, was there any suggestion that it would apply to how the parties had held their assets or had "chosen to regulate their financial affairs" *during* their marriage. Indeed, it is very clear that it does not because it was only applicable to an agreement which was intended to govern what should happen *on* divorce.

155. Indeed, as Phillips LJ pointed out during the course of the hearing, in every marriage the parties could be said to have "chosen" how to regulate their affairs because they will have had to decide on some structure in order to manage their finances. Further, as he said, the underlying policy of s.25 of the MCA 1973 *is* to disturb the parties' autonomy in order to achieve a fair outcome or, as Lady Hale put it in *Miller*, at [124], the court is "given a wide range of powers to reallocate" the parties' resources in accordance, at [137], with "the principles of fairness, equality and non-discrimination". In addition, as referred to above, it seemed to me that this was a one-way street in that Mr Todd cannot have been suggesting that the retention by one party of all the assets in their sole name was something which the court should "respect". This would make it a very partial argument which, as I have said, would not advance the objective of fairness.

156. I am equally not persuaded that the absence of a pre-nuptial agreement is of any relevance. In my view, the judge was right to reject the wife's submission and decide, at [73], that "the absence of a pre-nuptial agreement is not significant". The converse is undoubtedly potentially very significant but the fact that the parties did not enter into such an agreement does not impact on the application of the sharing principle. At times in the course of his submissions, it appeared that Mr Todd was advocating a path which would require the court, to adopt Coleridge J's expression, as relied on by the husband, to undertake "an arid and impermissible rummage through the attic of married life". Absent the formality of a nuptial agreement, it would not promote fairness to require the parties or the court to search through their marriage looking for words said or things done which might suggest a greater or lesser adherence to the sharing principle. In addition, it would not promote predictability because of the scope for investigation and argument. The sharing principle is applied as a matter of fairness; it is not elective save when the parties have entered into a formal nuptial agreement of the type described in *Radmacher*.

157. Mr Todd's submissions are also not supported by what was said in *Miller* or *Parra*. The observations in the former case by Lady Hale, at [153], and Lord Mance, at [170], have been addressed substantively in subsequent decisions as referred to above. It has become clear that to seek to exclude certain property generated *during* the marriage from the application of the sharing principle would, as set out in *Charman*, be "deeply discriminatory and would gravely undermine the sharing principle". In any event, that is not the issue in this case. Indeed, Mr Todd seeks to challenge the judge's decision in part on the basis that he did *not* equally divide assets which, he contends, the judge should have decided had been generated during the marriage.

158. The case of *Parra* does not assist Mr Todd. The observations made by Thorpe LJ pre-date the line of authority starting with *Miller*. These later cases set out what is meant by the terms matrimonial and non-matrimonial property and how the sharing principle should be applied to them. Indeed, Thorpe LJ noted, at [13] that *Parra* was "a case unaffected by the shifts signalled by the decision in" *White*.

159. I am also unpersuaded that Mr Todd's use of the term "separate property" is helpful. Although Mr Todd said that he used this as a synonym for non-marital property, at times he appeared to seek to link this with some of Lady Hale's observations in *Miller*. As referred to above, she was using the term in a different context. In my view, it is better to adhere to the terms marital/matrimonial and non-marital/matrimonial rather than introduce a new expression which would be more likely to cause confusion than advance the objective of a fair outcome.

160. I now turn to the issue of matrimonialistion. As submitted by Mr Bishop, the underlying principle is that fairness *may* require or justify treating property, which was not purely the product of the parties' joint endeavours, as matrimonial property and, therefore, within the scope of the sharing principle. I should make clear that this is not to depart from what was said in *Hart* and other cases about the court's approach to determining whether the parties' assets include assets which might be said to comprise or reflect the product of non-marital endeavour. It is about when an asset or assets which were at one stage non-marital property might be included within the sharing principle. The general issue is when this might apply and the specific issue is whether the judge was right to decide that it applied to the 2017 Assets and to Ardenside Angus.

161. Before addressing these issues, I propose briefly to deal with the question raised by both parties, namely whether the whole concept of matrimonialisation should no longer be applied. In my view, the answer is that it should continue to be applied.

162. As has been discussed in many cases, when setting out the principles applicable to the determination of financial remedy cases there is a balance to be struck between flexibility and certainty. The flexibility to achieve a fair outcome in the individual case and a sufficient degree of certainty as to the likely outcome. I consider that it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this. However because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage.

