This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: RG11D00397

Neutral Citation Number: [2014] EWFC 24

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2014

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

US	**Applicant**
- and -	
SR	**Respondent**

(No.3 needs) (Adverse influences/costs order reflecting litigation misconduct)

- -

- -

Richard Sear of counsel (instructed by **Pinsent Mason LLP**) for the **Applicant**
James Ewins of counsel (instructed by **Levison Meltzer Pigott**) for the **Respondent**

Hearing dates: 21st July 2014, 22nd July 2014, 23rd July 2014 and the 24th July 2014

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Judgment

Mrs Justice Roberts :

A. Introduction

1. Over the course of 10 days in October last year (2013), I dealt with a fact-finding hearing in financial remedy proceedings. I delivered a reserved judgment in January this year. It dealt with all aspects of computation and, in anticipation of issues as to costs, many and detailed allegations and cross-allegations which the parties made against one another as to conduct. Those issues went to both litigation conduct and conduct in the wider sense recognised by s. 25(2)(g) of the Matrimonial Causes Act 1973. In particular, I made a raft of findings in relation to the wife's unauthorised dealings with a Russian property portfolio and the husband's failure to disclose (until a very late stage of the proceedings) an offshore bank account which contained almost US$850,000. That judgment dealt with all aspects of the computation exercise which was a necessary precursor to the task which has occupied me over the course of five days this week : the distribution exercise.

2. This couple, between them, have now spent a total of almost £1.25 million on legal costs. Ignoring any notional reattribution of funds to the wife's account, the global assets which are now available for division in this case are agreed to be slightly in excess of £5 million. Of that sum, £1.76 million is tied up in pension funds. It is agreed that these funds should remain with the husband who is now, as I have found, all but retired. Thus, their combined costs bill represents about 38% of the remaining liquid resources which will be needed to provide homes for each of them, an income for the wife and the discharge of a significant raft of debt. In this context, it is a staggering figure. The near financial ruin which these proceedings have inflicted on this family is compounded by the fact that, even now, each continues to spend significant further sums on various private detection agencies doggedly pursuing the other in terms of their mutual suspicions that each has still to make full and frank disclosure of their finances. They are sums which this family cannot afford if their three children are to have any hope of completing their school careers in private education (an aspiration which their parents share), and I have already indicated my intention at the conclusion of these proceedings to make orders which will ensure (so far as is possible) that this now comes to an end.

3. Because this is, in effect, the resumption of a part-heard matter, I propose to say very little about the background and underlying facts. These are set out in detail in my computation judgment. Simply put, I am dealing with financial remedy claims arising within divorce proceedings after a relationship which lasted 16 years, albeit a marriage of just under 13 years. There are three children of this family who are now respectively 19, 17 and 14 years old. The wife is 48 and a Russian national. The husband is 63 and a British national. He spent many years working overseas as a senior executive in the gas and oil industry. He left remunerative employment in December 2011 and is now effectively retired and drawing his pension. He has since remarried (his wife is some 36 years younger) and together they have a child who is almost 3 years old.

4. The wife and the three children of the family remain living in the family home. The property has an agreed value of £1.1m and remains subject to a mortgage. The husband and his new family are living in rented accommodation having recently relocated to the UK after several years living in Kazakhstan, where he had been working.

5. At the time he met the wife, the husband was in his early 40's and divorced from his first wife. He had had a successful career and was financially established. He had residual maintenance obligations to his former wife but had re-established his capital base to the extent that he had both pension provision and the means (with his ongoing income) to acquire a portfolio of properties in Moscow. Of the four properties acquired during the relationship, only two now remain. Both are currently used as investment vehicles and generate income for the wife. In my computation judgment, I found that she had disposed of a third investment property at a very significant undervalue, without notice to the husband and at a time when she was well aware that the property would fall within the 'net' of resources which would be the subject of financial claims in these divorce proceedings. She has since spent or otherwise disposed of the proceeds which that sale produced. For these reasons, I included in my earlier judgment a finding as to notional reattribution to her account of £1 million (being the approximate loss to this family on the sale), £500,000 being money which – if shared in accordance with the beneficial joint ownership of the property – would be available on the husband's side of the balance sheet. It is accepted that this money is no longer available to this couple but, in accordance with my earlier finding, it should be. I am therefore going to have to consider how it should be factored in to the overall financial matrix in order to achieve a fair outcome as between these parties.

6. The impact of this loss and the costs burden of this case drive the outcome inevitably towards a needs-centric solution. There is no longer enough money in this case to enable either of these parties to achieve anything approaching the standard of living in retirement which they might otherwise have expected. That is the inevitable consequence of their own actions and their inability to reach any form of compromise notwithstanding the platform which I had hoped my earlier judgment would have provided for these purposes.

7. And so it is to the distribution process that I now turn.

B. Distribution issues

8. With their customary thoroughness, both counsel have produced detailed extraction schedules which follow the open proposals which each party advances in terms of outcome. The husband's open offer is dated 4 June 2014. The wife's response is dated 10 July 2014. We are working for these purposes from the foot of an asset schedule

which is, by and large, agreed save for certain aspects to which I shall come. As both counsel accept, very little has changed in terms of the underlying asset base since I delivered my judgment as to computation. I can therefore deal fairly briefly with the assets and liabilities.

9. In terms of properties, there are four which fall to be considered.

Property FC

10. FC has an agreed value of £1.1 million. Allowing for sale costs and the mortgage, there is an available equity of £777,000. It is agreed that the property will be transferred to the wife. It is also agreed that the redemption of the mortgage (£290,000) cannot be achieved until the sale of property R (one of the Russian properties). The parties are not agreed as to where the burden of discharging the mortgage should fall, nor who should meet the mortgage payments pending redemption. There remains an issue as to the tax which may be payable in the event of a future sale by the wife. Although one would expect the default position of the PPR exemption to apply, Mr Ewins has flagged up a potential issue because of the wife's dual tax status as a non-domiciled UK resident.

Potential tax issue

11. The tax issues in this case are still far from clear and it is not going to be possible for me to resolve them finally in the context of this judgment. However, they arise principally as a result of the fact that the wife is both living in a home in the UK and registered as resident in Moscow. She is currently able to take advantage of a reduced tax rate in Russia because of an earlier (and successful) claim for entrepreneur's relief. Instead of paying tax at a marginal rate of 30%, she only pays 6%. This rate follows through into her UK tax returns as a result of the double taxation treaty and she is given credit for this sum in her UK tax return. A significant element of the rental income derived from the two Russian rental properties (property A and property R) is necessarily remitted to the UK in order to sustain the wife's domestic economy in this jurisdiction. As a result of recent investigations by the wife's solicitors, she has been advised that she is liable to pay VAT on the legal costs she has incurred. That has added an additional £75,000 to the bill. The wife is concerned that her residence in this jurisdiction (the basis of the recent VAT assessment) will impact upon the residence requirement in Russia which is an integral component of her claim for entrepreneur's relief. Should she in future be required to pay tax in Russia at 30%, the net effect will be mitigated to an extent by the fact that she is already paying tax at UK marginal rates in any event and her overall income exceeds the lower rate thresholds. As to whether or not she will be liable to pay any CGT on the sale of her principal private residence in the UK, this has been the subject of some expert advice from Baker Tilly - see **[G2559]**.

Property A

12. It is agreed that this property will be transferred to the wife. The apartment has an agreed value of US$1.05 million (c. £613,000). It is currently producing a net rental income which W receives of just under £27,500 per annum. There is no mortgage. Costs of sale are not agreed. Mr Ewins has deducted costs at 4%; Mr Sear adopts a figure of 2%. This results in a difference on the figures of just over £12,000. In the context of a case where the actual funds available to the parties are over £5 million, I might be tempted to allow this differential to wash through. However, in a case where the driver is needs, I am going to adopt the higher percentage figure for the purposes of my calculations.

Property R

13. This is the Moscow property which has generated a great deal of controversy both in terms of its value, and in terms of the husband's suspicion that the wife's underlying agenda is to retain the property as a home for herself in the event that she decides to return permanently to Moscow in a few years' time when the children have completed their education in this jurisdiction. The wife accepts that she may well leave England when she no longer needs to be here for the children. However, without rehearsing at length the oral evidence which I heard on this subject, I am satisfied that the wife is fully aware of the urgent need for funds to be realised from the sale of this property. Whatever aspirations she may once have had, the plain fact of the matter is that, without releasing equity from this property, neither the husband nor the wife is going to have the financial means to run their lives, clear debt and provide for their future needs in terms of homes and incomes. It is as much in the wife's interest as in the husband's to liquidate this asset and to maximise the sale price as quickly as this can be achieved. Because of her track record in terms of previous unauthorised dealings (see my earlier judgment), it is accepted that a mechanism will need to be put in place which ensures a swift and transparent route to achieving this end. This will need to be reflected in the draft order which will flow from my judgment as to distribution. It is likely to involve a power of attorney given by the wife to a third party professional acceptable to both parties. That will inevitably involve some cost and the parties are not agreed upon whom the burden of those costs should fall.

14. However, from all that I heard from the wife during this hearing, I accept that she has interpreted my earlier judgment as a clear signal that property R must be effectively marketed and sold. She has taken steps to bring to a premature end the current tenancy agreement but has been unable to agree terms with Mr K, the tenant. Thus it seems that there is no possibility of achieving a sale with vacant possession before May 2015 at the earliest. However, that does not appear to prevent the earlier marketing exercise from going ahead and Intermark Savills has been instructed to proceed on this basis. I am

satisfied that when the wife goes out to Russia, as she intends, at the end of this month, she will secure access to the premises and will thereafter – by arrangement with the tenant – be in a position to ensure that future viewings can take place as and when arranged even if this has to be arranged for his as well as the agents' and prospective purchasers' convenience.

15. The value of property R has been the subject of much debate, into the history of which I do need to travel at this stage. There were before me in October 2013 expert valuations of the property ranging from US$4.25 million to US$4.882 million. It is currently on the market for US$4.25 million. I have seen an email from Ms I S dated 19 July 2014. In that email, she expresses her professional view (and that of Intermark Savills as the marketing agent) that this price is too high. It is the figure at which the wife gave instructions for it to be offered on the open market but the view of the professional charged with effecting a sale is that, unless and until the price is corrected, there is unlikely to be a sale. The current advice is that US$3 million could be achieved within a time frame of six to nine months. It was for this reason that I expressed my view that it was simply unrealistic to work upon the basis of historic valuations which bore no relation to current market realities, particularly in circumstances where Mr Sear seeks on behalf of his client a fixed and crystallised sum from the net proceeds. On the basis of a 'bottom end up' approach (rather than a 'top end down' approach), I propose to work from an assumed gross value of US$3.5 million. If the property sells for a figure in excess of that value, so much the better. Any surplus can be divided between the parties as a much needed accretion to the available funds in shares which I shall determine. If there is a dispute as to whether an offer below US$3.5 million should be accepted, that will need to be the subject of a further decision which will be taken by the court on the basis of the best evidence available at the time. It seems to me that, in circumstances where the value of the rouble continues to fall against the backdrop of uncertain and volatile market conditions, every effort has got to made to move forward as quickly as possible on the basis of a realistic sale price and US$3.5 million is the figure I am proposing to adopt.

Land at K

16. I have dealt with the history of these transactions in my earlier judgment. I do not repeat it here.

17. As a result of the sale of this property to her sister, there was a residual debt owing to the wife in the sum of c. £27,500. (That was the US$49,000 of the original US$60,000 owed.) On 18 September 20143, the wife entered into a Sale and Purchase agreement with her sister which was effectively a debt swap. In return for forgiving the balance of that debt, she agreed to take a plot of land which her sister had owned in full and final settlement of the debt. The transaction was completed through a power of attorney dated 8 June

2013. The wife tells me that she was unaware that this transaction had been completed on her behalf until January this year when she was in Russia.

18. The consideration stated on the face of the debt swap transaction is RUB1 million (c. £17,000). That is less than the outstanding portion of the debt but it is the only evidence before the court as to the value of the land at K which the wife now owns. I am told that it consists of two plots on which there is an apple orchard. There is no dwelling or other building on the land and, although it appears that planning consent could be obtained, there are no services connected to the land. The wife has no specific intentions of developing the land and it is difficult to see how she could afford to do so in any event. For the purposes of the distribution exercise, I am proposing to take a value of £17,000 as the value of the plot to her. Whilst I had considered attributing to it the higher value of the outstanding debt, it seems to me that this land represents an illiquid asset in her hands at the present time. There is likely to be a limited market for its resale as land and the wife does not have the means (at least for the foreseeable future) to exploit any development potential it may have. Thus, I am going to proceed on the best evidence available to me, which is the figure reflected in the document at **[Q 1]**.

Cash and realisable investments

19. The position here can be simply stated. Allowing for the cheque which the husband has just written to his solicitors for his ongoing legal costs, he has cash in his various bank accounts of some £345,000. (I am making no further allowance for other expenses he may have incurred since his updated disclosure because these can properly be described as ongoing living expenses and the line has to be drawn somewhere.) He has private equity investments worth between £115,800 (on the wife's case) and £113,400 (on his case). These are all UK shares so there are no conversion issues. However, the underlying share price will inevitably affect the value from time to time. For present purposes, I propose to take a figure of £115,000 as a fair representation of current value. These are readily realisable assets. It means that, subject to any orders I may make in relation to costs, the children's ongoing education or the discharge of debt pending a sale of property R, the husband has funds of £460,000 available to him. He is not going to be able to invest in the property market in terms of a home for himself and his new family unless and until the Russian property sells. He has unpaid legal costs of about £75,000. This figure does not include any further allowance for the costs of implementation. Thus, unless his solicitors are prepared to wait (and I shall come to this later), his available cash resources may be reduced to £385,000. I accept Mr Sears point that it is inevitable, whether through a combination of living expenses, ongoing legal costs (or a combination of both), that this fund will diminish further over the time it is likely to take to sell property R. His pension currently provides just under £42,600 net per annum, or a little over £3,500 per month. From this sum, he will need to pay rent and maintain himself and his family. As yet, his present wife has no earned income and I doubt whether she will produce anything of tangible benefit for the family prior to the sale of property R when the husband's position will, to a greater or lesser extent, be improved in terms of available liquidity.

20. The wife's cash position is even more stark. She has a little over £5,000 held in small amounts in various bank accounts. As I indicated during the course of argument, I am proposing to disregard this sum more or less entirely since it will inevitably disappear as a result of cash flow requirements over the course of the coming weeks and months.

21. In terms of overall cash flow pending a sale of property R, her only income is the rent she receives from Mr K and the Embassy tenant at property A. Allowing for tax at source and on remittance, she has an annual net income from those two sources of £91,780 (just under £7,650 per month). H is not currently making any additional contribution in terms of the children's support. Her current proposal is that he pays a capitalised sum of £30,000 towards their general maintenance and a further sum of £200,000 towards an education fund. He, in turn, offers £70,000 which excludes any provision for tertiary education.

Liabilities

22. As part of her 'needs' case, the wife seeks provision which will enable her to discharge a number of liabilities, some less pressing and/or more significant than others. I can take these shortly.

23. The most substantial liability is the debt which she owes to Novitas in respect of the litigation loan which she was obliged to take out following the refusal by Moylan J in July 2013 to make provision in respect of her legal services order application. The capital sum due to Novitas is £200,000. With compound interest at just under 20%, the total debt now stands at just under £230,000. The punitive (but commercially and contractually charged) rate of interest will continue to run until that debt is repaid. I have already expressed my provisional view that the outcome of the hearing last year might have been very different had the court been made aware of the extent of the 'hidden' funds standing to the credit of the husband's undisclosed account in Jersey. Not only might the court have taken a different course but I suspect the advice which the husband would have been given by his very experienced legal team might have been different. Of course, they too remained in complete ignorance of his deception at the time. I do not ignore the fact that the husband's current resources would have been depleted by a corresponding sum had he been prepared (or ordered) to pay these costs but, undoubtedly, the interest penalty would have been avoided.

24. I have already referred to the fact that the wife has an outstanding costs liability to her solicitors for £75,000. It was expressed by Mr Ewins in his original schedule as a VAT liability. That is not strictly correct since the wife's solicitors have discharged the VAT

liability on the wife's account from funds they were holding to see them through to the end of his hearing. Those funds emanated from a legal services order which I made in June this year in the sum of £127,577 with costs. That sum was ordered to cover outstanding costs of £75,000 and a fixed fee arrangement of £52,000 to take her up to the end of this hearing.

25. Whilst they are not yet quantified, I have well in mind the fact that further legal costs for each of these parties are inevitable as the orders I make today are implemented. Because the burden of those costs is likely to fall in equal measure on their shoulders, I do not propose to make any further adjustment and/or provision for those costs. They will simply have to be met out of the resources with which each is left. As to the potential costs which may be incurred by the husband in relation to any further hearing which is necessary in relation to a referral of this matter to the DPP (and Mr Sear has already advertised his client's intention to instruct leading counsel for these purposes), I take the view that these are not costs which I can or should factor into my approach to the division of these family resources. If and insofar as they are incurred, they flow directly from his own conduct, and the consequences of defending his position in the event of possible criminal charges has to lie at his door.

26. The wife seeks a contribution towards her costs of £300,000. The husband offers a fixed sum of £80,000. I shall return to the costs issue at a later point in this judgment.

Repayment of property R rental deposit

27. As to the other liabilities claimed by the wife, I accept that the property R rental deposit of RUB 580,000 (some £9,663) will need to be reimbursed at the end of Mr K's tenancy. There may be some saving I relation to a withholding for damage or dilapidations but any saving is likely to be spent of making good the damage. The wife has used the deposit to meet a tax bill at a time when she claims she had inadequate cash flow to meet the debt. That sum is not an immediate liability. It will fall due for payment at the end of May next year by which time hopefully a sale will have been negotiated.

The 'Iceberg' debts

28. As I advertised during the course of submissions, I take the view that the husband's legal ownership of the horse does not inevitably lead to the conclusion that he should be

responsible for the costs associated with the animal's keep. Iceberg was transported from Russia when the family moved to England (at some significant cost, as I recall). That step was undertaken in order to preserve for the parties' eldest daughter, A, during a difficult period in her life the amenity of having her own horse with all the attendant expense which came with that hobby. The wife has already told me that the 'running costs' have been in the region of £12,000 per annum. A has been attending university for some time now, albeit that she is changing both universities and courses. In my view, this was never an expense which this family was in a position to afford once the new financial landscape emerged as the ongoing reality of life.

29. It is to be hoped that a buyer will be found and that the sale proceeds will be sufficient to discharge the debt which is due in respect of the unpaid livery and other fees which I am told are now in excess of £6,000. In the event that there is a shortfall, I am not going to require the husband to contribute to this debt. It seems to me that the wife and A must together take whatever steps are necessary to sell the horse and repay the outstanding costs which have arisen in circumstances where no benefit has accrued to the husband. I know not whether he continued to give his blessing to A's wish to keep the horse but I can see no reason why he now should be responsible for the debt. He must deliver to the wife the passport and any other documents which he may retain in his possession so that these arrangements can be swiftly put in hand.

30. As to the other small debts and loans (including the school fees loan from Mrs M), these come to approximately £12,800. That figure includes a sum of over £2,000 which A received by virtue of her student loan but at a time when she had already left her former university. The money was spent by the wife on family living expenses. I reject the submission made on behalf of the husband that these are 'bogus' or manufactured debts. They will have to be managed as debts always have to be, and I will come back to the manner in which these will be dealt with in due course.

Pensions

31. It is agreed that there will be no pension sharing in this case. The husband will retain the full value of his funds which are currently worth £1.763 million on the basis of fair value. The husband contends that I should take a lower value of just under £1.5 million (£1.478 million) which is the CETV value. I have in the bundles a pensions report which was prepared for the purposes of the last hearing in October 2013. It has not been updated, and I accept that the values will be marginally lower to reflect the fact that these pension have been drawn down over the course of the last nine months. I also accept, as I was told by Mr Sear, that there is no further possibility of commutation so as to provide for the release of further capital. A dependant's pension of £20,000 per annum has already been carved out of the available benefits for the husband's widow on his death.

32. I bear in mind that these pensions will deliver to the husband for the remainder of his life a guaranteed, annuity based income which will keep pace with inflation and thus its full value to him will be preserved over the life of the funds. They will continue to provide for his (much younger) widow at a not insubstantial rate on his death. To that extent they represent a valuable resource, albeit that they represent an income rather than a capital resource. The wife will have no further claim on these funds and, for these reasons, I consider that it is fair in all the circumstances to adopt a fair value figure for the purposes of my calculations, rather than a base line CETV. It represents the likely cost of purchasing or replacing the benefits to the husband were he to go into the market place now. The wife, on the other hand, is going to be reliant for her future income upon a combination of property investment / rental yield (should she retain property A for these purposes) and any return on capital which she can secure in markets the performance and volatility of which it is not possible to predict at this stage. Even adopting *Duxbury* assumptions for these purposes (and I bear in mind the possibility that she may well return to Russia at some stage in the future when the children are no longer in education here), we are all familiar with its deficiencies as a tool for providing copper-bottomed security for a the wife, regardless of its underlying assumptions. In contrast, the pension benefits which the husband will be retaining intact will remain a very valuable resource in his hands.

C. Approach to a fair division against all factors, including s25 Matrimonial Causes 1973

33. My starting point is inevitably section 25 of the Matrimonial Causes Act 1973 and the various factors set out within that section. Because of the detailed knowledge which I have about this case and the lengthy judgment I have already delivered, I am not proposing to deal with these factors individually. The parties should know that I have had them well in mind throughout as I have approached the final aspect of the distribution hearing.

34. I have already made clear my view (with which neither counsel takes issue) that this case is now wholly driven by needs. Nevertheless I bear well in mind that, were it not for the overriding imperative of needs, I might well be adopting a different approach in terms of the sharing of some assets (most notably the pensions) which had been accumulated by the husband in significant measure prior to the marriage. The Russian property portfolio was also funded in part by the sale of shares which he had acquired as a result of equity participation in employment long before his marriage to the wife. Given the value of the resources which remain to this couple, I am spared the task of making specific findings in relation to the value of the non-matrimonial property in this case. It would be an empty and futile exercise. Every last pound and rouble in this case is going to be required to meet ongoing need and make provision for these children.

35. However, in terms of approach, there is a fundamental difference between the presentations advanced by Mr Ewins and Mr Sear.

36. Mr Ewins, in his schedule, advances his case in relation to extraction and the resulting apportionment of assets as between the husband and the wife without any specific reference to the reattribution figure of £1 million. That is the figure which I found to be a proper reflection of the financial loss which she had caused this family through her unauthorised sale of Property B at a very significant undervalue.

37. In his written submissions, Mr Ewins reminds me of the passage from Wilson LJ's judgment in *Vaughan v Vaughan* [2008] 1 FLR 1108 where he states that

> *"… a notional reattribution to a spouse of property which he (or she) has dissipated, or has transferred in order to obstruct the other's claims, 'does not extend to treatment of the suns reattributed to a spouse as cash which he can deploy in meeting his needs'.*

38. I accept that the figure of £1 million does not represent 'real money'. I accept that it is not a fund which is in any way available to this wife now or in the future. I made that much quite clear in my computation judgment at paragraph 284. Mr Ewins contends that the proper way to reflect my findings in relation to the wife's own misconduct in this regard is to ignore the figure entirely for the purposes of meeting her needs but then (possibly) to reintroduce my findings when I come to reflect upon the scale and extent of the punitive costs order which I might otherwise order the husband to pay over and above her needs.

39. That approach, it seems to me, has its shortcomings because the figure for which he contends (ie. £300,000) will do no more than clear the Novitas loan and sweep up the £75,000 shortfall which has only recently emerged as a result of the VAT position. It will not leave her with a cash balance over and above those debts which I could then look to adjust down to reflect her conduct in relation to the B property débacle. I could, of course, reflect an appropriate adjustment in the costs position by leaving all or some part of those debts to be met from her share of the property R proceeds, thus reducing the balance of funds which will ultimately be available to her for income generation.

40. In contrast, Mr Sear lays out for me a clear road map along which there are five 'signposts' to a fair result. As part of that overarching approach, he invites me to compute what an equal sharing of the assets might produce if the reattribution figure is included as a hard number on the wife's side of the schedule, subject to any adjustment which might be necessary to ensure that her needs are met. If and insofar as I need to provide a 'top up' to meet needs, he says I should approach the assessment of that sum on a conservative basis rather than by adopting a needs based approach.

41. I pause there to say that I do not fully understand that logic. The concept of 'needs' is obviously an elastic one. It is one which can be assessed by reference to any given number of factors ranging from that which is required to lift a party out of destitution to that which might more reasonably reflect a standard of living enjoyed during the currency of a marriage. It involves a consideration of the scale of the resources which are (or may be) available to meet those 'needs'. It may involve an application of what the courts used to refer to as 'generously assessed' needs until that was disapproved as an improper gloss on the words in the statute by Ward LJ in *Robson v Robson* [2011] 1 FLR 751, CA.

42. If what Mr Sears means is that, if needs leads me towards an adjustment away from equal sharing, I should assess the wife's needs conservatively rather than generously, I would not disagree with his basic proposition. But it seems to me that this is where the difficulty of adding back in the reattribution of £1 million as a hard figure becomes more than simply a conceptual issue. If she requires a 'top up' on the basis of needs when that figure is included, how much greater will be her 'need' when that figure is stripped out in terms of hard cash which is actually available to her ?

43. It seems to me that I cannot ignore the fact that, as I have found, but for the wife's actions this family would have £1 million more in terms of the underlying asset base than the figures in the agreed schedule suggest. I cannot ignore the fact that, by her actions, she has potentially deprived the husband of a sum of £½ million which would have gone a considerable way towards meeting his housing costs. That conduct has to be reflected somewhere in terms of outcome, notwithstanding the obligation which I have to carve out an extraction route which meets needs and fairness on both sides of the case.

44. What I have done in terms of reaching a conclusion as to the appropriate division of assets is to apportion the assets and liabilities in such a way which reflects the baseline of consensus as to which assets should follow which party. I have then considered what further adjustment needs to be made to reflect sharing, taking into account the £500,000 which is notionally no longer available to the husband. This figure I have cross-checked against 'needs' on both sides. As a final exercise, I have reached a decision in relation to the figure which, in my view, properly reflects the husband's liability for costs. I have then done a final cross- check to ensure that the outcome (which includes provision as to the timing of various payments) is one which meets needs and cash flow requirements and which represents a fair outcome for these parties given all the circumstances of this case as I know them to be.

45. It is to those conclusions that I now turn. They will need to be reflected in a carefully drawn order which is likely to contain numerous recitals and undertakings in order to give full effect to the extraction route which I propose to adopt. These are the headline points, and I will deal with any clarification on the detail which may be required at the conclusion of my judgment.

D. Conclusions

Property R

46. The mechanics for the marketing of property R need to be implemented as quickly as possible. I am hopeful that, once in place, the agents will feel confident in embarking upon an aggressive marketing campaign which may well produce a buyer who is willing to pay an acceptable price at, or in advance of, the conclusion of the current tenancy.

47. From the proceeds of sale will be deducted the following :-

    i. all reasonable sales costs and local taxes;

    ii. CGT;

    iii. the rental deposit of £9,663 which is due to the outgoing tenant, less any allowance which may be made for dilapidations;

    iv. the sum of £100,000 in respect of an education fund for the three children of the family.

48. Once these deductions have been made (and I accept it may be necessary to retain some funds in escrow if, for example, the tax liability remains uncrystallised), the balance will be divided equally between the parties. By my calculations, on a sale at US$3.5m, this will provide each with a sum of about £926,000 less any claw back for tax and expenses. Should the property sell for more than US$3.5 million, the same formula will be adopted so that they share equally in any uplift over and above that sum. That, I hope, will provide the context for co-operation and incentivising the agents to get on and find a buyer.

49. From his share of the property R proceeds, the husband will pay to the wife a sum of £30,000 in respect of a modest contribution towards the actual costs of supporting these three children. I appreciate that that sum has been calculated from the foot of what might have been payable had the wife approached the Child Maintenance Service (the CSA as was). It makes a proper allowance for the husband's responsibilities to his youngest child. It seems to me only appropriate that he should be making some contribution to his three older children's continuing expenses notwithstanding the facts

that his income is now significantly reduced from its pre-retirement level and he has new responsibilities.

The Education Fund

50. In terms of the education fund, I have not allowed the full £200,000 for which the wife contends. I recognise the shortfall in terms of the protection it would otherwise provide throughout secondary and tertiary education, but I do not consider an additional £100,000 is affordable if other direct needs are going to be met. I have already remarked during the course of this hearing that private education might well have been a casualty of this litigation and the stances which these parents have adopted in terms of their failure to reach an acceptable accommodation one with the other so as to halt the haemorrhage of legal costs. I am going to proceed on the basis that the interim period until the sale of property R can be covered in the manner suggested by Mr Ewins. In other words, the funds which are currently available through the trust arrangements put in place by the children's paternal grandmother will be the first port of call for school fees and/or university costs with any balance due to the fund on account of the wife's expenses being reimbursed from the property R sale proceeds. Over and above the provision of £135,000 which has been earmarked for these purposes (which sums includes the monies currently held in the Will trust), educational costs which continue to arise are going to need to be met through a combination of means. Student loans and holiday jobs are a feature of most young students' lives. If the wife feels she needs to divert part of her free income or capital towards topping up the fund or paying expenses directly, that will be a matter for her. But in circumstances where needs dominate and a total of £2.25 million has been lost to the family as a result of the litigation costs and the sale of property B, I do not regard provision over and above £100,000 to be reasonable.

Property A and the land at K

51. The wife will retain property A. It is in her sole name. There is no mortgage and nothing further needs to be done. I have allowed for costs of sale in my assessment of the net value to her. If and insofar as there is any tax to be paid on a sale some years down the line (or earlier, if she so elects), that tax will be for her sole account.

52. There is nothing further which needs to be done in terms of securing her title to the land at K. As I understand it, the Sale and Purchase Agreement which was completed under the power of attorney she granted is the final step required in the chain of transactions.

Property FC

53. Until the sale of property R and the distribution of the net proceeds to the parties, FC will remain in the sole name of the husband. Once that distribution has been completed, the husband will transfer to the wife his interest in the property subject to the mortgage. It will be for the wife to decide whether she redeems the mortgage of £290,000 from her share of the property R proceeds or whether she continues to preserve the capital for investment purposes. I suspect that this decision may well be influenced in part by the eventual sale price which is agreed for property R.

