Neutral Citation Number: [2012] EWHC 2420 (Fam)

Case No: FD11D05745

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2012

Before :

SIR HUGH BENNETT
sitting as a High Court Judge

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Between :

	AC	**Applicant**
	- and -	
	DC **and others**	**Respondent**

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- -

Ms Deborah Bangay QC, Mr David Ewart QC, and Mr Dakis Hagen
(instructed by **Levison Meltzer Pigott, Solicitors**) for the **Applicant**

Mr Valentine Le Grice QC, Mr Giles Goodfellow QC, and Ms Pegah Sharghy
(instructed by **Brachers LLP, Solicitors**) for the **Respondent**

Hearing dates: 6,7,8,9 and 10 August 2012

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Judgment

Sir Hugh Bennett :

1. This is an application for financial remedies by AC ("the wife") against DC ("the husband"). They married in August 1998, when the wife was 20 years old and the husband was 48 years old. They have three children, X born in November 1997, now 14 years old, Y born in August 1999, now 13 years old and Z born in March 2008, now 4 years old.

2. The husband was previously married. He and his former wife had one child, W, now 33 years old. In 1995 the wife and the husband met. The wife was then 17 years old and working in the husband's business. In February 1996 they began to cohabit in the husband's property. In October 1996 the matrimonial home, was purchased by the husband for £550,000 with a mortgage of £390,000. The wife and children still live there.

3. On 22 June 2010 the husband was arrested and charged with a sexual offence with a female friend of X. The same day the husband left the matrimonial home and went to live with his brother E. In December 2010 the wife issued her divorce petition and Form A. However, on 7 April 2011 both the petition and the application for ancillary relief were dismissed, by consent, as the husband was very upset at the prospect of divorce. In October 2011 the wife issued another petition for divorce with a Form A also being issued in October. In March 2012 a decree nisi of divorce was pronounced. On 2 July 2012 Mostyn J., upon the wife having amended her petition for divorce to ask for judicial separation, rescinded the decree nisi and pronounced a decree of judicial separation. The reasons for this course of events will become apparent in due course.

4. In 2008 the wife says that she noticed a change in the husband's behaviour in that he became increasingly aggressive and uninhibited. It was a condition of the husband's bail, following his arrest in June 2010, that he live apart from the wife and children. What appears to have triggered the husband's behaviour was the onset of frontal lobe dementia. He was first diagnosed with this condition by Dr S, a consultant neurologist, in September 2010, which he formally confirmed in his report in March 2011. This diagnosis was confirmed by Dr C a consultant neurologist, in April 2011.

5. In September 2011 the husband was convicted of a sexual offence with a child. He was given an absolute discharge (because of his mental condition), placed on the sexual offenders' register for 5 years and prohibited from having contact with girls under 16, unless supervised, until 1 September 2016.

6. As a result of further medical evidence, in particular the report of Dr S of February 2012, that the husband did not have the capacity to conduct the matrimonial finance proceedings, on 29 February 2012 Mr T was appointed as the husband's litigation friend.

7. On 4 April 2012 Dr S made a further report in which he opined that he expected the husband to live for at least 3 years from the date of his report and that it was very likely he would live beyond December 2013. The cause of death in patients such as the husband is usually due to physical decline associated with severe cognitive dysfunction.

8. It will be necessary to trace the history of this case, particularly as to the husband's business, in more detail to see how the present position is arrived at. But, first, I shall set out the current financial position of the family.

9. The husband is the owner of 712,753 shares in D (Holdings) Ltd. ("DH"), i.e. 84.6% of the issued share capital. The balance is held as to 12.4% by Mr R, the managing director of DH and as to 3% by the directors of L Ltd., an Irish company wholly owned by DH. In the spring of 2012 three offers were received for the shares in DH ranging from about £55m to about £62m. On 11 July 2012 Heads of Agreement were entered into between DH's shareholders and B Ltd. Clause 1 recites that, except for clauses 10-15 inclusive, the Heads of Agreement are not intended to be legally binding. Clause 3 provides that the entire issued share capital of DH will be sold for £63.75m on "cash free/debt free" basis payable in full in cash upon completion. An exclusivity period of 6 weeks from 11 July was agreed (clause 12), i.e. that the shareholders and DH would not seek to sell the shares to anyone else during that period. However, clause 12.4 provides that if B Ltd gives notice not to proceed with the transaction the exclusivity period etc. would lapse. Thus if the sale goes through at a price of £63.75m the husband's gross proceeds of sale would be c. £53.9m. What are the net proceeds of sale of the husband's shares is hotly disputed.

10. The wife, through her legal team led by Ms Deborah Bangay Q.C., asserted in opening that the total net assets of the wife and the husband are roughly of the order of £43m. I say "roughly" because Ms Bangay told me in opening that there were a number of assets of the husband upon which she could then put no figure. She assessed the husband's net proceeds of sale to be £38.07m – see Annexe 9 of her written opening.

11. The husband, through his legal team led by Mr Valentine Le Grice Q.C., asserted that the total net assets amounted to £30.68m. He assessed the husband's net proceeds of sale of his shares in DH to be £27.5m.

12. The difference between the parties' contentions as to the net proceeds of sale of the husband's shares amounts to some £10.56m – see Annexe 9 where Ms Bangay sets out the constituent elements of the difference, which I shall have to resolve.

13. It is therefore unsurprising that the parties' open positions are far apart, save for one matter. It is agreed that the former matrimonial home, held in joint names of the wife and husband, should be transferred absolutely to the wife. It is mortgage free and valued at £1.9m. Net of costs of sale it is worth £1.843m on the wife's schedule (Appendix 4 to Ms Bangay's opening) and £1.862m on the husband's schedule attached to Mr Le Grice's position statement.

14. The parties' open positions were not made known until Ms Bangay's and Mr Le Grice's position statements exchanged at the very end of the week before the hearing began on 6 August 2012. The husband's position is that the former matrimonial home should be transferred to the wife and she should be paid a lump sum of £8m provided that the sale of DH to B Ltd is completed. Completion of the sale should be a condition of the order of the court. If the condition fails to materialise the order for the lump sum should fall away and the wife's claims be adjourned with liberty to restore. It is recognised that such a fall back position is "unsatisfactory". However, the prospect of the sale proceeding is sufficiently good to justify the wife's claims being heard now rather than in proceedings under the Inheritance (Provision for the Family and Dependants) Act 1975 should the husband die in the near future.

15. So, broadly speaking, the husband proposes that the wife should exit with assets worth just under £10m (presumably together with her flat, her cars, horses, jewellery, bank account and any pension she may have from D Ltd. from a total asset pool (on his case) of about £30.68m.

16. So far as the children are concerned, the husband proposes that he should pay the children's school fees and £15,000 pa periodical payments per child during his lifetime. They are well provided for under his statutory will and letter of wishes.

17. The wife, through Ms Bangay, asserts that she is entitled to 50% of the marital acquest. She should be paid a lump sum by the husband equivalent to 50% of the net proceeds of sale of the husband's shares in DH (having made certain add backs). In the alternative, if the contemplated sale falls through by 1 December 2012 or does not proceed to completion within 3 months of exchange of contracts, then 50% of the husband's shares in DH should be transferred absolutely to the wife. There should be lump sum orders for each of the 3 children, following a sale, in the sum of £2m, for their maintenance needs, to be held on "bare trust" for each child by the wife. In the alternative, if the contemplated sale falls through by 1 December 2012 and does not proceed to completion within 3 months of exchange of contracts, then 15% (i.e. 5% for each child) of the husband's shares in DH (as remain following the satisfaction of the wife's award) should be transferred absolutely to the wife in equal shares for the children to be held on "bare

trust" by her.

18. Thus, again speaking broadly, the wife proposes that for herself if the sale proceeds she should receive, on the basis of her computation of the assets (including add backs) at c. £42.87m, the former matrimonial home and 50% of £38m (the alleged net proceeds of sale of the husband's shares) (and together with the assets set out in parenthesis in para 15 above).

19. I shall now turn back to the narrative of the parties and their relationship and deal with issues between the parties.

20. The husband at the time the parties met in 1995 was 45 years old, divorced with one child then aged 16 years (W). The wife, who gave evidence before me and who impressed me as a truthful person and still very much in love with the husband, told me that in 1995 and perhaps more importantly as at February 1996 when cohabitation began, the husband was established in a good and successful business. He lived in a good property, drove a Jaguar and the wife told me that she was proud of what he had achieved.

21. The wife's evidence is consistent with that of Mr R, DH's managing director, in his statements of 31 May and 20 July 2012. From those statements the following picture emerges. Prior to 1986 the husband and Mr R had known each other for about 14 years. In 1986 D Ltd was established by the husband and Mr R. They developed the business. The husband was the entrepreneur; Mr R implemented the husband's plans.