163. In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly. This is not a hard and fast line but remains a question of fairness, reflecting, as Wilson LJ said in *K v L* at [18], that "the importance of the [non-marital] source of [an asset or assets] *may* diminish over time". With some diffidence, I would propose the following slight reformulation of the situations to which Wilson LJ referred in *K v L*, having regard to the developments that have taken place since that decision as follows: (a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth; (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.

164. In the first example, the sharing principle would apply in conventional form. In (c), the court will typically conclude that the former matrimonial home should be shared equally although this is not inevitable as shown by cases such as *FB v PS*.

165. The example in (b) requires a more nuanced approach similar to that referred to in *Hart*, at [96], when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property. As Mostyn J said in *JL v SL (No 1)* at [18], the underlying question is whether the asset or assets "should have the same character as those assets built up by their joint endeavours during the marriage, with the consequence that they should be shared … on divorce". I have deleted the word equally because that was simply a reference to what the District Judge had done in that case. Does fairness require or justify the asset being included within the sharing principle?

166. The conclusion that it does, however, does not mean that it must be shared equally. The submission by Mr Todd that, once an asset is matrimonialised and treated as matrimonial property, it *must* be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome. This is because, again as Mostyn J said in *JL v SL (No 1)* at [19], it may be that the "non-matrimonial source of the moneys in question" remains "a relevant consideration". In its evaluation of all the

relevant factors in the situation described in (b) above, it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an other than equal division. Another way of putting it, repeating what I said in *Hart*, at [86]:

> "The court will have to decide, adopting Wilson LJ's formulation of the broad approach in *Jones*, 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".

167. I now turn to this case.

168. The judge concluded, at [73], that prior to the transfers in 2017 the wife "could not possibly have mounted a claim to share equally in the Husband's pre-marital wealth". I agree with that conclusion which does not appear to be challenged by the wife. I also agree with the judge when, at [74], he rejected the wife's case that the 2017 Assets became the wife's "separate property". I, therefore, reject Mr Todd's submission that they became the wife's non-marital property. Indeed, in my view, it would be a nonsense to suggest that she became the *source* of this wealth. This is because, I repeat, source is a reflection of when and how an asset was generated, not title.

169. Where I respectfully part company with the judge is when he concluded that the 2017 Assets "became matrimonial property". This was not the "only possibility". I disagree with him because this conclusion was based, and solely based, on the fact that those assets were transferred by the husband into the wife's name. This is making title the determinative factor when deciding how the wealth is to be characterised rather than its source. This is particularly so in this case when the reason for the transfer was a tax scheme which was never fulfilled and in which the next step would have been the transfer by the wife of those assets into a trust. There was, in my view, nothing which justified the conclusion that the importance and relevance of the source of the 2017 Assets being non-matrimonial (which I deal with further below) was in any way diminished as a result of their transfer to the wife.

170. Mr Todd's somewhat immoderate submissions that this would "condemn" a spouse as "inferior" to, or "worse off" than, those who were not married do not assist. The legal framework is very different and, as a result, the applicable principles are very different. It is not a matter of better off or worse off, nor indeed is it a matter of "confiscation". It is the exercise by the courts of their powers under the MCA 1973 in accordance with established principles to achieve a fair outcome.

171. I conclude, therefore, that the transfer of the 2017 Assets into the wife's sole name did not change their characterisation. This did not transform them into matrimonial property. I return below to the impact of this on the judge's ultimate determination.

172. There was little focus on the shares in Ardenside Angus during the course of the appeal. There is also scant information about the financial history of the business. I do not consider that we are in a position to conclude that the judge was wrong to determine that the business had "become matrimonial as a result of the placing of "A" shares in the Wife's name". This might have been a generous decision in the wife's favour but

it was tempered by the judge's further conclusion that "the source of the business, namely a pre-marital asset, is relevant".

173. I next deal with the wife's challenge to the judge's conclusion that Ardenside was not matrimonial property. Despite Mr Todd's criticism of the judge's analysis, it is clear to me that the judge was plainly entitled to conclude, for the reasons he gave, that it had not become matrimonial property and that there was no justification in sharing its value. The judge rejected much of the wife's evidence and concluded that it "was purchased before the marriage and has, in essence, remained the same throughout the marriage". The judge's decision was fully supported by his factual conclusions.

174. Finally, I deal with the effect of my above conclusions on the judge's ultimate determination. I do so by applying the sharing principle in the manner which I consider the judge should have adopted.