54. In the meantime, she will take over responsibility for the mortgage until sale. If she can, with the husband's assistance, negotiate a mortgage holiday, so much the better. If not, I am satisfied that – stretched though it may be in contrast to the standard of living she has previously enjoyed – she will have the greater income even allowing for her responsibilities towards the children. The husband's cash flow, for reasons which will become apparent, will be extremely tight. Until the sale of property R, he is going to be dependent upon his pension income of £42,500 per annum whereas the wife will have a rental income of almost £92,000 net from Properties R and A. Until May 2015, that income is more or less secure. Mr K, the tenant, has said he will not be leaving until May 2015 and the tenant at property A is a foreign Embassy. Whilst I accept that the liability for the mortgage will impact in the short term upon the level of the wife's discretionary spending (absent a mortgage holiday), it is, as I find, an expense which is going to have to be met from hereon in without contribution from H.

55. Once the wife receives her capital, she will be in a position to discharge her residual indebtedness (and I am not here including the Novitas loan, with which I am going to deal separately) and to decide how best to arrange her affairs. She may decide to retain FC for the next four or five years. She may decide to sell and release some additional capital. Either way, it will be a matter for her and I suspect much will depend upon what can be achieved in terms of the property R sale price. The husband, at that stage, will know what he has to invest in a home for himself. Once he has settled his liabilities under the terms of the orders I am proposing to make (including his liability for costs), he can determine whether to invest most or all of his free capital in a home and live off his pension or, if he prefers, he can buy a slightly cheaper property and preserve some free cash.

56. I am not making any specific provision for the purchase of cars. Each of these parties will be free to make their own arrangements once they know where they stand. If the wife believes it is reasonable to spend £25,000 on a car at that stage, that will be entirely a matter for her. The same considerations apply to the husband.

E. Costs

57. I turn now to the final part of the extraction exercise. I have to determine the extent to which the husband should pay or, alternatively, make a contribution to the wife's costs bill over and above that which he has already made as a result of my order in June this year **[N105]**. Mr Ewins reminds me that this provision was, in one sense, simply part of managing the wife's cash flow and putting in place arrangements for her continued legal representation without which she would have had to conduct this hearing as a litigant in person. For reasons which I explained in my costs judgment, that would have been a completely untenable state of affairs given the complexities of this case and her disadvantage in terms of English being very much a second language for her.

58. That husband is inevitably going to have to meet a very substantial part of the costs in the financial remedy proceedings is not in issue. I put down a clear marker to that effect in my earlier judgment.

59. The costs award which I am proposing to make is designed, in part, to reflect the court's opprobrium of the husband's conduct in this litigation. As I have said before, this was not simply an attempt by him to conceal assets. This was a deliberate and sustained concealment compounded thereafter by a fraudulent presentation advanced on the basis of fabricated evidence. He misled the court, his former wife, her advisers and his own legal team. Conduct on that scale has to be reflected in a punitive costs order. Had he succeeded in concealing the full extent of his financial resources with the result that a final order was made on a completely false basis, I have little doubt that as part of any fresh hearing on a set aside application, he would have been ordered to pay most, if not all, of the wife's costs of the previous (and abortive) hearing.

60. It is absolutely fundamental to the underlying forensic enquiry which the court has to undertake when conducting financial remedy proceedings that a party complies with his or her obligations to make full, frank, complete and up to date disclosure of his or her financial circumstances. It is only on that basis that the court can undertake the detailed evaluation which is necessary under section 25 of the Matrimonial Causes Act 1973 so as to reach a fair result as between the parties. The corollary of compliance with that obligation is that the court is prepared, as a general rule, to afford to the parties the reassurance that all financial information which they disclose will be protected by an overarching confidentiality. The parties owe each other a duty of confidence and that confidence exists as between the parties and the court not only during the proceedings themselves but after they have concluded. By his actions in concealing from the court (and the wife) a very substantial sum of money, the husband has not only wasted a significant amount of court and judicial time; he has shown himself to be contemptuous of the very process which is designed to deliver a just and fair result to each of these parties at the end of the day. He can expect nothing but a heavy costs penalty.

61. Section 51 of the Senior Courts Act 1981 provides that, subject to that and other enactments and rules of the court *'the costs of and incidental to all proceedings in the High Court shall be in the discretion of the court'*. The discretion which I have to make a costs order in these proceedings is a wide one and it relates to all of the costs of each of the parties. That power is reflected in r 28.1 of the Family Procedure Rules 2010 which provides that *'the court may at any time make such orders as to costs as it thinks just'*. In this context, the conduct of the parties is a magnetic factor on costs and, where conduct is engaged, the starting point set out in r 28.3(5) is disapplied.

62. With some specific exceptions, the CPR costs regime applies to and is incorporated within the FPR 2010 : r.28.2 FPR 2010. Part 44 of the CPR sets out the general rules as to costs although r.44.2(1), (4) and (5) do not apply to financial remedy proceedings : see FPR r.28.3(2). Thus, the general rule in civil proceedings that costs follow the event has no application in financial remedy proceedings.

63. However, although the general rule in these types of proceedings is that costs lie where they fall, the court nevertheless has a discretion to make an order for costs in certain circumstances, and it may do so at any stage of the proceedings, where it considers it appropriate to do so because of the conduct of one party in relation to the proceedings (whether before or during them). This provision is not new to the FPR 2010; its predecessor appeared in r. 2.71 of the FPR 1991.

64. Pursuant to FPR 2010 r. 28.3(7), in deciding what order (if any) to make, the court has to have regard to a number of factors including the following :-

    (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
    (b) …
    (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
    (d) the manner in which a party has pursued or responded to the application or a particular or issue;
    (e) any other aspect of a party's conduct in relation to the proceedings which the court considers relevant; and
    (f) the financial effect on the parties of any costs order.

65. Mr Sear submits on behalf of his client that, in this context, and in the light of r.28.3(7)(e), the court should consider the impact of the wife's own conduct in relation to the sale of Property B and the reattribution issues. Whilst I do not, for a moment, ignore the financial impact on these proceedings of that conduct, in my view its resonance lies more in the impact of reattribution on overall division than in its engagement as a neutralising factor in relation to the husband's overarching conduct throughout almost the entirety of these proceedings, as I shall explain.

66. In terms of the litigation chronology, these proceedings started life in the R Court on 2 March 2011. The prayer in the husband's petition seeking dissolution of the marriage included a claim in respect of ancillary relief. His Form A was issued by his present solicitors on 12 May 2011. The wife's Form A followed on 11 April 2012. These dates are relevant because the new FPR 2010 came into effect on 6 April 2011. On that date, the FPR 1991 were revoked. PD36A of the 2010 Rules made provision for transitional arrangements supplemental to the FPR 2010. It deals with their application to proceedings started before 6 April 2011. Under paragraph 4.2, Part 1 of the FPR 2010 (the overriding objective) applies to all existing proceedings from 6 April 2011 onwards. Paragraph 4.5(1) provides that any assessment of costs which takes place on or after 6 April 2011 will be in accordance with FPR Part 28 and the provisions of the CPR as applied by that part. Thus, even if the prayer in the husband's petition (which pre-dated the coming into effect of the new Rules) was the first 'foot print in the sand', both parties' Forms A initiating the formal process of their financial claims post-dated the changes. For all practical purposes, we are squarely in the territory of the FPR 2010, including FPR r.28.3 and the overriding objective which requires a court to deal with cases justly. As r.1.1(2) explains, this includes ensuring that parties are on an equal footing, that expense is saved and that the case has allotted to it an appropriate share of the court's resources taking into account the need to allot resources to other cases.

67. As was clear from the President's Direction (Ancillary Relief : Costs) [2006] 1 FLR 865, the amendments to the costs rules in the old FPR (and in particular r.2.5(1)D which included the original formulation of the 'overriding objective') were necessary because, under the new rules, the court only had power to make a costs order in ancillary relief proceedings (as they then were) when this was justified by the litigation conduct of one of the parties. With the abolition of the former *Calderbank* / without prejudice rules, a finding of conduct (in the sense of litigation conduct) became the trigger for the disengagement of r.28(3)(5).

68. In terms of 'issue based costs', the application of CPR r.44.3(4) to (7) to financial remedy proceedings enables the court to make an order for costs to be paid by a party only in relation to a specific part of the proceedings. If it is going to exercise its discretion in this way, the court must, if possible, make the order by way of an order for the payment of a proportion of the costs or for a stated amount. This is the approach, as I have said, which Mr Sear invites me to take when considering the husband's overall liability. In his written submissions, he has set out at paragraph 46 the various additional costs and expenses to which he claims his client was put by various actions and/or steps initiated by the wife in these proceedings. Mr Sear reminds me, quite properly, that the wife's own conduct in these proceedings has been far from exemplary. I bear that factor well in mind. I have referred in each of my substantive judgments in this case to the very significant financial loss which she caused to this family in the context of her dealings with the Russian properties. It is a factor in the case which, combined with other issues which I have considered, will result in her receiving a discounted financial award of less than 50% of the assets and the imposition of financial stringencies on her future domestic economy which might otherwise not have been necessary. It is because of that conduct that she will be meeting from her share of the available resources the costs associated with the 'policing' of the sale of Property R.

69. However, I cannot ignore the fact that virtually the entirety of these proceedings has been contaminated by the husband's failure to disclose. What has been referred to in these proceedings as 'the big lie' was already in existence before the husband swore to the accuracy of his financial disclosure in his Form E in July 2011. It continued through his second Form E in May 2012. As of that date, there was a sum of US$845,065 sitting in his offshore account. In the context of the global assets available to these parties, that sum was a very significant resource and its existence was highly material to the outcome of the proceedings. It was not until a very late stage of these proceedings (and, significantly, after the FDR before Mostyn J – a fundamental 'missed opportunity' to settle this case in circumstances where the combined legal costs bill was already approaching £300,000) that the husband was finally backed into a corner and had to show his hand. He himself accepted in cross-examination at the last hearing that he probably would have continued to conceal these funds had Moor J not made the disclosure orders which he did in September 2013. The disclosure, when it came on 17 September and 2 October last year operated to completely de-rail the substantive hearing as the opportunity to resolve all issues between these parties. It was listed as a 10 day final hearing. That time estimate had been allowed because of the inevitable complexities of the case, not least amongst them the Russian property dimension. As I said in paragraph 5 of my previous judgment,

> *'Thousands of pages of documents have been re-scrutinised and the scope of enquiries of third parties and other entities … has resulted in a situation where, as both sides acknowledged, the enquiry which I have conducted over the course of 9 days has inevitably been limited to an OS v DS fact-finding exercise.'*

70. We have now had to spend a further 5 days of court time concluding the exercise which should have been completed before the end of last year. The husband's only "excuse" or "mitigation" for his conduct in failing to disclose his assets was his concern that it might be impossible to unravel the impenetrable dealings which the wife had conducted with the Russian portfolio, that she would get away with what she had done 'Scot free', and that he would never see a penny from any subsequent sale of property R. These fears led him to believe (as he told me) that the 'hidden' funds might be all he had to fall back on in terms of his own ability to provide a home for himself and his new family. He should have had greater confidence in the English judicial system. The hearing last year established more or less precisely what had gone on in terms of the wife's dealings with the properties even if it was impossible to conduct a detailed trace of her application of all the funds she received. Far from being absolved of any consequences of her actions, my award will reflect those unauthorised dealings in a reduction in what she would otherwise be entitled to receive. Finally, a mechanism is going to be put in place to ensure that both the sale itself and the proceeds flowing from the sale are protected and preserved pending their distribution to the parties in this jurisdiction.

71. For all these reasons, it seems to me that to proceed on the basis of an 'issue based' costs order is to ignore the contagion which has infected the last three years of this litigation. I return again to FPR 2010, r.28.3(7). H has plainly failed to comply with the rules and previous court orders which required him to make full and frank disclosure of his

financial circumstances : r.28.3(7)(a). In the light of that conduct, he can hardly complain that it was unreasonable for the wife to pursue her allegations of non-disclosure and/or to contest his case that he had, throughout, provided transparent disclosure : r.28.3(7)(d). I have already alluded to the wife's own conduct in relation to the sale of Property B : r. 28.3(7)(e). I am going to consider the financial effect on the parties of any costs orders I make in paragraphs 76 to 82 of this judgment : r.28.3(7)(f).

72. The wife does not seek all of her costs so as to provide her with a complete indemnity. She seeks a sum of £300,000 over and above what has already been paid in order that she can discharge the Novitas loan and the VAT element of the costs she has already remitted to her solicitors at a time when she believed she was zero rated for VAT purposes.

73. She has total costs of £617,840. The contribution which she seeks from the husband in addition to those sums he has already paid from his Jersey account would amount to a total contribution of £427,577 (plus whatever he paid to satisfy the 11 June costs bill), or about 69% of her total expenditure on costs. Let us call it 70%. Is this a reasonable sum in all the circumstances ?

74. There is no formulaic or accurate weighing mechanism for determining how the respective misconduct of the parties should be reflected in any order for costs : see *M-T v T (Marriage : Strike Out)* [2014] 1 FLR 1352, at para [134]. In that case, Charles J described his knowledge of the case and his consequent ability to reach a fair conclusion as to the percentage of the overall costs burden which the husband should pay as 'having lived through the litigation'. In terms, I can relate to that experience 'having lived through <u>this</u> litigation'. There is little about its course, the underlying facts or the parties' involvement with it that I do not know.

75. I have concluded that the sum which the wife seeks is not unreasonable in the circumstances. In my view, an overall contribution to her costs of 70% properly and proportionately reflects the impact of the husband's conduct and the manner in which he has chosen to conduct this litigation. If the impact of that costs order is a global liability (including his own costs) of over £1 million (or some 84.8% by my calculations), then he is the author of his own misfortune.

F. Overall Fairness

76. I have tested the fairness of that conclusion in the context of the net effect to each of these parties in terms of my overall award.

77. This award will mean that the husband has to liquidate some, if not all, his shares. I do not regard that as anything other than an inevitable consequence of his conduct. The husband will pay from his existing cash reserves a sum of £229,497 to discharge the Novitas loan. According to the agreed schedule, that is an up to date figure as at 26 July 2014. If and insofar as further interest accrues between that date and 1 August 2014 (ie. 7 days hence) which will be the date stipulated for payment of this element of the costs award, that interest will fall to the husband's account. The balance of the award (£70,503) can be paid out of his share of the property R sale proceeds.

78. If he sells all the shares, that will leave him with cash reserves of just under £231,000. I know not what arrangements he has made with his own solicitors although I am aware that he still owes them a sum of £75,757. They may take the view that this sum can be met out his share of the property R sale proceeds.

79. I am satisfied that cash reserves of £230,000 will be sufficient to act as a financial buffer for the husband during the period between now and the sale of property R. He will have his pension income of £42,600 per annum. In this context I make it plain that, if and insofar as he is able to secure some part-time consultancy work, all well and good. I am proceeding from the foot of my finding that he is not working at the present time but I make it clear that, should opportunities arise for him to take on some form of remunerative work in the future to supplement his pension income, that must not be seen as a platform for disturbing the terms of my award in these proceedings. In my view, the likelihood of his returning to his pre-retirement levels of income in full-time employment is so remote that I discount it. He is plainly not a well man. But that does not mean he does not have some residual earning capacity should he choose to seek something similar to part-time consultancy work on a "needs must" basis.

80. The wife will have to manage her own domestic economy from the rental income she will continue to receive from the two Russian properties until a sale of property R can be achieved. That will provide her with about £92,000 net per annum. If, as we must hope, the agents can be incentivised to achieve a sale within a year or less, this will be a limited period of financial stringency for both these parties. Once the sale is achieved, each will thereafter take a view on how best to restructure their finances.

81. Assuming a sale at US$3.5 million, W will be left with readily realisable assets of c.£2.316 million. She will be clear of debt, save for the FC mortgage of £290,000. Mr Ewins' calculations in relation to the *Duxbury* fund she requires to top up her income over and above the A rental is predicated on a figure of £860,000. That sum will be available to her subject to any decisions she makes in relation to restructuring.

82. The husband will have cash of c. £1 million depending on the extent to which he chooses to deplete his existing capital between now and a sale of property R. He, too,

will be clear of debt and will retain in tact the entirety of his pension. He will be able to re-house himself and his family for the figure of £750,000 to £800,000 (which is the figure suggested to me by Mr Sear in closing submissions) or, if he chooses, he can buy a more expensive property. I accept that he wishes to make provision for his youngest daughter and he will need decide how best that provision can be carved out of the available resources. Including the value of his pensions, the husband's net overall position will be significantly better than the wife's in that he will retain assets worth c. £2.744 million (or 54.22% of the total available resources).

83. In percentage terms, the difference between what the wife will retain (45.78%) and what the husband will retain (54.22%) is not far short of 10%. On the basis of the global asset base (just over £5 million), that difference in their respective shares is a proper reflection of the wife's misappropriation of the husband's half share of the £1 million loss incurred on the sale of Property B. That is not the route by which I have reached my conclusions as to distribution and extraction but it is a useful cross-check nonetheless as to the overarching fairness of the award on a needs basis.

84. It is axiomatic that these figures will increase in direct proportion to any increase which can be achieved in the sale price of property R. However, proceeding on the basis of the best evidence available to me, I am satisfied that, even at US$3.5 million, needs are met on both sides.

85. Is it fair in all the circumstances that the wife should receive less than 50% ? My answer to that question is : undoubtedly, yes. I cannot ignore the impact of her conduct in selling Property B at such a substantial undervalue. The notional reattribution is properly anchored to this departure. I bear in mind, too, that in terms of *Wells* sharing, she is receiving predominantly liquid (or at least realisable) assets. That should provide her with a degree of financial autonomy in terms of her future decision-making which will not necessarily be available to the husband in circumstances where a substantial percentage of his share of the assets will remain tied up in pension. Furthermore, in terms of overall fairness, I am satisfied that the award which I have made properly reflects the existence of non-matrimonial property acquired by the husband prior to the marriage which represents an unmatched contribution by him.

86. Thus, whilst there is no particular hierarchy in terms of the various factors which have informed my conclusions over and above the predominance of 'needs', I am satisfied that this represents a fair outcome bearing in mind (i) the existence of non-matrimonial property; (ii) reattribution issues; (iii) the nature of the assets which each will retain at conclusion of proceedings and (iv) sharing.