22. In 1992 D Ltd purchased 60% of the issued share capital of L Ltd, a business based in Eire. D Ltd subsequently purchased the balance of 40%. Mr R says that the acquisition of L Ltd significantly expanded the business of D Ltd and moved it into a different league in the market. In 1993 shortly after L Ltd's acquisition the turnover of D Ltd was at its year end £8,623,689. By the year end in 1998 the turnover had increased to nearly £30m.

23. In January 1998, shortly after X's birth, the husband suggested marriage to the wife and a date was fixed.

24. Before the parties were married in August 1998 the husband went to his solicitors and had prepared a pre-nuptial agreement. It was signed by both parties and bears the date of 10 July 1998. In the schedule thereto the husband's assets were put at £5.54m of which £4m was attributed to his shareholding in D Ltd (said then to be 82.175%). The wife's assets were said to be modest and not detailed. The recital recorded that each of the parties had received legal advice thereon. It was purportedly agreed that in the event of divorce or judicial separation neither party would apply to the Court for financial provision, whether income and/or capital, which exceeded in total £500,000 adjusted for price inflation.

25. Despite the evidence filed on behalf of the husband suggesting reliance upon this agreement, Mr Le Grice in his position statement conceded that the wife should not be held to its terms. However, it is relied upon as "reinforcing" the quantum of the husband's open proposals, that the husband did not intend to share out of his assets his pre-acquired wealth and that the wife must have known that the husband was looking to protect his position.

26. In my judgment the concession made on behalf of the husband is entirely justified. I find that the wife never had any legal advice on the proposed agreement, and, as Mr Le Grice submitted, there would be intrinsic unfairness in seeking to hold the wife to that agreement entered into so long before the celebrated case of <u>Granatino v. Radmacher (formerly Granatino)</u>

[2010] UKSC 42, [2011] 1 AC 534.

27. However, it is very much part of the husband's case that there was, by 1996, a significant pre-marital acquest thereby disentitling the wife from receiving half the net proceeds of sale of his shares. Submissions are made to that effect at pp 8 to 10 of Mr Le Grice's position statement, which I shall have to consider later in this judgment. Suffice it now to say that I find as a fact that by the time of cohabitation in February 1996 (which then moved seamlessly into marriage) the husband and Mr R's business of D Ltd was well established.

28. The parties' relationship between 1996 and 2010 lasted 14 years. The wife looked after the children and cared for the home; the husband was the breadwinner, and a very successful one. I am satisfied they were a deeply attached couple and what brought to an end this happy relationship was the husband's dementia manifesting itself by inappropriate behaviour. But for that development of dementia I am confident that they would still be together.

29. From a turnover of D Ltd of nearly £30m in 1998 it rose by 2002 to c. £60m. It then reached a plateau of £50/£60m for the next five years. According to Mr R 2008 and 2009 were more difficult. Since the retirement of the husband from the business in late 2010 the turnover increased and 2011 and 2012 are the two best years the company has had.

30. As to the standard of living of the parties during the marriage is concerned, I accept the wife's evidence that it was the husband who set the standard. When they visited Harrods he might spend anything between £10,000 and £15,000 on clothes. Holidays she described as lavish. The husband generally enjoyed the best. They had a lovely home upon which substantial sums of money were spent. I assess their standard of living as high but not in the league of the super rich. This high standard of living was funded by D Ltd.

31. As to their contributions up to and including 2010, each of the wife and the husband made their respective contributions. The wife was the homemaker; the husband the breadwinner. The husband had brought to their relationship his successful business thus enabling a comfortable living from the start.

32. I am, of course, required to take into account their future contributions. From about 2010 the husband's faculties have become less and less. E, the husband's brother, told me that currently the husband cannot communicate, walk or go to the toilet independently. As I have noted his expectation of life is seriously curtailed and he is under a serious disability.

33. The wife is now 34 years old with, I am satisfied, no earning capacity. The children are 14, 13 and 4, which means that the wife will be 48 when Z becomes 18 years old. She is effectively now a single parent and for the children's minority she will have the sole responsibility for them including having to deal with the emotional fall-out of the husband's premature death, following his illness, which must be distressing both for the husband and the wife. The wife's future contribution is a significant factor.

34. I must now turn to the assets and in the light of the fundamental differences between the parties I must try to determine what they are. That in effect means the husband's assets, as the wife's by comparison are small.

35. The wife has a half share in the former matrimonial home, a flat worth some £87,000 after costs of sale and CGT and some funds of about £100,000 in bank accounts. She has a pension pot of some £200,000. She has loans outstanding to repay of some £500,000.

36. In order to assess what are truly all the assets and liabilities of the husband it is, I am afraid, necessary for me to trace the history of the case from and including 2010 to the present, because this period involves complex financial transactions involving DH (incorporated as the holding company in 2003) being prepared for sale and the attempts to shield the directors, the shareholders and D Ltd from tax.

37. The arrest of the husband in June 2010 acted as a catalyst both for DH and the husband, in that it led to the exit of the husband from running DH. Furthermore, the husband wanted to spend more time with his family. I am satisfied that within a short time of the husband's arrest the sale of DH was actively pursued together with a complex scheme to mitigate tax arising on the sale of his shares.

38. EFRBS is an Employer Financed Retirement Benefit Scheme. It is explained at C2/A2 et seq., a document drawn up by XAT. Basically it is a scheme to earmark out of a company's profits funds to make payments to employees on their retirement. The company can put such payments against Corporation Tax. The employee is liable for income tax on sums drawn out of an EFRBS. The EFRBS can lend money to the company at a commercial rate of interest. The trustees of the scheme can invest the monies to get the best return for the employee. All funds in the scheme held by an employee shareholder in the company will fall outside the estate of such a person for Inheritance Tax purposes. The scheme was "underpinned" by an opinion from Mr Robert Venables Q.C.

39. In July 2010 an EFRBS was established with the Z Trust Company Limited, of the Isle of Man, acting as trustee. Later 7 Isle of Man entities were established, namely limited companies. In August the board of DH approved payments to EFRBS of £650,000 for the husband duly paid over by DH to the husband's EFRBS (G Investments Ltd.) on 23 August 2010. On 21 September a meeting took place between the husband, Mr R, Mr M (Financial Director of DH and D Ltd), Mr L (another director), Mr U of SH (DH's accountants) and two representatives of XAT. The discussion centred around the husband and Mr R transferring their shares in DH to a Non Resident Trust ("NRT"). The husband had agreed to purchase Mr R's shares for £500,000 on completion and £4.5m in 2011. The husband would resign as a director. A NRT would be established and the husband and Mr R would gift their shares in DH to the NRT, in fact to separate sub-funds. No CGT would arise. Thereafter sales of assets by the NRT or the sub-funds would be exempt from CGT as long as the trustees were non-resident. Trustees in Belgium were suggested; the money in the husband's EFRBS would be used to purchase Mr R's shares.

40. In October 2010 the husband's EFRBS (G Investments Ltd) received another £260,000 from DH.

41. By mid-December 2010 matters had moved on apace. On 2 December the husband gifted his shares (712,753) in DH to the Trustees of D Ltd Employee Benefit Trust as did Mr R with his shares. On 7 December two sub-funds of were created for the husband and Mr R into which the shares were transferred and the D Foundation was constituted in Belgium. The founder was DH. On 8 December a further £522,200 was paid by D Ltd to the husband's EFRBS (G Investments Ltd). The husband's shares were transferred into D Foundation.

42. On 13 December 2010 a Share Purchase Agreement ("SPA") was executed by D Foundation for the "sale" of the shares of the directors of DH (but not including the husband and Mr R) held by the IOM companies (one for each director). The consideration was said to be

£15m but not paid.

43. On the same day a Put and Call Option Agreement ("PCOA") was executed whereby the directors (not including the husband and Mr R) were to receive from D Foundation a sum of £650,000 each if within 3 years DH was sold following an "exit event", i.e. if either the profit of DH equalled or exceeded £12m or the "fair value" of DH was equal to or exceeded £100m or an offer price of £100m or more was received in respect of an exit event. If the exit event was not achieved then the directors received pro rata less than £650,000 as demonstrated by the worked examples C2/277 et seq., and as conceded by Mr R in his cross-examination. The NRT was entitled to exercise an option to purchase the shares on or after the expiry of 3 years. An option was granted to the directors to require the NRT to purchase their shares after 3 years. The husband had the right to veto any sale of DH.

44. On the same day the husband resigned as managing director of D Ltd and entered into a Consultancy Agreement with D Ltd. Under that agreement the husband, in return for providing consultancy services, was to be paid £493,908 on 13 December 2011. D Ltd could terminate the agreement by giving 2 years' notice.

