Leapingwell v Sinclair

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	16 November 2012
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Text

[2012] JRC 215

ROYAL COURT

(Family)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Kerley **and** Olsen.

F
Petitioner
and
G
Respondent

Advocate M. E. Whittaker **for the Petitioner**.

The Respondent appeared on his own behalf.

Authorities

Pacific Investments Limited -v- Christensen [1997] JLR 170.

Matrimonial Causes (Jersey) Law 1949.

BJ -v- MJ [2011] EWHC 2708 (Fam).

Whaley -v- Whaley [2011] EWCA Civ 617.

Matrimonial — applications for financial relief ancillary to divorce.

The Deputy Bailiff
Introduction

1 This is the Court's judgment on the hearing of the applications for financial relief ancillary to the divorce of the petitioner and the respondent. The parties were married on 6 th November, 1999, in New South Wales, Australia. They first lived in Australia, and then moved to Hong Kong, returning to Jersey in or about 2009. There are two children of the marriage, D born in 2001 and E born in 2002. The decree nisi was granted on 2 nd November, 2011. There have been numerous proceedings involving the children and the financial matters between the parties, including proceedings commenced by way of Order of Justice restraining the respondent from removing the children from the jurisdiction. The dispute between the parties concerning the children rumbled on until July 2012 when, by consent, it was settled that the interim residence orders in favour of the petitioner be confirmed, the injunctions against the respondent lifted, and contact arrangements were set out in detail. Each party was ordered to bear their own costs in relation to children's matters save in respect of costs orders previously awarded. One of those orders had been to grant the petitioner indemnity costs in relation to a contention by the respondent that the younger child may not have been his, resulting in DNA testing which confirmed conclusively that he was indeed the father. There was no basis for this particular contention by the respondent. It caused the petitioner great distress, and the indemnity costs order was a result. The decree nisi was made absolute on the petitioner's application on 3 rd September, 2012.

2 The core issues for the Court as described by Advocate Whittaker in her opening, with which the respondent agreed in this respect, were:

(i) What level of maintenance should be payable by the respondent to the petitioner for each of the children?

(ii) Should there be any annual increase in that maintenance?

(iii) Should there be any nominal order for spousal maintenance due by the

respondent to the petitioner?

(iv) Should the petitioner be ordered to pay the respondent a lump sum, and if so, how much and from what source would the petitioner be expected to derive the funds to make it?

(v) Should any cost orders in relation to financial matters be made against either party?

3 The matter of costs was by agreement left over until after the Court's decision was given in relation to the other issues.

4 The hearing in this case took place over three days. Much of the evidence was concerned with the parties' lifestyle in the early days of their marriage. In our judgment, this was unnecessary. The assets of the parties today make it plain that essentially this remains a needs-based case, rather than one where the issue for the Court is a fair division of a financial pot accumulated over the course of the marriage. We were told that the parties have between them run up legal fees in excess of £340,000. If this is so, it is a disgraceful waste of money.

5 It is clear from the evidence which we have heard that the parties enjoyed a good standard of living in both Australia and Hong Kong. This was no doubt in part due to the respondent's success in business – he had worked for Deutsche Bank, and then Dow Jones as a director of marketing to specialist derivative experts in investment banks and hedge funds in Asia, whilst living in Australia, and in Hong Kong he worked with UBS in the specialist area of derivatives and prime brokerage. However, the petitioner also worked in the early years of the marriage before their children were born, and the standard of living was no doubt improved by the availability of domestic help when the parties lived in Hong Kong. