

F v F (CLEAN BREAK: BALANCE OF FAIRNESS)

[2003] 1 FLR 847

Family Division

Singer J

16 December 2002

Financial provision – Clean break – Liquidity – Family company – Whether unfair and unjust to impose clean break where equality of division not practical

The husband and wife had been together for 28 years and had two children, both now adult. The wife was not employed outside the home. The husband had established his own company, in which he held 94.1% of the issued shares. His current annual income, taking into account expenditure which the company met for him, was assessed at £450,000. Apart from the husband's pension, the main assets were the family business, the matrimonial home, and certain endowment policies, which together were assessed as being worth about £3,480,000. The husband's proposals involved the wife receiving £880,000, plus 90% of the main pension fund, on the basis of a clean break. The husband proposed an annual budget for the wife of about £40,000 and suggested that she should move to a smaller property. The wife presented a budget for herself of about £90,000, and wished to remain in the matrimonial property; she suggested that the husband would have to pay between £750,000 and £1.25m to achieve equality on a clean break, which in practice meant that a clean break solution could not fairly be found, and that instead he should pay her continuing maintenance of £85,000. She proposed that she receive an equal share of the pension fund. Equality of contribution was not disputed, but the husband argued that the illiquidity of the company justified departure from equality of division.

Held – awarding the wife the matrimonial property, two endowment policies, a lump sum of less than £60,000 and a pension sharing order for 50% of the main pension fund, with periodical payments of £75,000 –

(1) Illiquidity was an extremely relevant factor when carrying out the s 25 exercise, not to be disregarded any more than the non-availability as free capital of the bulk of a pension fund. The illiquidity of assets, even very considerable assets, might make it unfair and unjust to impose the clean break favoured by s 25A of the Matrimonial Causes Act 1973 (see paras [79], [86], [89]).

(2) In this case a clean break was not feasible, nor appropriate, nor just. It would be reasonable for the wife to have an annual net income of £75,000. To achieve this on the basis of a clean break, even if she were to rehouse, would require the husband to pay the wife an additional lump sum of £550,000–£ 600,000. On the available evidence, it would not be possible for the husband to raise such an additional sum without selling the company, which was not an outcome the wife was suggesting should be imposed on him. The husband's offer did not meet the merits of the case even on the basis of his own valuation of the various assets (see paras [42], [43]).

(3) Continuing maintenance would mean that the husband and wife would share in the results of the company's performance until such time, if ever, as emerging liquidity enabled a clean break to be achieved upon a basis that was fair in the circumstances then prevailing. If liquidity had been no object, and broad equality the outcome, the wife would have received far more than the effect of this order. The husband would therefore be trading with and making profits from capital which, in changed circumstances, would fairly have been the wife's. It was difficult to see how the imposition of a maintenance obligation in return for use of that capital could be unjust (see paras [90], [91]).

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Statutory provisions considered

Matrimonial Causes Act 1973, ss 21A, 25, 25A, 31(7B)

Inheritance (Provision for Family and Dependants) Act 1975

Cases referred to in judgment

Cowan v Cowan [2001] EWCA Civ 679, [2002] Fam 97, [2001] 3 WLR 684, [2001] 2 FLR 192, CA

Lambert v Lambert [2002] EWCA Civ 1685, [2003] 1 FLR 139, CA

N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69, FD

Page v Page (1981) 2 FLR 198, CA

Wells v Wells [2002] EWCA Civ 476, [2002] 2 FLR 97, CA

White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL

Philip Moor QC and *Stephen Trowell* for the petitioner

Martin Pointer QC and *Justin Warshaw* for the respondent

SINGER J:

[1] The questions raised by this ancillary relief application seem to me to take a little further the development and working through of the decision of the House of Lords in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981. The evidence and submissions in this case were heard in the week following the Court of Appeal decision in *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139, which can be said to redefine and redirect the thrust of the considerations adumbrated, particularly in the speech of Lord Nicholls of Birkenhead in *White v White*. Their Lordships were dealing in *White v White* primarily, of course, with the correct application of s 25 of the Matrimonial Causes Act 1973 (the 1973 Act) to the judicial exercise of discretion as applied to the facts of that case, but the observations and considerations there expressed are of far wider application. What their Lordships did not and indeed could not have done is to express anything other than an extremely influential opinion as to how those considerations might be applied across the infinitely varying spectrum of factual circumstances in which ancillary relief applications arise.

[2] As will become apparent, the circumstances of this case have resonances with some earlier reported decisions in the post-*White* era. Thus, as in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69, the extent to which liquidity can and should be made available from a family company is a key question here. And, as in *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97, I must have regard to the quality and nature of the assets with which each party will be left after an award so as to ensure that there is no inappropriate imbalance in liquidity and risk.

[3] The area in which this application may perhaps be regarded as breaking new ground, post-*White*, is as follows: is this a case where, despite assets valued in simplistic terms at over £4m, it would be unfair and unjust to impose the clean break clearly favoured as the outcome by Parliament when, in 1984, s 25A of the 1973 Act was introduced? And how and how far should one respond to the triangular tug on the balance of fairness exerted by that statutory attraction towards a clean break, poised against inelastic illiquidity on the one side, and the flexible yardstick of equality on the other?

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The relevant history of the marriage and of these proceedings

[4] The parties (to whom I shall refer as H and W) will very shortly both be 54 years old. They married in March 1972 when they were in their early twenties. So far as I am aware, after the marriage W had no effective employment although an income and benefits have been paid and extended to her by the family company. There are two adult children born in 1973 and 1974. As it happens their son still lives in the former matrimonial home (where W and her own mother live), but I have not been asked to regard his need for accommodation there as long term and I assume that in due course he will make his own home elsewhere.

[5] Cohabitation between the parties lasted very nearly 28 years from the date of marriage, until, in January 2000, H left home to live elsewhere with Mrs M (as he continues to do). But since 1996, that relationship (or, at least in the early part of that period, W's suspicion that there was such a relationship) caused significant strains in the marriage. Even after separation, however, W told me that she was keen for H to return. They spent time together during this interregnum period and indeed in May 2001 went alone together on a fairly lavish holiday to Thailand. However, in July of

that year W decided to institute divorce proceedings. A decree nisi has been pronounced but not yet made absolute.

[6] In August 2001, W instituted ancillary relief proceedings seeking the full range of available relief including an adjustment of property order in relation to the matrimonial home, OH, and an order in relation to pensions.

[7] In October 2001, a district judge made an order for maintenance pending suit. Upon the basis that W would continue to receive her net salary from the company of £17,682 pa, all car expenses except for petrol, and private medical insurance, the district judge ordered H to pay maintenance pending suit at the rate of £42,000 pa. She thereby rejected H's submission that he could not afford to pay more than £24,000 pa on the same basis, and that to do so would provide W with a standard of living significantly more affluent than the full family enjoyed during the marriage.

[8] H filed notice of appeal from that decision but later, in circumstances which I shall detail, abandoned his appeal. The subsequent course of preparation for the ancillary relief hearing was relatively unremarkable. That notwithstanding, by the time that the case was opened before me there were (quite apart from diametrically opposed views as to whether this was a clean break case) valuation issues both in relation to the shareholding in the family company and the value of the former matrimonial home. Substantial costs have been incurred, estimated at £150,000 expended by W and £136,500 expended by H.

[9] H's career history is as follows. As a teenager he worked for a fishing tackle retailer and demonstrated and developed a talent for designing and making improved angling equipment. He went into business on his own account, but then diverted into a partnership with his father and another designing and making equipment for the display of merchandise. That trade came to a halt in the early eighties when they were badly let down by a debtor who went under. H then turned his hand and his obviously significant talents once again to what has proved to be the buoyant leisure activity of angling. He told me that over the years he has made many inventions and registered many designs. The family company, which was established in about 1982, has flourished. H owns 94.1% of the issued shares, and his brother and sister each

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hold 2.6%. The remaining 600 shares (just over 0.5%) are in W's name, but it is agreed that she will (subject to a capital gains tax (CGT) indemnity) transfer them to H.

Contributions

[10] There is no doubt that H is an enthusiast who derives both pleasure and challenge from his work. It is that work over the lifetime of this marriage which has produced the wealth now available to the parties. *Lambert v Lambert* leads to a reappraisal of the scope for the 'stellar quality' of the wealth-producer to lead to a departure from the broad principles of *White v White*: but in this case Mr Pointer QC (who with Mr Warshaw has represented H) has not sought to contend that this is a factor in this case. I therefore treat the contributions of the parties over this long marriage as equal, notwithstanding that the nature of their contributions to the family has been so self-evidently distinct.

The major assets and their valuation range

[11] W seeks an adjustment of property order in relation to the former matrimonial home, OH, a rural property outside Chelmsford purchased in about 1979. It cost of the order of £50,000 and has been much extended since (a good deal of that with H's physical labour). Along the way it has become encumbered with a mortgage upon which under £30,000 remains outstanding. H had in fact transferred the house and its three acres into W's sole name in 1984 and that remains the position. He has since purchased in his name an additional plot of land which (it is common ground, as part of the overall rearrangement of their financial affairs) will be transferred to W. The issue (apart from whether its value is £700,000 or £800,000) is whether, and if so when she

should be required to move to cheaper accommodation, or (perhaps putting the question more aptly) what notional capital could and should be regarded as available to her for income-producing purposes if it be the case that she chooses to go on living there but that the retention long term of this property would be an unreasonable deployment of family resources.

[12] In relation to the principal company, disagreement exists as to the value of the parties' shares, the range being between £2.119m (contended for by H) and £2.996m (as computed by the accountant instructed by W). Both values allow for CGT and incidental costs of disposal in the event of sale. They also, for simplicity, include the net value of an associated company wholly owned by H which holds certain intellectual property rights upon which the principal company depends.

[13] If one disregards (as I propose to do) the value of household furniture, equipment, and other personal possessions on each side, and minor fluctuating credit card liabilities, then apart from OH and the family company the only other really significant asset available to the parties is their pensions. There are four small policies maintained with commercial providers: three for H with an aggregate cash equivalent transfer value (CETV) of about £80,000, and one held by W with a CETV of £17,000 to £18,000. Far more significant is the self-administered scheme of which H is a beneficiary. Its assets are currently held entirely in cash and as at 5 April 2002 stood at just short of £468,000.

[14] I very much bear in mind that these pension valuations, whether expressed as CETVs or as the value of a fund held in cash, are for practically

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all purposes a quite distinct form of currency compared with assets which can be realised for cash which is then freely available. As and when these pensions are drawn there will clearly be the potential to withdraw up to the maximum permissible commuted lump sum. But the balance must be used to provide an income stream. Happily, the power to make pension sharing orders under s 21A of the 1973 Act is available in this case, and each party proposes that an order should be made in W's favour. It is possible then to arrive at an approximation for the gross income which such a pension annuity could in current circumstances provide, if W chose (as I assume she could) to draw her pension immediately.

[15] In this manner, the s 25 discretion as to the pension assets can be looked at in isolation, as it were, although always taking into account their nature, value and proposed distribution when standing back to consider how fair and appropriate any proposed order is overall. What is then highlighted in the case of this family is the serious lack of practical liquidity imposed by the distribution and nature of the two other main elements in their economic equation, the shares in the family company and OH.

The open proposals

[16] H seeks a clean break, and therefore maintains that I can and should make orders upon the basis of which (in the words of s 25A of the 1973 Act) 'it would be appropriate ... that the financial obligations of each party towards the other will be terminated' as soon as the orders have been met. His proposal was made in correspondence the week before the hearing and has not been subsequently revised. He proposes that W should keep OH together with the small plot of adjacent land currently in H's name; that the company shares should go to H; and that W's connection with the company and her income from it come to an end. H offers that W should take a 90% share of the funds of the self-administered pension. He would also transfer to her two insurance policies with a current surrender value of just under £21,000. He would in addition pay her a lump sum of £210,000 by three equal instalments over 18 months, and meanwhile maintenance calculated by reference to the reducing balance outstanding. H seeks the release to him of some paintings and other equipment (some of it, as it transpired, purchased by the company). His offer is silent as to costs. The proposal is on the basis of a clean break, including potential

claims under the Inheritance (Provision for Family and Dependants) Act 1975.

[17] The response of Mr Moor QC (leading Mr Trowell) for W is that whether OH is worth £700,000 or £800,000, and whether the company shares are worth (broadly) £2.1m net or £3m net, the value of the overall package comprised in that offer falls very far short of what it would be fair (if practicable) for W to receive upon the termination of this marriage. On her behalf it is suggested that the pattern and incidents of this marriage are such that a broadly 50% division is justified, and that there would, in this case, be no very striking reason to depart from that to any significant extent. If, therefore, the pensions assets were approximately equally divided so that W kept her own small pension and received 50% of the current fund value of the self-administered scheme, the capital sum which should be ordered and which would need to be found would be of the order of £750,000 on H's valuation, and £1.25m on her own, plus OH. H's proposal to pay about £230,000 over 18 months, in combination with the extra 40% (representing £187,200 of

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illiquid pension-fund cash) falls so far short of those figures as to render that suggested outcome wholly unfair, in terms of an appropriate exercise of the s 25 discretion. Thus this is not a case where a clean break solution can fairly be found, and there must necessarily be continuing maintenance provision for her.

[18] W maintains, moreover, that even if one disregarded what she says would be the unfair disparity in their capital position upon H's proposals, the income which she would be able to derive from the pension (were she to draw it immediately), plus the income which could be derived on a *Duxbury* (income and capital drawdown) basis from the proposed lump sum augmented by whatever 'change' it would be reasonable for her to achieve from moving home, would in aggregate be inadequate to meet any reasonable assessment of the spendable income which in all the circumstances she should have at her disposal.

[19] W's open proposal, therefore, is (in its essentials) that H should assign the two insurance policies worth about £21,000 as he proposes, but should not pay her the £210,000 which he has offered. She suggests equal division of the self-administered pension fund. Her shares in the family company would go to H subject to the CGT indemnity already referred to, and she would cease to receive her salary and her other benefits from the company (although she suggests that it would be both reasonable and tax-efficient for her to receive an ex-gratia payment of £25,000 by way of compensation for her loss of office). Rather than the lump sum of £210,000 he proposes, H should make periodical payments to her at an annual rate (she submits) of £85,000.

[20] W recognises that H is at present living with Mrs M in rented accommodation costing him (or the company: it is far from clear) £20,400 pa to rent, and that it would be a reasonable aspiration for him to wish to purchase. He could, on her proposal, put as much as or more than the £210,000 he has offered her, and meet without hardship the cost of borrowing the balance. The cost of such a mortgage could and should be factored into the calculation of her periodical payments award.

[21] W maintains, therefore, that a clean break is not 'appropriate' notwithstanding the thrust of s 25A, but that to impose one upon terms such as proposed by H would constitute an unjust result. She recognises that upon her proposal she would take effectively the whole of the truly readily realisable capital represented by OH, leaving H with effectively only the shares and his income. She recognises that the future of any company, even one with so good a track record as this, cannot be assured. To the extent that she is dependent upon continuing periodical payments related to the value of the income and benefits which H can abstract from the company, she appreciates that if the company genuinely falls on hard times her maintenance income may suffer downward variation. But that (it is argued on her behalf) would be a fairer outcome than a clean break upon the basis of so inequitable a capital division.

[22] It is perhaps worthy of note at this stage that from first to last during the course of the hearing no explanation was proffered on behalf of H as to the sources from which

he proposes to raise the three £70,000 instalments which he offers to pay over the next 18 months. Thus, not only do I not know whether he hopes to achieve some or all of such payments from income or bonus receipts from the company, or from borrowings, but I have no information or indication to what extent if at all it may be possible for him to raise more than £210,000. Mr Pointer in final submissions did, however,

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recognise that I might fix the price of a clean break at some higher figure, suggesting that his client should then be in a position to decide whether or not he could, and if he could whether or not he would, meet that order.

[23] W, for her part, clearly recognises not only that she may remain dependent upon a variable maintenance order during joint lives, but also that if she survives H while the maintenance order still subsists she may need to bring a claim against his estate. She has no doubt also been advised that her remarriage would have the effect of bringing periodical payments to an end. Her expectation is, however, that at some stage H (and his brother and sister who play no active part in the company's affairs nor in its control) will sell the company. Thereupon either she or he could invite the court to exercise the powers contained in s 31(7B) of the 1973 Act to make supplemental provision (most probably by way of lump sum) for W upon discharge of the periodical payments order, so as to achieve a clean break at that stage.

A broad assessment of means and needs

[24] Having thus dealt with the shape of the capital aspects of the case, and with the parties' rival contentions, I turn to a consideration of their standard of living, the means available to H from the company, and the financial needs, obligations and responsibilities of them both.

[25] This was not, in my judgment, a marriage during which there has throughout been lavish expenditure. In the early period of the family company's trading, H raised working capital by bank borrowings, guaranteed personally, and felt sufficiently uncomfortable about the risks of failure to take the sensible precaution of giving OH to W. In order similarly to protect the commercially crucial patents and registered designs, she became the owner of the company which held them. (Canvassed in evidence were disputed circumstances in which she transferred those shares to him, but I do not feel it necessary to make any finding as to that, and indeed were I to find that W's account is the more accurate it would not affect the outcome of her applications.)

[26] As will be apparent, however, the growth of the company and of its profitability has been gratifying. From H's evidence it is clear that the company has for many years been able to afford him luxury performance motor cars, which he explained to be one (but, as it transpired, only one) of his indulgences. The company has clearly also afforded for the parties works of art, decoration and equipment at their home which in a more conventionally operated domestic economy might have been purchased from their taxed income. I have no doubt at all upon the evidence of which I heard a great deal that if H takes a fancy to purchase something which catches his eye, the company has been there to pay the bill. Whether it be the tractor for the garden at the family home, the wages paid formerly to the gardener and housekeeper, art works on the wall or luxury luggage for travel, the relatively slim scale of H's voted drawings and benefits has been padded out in this manner. Similarly, when it comes to travel, H undoubtedly undertakes a number of primarily business-orientated journeys to, for instance, the USA and the Far East. Many of these have included fishing trips, undertaken wholly or partly at company expense for the research and development they involved. I need not, I think, descend into detail nor attempt precise computations.

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[27] At the time when H, in October 2001, swore his affidavit in response to W's maintenance pending suit application and filed his Form E, he deposed to a gross salary of £70,000 (£46,000 net) for the preceding year and £80,000 gross (£52,000 net) for

the then current financial year. In his Form E he said that he received no other income or benefits. He asserted for himself a budget need of £36,200 annually, including £3,500 for clothes and £4,000 for holidays. In his affidavit he suggested that upon the basis that W continued to pay the mortgage (which accounts for all but about £2,000 of her net income from the company) and had the use of the car (but paid for her own petrol), her additional reasonable annual outgoings pending the final hearing would be £25,740 (in fact inaccurately added at £23,740), so that he offered £2,000 per month.

[28] As stated, H lodged notice of appeal against the district judge's order that (upon the same basis) he should pay £3,500 per month. The appeal document lodged in early November complains that the district judge failed to pay proper regard to his net income (at the date of that hearing of the order of £3,500 per month) and his ability to pay the amount ordered, and that the order left him with an inadequate sum to provide for his own needs and requirements. H in fact discontinued his appeal early in 2002. But by then the pattern of his remuneration had changed radically. His net monthly income leapt to £14,500 per month (of which the gross equivalent is about £280,000 pa). He received the first such payment in the last week of November 2001. Then, before the company year-end on 31 December 2001, he became entitled to a £90,000 net (£150,000 gross) bonus.

[29] H explained that it was necessary for his salary to be increased in this fashion not only to pay the £3,500 maintenance awarded, but also to meet the £1,700 per month rent upon P Cottage where he lives with Mrs M. It would seem that until then, throughout the 22 months since the final separation in January 2000, that rent had been paid by the company. There is a suggestion in H's affidavit that this was a justifiable expense because he maintains an office and works at the property, and also uses some of the facilities of its private lake for research and development. It is to be observed that at a marginal rate of 40% he would have needed £34,000 pa gross income to fund the annual rent of £20,400: but his gross salary (ignoring the bonus) went up £200,000. More recently, H told me, the company has again started paying the rent. Whether it has done so on the basis that this is proper corporate expenditure, or whether some adjustment to H's salary arrangements (or another year-end bonus) will regularise the position, remains to be seen. But factors such as these are perhaps an indication of how it comes about that I regard H's assertions as to the standard of living which his income and which the company afford him through a considerable tint of what I hope is realistic scepticism.

[30] At the same time as his salary more than quadrupled in net terms, in November 2001 the pattern of H's spending from his principal personal bank account changed dramatically. In something like 10 months from mid-December 2001, he withdrew £74,000 in cash, regularly drawing £7,000 at a time. He explained how significant savings could be achieved if one bought, for instance, one's clothes with cash. He explained how the suit he was wearing cost £1,200 and that he had quite a few like it. He agreed that his spending on clothes would have been between £20,000 and £30,000 for the year. (This is to be contrasted with his budgeted expenditure of £3,500 in the

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document filed in October 2001.) That had, however, not been the position prior to his salary increase, he maintains. Analysis of the drawings through the same account over the preceding 6 months or so showed that, at most, £4,000 could have been withdrawn in cash.

[31] H did have the grace to smile rather wryly when agreeing that he would find £36,200 (his stated figure) as a tight budget for himself to live on for so long as a year. It would not easily have permitted him to spend (as he has in recent months) £16,000 at Sotheby's on three paintings and £5,500 on watches for himself and Mrs M.

[32] Relatively recently the company has disposed of one or more cars (including the more recent of two Porsches successively purchased for H's use) in order to provide him with a Bentley that cost £140,000: something of a bargain according to H. He explained that this did not really cost the company anything, as its borrowing for the

purpose of providing him with motor vehicles remained unchanged at about £100,000. What no doubt, however, he will need to take into account is the £32,200 pa gross income notionally attributable to him under the new company car and car fuel benefits regime, which will leave him with the obligation to pay nearly £13,000 pa additional tax for the privilege of driving the car.

[33] It would seem that H is currently receiving salary at a rate equivalent to just over £300,000 pa gross. But in addition to this there are of course P11D benefits, and any other expenditure which the company meets for him but which salaried employees normally meet out of the taxed income in their own pockets. Furthermore, I have been asked to regard the salary paid to Mrs M (who undoubtedly is an actual rather than a nominal employee of the company) and the provision (until recently) to her of a company car as containing an element of subsidy to assist with the expenses of her life with H. And, finally, H agreed that it would be open to him henceforth to reallocate to himself the income and the cost of the benefits which the company will cease to pay W.

[34] Mr Walton, the forensic chartered accountant instructed by W, grosses everything up and suggests £562,000 as the gross income which H would have needed to receive in 2001 to do for himself what, in large part, the company has done for him. That figure is vociferously contested. It may contain an element of overstatement. Much may depend upon the true position in relation to the P Cottage rent. Maybe 2001 will indeed prove to have been an exceptional year. But the company's own management accounts for the first 8 months of the current trading year show H as receiving salary at a rate which, when annualised, is £305,000. I leave aside the pension provision, hitherto running at the rate of about £50,000 a year, which this year it may not be provident to inject into the self-administered fund. I leave aside the question whether any bonus will augment H's income before the end of December. I take no account by way of any inference against H which might arise from the confused and unclear presentation of the position concerning the P Cottage rent. I take a generous view of the value of Mrs M's services to the company. But yet when I come to assess in broad terms the gross sum which H would conventionally have to earn to be in a comparable situation, the minimum figure at which I arrive is £450,000. I arrive at this conclusion notwithstanding the analysis marshalled by Mr Nedas, the accountant instructed by H, whose view is that his total income from his employment will be approximately £350,000. I disagree specifically with his suggestion that

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£20,000 gross is sufficient by way of addition 'for any ... salary or benefits that may be incurred and not budgeted for'. And, in any event, I am entirely satisfied (subject of course to the continuing profitability over time of the company) that H can and will make adequate provision from the company for his own needs and to meet his responsibilities.

[35] In October 2001, W, with the assistance of her solicitors, produced her own schedule of annual expenditure. If one deducts the mortgage repayments, it amounts to something like £90,000 net. H complains that this is several times more than the annual expenditure which the family was meeting in the last years of cohabitation. But if one were to add up and then gross up the wages, the benefits, the purchases made for them by the company, and the other expenditure met for them by the company, although £90,000 plus the mortgage might somewhat exceed their net expenditure, I very much doubt that it represents a multiple of it.

[36] Mr Pointer was able to demonstrate how some of her suggested expenditure was out of kilter with what W has actually been spending. But it must be borne in mind that in the year since the maintenance pending suit was fixed, it may well have been necessary for W to curtail her spending in order not to get further into debt (for instance in relation to costs) than she in fact has. To the extent that she may have indulged in forensic opportunism by asserting an inflated budget, I am more than satisfied that H has inversely and quite deliberately pitched unrealistically low his estimate of what both he and she would need to spend to maintain their standard of

life.

[37] I observe (and I and others have said it before) that the level of expenditure to which a spouse aspires after a long marriage such as this is not tied to what demonstrably may have been the family's level of expenditure during the latter years of the marriage. That is the case whether their expenditure was frugally prudent or recklessly extravagant.

The income effect of H's clean break proposal

[38] Upon the basis that H's remuneration package, the level of which is largely controlled by his own decision, is of the order of £450,000, I find unsustainable and unacceptable the suggestion that the court should in any way circumscribe W's reasonable spending (after paying off the mortgage) to £40,000 pa or thereabouts (as did H by way of commentary upon her budget). Nor am I attracted by the argument that she should have no more available than something of the order of £42,000 net (as H advanced in final submission) because that is the most that a *Duxbury* calculation projects upon H's proposal that, in addition to immediately drawing her enhanced pension as an annuity without commutation, she should treat as a *Duxbury* (and therefore ultimately self-consuming) fund not only the £210,000 lump sum and the surrender value of the two policies, but also the whole of the £300,000 which (it is suggested) would be released upon the purchase of a more appropriate home. What this argument does do, however, is highlight the essential unreality of H's stance.

[39] In my opinion, it would be reasonable for W to have an annual net spendable income of the order of £75,000. When that is contrasted with the scale of H's package of remuneration and benefits this seems to me adequately to reflect the fact that it is he who must exert industry and inventiveness to sustain the company's ability to maintain him to that level. It also reflects, in my view fairly, the disparity that W has her own home with

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the mortgage, one way or the other, paid for or paid off. Whether that home should for the time being be her present one, or whether she should notionally be treated upon the basis that it would be reasonable to expect her to move to a significantly less valuable property so as to release a cash fund with which to augment or contribute to her income, is a topic to which I shall return. A net spending capacity of £75,000 as against the value derived by H from the company seems to me also adequately to allow, as an additional factor, for H's reasonable aspiration at a time of his choice to make a substantial down-payment and then borrow of the order of £300,000 to £500,000 to purchase a home commensurate with OH, or some more or less valuable but still totally acceptable property. I also take into account that, at the age of 54, it would be reasonable for him to amortise that mortgage to some extent at least from his income.

[40] All in all, although no precise mathematical calculation is possible, I conclude that, notwithstanding these additional burdens, H would still be in a position to maintain an extremely good lifestyle even if in the event the whole of the £75,000 pa net which I conclude it would be reasonable for W to have, must be met by a periodical payments order.

[41] As already stated, Mr Pointer's calculation of the income which would be available to W upon H's proposal assumes that she immediately translates 90% of the self-administered pension into an annuity, trades OH down so as to release £300,000 and treats that and the whole of the capital (£231,000) as a *Duxbury* fund. The resultant figure (once 40% tax is applied to the gross pension payment) is of the order of £42,000, very significantly below the £75,000 which in my view it would be reasonable for her to have.

[42] When testing the fairness of H's proposal it may, therefore, be helpful to take as a guide how much extra capital (on the same assumptions) would be needed to enhance the *Duxbury* fund to bridge the £33,000 net gap. The answer is, broadly, that one would need to increase the *Duxbury* fund by something of the order of £550,000 to

£600,000. That is the approximate scale of the additional lump sum, over and above his proposals, which H would need to pay W in order for her to achieve, on any basis, what I regard as a reasonable level of spendable income. I have no reason to believe that H could raise that amount of money within a reasonable time without selling the company, an outcome which W does not suggest should be imposed upon him. It is also to be observed that this calculation supposes that, apart from her new home, W should have no access to any free capital unless she makes inroads upon the *Duxbury* fund.

[43] It therefore appears to me that H's proposal fails by a very significant margin to provide W with the combined standard of living and accommodation which I regard as appropriate in the circumstances of this marriage and divorce. My primary conclusion, therefore, is that his offer does not meet the merits of the case whether the matrimonial home is worth £800,000 rather than £700,000, and even if the shares in the company are worth £2.1m rather than £3m. For my part, I would feel justified without more in regarding this as a case where a clean break is not feasible, nor appropriate, nor just. And, again, for my part, I would feel content to go on to consider to what extent it would be reasonable for W actually or notionally to release capital from OH to reduce the maintenance liability on H; or whether that would in current circumstances be unreasonable, so that he should be ordered to pay her £75,000 pa. But I have heard the best part of 1½ days of valuation

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evidence in relation to the company shares and OH, and shall therefore summarise that evidence and give my conclusions.

The value of the company shares

[44] As to the family company, Mr Walton produced his report dated 15 October 2002, to which Mr Nedas responded with a report dated 23 October 2002. They met to discuss the case on 31 October 2002 and subsequently had further discussions as a result of which the extent of their differences widened so far as overall valuation was concerned but became simplified in a number of other respects. The final position only became clear on the second day of the hearing when a schedule was produced. It resulted in the spread of net realisable value for the shareholdings to which I have already referred, namely between £2.119m and £2.996m.

[45] Mr Walton had in fact increased his valuation in the light of a number of specific points drawn to his attention by Mr Nedas. Mr Nedas for his part had also increased his valuation, but more fundamentally had abandoned the valuation basis of his written report which relied upon what he described as 'the enterprise value/earnings before interest and taxation (EBIT) approach'. He had earlier rejected, but then espoused, Mr Walton's more familiar calculation approach based upon applying a price/earnings (P/E) ratio to what he assessed as the annual future maintainable after tax earnings of the business.

[46] When analysed, the points of substance between them came down to three in number.

[47] The figure taken as the annual future maintainable earnings of the business depends in part upon a value judgment as to what should be added back to reflect excessive remuneration payments made to H and W (and to Mrs M). The accountants were £81,000 apart for the year which they both took into account in their overall calculations. After 30% corporation tax, that nets down to approximately £56,000, which however is then magnified (in terms of its effect upon the result) by whatever the appropriate multiplier may be.

[48] As to the £81,000 difference, it is in part to be accounted for by a difference of view about how many employees would be needed to undertake the various roles currently performed by H were he to cease to perform them all, and how much such employees should be paid. But as to £65,000 of the £81,000, the division of opinion related to the question whether (and over how many years) the purchaser would deduct from the capital payment for the shares an amount to reflect the assumed cost

of consultancy fees and expenses payable to H during the years after sale. It seems to me to be highly questionable whether, in the final stages of a negotiation such as might result in the sale of the shares, so rigid an approach would be taken by the purchaser or, for that matter, accepted by H. The purchaser would, after all, hope and expect to receive valuable input from H during the period of the consultancy, and that his input would find fair reflection in profitability. And H would not want to brook any reduction in the share price upon which he would be four times less taxed than if this element came to him subsequently as income. But this is the sort of bargaining counter which in the real world would most likely be resolved eyeball to eyeball across the table when other negotiating chips are cashed, and may prove to have only very marginal effect. I must not lose sight of the fact that in that

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smoky room (or whatever is the correct and clean air equivalent) more tolerance will prevail, in one direction or the other, than can be contained within the two dimensions of an expert report.

[49] But there are other considerations not taken into account because no doubt they are not known to the accountants. What they were attempting to identify were the annual future maintainable post-tax earnings of the business of the company. Would the purchase by the company of a number of cherished car registrations for a total of £85,000 be regarded as crucial to its core business? Or the expenditure of the best part of £15,000 on statues and furniture for the boardroom? Or the £3,300 which the company expended on a silver inkwell for H's desk? Or the £2,400 which it spent on three pieces of designer label luggage for his use? I have not checked to see whether I may have fallen into the error of selecting purchases from more than one accounting period, but in any event these are only examples. The question was not put to the accountants, but I am bound to say that I regard it as self-evident that any purchaser to whose attention the scale of such expenditure was drawn might well take the view that here was one way in which annual future maintainable earnings might be increased, so that a valuation which regarded them as ongoing annual features of business expenditure would to that extent (after tax and when multiplied up) represent a significant under-valuation.

[50] To put it into numerical terms, the £81,000 discrepancy between the two accountants' estimates of the add-backs translates into a difference of between £324,000 and £378,000 approximately in the value to be ascribed to the shares, after CGT.

[51] The second element of disagreement relates to the choice of the P/E ratio. The value of this disparity in terms of its effect upon the two valuations amounts to some £340,000. Mr Walton took as his base-point the Private Company Price Index in fact created and published by the firm of which Mr Nedas is a partner, BDO Stoy Hayward. He then applied a discount factor of 40% which he regarded as appropriate in the light of the general reduction in P/E ratios recently, the relatively small size of the company and the fact that it operates in a relatively narrow sector. He therefore discounted the ratio from 12.5 to 7.5, and applied the lower figure to what he regarded as future maintainable profits for the appropriate year. As that year he selected the current calendar year for which actual figures are available for the first 8 months, and a projection supplied for the last four.

[52] Mr Nedas arrived at a P/E ratio of 6.53 by a quite different route. His starting point was the FTSE Leisure Sector P/E ratio of 14.51 published at the beginning of the month. That relates to public quoted companies. To this he applied a discount of 55%. As to 45%, this was a deduction (in turn derived from two separate indexes) to allow for the fact that this is a private company, and as to 10% it was to reflect the small size of this company.

[53] I do have a question mark in my mind, developed since the conclusion of submissions and therefore not canvassed for comment at the time. Should not the 45% for the difference between public and private have been taken off first, and only then (from the resultant 55%) the 10% for size deducted, rather than both in the same

calculation? That seems to me more logical. The effect would be to increase the P/E ratio Mr Nedas applied for the current year from 6.53 to 7.18, more than half way to Mr Walton's ratio of 7.5. I have not (I emphasise) heard argument on the point, and therefore I have disregarded

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it, nor have I allowed it to affect the conclusions at which I had already arrived (and which it would only serve marginally to fortify rather than to alter). If, however, it is sound, then it means that the valuation for the shares at which I have arrived is likely to be on the conservative side.

[54] That, however, was not the whole difference. For Mr Nedas took into account profits and/or projected profits not only for the calendar year 2002, but also for the calendar year 2003. To his own estimate of this year's profit (based on the same forecast but applying different add-backs) he applied the 6.53 P/E ratio. But in relation to the wholly prospective forecast profits he applied the lower P/E ratio of 5, on the basis that they have yet in their entirety to be earned and are therefore more speculative. He then took the average of the two figures.

[55] What I must confess still seems odd to me is that the result of applying a lower multiple for next year's forecast profits is to factor into the resulting average a valuation ingredient for next year which is some £340,000 less than his valuation would be if based only on the current year. Yet next year's forecast shows increased turnover and profits, and indeed (after add-backs) an increase in net profitability for the company from £417,200 to £465,500. That is an 11.58% increase in adjusted profits, admittedly only forecast. The application of the lower P/E ratio of 5 as against 6.53 results, however, in a 23.43% decrease in the pro rata contribution made to the result by that year's projected enhanced out-turn, which reduced proportion Mr Nedas has incorporated into his ultimate valuation.

[56] I find myself, therefore, more favourably inclined to the view of Mr Walton, who was not prepared in any event to base his valuation on next year's projection, but also disagreed with his colleague's methodology.

[57] I have in fact conflated the second discrepancy (P/E methodology and selection) and the third (whether to rely on the 2003 projection). Together they account for roughly £500,000 of the difference between the two accountants.

[58] I am simply not in a position to say, as between two experienced accountants, which of them is correct (or more correct) in asserting that their respective selected P/E ratio is 'more scientific' than the other. I shall therefore adopt a P/E ratio of 7. But for the reasons which I hope I have clearly stated, I shall apply it to this year's adjusted net profit of £473,900 computed by Mr Walton, rather than the lower figure for which Mr Nedas contends. Net of disposal costs and CGT this produces a value for the parties' combined 94.7% shareholding in the principal company of £2,721,585. When the agreed net value of £72,000 for the associated company is added to this, the figure which I shall take as the net value of the company interest is £2.8m.

The value of the former matrimonial home

[59] After some 36 years' relevant experience, Mr Gibson retired as a director of FPD Savills in 1999. Since then he has continued to work as a consultant for the same firm and has (in my judgment) certainly remained in touch and has retained relevant expertise in country house valuations such as this. He is a fellow of the Royal Institute of Chartered Surveyors. FPD Savills were selected and jointly instructed to value OH. That task was delegated to him. Mr Gibson's report is dated 17 October 2002. The gross value he ascribes to the house and its about three acres (including the plot separately owned by H) is £700,000. He subsequently confirmed that value when given

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details of three planning consents obtained in relation to the property, none of which (in his view) added materially to its value.

[60] He applied four criteria to the property (and to others about which he was asked) in arriving at his conclusion. First, is its location in the countryside in terms of surrounding towns and villages, ease of communication and so on. Next, its situation in the context of its immediate surroundings and their charms and any less attractive attributes. Thirdly, the property itself as a living unit. And fourthly, its general impression in terms of status as a home. This house is not one to which he would attribute a somewhat indefinable 'star quality' (reminiscent perhaps of other attributes which, though difficult to define are, like the elephant, self-evident when you are confronted by them). And on his personal rating by cost of the areas of Essex, he put this at fourth from the top of seven levels.

[61] H took the view that OH would command a significantly higher price if sold in the current market. He sought preliminary advice from Mr Parry, the assistant manager of the country homes division of the Bradford & Bingley's estate agency which has branches throughout Essex. Mr Parry's relevant experience extends to 17 years since he started to work in estate agency. In one letter written before and one letter written after he had seen Mr Gibson's report, he suggested marketing the property at £800,000 in the hope that sufficient competition would be generated between a number of would-be purchasers as would drive up the price to what he regarded as an achievable £825,000 to £850,000. A considered report was only available from him on the second day of the hearing, 19 November 2002. It was to the effect that £700,000 is indeed an under-valuation for this property which in his hands he felt could and should achieve £800,000.

[62] Mr Moor took no serious point against the admission of this evidence, which by the time I had heard a full half-day of it, involved detailed consideration of brochures and descriptions of some nine rural houses spread over quite a varied stretch of Essex. Some had been sold at a known price, some were on the market at a known asking price, some were known recently or not so recently to be subject to contract or to be on the brink of the exchange of contracts, one was known not to have proceeded to exchange of contracts for reasons which remained speculative. Some (not many) are period houses. All, in my judgment, based on the photographs in the brochures, are of a markedly different style to OH, and present a wide and differing range of charm and attraction. I of course accept that these are qualities which are very much in the eye of the prospective purchaser (and indeed of the owner-occupier).

[63] I do not regard it as necessary to trawl in detail in this judgment through the pros and cons of all or even any of what were discussed as potential comparables, but in my view were such only in the very broadest sense if at all.

[64] I agree with Mr Moor that the essential difference between Mr Gibson and Mr Parry may be that Mr Gibson is, in the light of current market circumstances (and to use his own word) 'cautious'. Whereas Mr Parry presented as far more ambitious and optimistic in his presentation of what his agency could achieve. When pressed however, and when he addressed the questions posed, there was less to back up his optimism than one might have supposed. I found his approach, and his evidence, unhelpful and agree with

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Mr Moor that he was offering an evaluation based on hope rather than on any well-founded expectation or recently achieved experience.

[65] I found Mr Gibson an impressive witness, not just in the no doubt practised way in which he gave his evidence, but also by reference to the cogency and commonsense of his approach to the exercise, which all agree smacks more of art than of science. I adopt his valuation of £700,000 for this property.

[66] Against the background of reports of rapidly increasing house prices in at least some areas of the market it is, I hope, not inappropriate to refer to warnings reported in the business section of *The Times* for the day when I heard this evidence, even though no reference was made to it at the hearing. The Council of Mortgage Lenders (CML) recorded record levels of remortgaging during the previous month, so-called 'equity withdrawal', later described as 'people ... using equity in their homes to fund

short-term lifestyle requirements'. The CML are reported to expect base rates to increase, and annual house price inflation to halve over the next year. But these are just symptoms of a generally felt sense of unease that the boom in house prices may not only run out of steam but may go into reverse. I believe that there are ample grounds for applying a degree of caution in current circumstances.

W's housing needs

[67] One historical feature of the case to which I have not previously referred is that, in about 1985, W's mother sold her house and contributed about £23,000 to the cost of an extension to OH. Since then she has occupied an inter-communicating bedroom and sitting room on the first floor. She is now nearly 79 and has chronic health problems which seriously limit her mobility and degree of activity. To alleviate these handicaps air-conditioning has been installed in the suite she occupies. It is quite a performance to bring her downstairs. She is not strictly house-bound in the sense that she can be transported to stay with her other daughter, as happens from time to time.

[68] On behalf of H, Mr Pointer suggests that it would be reasonable for OH to be sold more or less immediately and for an alternative property to be acquired by W at a significantly lower price where she and her mother (and for the time being the parties' adult son) should move to live. But the view I take, having regard to the evidence of both H and W, is that each of them has taken on, at the very least, a moral obligation and responsibility towards W's mother who has lived in their home for some 17 years and to whom over that period they (and not least H) have extended significant hospitality and financial support. Although I do not doubt that if she had to do so, W's mother could in fact move (as indeed she would need to if it became necessary, for instance, for her to live in a nursing home), I do not think it would be fair to her to bring about a situation where W was obliged to sell this property.

[69] In fact, on any view of the outcome, W will be able to choose if and when she wishes to leave OH. As I have found, it would be reasonable for her to have available spending power of £75,000 annually. If a clean break is achievable, but W prefers to leave some of what would otherwise be income-producing capital tied up in her home, then she might need to find a way of living on less than £75,000 each year, and I see no reason why that should present her with undue difficulty.

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[70] If, on the other hand, the solution to this case involves continuing periodical payments, then H will still be in a position, after meeting the order, to provide himself with income and benefits sufficient to live to an at least equivalent standard, and in addition to fund his own housing borrowings. If, for example, instead of paying W the £210,000 lump sum proposed, he put that towards the deposit on a house, then (in the current market) he would be able to buy a property to the same value as OH. If (as his P60 for 2001/2002 demonstrates was the case last year) the income on which he pays tax is of the order of £360,000, then if one crudely applies an overall tax rate of 40% he would be left with a net income of £216,000. If W received £75,000 by way of periodical payments that would leave H with £141,000 net spendable. If he were to borrow £500,000 at even 8% then the annual interest cost of the mortgage would be £40,000, and he would still have £100,000 available for his other needs. In addition, and as described, he has benefits both taxed and untaxed, and there is moreover room to redeploy to him the saving in income and the cost of benefits which will accrue to the company once W's employment ceases.