45. In early January 2011 the husband resigned as a director of D Ltd and DH.

46. Two matters should be noted at this stage. First, the proposed acquisition of Mr R's shares by the husband never proceeded save that Mr R told me that in 2010 the husband paid him £500,000 albeit no shares were transferred to the husband. Mr R told me that he and the husband therefore agreed that the payment of £500,000 would be treated as a loan repayable upon the sale of DH. He further told me that he has the funds to repay the husband. Mr T, the husband's litigation friend, was completely unaware of this loan. That the husband did use a sum of c. £500,000 is confirmed by G Investments Ltd's loaning him £500,000 in November 2011 (see C1/409) and G Investments Ltd's bank account at C1/397.

47. Second, the transfer by the husband in December 2010 and the subsequent dealings were the subject of an application by the wife dated 28 February 2012 to set them aside pursuant to s. 37 of the Matrimonial Causes Act 1973. On 2 July 2012 Mostyn J. set them aside giving his reasons in a judgment of 19 July 2012. At para 12 he said:-

> "On the evidence before me I was wholly satisfied on 2 July 2012 when I made my ruling that:
>
> i) The transaction in December 2010 manifestly had the effect of defeating W's claims for a financial remedy in that they either prevent relief from being granted or had the result that lesser relief would be granted.
> ii) H has not demonstrated that he effected the transaction without the intention to defeat W's claims.
> iii) It has not been shown that R9 received the shares in good faith and for valuable consideration and without actual or constructive notice of W's potential claims.
> iv) Therefore all the factual criteria are satisfied.
> v) It would be a fair and just exercise of my discretion to set aside the transaction for were I not to do the very vice that s37 is directed towards would be given full rein.
> vi) There would be consequential order under s37(3) to reverse certain subsequent dealings, which are compendiously described in the skeleton argument

of Mr Goodfellow QC at paras 2.1-2.4."

48. There is, as yet, no actual order of Mostyn J., due, I am told, to disagreements between the lawyers as to its terms. Be that as it may, it is clear that the effect of Mostyn J.'s pronouncement was the intended revesting of the shares in the husband. It is also clear that Mostyn J did set aside the Side Letters of November 2011 – see Mr Goodfellow's note referred to in para 47 vi) above, which I have been shown.

49. In April 2011 two Powers of Attorney ("POA") were executed by the husband, one in relation to his business affairs, and the other in relation to his personal and property affairs. In relation to the first of the two POAs, Mr R and E are the husband's attorneys; in relation to the second, the attorneys were the wife (until divorce), W, and a Trust Corporation. In July 2011 both were registered with the Court of Protection. On 29 September the second POA was revoked and the husband executed a further POA in relation to his personal and property affairs appointing W and E as attorneys.

50. By the autumn of 2011, DH had approached Cavendish Corporate Finance ("Cavendish") to advise upon the sale of DH. I am satisfied that this came about because the husband's condition was deteriorating (see Dr S of 19 September 2011 at C3/134). E told me that in November 2011 the husband was pretty ill and had gone down rapidly over the previous six months. On 10 October 2011 the husband made a new Will.

51. On 16 November 2011 occurred events which regrettably were not disclosed to the wife or her advisors until 29 May 2012. On 28 May 2012 an opinion of Mr Giles Goodfellow Q.C., on behalf of the husband, was sent to the wife's solicitors. Reference was made therein to "Side Letters". The husband's solicitors then promptly disclosed 5 Side Letters dated 16 November 2011 and the relevant IOM company behind which were each of DH's directors (but not Mr R). The relevant terms of each Side Letter are that if between 16 November 2011 and 16 May 2013 DH was sold ("the trigger event") an "additional payment" was to be made by D Foundation to the directors. The amount of the additional payment to each director (save for one) was £1.3m less any sums received under other agreements if the trigger event occurred before 16 May 2012, but £1.2m less as before if the trigger event occurred between 16 May 2012 and 16 May 2013. But for one director the figures are £3.1m and £3m respectively.

52. The total payments due under the Side Letters amount to £7.8m if DH is sold before 16 May 2013. Of that, £3,250,000 (£650,000 x 5) is "payable" under the December 2010 arrangements if the trigger events occurred. The wife, as I understand it, makes no complaint about that. But she is deeply unhappy that the balance of £4.55m should be paid by D Foundation to the directors regardless of what sale price for DH is achieved, in relation to which the Side Letters are completely silent.

53. Before Mostyn J., Mr Dyer Q.C. for the IOM entities, i.e. the directors, made it quite clear to the judge that if the Side Letters were set aside then the sale to B Ltd might well be at risk (see the exchanges at A1/277 et seq and A1/280), as the directors would have no incentive to sell DH. Accordingly it seems to be have been agreed that, although Mostyn J. did set aside the Side Letters under s.37, nevertheless, the directors would not be prevented from receiving £7.8m but that the wife in the hearing before me would be at liberty to contend that the balance of £4.55m should be "added back" to the husband's assets as reckless expenditure per <u>Norris v. Norris</u> [2002] EWHC 2996, [2003] 1 F.L.R. 1142, <u>Vaughan v. Vaughan</u> [2007] EWCA Civ 1085, [2008] 1 F.L.R. 1108, and <u>Mills v McCartney [2008] EWHC Fam 401.</u>

54. On 17 November 2011 Cavendish were appointed to advise on the sale of DH. Their remuneration was to be a) a fee of £10,000 p.c.m. for the first 6 months of the engagement; b) 1% of the gross consideration on sale; and c) a bonus of £250,000 if the company was sold by 1 May 2012. These charges were to be paid by D Foundation. However, as is apparent, DH has not yet been sold and accordingly the bonus of £250,000 is not payable under the terms of the November engagement agreement. Mr Le Grice, in his closing submissions, correctly conceded this point.

55. During the autumn and winter of 2011/2012 the wife's former solicitors sought undertakings from the husband through his former solicitors in relation to any possible sale of DH. Undertakings were forthcoming but not to the satisfaction of the wife's solicitors.

56. On 21 February 2012 an unsworn Form E of the husband was provided to the wife's former solicitors. On 28 February the wife applied for (inter alia) a raft of orders under s.37 of the Matrimonial Causes Act, 1973, joinder of D Foundation and the relevant IOM entities, and the appointment of a litigation friend of the husband.

57. On 29 February Mr T was appointed the husband's litigation friend. On 2 March 2012 Holman J. made a number of orders which included joining D Foundation and the IOM entities as parties and an injunction preventing the sale of the husband's then former shareholding in DH but not the marketing of DH for sale.

58. In April 2012 DH made presentations to potential bidders. By the end of May three (according to Mr M), two (according to Mr R) offers had been made. At the end of May an application was launched by the husband and the other parties to discharge the injunction preventing the sale of the shares in DH. On 20 June, Moor J. discharged the injunction preventing the sale on terms set out in his order which it is not necessary for me to set out. This, then, led to the Heads of Agreement of 11 July 2012.

59. Mr R explained to me that the present situation with B Ltd is that as at 7 and 8 August (when he gave evidence) was the first week of the 6 week period of due diligence investigations by B Ltd into DH. He told me that, taking into account any horse trading after due diligence was over and exchange of contracts, he reasonably expected that the sale of DH would be completed (i.e. the cash price for the shares actually paid) by the end of September 2012. His opinion is that DH is worth in excess of £60m and if a sale price of more than £60m with B Ltd cannot be achieved the sale is unlikely to proceed. However, under a little gentle prodding by me, he said that he would not stick rigidly to £60m. If the best sale price was £55m, the sale would not proceed. If it was £57m the sale would probably not proceed. I infer from his evidence that the closer a sale price became to £60m the more likely it was that the sale would proceed.

60. Mr M in his evidence agreed that a sale to B Ltd was likely to be completed by the end of September. He was confident of that outcome from his discussions with his counterpart at B Ltd.

61. Having set out the history to date relating to the sale of DH, it is convenient now to turn to the dispute between the parties as to what constitutes, or is likely to constitute, the net proceeds of sale in the husband's hands on the assumption that the sale to B Ltd is completed.

62. The first issue is the gross proceeds of sale which are put by Ms Bangay at the figure in

the Heads of Agreement namely £63.75m and by Mr Le Grice at an estimated figure, after due diligence is completed, at £62m. There is no need for me to resolve this issue. I would expect in the normal course of a commercial transaction there to be some horse trading, after due diligence is completed, as to the figure of £63.75m. If that figure is knocked down by B Ltd and agreed then the husband's net proceeds of sale will be proportionately less, and thus the wife's share in them will be proportionately less. However, simply for the sake of convenience (and nothing more) I shall take the figure of £63.75m.

63. Second, what are the appropriate professional fees to be deducted from £63.75m? So far as Cavendish are concerned, it will be entitled to a transaction fee, which, if the sale price of £63.75m is achieved, will amount to £637,500. However, I find that there is no contractual basis at all for Cavendish to be paid a bonus fee (put in Mr Le Grice's schedule at £200,000). It will be remembered that the bonus was only due if DH was sold by 1 May 2012. It was not. Mr R told me that there are negotiations between DH (and presumably D Foundation) and Cavendish for a bonus to be paid. But, in my judgment, I find that these negotiations are inchoate. So, as matters stand, no bonus is due, as rightly conceded, as I have said, by Mr Le Grice in his final submissions.

64. The other significant sale costs to be deducted from £63.75m will be the fees of Brachers LLP in the sum of c. £300,000. Mr Le Grice told me that the fees of SH and XAT will be de minimis.

65. Accordingly, the gross proceeds of the husband's shareholding in DH are likely to amount to about £53,135,568. It is estimated that the husband's liability to CGT thereon will amount to about £12-£13m, depending on whether the husband can legitimately offset certain deductions, set out in Counsel's schedules, which are hotly disputed and to which I now turn.

66. I come first to the figure of £4.55m – see paras 52 and 53 above – said by the wife to be reckless expenditure by the husband and thus to be "added back". The law on this topic is succinctly set out by Wilson L.J., as he then was, in Vaughan at para 14 of his judgment:

> "Such was a rare legal error on the part of the district judge. Miss Ward tells us that it was curious that he should refer to an absence of legal principles in that she and counsel for the husband had referred him to a recent example of such reattribution, namely *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142. Although such was a decision at first instance, it is the last in a line of authority which stretches back to the decision of this court in *Martin v Martin* [1976] Fam 335 that, in the words of Cairns L.J. at 342H:
>
> "a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably."
>
> The only obvious caveats are that a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for

> example in the purchase of accommodation. At all events the district judge's failure to despatch the issue by reference to the relevant legal principle, in my view, conferred upon the circuit judge an entitlement, at any rate in principle, to despatch it differently."

67. Ms Bangay, in her final submissions, told me that the expenditure of £4.55m was unreasonable. The husband himself is not to blame, as it is more likely than not that as at November 2011 (the execution of the Side Letters) he was incapacitated. It is his agents, Mr R and E, acting as such, who incurred the unreasonable expenditure. Although Ms Bangay concedes that these monies have not yet been spent since the sale has not been completed, nevertheless the husband is bound to pay them if the sale is completed.

68. In my judgment the time at which the Side Letters were negotiated, the way they came to light, and the subsequent explanations as to their rationale, are not without significance. It will be remembered that in October 2011 the wife had issued a petition for divorce and was plainly agitated about the prospect of the sale of DH. On 11 October her solicitors in the IOM wrote to each of the IOM entities (i.e. effectively directors of DH) giving notice that the wife was likely to apply in England for an injunction in relation to the shares. Similar letters were written on 20 October by the wife's former solicitors in England. Brachers LLP, it is common ground, drafted the Side Letters. Brachers LLP were then acting for D Ltd and DH. In December 2011 the wife issued her Form A.

69. On 2 March 2012 the wife's application under s.37 came before Holman J. The husband was then represented by Mr Cohen QC, instructed by Cripps Harries Hall of Tunbridge Wells. D Foundation and the IOM entities were represented by Mr Le Grice QC, instructed by Brachers LLP. Mr M was present before Holman J., sitting behind Mr Le Grice. The following was noted by Mr Cohen as to the interests of the IOM companies:

> "The payments to the 6 IOM companies are to be calculated in accordance with a formula, set out in the Put and Call Option Agreement, which provides for payments to be made, dependent on the fair market value and profit of DH on sale. The 6 IOM companies are entitled to £3.9 million (£650,000 each) if the fair value of DH is £100m. The entitlement will be less if the fair value proves to be between £50m and £60m."

70. It is common ground that no mention was made by anyone at the hearing of the Side Letters. The wife did not know about them. Mr Cohen could not have done otherwise he would have mentioned them and would have corrected his note. Mr Le Grice cannot have known of them either. However, Mr M, who was present in court did know of them. However, Ms Bangay did not ask him, when cross-examined before me, why he did not tell Mr Le Grice on 2 March about the Side Letters, and thus it would not be right to criticise Mr M for not then drawing the court's attention to them on 2 March. The Side Letters were disclosed on 29 May 2012 in the circumstances set out in para 51 above.

71. There then came, in a statement of 25 June by Mr R, the purported rationale behind the Side Letters. I quote the relevant parts of para 6 thereof:

> "The directors of our subsidiary businesses, D Ltd and L Ltd

had at that time been granted enterprise management incentive options in DH which the First Respondent had assured them that on a sale of DH for £100 million would be worth £650,000. The valuation of £100 million was the First Respondent's aspirational target value and was not arrived at by any scientific, mathematical or accounting process.

The discussions with XAT took some time and it was not until December 2010 that the First Respondent and I settled our shares into an offshore trust. The First Respondent wished to incentivise the directors of D Ltd to try to achieve his aspirational target value. His shares, which were held in the trust were then sold in six equal tranches to Isle of Man companies owned by Efurbs set up to benefit the individual directors (the Third to Eighth Respondents).

The First Respondent's shares were transferred at an aggregate value of £15 million, based on a valuation prepared by DH's accountants, SH. The directors insisted on having a proprietary interest in the shares so that the terms of their incentivisation would be honoured. In my opinion, they were concerned that the First Respondent might renege on the deal once the value had been achieved and this afforded them some security. The First Respondent had a reputation as a hard negotiator and was also known to have reneged on deals in the past.

It was envisaged that when the aspirational target value, which the First Respondent believed would take 3 years, was achieved and a sale concluded the shares would be able to be called back by the trust and the directors' Efurbs would receive payment of £650,000. The arrangements became known as Project P and the Applicant has a copy of the transaction documentation.

At or around the same time all of the directors of D Ltd and L Ltd negotiated two year notice periods with the respective companies again to ensure they would do their best to achieve the growth required to achieve the aspirational value. This was to also lock them into the company.

About a year after the scheme was set up it became clear about the extent of the First Respondent's illness. Once this became better understood, he requested that a sale of the business be brought forward so that he could enjoy the proceeds of sale sooner than he had anticipated. Although we were all aware the aspirational value had not been achieved, I agreed with the sale going ahead.

The First Respondent and I knew that the directors' involvement would be crucial to enable a best possible price to be achieved. The directors were aware of this, as well as the fact that their cooperation and consent would be required for an early sale as the Project P documentation did not allow the First Respondent's trust to regain the shares until a period of three years had elapsed or the aspirational target had been achieved.

The directors of D Ltd were particularly concerned that they may lose their jobs if the company was taken over by a competitor (which was thought likely) and would also therefore lose their benefits, pension contributions and bonuses if the purchaser found them surplus to requirements. The First Respondent in conversation with me accepted that the directors should receive the value for their shares as if the aspirational target had been achieved. After some negotiation with the D Ltd directors the First Respondent agreed that the D Ltd directors would be reimbursed for the potential loss of two years' salary, bonus, benefits and pension contributions and receive the target value for their EMI shares if they agreed to an early sale and it was concluded within 18 months.

The trustees of the First Respondent's trust were requested to give effect to this negotiation and the Side Letters were prepared and entered into.

As part of the sales process the D Ltd directors have reduced their notice periods from two years to six months.

I have heard that it is the opinion of the Applicant's counsel expressed in court on the 20th June, 2012, that the directors have been "lining their pockets" at the Applicant's expense. I think this is a disgraceful statement to make and totally lacking in understanding of the commercial realities facing DH. Whilst it is true that the directors stand to be enriched by their agreed incentivisation packages they have been fundamental in raising the value of the business from approximately £18 million under the SH valuation to the £63.5 million that has been currently offered for the business.

I believe that the agreement reached with the directors was a sensible commercial agreement. Although the funds payable to the directors has increased so has the net sum payable to the Applicant and the First Respondent as we are now talking about a sale value considerably in excess of the company value at the time the scheme was set up."

72. What to my mind was so striking about the oral evidence of Mr R and of Mr M and E on this topic is one of a severe degree of confusion and vagueness. Mr R said he did a "rough calculation" of the payments due under the Side Letters over and above those payable under PCOA. He did not present the husband with any breakdown of how these payments were made up. Mr M told me that, contrary to para 11 of his statement of 25 May 2012 that the husband and his attorneys came to see the directors, the husband never came to discuss the Side Letters with the board of directors. His understanding was that the discussions about the Side Letters were solely between Mr R and the husband. He was unable to find any board minutes at which the husband attended re the Side Letters. He and the husband had no discussion at all about the Side Letters.

73. E, one of the directors and a beneficiary of a Side Letter had no idea how the payments thereunder and additional to those under PCOA were calculated. He told me that he discussed the Side Letters with Mr R on one occasion and then only for a couple of minutes. He told me that it was his understanding that the payments due under the Side Letters, over and above the payments under PCOA, were to be paid by DH not the husband.

74. Having heard the oral evidence I am satisfied that Mr M and E had really next to nothing to do with the negotiations leading up to the Side Letters. Mr R told me that it was he who came up with the idea of the Side Letters. He did not involve E in the discussions at all. Mr R accepted that the husband was totally dependent on him, as the husband's attorney, to act in his best interests. The purport of his evidence was that the Side Letters were arranged between the husband and himself and that the husband understood what was happening.

75. One of Mr R's critical reasons for the rationale of the Side Letters was that the value of DH had risen from c. £18m as per SH's valuation to the £63.5m now offered. On 5 May 2011, SH, DH's accountants, valued each share at £15.15 at 10 February 2011 based on the year end figures of 2009 and on 24 January 2012 they valued each share at £21.12 giving a total valuation of c.£18m based on year end figures of 2010. Thus it is said that in late 2010 DH was worth c. £18m. However, it will be remembered that the husband at that time made an initial payment of £500,000 to Mr R on account of the intended purchase of his minority shareholding which Mr R had valued in 2010 at £5m. Ignoring any discount for a minority stake, that would have valued DH at £42m in 2010. It is thus very difficult to reconcile SH's valuation with the reality of DH's value in 2010 as shown by the valuation the husband and Mr R put upon the latter's (minority) holding at that time.

76. Furthermore, if one considers the Earning Before Interest and Tax ("EBIT") and turnover figures taken from DH's accounts and reproduced in a schedule annexed to Mr Le Grice's opening position statement, they are for the years ended August 2009, 2010 and 2011 respectively £2.7m and £42.1m, £5.8m and £61.7m, and £1.89m and £71.8m. Historically they compare favourably with previous years but they do not suggest, in my judgment, an increase in value from a base of £18m in 2010 to a figure of £63.75m in 2012. I thus consider that I can place little or no reliance on the SH valuation and thus on Mr R's evidence on this point.

77. The husband was asked to give a breakdown of how the excess over £3.25m, i.e. £4.55m, was arrived at. By letter of 13 July 2012 Brachers LLP made a breakdown which has been analysed by the wife's team (as revised on 8 August 2012) at p. 16 of the wife's opening submissions. The letter was plainly an ex post facto attempt at justifying the excess. No document preceding or contemporaneous with the Side Letters setting out how the excess was arrived at has ever been produced. In the light of Mr R's evidence, I am satisfied there never was any such document created by Mr R or anyone else at the time. Thus at the time, the excess must have been a figure plucked out of the air, probably by Mr R. What one would have expected was, at the least, a contemporaneous working calculation by Mr M, the finance director.

78. Thus I am extremely wary of ex post facto attempts to validate the excess. Having carefully analysed Ms Bangay's schedule in relation to each of the items therein I am satisfied that the basis for the calculation supplied on 13 July 2012 is very largely flawed. I accept the salary increase item. However, the remainder of the items simply do not have any validity for the reasons given in the schedule. To take but two examples. The loan shortfall amounting to £60,000 is a complete mystery. It has never been explained and Mr M told me there is nothing

in writing to support it. The car allowance of £75,000 is ridiculous. A director was entitled to the <u>use</u> of a car, not to a new car every one and a half years.

79. Mr M gave evidence that the commercial rationale for the Side Letters was as follows. The directors/IOM companies under Project P could hold up the sale of, or have 3 years in which to sell, DH. Thus they needed an incentive to agree to an earlier sale of DH. The next day, upon his return to give evidence, he agreed in further cross-examination that if legally that was inaccurate the commercial purpose of the Side Letters fell away.

80. Ms Bangay submitted that indeed the alleged foundation of the Side Letters did fall away. Clause 4 of PCOA (to which the directors were parties) gave NRT an option to purchase the shares but only, per clause 4.2.1,

> "on or after the third anniversary of the completion date".

However, by a Deed dated 26 May 2011, the IOM companies, i.e. the directors, granted a charge to D Foundation over the "Charged Investments", i.e. all shares and any future shares in DH. Clause 9.1 provided D Foundation, the charge, with rights in respect of the shares which, I am satisfied, gave D Foundation a power to sell the shares at any time and that had D Foundation exercised those rights there is nothing that the IOM companies/directors could have done to prevent it and the directors' security of employment might well have been at risk from the new owner of DH. Thus, it would seem that D Foundation – effectively the husband – had no commercial need to incentivise the directors to a sale prior to 3 years from the PCOA completion date. He had the power to bring about an early sale with no concomitant obligation to compensate the directors for any loss of earnings etc. during the remaining two years.

81. Mr Le Grice's submissions on this issue are set out in pages 3 and 4 of his final submissions which he amplified orally. The nub is that the Side Letters were agreed. No fraud or dishonesty is alleged. Even if there may have been a breach of trust under the POAs such breach does not disentitle the directors to the benefits under the Side Letters. Mr M said that the Side Letters were as a result of negotiations. The directors had a powerful hand. Unless they were offered terms encouraging them to sell DH for the best possible price they could walk. The lack of a link between the benefits under the Side Letters being dependent upon DH reaching a certain sale price was not as odd as it seems because Mr R will not allow DH to be sold if he considers the price unacceptable. The husband's decision in the autumn of 2011 to sell DH was the right decision and as quickly as possible. The commercial reality was that the directors were essential to the sale and had to be kept on side. Thus, Mr T, as litigation friend, cannot be criticised for permitting the payments under the Side Letters to be made if and when DH is sold to B Ltd.

82. In my judgment, Mr Le Grice's submissions do not meet the thrust of Ms Bangay's submissions. It is not necessary for me to make findings about whether or not Mr R and/or E broke the terms of the POAs by permitting the husband to enter the Side Letters. The issue is in <u>Vaughan</u> terms whether there is clear evidence of dissipation (including a wanton element) by or on behalf of the husband. Mr Le Grice submitted that, whatever the actus reus, the husband lacked "mens rea" due to his likely incapacity. He relied upon para 28 of the judgment of Wilson L.J. in <u>Vaughan</u> where he said, inter alia:

> "No doubt there are cases in which the mental incapacity of the dissipating spouse is such as to render reattribution unfair .... "

However, in the instant case, the reattribution, if reattribution there is to be, comes about either by reason of Mr R's evidence that the husband did have capacity to enter into the Side

Letters or if he lacked capacity by reason of the actions of his attorneys, Mr R and E. In my judgment, mens rea, which in any event is an inapposite concept in this area of the law, is irrelevant. In my judgment, the excess of £4.55m is to be "added back" on the basis set out in Vaughan for the reasons set out above. I accept Ms Bangay's submissions and reject those of Mr Le Grice.

83. The next deduction the husband asserts that he must make from his share of the gross proceeds of sale are "payments to the Irish directors (of L Ltd) to purchase their shares "amounting to £2,031,926.93 and "potential discretionary payments" to Irish directors of £1,455, 261.84 (see Mr Le Grice's schedule).

84. I am afraid I do not understand why payments are to be made by the husband to the Irish directors to repurchase their shares in DH if and when DH is sold to B Ltd. C7/231 to 235 is a document deposited in the data room of DH. Para 8 thereof makes it clear that on 2 March 2011 the Irish directors exercised their options to purchase their shares in DH totalling 25,405 shares. Para 12 states that the current shareholding of the Irish directors is 25,405 shares. Thus when DH is sold they will receive from B Ltd the value of their shares. If the husband nevertheless buys the shares of the Irish directors and then sells them to B Ltd, no deduction from his proceeds of sale will in fact arise.

85. On 25 April 2012 L Ltd agreed with each Irish director that in consideration of their assisting with the sale of DH, L Ltd agreed to pay each a bonus, in the event of DH selling for in excess of £101,949,518, calculated in accordance with the number of shares held by each director in DH. The bonus is payable within 7 days of any sale of DH. It is this document which is said to give rise to the potential discretionary payments totalling £1,455,261.84.

86. Mr Le Grice's response is to say the least laconic. At page 4 of his final submissions he submitted that if the Irish directors receive additional discretionary payments, considerations similar to the English directors will apply. The principal distinction is that through exercising their share options the Irish directors have shares which improves their bargaining position. Orally he submitted that these were business decisions which neither the husband nor Mr T can prevent.

87. The "deduction" of £2,031,926.93 simply will not arise – see para 84 above. As for the alleged "discretionary" payments, they can only arise if DH is sold for in excess of £101,949,518 which self-evidently will not happen upon a sale to B Ltd. Second, even if they do arise, on the face of the documents signed by Mr R on 25 April in respect of each of the Irish directors, Mr R signed on behalf of L Ltd and not the husband. Thus it is inexplicable how it can be said that the Irish directors are entitled to any bonus at all and are entitled to look to the husband to pay them.

88. In his final submissions Mr Le Grice told me that it was unlikely that any Belgian tax would be payable by D Foundation and accordingly no deduction would arise under this head.

89. Thus, having made the above findings, I compute, so far as I am able, what is likely to be the net proceeds of sale in the husband's hands on the basis that B Ltd completes its purchase and pays £63.75m. The following deductions are to be made:

Cavendish	£637,750
Brachers LLP	£300,000

Thus the husband's share, so far, is as I have said in para 65 above, is £53,135,568.

If the correct rate is 10% on the first ten million by reason of entrepreneurs' relief, then the likely CGT payable is £1m plus 28% of the balance (i.e. after the first ten million) which Ms Bangay in her final submission puts at £12,389,000 and Mr Le Grice at £13,408,860 if a gross of £62m is taken. Thus at this point the husband's net proceeds will amount to roughly £40m if a higher figure of £13m is taken for CGT. From that must be deducted £3.25 in payments to the directors and a figure of c. £1.275m which Mr Bangay accepted during Mr Le Grice's closing submissions as a proper deduction representing the likely premium payable by the husband as a warranty insurance premium.

90. Thus the net proceeds are now at £35,475,000. However, Ms Bangay submitted that there are yet further inappropriate deductions and further add backs. I propose to take them briefly. First, the husband's legal costs of c.£450,000 in defending unsuccessfully the s.37 proceedings. In my judgment the husband was entitled to legal representation and there is no dispute that a sum of that magnitude was spent by the husband in that regard. I cannot see that this item amounts to dissipation and/or it seems to me that reattribution would, given the husband's incapacity and that Mr T not being able to take <u>any</u> instructions from him, be unfair. Second, it is said that the husband's costs liability to the directors of £282,500 (see Mr Le Grice's latest asset and liability schedule) is not a proper deduction. I disagree. The fact is that he will have to pay them and any reattribution would be unfair.

91. However, there are undoubtedly loans of £150,000 to each of the husband and the wife made by D Ltd earlier in 2012 to be repaid. The likelihood is that £300,000 will be repaid to D Ltd/DH by the husband from his net proceeds of sale. Accordingly, the net proceeds of sale of the husband's shares are likely to be £35,175,000. But this figure depends very much upon the amount of CGT actually payable by the husband.

92. Thus, the total assets less liabilities of the wife and husband can now be seen more clearly. There must be added to £35.175m the former matrimonial home at £1.843m, the wife's flat at £87,300, the wife's bank accounts at £105,000, the husband's bank accounts and the repayment of the loan from Mr R all at c. £614,007, G Investments Ltd at £175,000 Ms Bangay accepted that there are no other assets in G Investments Ltd), giving a sub-total, so far, of £38m. I ascribe no value to the separate company A Ltd.

93. The wife has unpaid legal fees and a litigation loan amounting to £346,000. I disregard any income tax liabilities of the husband arising from the EFRBS said to be £723,000 which appeared in Mr Le Grice's first schedule of assets and liabilities but which in his later schedule had become "tbc". These alleged liabilities did not appear either in the husband's Form E or in Mr T's statement and no evidence at all was placed before me in this regard. Mr M confirmed that the EFRBS scheme was an efficient tax avoidance scheme. The husband has further liabilities, per Mr Le Grice's latest schedule of assets and liabilities, of £7,000 CGT on the sale of the wife's flat, £5,000 tax re the loan to him of £150,000, his loan from E of £84,000 and legal costs payable to the wife for her s.37 costs, to the directors for their s.37 costs and his own unpaid costs, which all in total come to £855,000. The sub-total thus is now £36.8m. To that must be added the parties' pensions, of which the wife's amounts to a pot of c. £200,000, of approximately £750,000 on the wife's figures or £925,000 on the husband's. Thus, the parties' total assets less liabilities are of the order of some £38m, of course, predicated on the basis that the sale to B Ltd goes through.

94. I now turn to the next major area of dispute which in several of these "big money" cases is familiar territory. Both parties agree that this case is a sharing not a needs case. Ms Bangay

submitted that the matrimonial assets should be split equally. Mr Le Grice submitted that a departure from equality is the fair outcome on account of the husband's pre-marital acquest. Mr Le Grice submitted that this case is clearly not a 50/50 case. D Ltd was an established business as at February 1996, the date of the start of cohabitation, which, it was accepted by him, moved seamlessly into marriage. The wife herself gave evidence that it was then a good and successful business. Mr Le Grice relied on the evidence of Mr R that the purchase of L Ltd in 1992/93 made a huge difference to D Ltd and was for that business a "life changing" event. Mr Le Grice also relied upon the matters I have set out at para 27 above.

95. Mr Le Grice relies heavily upon the authority of Jones v Jones [2011] EWCA Civ 41, [2012] Fam 1., and in particular paras 31-52 of the judgment of Wilson LJ, as he then was. I do not intend to set them out, but I have read, indeed re-read, them. I shall attempt to summarise what he said which may be relevant to the instant case. Whatever approach (see paras 33 and 34) is adopted, it is inherently arbitrary. Application of the sharing principle is arbitrary but it is a fact "which we should accept and by which we should cease to be disconcerted".

96. In Jones there was in evidence a valuation of the company as at the date of marriage. In the instant case there is no professional valuation whether at the date of marriage or at the date of cohabitation. In Jones there was found to be a "spring board" which had a value as at the date of marriage, thus enabling the value of £2m to be doubled to £4m (para 43). Next, the Court of Appeal made an adjustment for passive economic growth between the date of marriage and the date of sale of the company (para 44). By taking the FTSE All Share Oil and Gas Producers Index between the date of marriage and the date of sale of the company the figure of £4m was lifted to £8.7m rounded up to £9m. In the instant case there is no such comparable index.

97. Thus Wilson LJ concluded at paras 51 and 52 that (deducting £9m from £25m) £16m represented the value of the matrimonial assets and should be split equally so resulting in an award to Mrs Jones of £8m. That represented 32% of £25m, the total assets, which was fair. Sir Nicholas Wall P. was plainly relieved at that outcome since the award represented "an old fashioned third" of the pot – see para 67. Arden LJ described at para 64 the methodology as "arbitrary or ad hoc but nevertheless was a principled one when assessed by the cross-check of overall fairness: see above at para 52".

98. Accordingly Mr Le Grice, in the absence of any professional valuations of D Ltd and the husband's interest therein as at February 1996 and on the basis that the "board" had by then been "sprung", adopted an arbitrary (in my judgment) way of arriving at a rough value of the husband's shares in D Ltd as at February 1996. In his opening statement he submitted that the share sale of £63.75m could be used to reach a broad assessment of D Ltd's value at the time of the marriage. The EBIT of the years ended August 2009, 2010 and 2011 are taken and weighted average applied which produces a price earnings ratio of 3.19. Taking weighted averages of the EBIT for the years 1996, 1997 and 1998 produces a figure of £7,448,638 which when multiplied by 3.19 produces a value of £23,761,155. The husband's shareholding (taken at a rough 85%) produces £54m as of now, and £20,230,000 as at 1998 which if adjusted for inflation comes to £29,881,000. The "marital share" is therefore £54m less £29,881,000 i.e. £24,260,000 of which half comes to £12,200,000.

99. Thus, allowing for the transfer of the former matrimonial home to the wife and her pension £10.36m overall is the fair and correct amount for any award.

100. The above calculations were amended by him to arrive at the value of the husband's shares in February 1996, the date of cohabitation. The value he calculated is £20.40m. The marital

share therefore increased to £33.74m of which half is £16.87m. Nevertheless as I understood the submissions, Mr Le Grice stood by the husband's open position as at the beginning of the hearing.

101. Ms Bangay submitted that this was pre-eminently a case for sharing not just all the assets, but particularly the net proceeds of sale of the husband's shares in D Ltd, equally. I have assessed the likely net proceeds of sale of the husband's shares to be £35,175,000 of which half is arithmetically £17.59m. (It may be wrong to compare £17.59m with £16.87m since Mr Le Grice's figures take no account of CGT whereas the figure of £37.175m does.)