175. There is, rightly, no challenge to the judge's decision to divide the former matrimonial home (£20 million) and the other assets (£3.6 million) equally between the parties. As set out above, I also consider that the judge's decision that Ardenside (£20 million) was not matrimonial property cannot be successfully challenged.

176. The judge's decision, at [76], that Ardenside Angus "became matrimonial" is not disturbed for the reasons set out above. Applying the judge's analysis as set out in paragraph 67 above, namely that "the source of the business" remained relevant although "much of their value may well have been generated during the marital partnership", I consider it fair to treat 20% of the value of this asset as non-matrimonial. This would mean that 80% (£6.88 million) would be matrimonial. In other words, the division of this asset with the wife receiving 40% and the husband 60% "makes fair allowance for [it] in part comprising or reflecting the product of non-marital endeavour". That would bring the matrimonial assets to £30.48 million of which half is £15.24 million.

177. That leaves the 2017 Assets of £80 million. The judge's conclusions in respect of the source of these Assets is set out at various points in his judgment: at [75], he said that "at least *in significant part,* this is money that was generated before the marriage"; at [81], he said "*to a significant extent*, this money was pre-marital" and he referred to "the pre-marital origin of *most of this sum*"; at [82], he said that "*an element* of the sum of £80 million is not pre-marital" because at "least a part of this figure was generated" during the parties' relationship; and, at [83], that it was "almost impossible to say what proportion of the £80 million was earned" during the marriage and that all "I can do is say that I find that a part of the sum of £80 million is money that was earned during the marriage"

178. It is clear that these findings do not support the actual division of the 2017 Assets effected by the judge, namely, as referred to in paragraph 66 above, by awarding her £29 million or 36% of their value. Despite the judge's comment that he considered it "almost impossible" to conclude what proportion of the £80 million was earned during the marriage and while he might not have been able to arrive at a precise proportion, he had clearly determined that "most of this sum was pre-marital" and only "an element" was not. The division he effected did not properly reflect these conclusions; in fact, it reflected precisely the opposite. It did not adhere to the approach set out in *Jones* and *Hart*, namely to award the wife such percentage "as makes fair allowance for [it] in part

comprising or reflecting the product of non-marital endeavour". The *source* of this wealth had not changed as a result of its transfer to the wife and, in the application of the sharing principle, this remained the critical factor. If the judge had adopted that approach, which in my view he should have done, he could not have concluded other than, at least, 75% was non-marital. The balance of 25%, or £20 million, would then be added to the other matrimonial property of £30.48 million, giving a total of £50.48 million.

179. The approach I have adopted above reflects the fact that, in this case, the different assets fell into clearly different categories. Other cases may not enable this approach to be taken and I make clear that I am not departing from what was said, in particular, in *Hart*, at [96], that the "court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness". However, the manner in which the court's applies that broad assessment needs to reflect the particular circumstances of the individual case.

180. In the present case, there was a clear path which the judge should have adopted and, indeed, might well have done but for his decision that the 2017 Assets "became matrimonial property". In any event, his conclusion on the application of the sharing principle cannot stand. Applying the approach set out above, the fair outcome would provide the wife with approximately £25 million (half of £50.48 million) and the husband with approximately £107 million.

Conclusion

181. For the reasons set out above, I have concluded that the wife's appeal must be dismissed and the husband's appeal must be allowed. The judge's application of the sharing principle was flawed and has resulted in an unjustified division of the family's wealth in the wife's favour. In my view, as explained above, a fair application of the sharing principle would have resulted in the wife receiving/retaining wealth of approximately £25 million in place of the judge's award of £45 million.

182. The difficulty this creates is that the judge, at [85], did not "undertake a needs assessment". He simply concluded that his proposed award of £45 million would comfortably ("very well") meet the wife's needs. Despite Mr Bishop's encouragement, I do not consider that we are fairly able to determine the wife's needs. We have, of course, heard no evidence, but we have also not been able to undertake the sort of assessment and evaluation which would be required in order properly to determine that issue. A judge may well decide that the wife's needs could be met by a sum in the region of £25 million (and I do not overlook that the husband considered that his offer of £25 million exceeded the wife's needs) but they might not.

183. Accordingly, very regrettably, I consider that the matter must be remitted for determination by application of the needs principle, *if* (and I emphasise *if*) the parties cannot even now arrive at an amicable solution. If they cannot, and although we have overturned his decision on the application of the sharing principle, in my view Moor J, if available, would be best placed to make such a determination.

Lord Justice Phillips:

184. I agree.

Lady Justice King:

185. I also agree.