[71] H's opening proposition was, however, that W should buy 'somewhere comfortable' for £325,000. The suggestion was that W need provide only £250,000 of this and that her mother should contribute at least £75,000 to the purchase. I can see no earthly reason why she should (even if she has capital available to her to that extent), and this proposition was not pursued.

[72] A first batch of estate agents' particulars was produced late. W had clearly made a brave attempt to inspect or at least to view from the outside as many of them as she could. H had made no such attempt. Accordingly, though her view (that he

would not dream of living in any of the properties thus offered by way of an example) is known, whether he in reality suggests that she and her mother should do so remains an open question. It is true that a second batch of particulars arrived later which no one had an opportunity to inspect. In the event, H's proposal in final submissions was that W could and should buy a property for the more generous sum of £450,000 (including all moving costs). Whether that would or would not purchase her a reasonable home, I am satisfied for the reasons I have stated that fairness as between the parties does not require her to move at this stage, and that to the extent if at all that she is currently 'over-housed' the outcome at which I shall arrive remains unaffected.

[73] Conduct plays no part in my approach to the s 25 exercise. No health consideration of which I am aware arises on either side.

The capital effect of H's clean break proposal

[74] Having reached my valuation conclusions, it is possible to look at the overall capital effect of H's proposals in terms which are broad but emerge very clearly.

[75] The value of OH after discharging the mortgage with a recent redemption figure of just under £30,000 (as to which H has made no proposal) and after deducting notional costs of sale is £649,000. H has offered to assign to W two Eagle Star policies which, a year ago, had surrender values of £20,456 according to the documentation. They are without-profit endowment policies the larger of which (for £22,000) matures in August 2003, and the smaller (£3,000) in April 2005. The premiums are very modest. I will ascribe to them a value of £21,000. The shares in the companies are worth £2.8m. In

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addition, H has an investment in a partnership with his brother in relation to which I accept his valuation of £10,000. I ignore, on either side, bank balances (positive or negative) and credit card debts, personal chattels and furniture, the value of the Toyota motor car driven by W and its registration number (but on the basis that both are transferred to her). I note (but make no particular allowance for) the fact that W owes relatives £47,535 advanced to assist with her costs and that H similarly owes his brother £60,000. I also disregard from this simple calculation (while of course noting) that upon the basis of the costs estimates put in at the hearing, W is likely to have outstanding unpaid fees of the order of £100,000, and H similarly will owe his solicitors up to £45,000 in costs.

[76] The aggregate of the net value of OH (£649,000); the company shares (£2.8m); the two endowment policies (£21,000) and the partnership interest (£10,000) is £3,480,000. H's proposal would involve W keeping OH in its entirety and receiving the two endowment policies, a total of £670,000. To that H would, over 18 months, add the proposed lump sum payment of £210,000: a total therefore of £880,000 out of £3,480,000. One half of the total is £1,740,000. £880,000 is 25.29%, or only fractionally over one quarter of the capital assets, other than pension funds.

[77] If, however, in the context of an ongoing maintenance outcome, H were to be absolved entirely of the responsibility to find a lump sum of £210,000, then W would retain assets worth only £670,000, out of a total of £3,480,000. That represents only 19.25%, and is £1,070,000 short of 50% (again, treating the pension funds as separate).

[78] I have left the pension funds in their own compartment. H's proposal is that W should receive 90% of the funds. It seems from the schedules his counsel prepared for final submissions that his proposal would involve equating those in which a CETV is available with the self-administered fund represented by cash. That appears to me (I may be wrong) to equate chalk with cheese. I prefer the simpler solution of ignoring the modest disparity between H and W in the CETV valuations of their commercially provided policies (£18,229 to W as against just over £80,000 for H). I do so largely because it does not seem to me to be cost-efficient to make pension sharing orders in relation (as I would have to do) to three out of these four relatively modest policies. If,

however, H's 90% proposal is applied only to the self-administered scheme, as against the equal division which is the proposal made on behalf of W, she would receive 40% more than that equal division which might be thought otherwise to be fair, namely 'extra' pension fund cash of £187,100. This, upon analysis, is what H asks me to make W accept as fair exchange for the £860,000 shortfall there would be if equal division of the capital assets outside the pension funds would be an appropriate outcome but for the illiquidity of the company.

Applying White v White

[79] How far is it reasonable for illiquidity to bend the yardstick of equality in order to achieve a clean break? Mr Pointer's primary argument is that when one tests the shape of the case and the value of the assets available here against that yardstick, one can and should depart significantly from it in this case because of the illiquidity of the shares. I entirely agree that their illiquidity is an extremely relevant factor, not to be disregarded any more than the non-availability as free capital of the bulk of a pension fund. Furthermore,

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points out Mr Pointer, the fortunes of a company with a business such as this, operating in a very competitive environment, may wax and wane. Bricks and mortar are on a more stable foundation.

[80] Mr Pointer starts his submission by emphasising that the true ratio of *White v White* is that the judge's objective is fairness, not equality. That was a submission which he made to the Court of Appeal in *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FLR 192 at paras [21] and [43] where it was adopted by Thorpe LJ. Mr Pointer also points out that in *White v White*, at 605 and 989 respectively, Lord Nicholls of Birkenhead, at the end of that important paragraph where he emphasises that 'there is no place for discrimination between husband and wife and their respective roles', refers to *Page v Page* (1981) 2 FLR 198 as a case in which the Court of Appeal 'may have lost sight of this principle'.

[81] *Page v Page*, it pays to look back and remember, was a case where after married cohabitation of 41 years, the wife, 78 and in poor health, had meted out to her as sufficient to eke out her 'reasonable requirements' a total of £120,000 on a clean break basis, leaving her husband with £270,000 notionally (of which he had in fact transferred £124,000 to his mistress during the course of the proceedings). There was also considerable disparity (in favour of the husband) in their income positions. Bush J had arrived at his conclusion (which left the wife on the one hand, and the husband and his mistress on the other, with equivalent capital sums of £195,000) on the basis 'simply that it would be unjust to give the wife less'. This decision of the Court of Appeal was, may I suggest, perhaps one of the most discriminatory of early decisions under the 'old regime', and one which contributed significantly to the erroneous development of the law which it took *White v White* (and now *Lambert v Lambert*) to correct.

[82] Lord Nicholls of Birkenhead's speech then continues with the following paragraph:

'A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. *More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other.* Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. *As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.* The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.' (emphasis added)

[83] Mr Pointer draws attention to the fact that, in the very next paragraph (at 605 and 989 respectively), Lord Nicholls of Birkenhead disavows any presumption of equal division which, he says (at 606C and 990 respectively) 'would go beyond the permissible bounds of interpretation of s 25'. Thus, Mr Pointer suggests (basing himself upon the first of the italicised passages in the paragraph quoted above) that equality is likely to be the minority rather than the majority outcome.

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[84] I do, however, find that difficult to reconcile with the subsequent italicised sentence: 'As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so'. My tentative suggestion for an interpretation which reconciles the apparent inconsistency is as follows. There are many cases where the means of the parties are inadequate fully to meet the needs of them both. *White v White* recognises this. The needs of the children for a home may dictate unequal division of available assets in favour of their primary carer. Distributive equality may be manifestly unfair, quite irrespective of gender, where one party has brought disparate wealth into a short marriage. These are but examples. But if (as one might initially assume would be the case here) there is more than enough to meet both their 'financial needs, obligations and responsibilities' and to spare, then good reason should be found before equality is departed from after a marriage such as this. I therefore decline to adopt Mr Pointer's submission that the three feet necessary to add up to the yardstick will only uncommonly be found.