102. Ms Bangay's submissions are set out between paras 40 and 64 of her final submissions. She takes issue with the husband's approach as articulated by Mr Le Grice. It is unjust to reflect pre-marital wealth in the division of the assets because of the duration of the marriage, the nature of its breakdown, the husband's short life expectancy and the mingling of marital with non-marital wealth, and her contribution in the future as a single parent.

103. She referred me to a decision of Mostyn J., namely N v F [2011] EWHC 586 (Fam), [2012] 1 FCR 139. At para 7 Mostyn J. noted that the treatment of pre-marital property is "highly fact-specific and very discretionary". Having reviewed a considerable number of authorities he said at para 14 as follows:

> "I adhere to my view that the two-step approach is the right one, generally speaking. It is precisely what Wilson LJ did in *Jones v Jones*. It seems to me that the process should be as follows:
>
> (i) Whether the existence of pre-marital property should be reflected at all. This
>
> depends on questions of duration and mingling.
>
> (ii) If it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in *Jones.*
>
> (iii) The remaining matrimonial property should then normally be divided equally.
>
> (iv) The fairness of the award should then be tested by the overall percentage technique."

104. At para 4 of his judgment Mostyn J. concluded re pre-marital worth as follows:

> "I conclude that it would be wrong and unfair for none of H's pre-marital wealth to be excluded from the sharing principle. It was the bedrock on which this marriage was founded. As against that are the undoubted facts that the marriage was long and the monies were well and truly mingled with marital funds, signifying an acceptance by H that to a great extent the monies, or at least their growth or earnings, would be shared with (or to

> use the words of the marriage service 'endowed on) W. I have concluded that £1,000,000 should be excluded. This satisfies the justice of the sharing principle, and as I will show below, the residual sum will meet W's needs. Any greater excluded sum would not permit W's needs to be reasonably met. But for this factor I would have excluded more. If W's needs suddenly had come to be met or had disappeared by virtue of an unexpected event, such as a windfall, remarriage to a rich man, or death (as happened in *Re Smith (decd), Smith v Smith* [1991] FCR 791, [1991] 2 All ER 306 then I would have excluded £2.116m being the actual value of H's pre-marital wealth, for the same reasons as I stated in *FZ v SZ (Ancillary relief: Conduct: Valuations)* [2011] 1 FLR 64."

105. Ms Bangay drew my attention to a number of important factors. The parties cohabited for more than 14 years. The wife has spent her entire adult life in a relationship with the husband. The parties separated not because the parties' relationship had broken down, but because of the nature of the husband's illness leading to inappropriate behaviour. Social workers, the wife told me in evidence, which I accept, told her in 2010 on three occasions that if the husband returned to the matrimonial home the children could be taken into care. She withdrew her first petition because it so distressed the husband. The wife made it clear to me in evidence that if it were possible, which it is not, she would have the husband back in the matrimonial home and look after him.

106. I am satisfied that this is a mingling case. The parties' lifestyles were, I find, entirely dependent on D Ltd and DH. The family wealth was DH and the family lived through the company. It is apparent from the evidence of Mr T, a friend of the parties for a very long time, that a lot of the family's expenditure was put through the books of DH and may not have been repaid by the husband. As I have said in relation to the standard of living, a high lifestyle had to be supported.

107. In my judgment, I conclude that it would be unfair for none of the husband's pre-cohabitation wealth to be excluded from the sharing principle. It formed a very important element upon which cohabitation and then marriage was founded. Into the balance, however, must go the length of the parties' relationship, the nature of the separation of the parties and the fact that the pre-cohabitation wealth of the husband was thereafter inextricably mingled.

108. How do I assess the value of that pre-acquired wealth? Mr Le Grice's ingenious argument is not only highly arbitrary, indeed artificial, but also it does not chime with what the husband considered was the value of his business interests in 1998. I, of course, accept that there was then no professional valuation of his shareholding. But the husband was a very shrewd and intelligent person. In 1998 he sought to protect his wealth by way of a pre-nuptial agreement. I am satisfied that he most certainly would not have undervalued his business interests, namely his shareholding, because he would have wanted to protect as much as he could. He put a value of £4m upon his shareholding. Why, it may be asked rhetorically, should he now, through his litigation friend and legal advisers, resile from that figure? Had he been able to give evidence to me I am satisfied that, if he had sought to resile from that figure, he could have given no sensible reason for so doing or, at the least, to any significant extent. To put it bluntly, the husband made his bed in 1998 and must lie on it now. However, I consider I must allow for some passive growth and inflation. Wilson LJ in <u>Jones</u> was fortunate in being able to calculate passive growth by virtue of an index. I have no such index. Thus I must do the best I can. I propose that an

uplift of £4m, to include inflation, would meet the justice of the case, thus bringing the value of the husband's shareholding in 1996 to £8m in today's money.

109. I therefore propose to deduct £8m from the parties' net assets of £38m. Half of £30m is £15m which comes out at just under 40% of £38m. I consider that in all the circumstances of the case, that 40% is a fair and just share of all net assets of the parties. I am satisfied that that will amply cover the wife's income needs, whether assessed as she would have them or reduced. The value of the former matrimonial home must be included in the share of 40%.

110. I am also satisfied that such an award will not adversely impact upon the husband's needs. He is likely to require highly skilled and therefore expensive nursing in the near future replacing the present system of carers. But the husband will have ample means to live off to ensure that he receives the best nursing care for the rest of his limited life span. If from the net assets of £38m a likely figure of £15m is payable to the wife (including the value of the former matrimonial home) and if he pays £4.55m to the directors and £3.49m to the Irish directors, he will still have remaining £14.96m. In the light of these figures it is unnecessary for me to determine whether the husband's consultancy agreement will continue.

111. The next major dispute is the wife's application for a lump sum of £2m for each child pursuant to s.23(1)(f) of the Matrimonial Causes Act 1973 upon trust for their minorities, to be paid out of the husband's assets. Mr Le Grice on behalf of the husband, submitted that the proper order was that the husband should pay the school fees of the children and periodical payments per child of £15,000 p.a. By order dated 5 July 2012, Mostyn J. sitting in the Court of Protection made an interim declaration order that "in the present circumstances" it was in the husband's best interests for a statutory will to be executed "as an interim measure" in accordance with the draft annexed to Mr T's statement dated 4 July 2012. It was executed, in fact, by the husband as well as by Mr T, on 5 July 2012. There is a nil rate band discretionary trust. The residue of the husband's estate is left to pay the wife the income during her lifetime and thereafter to the beneficiaries as defined by clause 6.4.4. upon a discretionary trust. By a letter of wishes of even date, the husband set out in clause 4 how he would wish his estate to be allocated in the long run, namely, for each of the children and W18%, for W's children 10%, 8% for E, 6% for the husband's other brother, F, and 1% each for a club, a charity, a nephew and a niece. He wished his children, including W, to be given first priority if interests under the residuary estate were to be accelerated, but (W apart, who is an adult) the children were young and caution should be exercised so that the funds "do more good than harm". Care should be taken not to pass capital over too soon in order to encourage the children to "make their own way and forge their own careers".

112. Thus, as I understand the provisions of the statutory will, the wife qua wife and a beneficiary thereunder is an integral part of the tax planning to minimise inheritance tax. If the wife survives the husband, which is of course highly likely, she has a life interest in the residue and her children can only inherit their "share" after her death unless the trustees decide to advance their interests. I am satisfied that it is probable they would pay great attention to the husband's letter of wishes if asked to advance the children's interests in whole or in part.

113. The purported justification put forward on behalf of the wife for a lump sum of £2m for each child is summarised by Ms Bangay at para 66 of her final submissions that "it is for the benefit of the children to receive an accelerated interest now in the family wealth to protect those sums against the uncertainties of the current will arrangements and IHT": see also para 83 of her opening submissions. As I understand her submissions that is the sole reason underpinning the application. The application is <u>not</u> put forward on the basis that such a huge sum is necessary

for their maintenance, education or training. Indeed, in the light of the likely size of award to the wife in her own right and to the ability of the husband to satisfy the children's school fees and maintenance (after satisfying the wife's award), I cannot see any justification at all for exercising my discretion to award any lump sum for the children. The children will be handsomely maintained.

114. Under the terms of the trust proposed by the wife into which would be paid the sum of £6m, a sum of £2m would be held upon trust until that child reached 18 years old i.e. became an adult. Mr Hagen, the wife's junior counsel, told me that there would be serious tax consequences if the beneficiary's interest under the proposed trust vested at the age of 25 years. Under s.32 of the Trustee Act, the trustees could resettle the property but, in his opinion, certainly no later than the age of 20. If he is correct, which I have no reason to doubt, then any of the children could call for the value of her or his interest at the age of 18 to be paid over, with a possibility (and no more) that that might be extended till 20. X will be 15 in November. Thus in a little over 3 years time she could be entitled to have paid over to her the value of her interest, i.e. £2m which will either increase or decrease over the next 3 years, but in any event a very large sum. Y is now 13, and so in 5 years time she will be able to demand that her interest be paid over. By contrast, under the statutory will X and Y are most unlikely to receive any part of their "inheritance" for a very considerable period of time and probably well after their 18th birthdays.

115. I must now assess the tax "advantages" put forward as the rationale of the proposed lump sums to the children. I have had the advantage of submissions of leading counsel specialising in tax, namely Mr David Ewart Q.C. and Mr Giles Goodfellow Q.C. for the wife and husband respectively. I am grateful to them for compiling a written summary of agreed points and their oral submissions.

116. If any lump sums are to be paid for the benefit of the children it is, in my judgment, axiomatic that they must be paid into a properly constituted trust with trustees, one of whom must be independent of the wife who, it is proposed, would be the other trustee. Thus I concentrate on para 6 of Counsels' agreed note. To the extent that the transfer into the proposed trust was a transfer of value it would be a Potentially Exempt Transfer ("PET") and no IHT would be chargeable upon transfer. However, such PET would become chargeable in the event of the husband's death within 7 years of the transfer. In the event of the husband's death within 3 years of the transfer, the value transferred by the PET would be charged at full death rates, 40%, with the benefit of taper relief at 8% for each year thereafter that the husband survived. The proposed trust would not be treated as a settlement for IHT purposes. Consequently there would be no "relevant property" charges to IHT purposes whilst held by the trustees and no exit charges when distributed to each child on her or his 18th birthday. The trust would not be a settlement for CGT purposes and so when distributed to each child upon its 18th birthday no CGT would arise.

117. The issue which divided Mr Ewart and Mr Goodfellow is whether any order of the Court for a lump sum or transfer of shares to the children would be a "transfer of value". It was agreed that if following argument and without collusion the court determined that a particular amount or value was required to be paid or transferred by the husband into the proposed trust, then HMRC would be unlikely to treat the provision as being a "transfer of value". Mr Goodfellow, however, expressed considerable scepticism (para 11 of the note and orally) as to whether the level of provision being proposed by the wife - £2m for each child – could realistically be ordered by the court pursuant to its powers under the MCA 1973. Such a level of provision, bearing in mind

their different ages and their needs, runs a real risk of not being regarded by HMRC for their maintenance, education or training under s.11 IHTA 1984. Thus Mr Goodfellow submitted that in order to obviate that risk, the court should set out why it considered that the amount ordered to be paid by the husband into the trust for the benefit of the children was truly for their maintenance, education or training. But he said £2m for each child of differing ages, particularly between the oldest child aged nearly 15 and the youngest aged 4 was "giving the game away". Mr Ewart sought to counter that argument by submitting that it is sufficient for the court to make the order sought by the wife which thus becomes "a liability imposed by law", s.5.5(5) IHTA 1984 and can be made for no consideration and still escape IHT. The making of an order by the court, he submitted, does not constitute a transfer of value – see para 2.54 of McCutcheon on Inheritance Tax 4th Edition (2005).

118. In my judgment, the difficulty which the wife faces is a simple one. She cannot point to any reason why from a maintenance, education or training standpoint a sum of £2m (she puts forward no lesser sum) is now required, or even may in the future be required for any of the children. Their school fees and such periodical payments as I may think appropriate will be met by the husband from his ample resources even after satisfaction of the wife's award. Furthermore, it is most unlikely that the husband will survive for 7 years following any order for lump sums and thus IHT will be incurred, which Mr Goodfellow told me (without dissent by Mr Ewart) will be a liability of the husband's personal representatives and of the children.

119. Mr Le Grice characterised the wife's application as a "raid" upon the husband's assets. I do not so characterise it, if that submission was intended to be a reflection upon the wife. I do not criticise her at all for making the application. But her application fails for the reasons I have set out above. It must follow that I should not exercise my discretion under s.24 MCA to order a transfer of part of the husband's shares to the proposed trust in the event that the sale to B Ltd does not proceed. Accordingly the wife's application for lump sums or transfer of property orders for the children must be dismissed.

120. I shall order that the husband do pay each of the children's school fees and periodical payments. I consider £15,000 p.a. for each child to be too low for X and Y and probably a little too high for Z. However, I see the attraction of making an order for a like sum for each child. My order is that the husband shall pay periodical payments at the rate of £20,000 p.a. for each child during his or her minority or until the cessation of tertiary education whichever last occurs. There will be the usual clause inserted for an uplift due to inflation.

121. I turn finally to the wife's application for a transfer of shares by the husband to her on the basis that the sale to B Ltd does not proceed. Mr Le Grice's submission (page 4 of his opening position statement) is that, if the sale does not materialise and hence the award to the wife of a lump sum falls away, her claims for financial remedies should be adjourned with liberty to restore. He specifically recognised that such a course is "unsatisfactory".

122. Ms Bangay boldly, but in my judgment with some justification, submitted that merely to adjourn the wife's claim would be an unwarranted abrogation of the court's responsibility to adjudicate on her claims. Distilling her arguments in paras 71 to 82 of her final submissions, her principal points are these. The sale may take longer than Mr R optimistically anticipates. The wife has been advised that the sale may take much longer and Ms Bangay therefore submitted a deadline of 1 December 2012. The husband may die at any time and the evidence, particularly E's, is that he has deteriorated significantly in the past 6 months. Were he to die, her only remedy would be to challenge the provision made for her under the statutory will by way of an

application under the Inheritance (Provision for Family and Dependants) Act 1975. That would mean more litigation, expense and uncertainty. The Court of Protection proceedings are continuing, the statutory will is an interim measure and it will be critical for that court to know the decision in the instant proceedings before a final statutory will can be authorised. If shares are transferred to the wife, she is a sensible, level-headed person who would take first-rate advice before exercising her rights as a shareholder, for it is in her interests that DH continues to thrive.

123. Mr Le Grice amplified his written submissions. If shares are transferred there is a risk that DH would be torn apart. The wife and E are not apparently on speaking terms. The other directors might perceive unwarranted interference by the wife in the running of DH. If a sale does not proceed any lump sum awarded on the basis of the sale to B Ltd proceeding will not prove to be the right figure. That is because DH has reached a summit in development and in the future the value of DH is likely to decline and not increase. Finally, he drew my attention to DH's Articles of Association and in particular clause 6 which prohibits the sale or transfer of shares unless and until the rights of pre-emption conferred shall have been exhausted. Notice of any transfer must be given in writing to DH. The other shareholders are then given the opportunity to buy the shares which the proposed transferor wishes to transfer. However, by clause 6(i) the directors are given an absolute discretion, without giving any reasons therefor, to decline to register any transfer of any share.

124. In my judgment, if the wife is, on the basis of the sale proceeding, entitled to an award of about 40% of the parties' net assets and since the husband's shareholding is overwhelmingly the largest individual asset, in principle I see no valid reason why such an award should not be reflected in an order made by the court on the basis that the sale does not proceed. Or, to put it another way, if the lump sum award is conditional upon the sale to B Ltd proceeding, but if the condition is not fulfilled, it would seem sensible and fair for this court to make a further order to reflect the award had the sale proceeded.

125. The problem with Mr Le Grice's submissions is that to adjourn her application introduces uncertainty and risks further litigation, expense and delay. Having seen the wife give evidence I think it improbable that a transfer of shares by the husband to the wife would lead to disruption in the running of DH. As Ms Bangay said, it is in her interest that DH thrives in anticipation of a future sale. If DH in the future sells for a figure less than that offered by B Ltd the wife will receive the value of the shares transferred to her, no more and no less. That is the risk she takes. There will be no top up. As for the argument based on the Articles of Association and although DH are not a party to these proceedings, I do not see how clause 6 is an absolute bar to the court exercising its statutory discretion under s.24 MCA 1973. I can make the order against the husband and await the response of DH and the directors. DH may decide to permit the husband to transfer the shares. If so, all well and good. If not, then the wife will have to consider her position, take advice and make any necessary applications.

126. As to the date by when the shares are to be transferred, I agree with the wife's proposal that it should be 1 December 2012. Thus, if there is no exchange of contracts by 1 December 2012 with B Ltd or, having exchanged prior to that date, the sale does not complete within 3 months of the date of exchange of contracts, then the husband and/or those acting on his behalf must effect the necessary transfer.

127. Finally, I would like to express my sincere gratitude to Leading and Junior Counsel and to the parties' solicitors for the way this case has been presented to me.