[85] Each case must of course be decided upon its own merits and subject to its particular considerations, but the idea that broad equality may amount to fairness should not be relegated to some minority role. In my view, Thorpe LJ was emphasising rather than derogating from this standpoint when at para [38] in *Lambert v Lambert* he said:

'I do not consider the approach which has been adopted by Coleridge J [in *H-J v H-J (Financial Provision: Equality)* [2002] 1 FLR 415] amounts to an impermissible judicial stride towards a presumption of equality. A distinction must be drawn between an assessment of equality of contribution and an order for equality of division. A finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the other statutory criteria as well as the over-arching search for fairness.'

[86] As I have said, Mr Pointer relies principally upon the illiquidity of the company as a reason for departure from the conclusion by way of fair award that equality of contribution might otherwise bring to a marriage of this length. Liquidity, the ability to pay, finds no express reference amongst the s 25(2) 'matters' to which the court is in particular directed to have regard, although clearly it is an element which can and often must be taken into account as one amongst 'all the circumstances of the case'. I do not for a moment suggest other than that it is a highly relevant consideration, nor indeed that the ease or difficulty with which any particular asset or class of asset can be realised should be disregarded when surveying the financial resources available to the parties. Liquidity can constitute an important element not only at the stage when the court considers the time for implementation of the order, but also at the earlier stage of arriving at a fair (albeit maybe only provisional) conclusion as to how the order should if practicable be fashioned.

[87] Mr Pointer relies upon Coleridge J's decision in *N v N (Financial Provision: Sale of Company)*, another case where there was almost no liquidity. The conclusion arrived at by the judge in that case was to require the husband to face up to the necessary sale of his business, but to mitigate the impact by departing from the broad objective of seeking to achieve equality in

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the interests of achieving an orderly redistribution of wealth in a creative and sensitive manner. Nevertheless, and notwithstanding consideration of the golden egg-laying abilities of the goose, the outcome was postulated upon the necessity that the company should go to market for sale. It is to be observed that, upon that basis, Coleridge J made an order (which no doubt accorded with his concept of fairness) which departed from equality to the extent that the wife received about 39% of the value of the available assets.

[88] Here, upon the calculation which I have carried through, what H proposes would only give W of the order of 25% of the non-pension assets.

[89] It is also true, as Mr Pointer draws to my attention, that the nature of the assets with which the proposed division leaves each party must be scrutinised carefully. In the Court of Appeal decision in *Wells v Wells*, the business which the husband had run successfully for some 13 years before the marriage, as well as throughout it, was now running at a significant operating loss. Its future was described by the first instance judge, Wilson J, as precarious, to the extent that any attempt at a realistic valuation exercise was pointless. Wilson J's solution gave the wife the preponderance of the 'copper-bottomed assets' while leaving the husband with all those assets which were substantially more illiquid and risk-laden. Giving the judgment of the court, Thorpe LJ canvassed whether fairness might be achieved in such a case by increasing the wife's shareholding in the company so that she might share the risks or benefits of future failure or prosperity. Such an approach held no attraction for the parties in *Wells v Wells* (nor was it canvassed in this case), but it is a clear indication that Thorpe LJ, at least in such circumstances, would regard a fair outcome as having higher priority than the clean break that s 25A promotes as the court's duty to impose when appropriate. But upon the basis that the husband was to carry the whole risk of the failure of the business, the Court of Appeal concluded that Mr Wells should have a significantly increased share of the available liquid assets. To this was added a mechanism which would enable the wife to apply for further provision were the husband to dispose of his shareholding within 5 years: another indication that the Court of Appeal is not prepared to surrender fairness for sacrifice on the altar of finality.

[90] This business, however, is far from being in the doldrums. Of course it is as subject as many another to the ebb and flow of macro-economic change as well as to more prosaic trading reverses. Were disaster to strike at the £2.8m value of H's shareholding then on his own clean break proposal he would have hooked himself on the very barb off which the Court of Appeal was anxious to get Mr Wells. If, however, as W proposes and I intend to order, H parts with less capital now and only 50% of the value of the self-administered pension fund, but pays W continuing maintenance, then each will share in the results of the company's performance until such time, if ever, as emerging liquidity enables a clean break to be achieved upon a basis that is fair in the circumstances then prevailing. Such a result is indeed consistent with that passage in para [24] of the judgment in *Wells v Wells* where Thorpe LJ said:

'In principle it seems to us that the separation of the family does not terminate the sharing of the results of the company's performance. That is easily achieved in any case in which the wife's dependency is

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met by continuing periodical payments. It is less easy to achieve in a clean break case.'

[91] Mr Moor furthermore makes the sound point, in my view, that if liquidity had been no object, and if broad equality would have been the outcome, W would have received far more (on my calculation £860,000 more than H proposes, and just over £1m more than will be the effect of my order). To the extent that she does not receive and may never receive that shortfall, H's continued trading through the company will take place with the benefit of funds in which W has a real interest. He will indeed be trading with and making profits from capital which, in changed circumstances, would

fairly have been hers. It is difficult, therefore, to see upon that basis how an outcome is unjust which imposes upon him a maintenance obligation in return.

The resultant award

[92] Unless the parties are able to agree some other solution, the details of which (or indeed the broad plan of which) are more satisfactorily tailored to their needs than can be this judgment, the result at which I arrive is that W should become the owner of the whole of the OH land. H should also procure the transfer to W of items such as the security system at OH for which the company may have paid. She will cease to receive her income and other benefits from the company. She will retain the Toyota (or have it transferred to her if it is registered in H's name) and will have transferred to her the registration plate which he conceded she could keep. He is to assign to W the two Eagle Star policies to which I have ascribed a value of £21,000 upon the basis that she will henceforth meet the monthly premiums. H will pay a modest lump sum, significantly less than the £210,000 which he offered. Its first component will be the amount required to pay off the mortgage on OH. Whether it has a second component depends upon whether the company pays W £25,000 by way of compensation for loss of office. If the company does not do so, then H will pay an additional £25,000 by way of lump sum. There will be a pension sharing order in relation to the self-administered scheme, 50% being the specified percentage value of the pension arrangement to be transferred. As between the parties and the pension administrators, the pension sharing charges are to be apportioned between the parties equally.

[93] In addition H will make periodical payments to W at the rate of £75,000 annually during joint lives or until her remarriage or further order. The payments will be made monthly in advance from a date which I shall determine in default of agreement. It seems to me sensible that a retail price index formula should be incorporated to reduce if not to obviate the need for any application to vary based solely upon inflationary changes.

[94] Subject to submissions on a point which I have raised separately, I propose that W for her part will transfer her shares to H who will give an indemnity in relation to CGT.

[95] I invite counsel now to prepare and so far as possible to agree a draft order to reflect the judgment and to isolate any points remaining for decision. Steps should now please be taken to secure the earliest convenient appointment.

In the 2-month period between handing down of judgment and hearing to finalise order, H offered and W accepted lump sum instalments totalling

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£1.0625m in place of the £210,000 proffered during hearing, so that in the event a clean break order was made.

Solicitors: *Levison Meltzer Pigott* for the petitioner
Sears Tooth for the respondent

PHILIPPA JOHNSON
Law Reporter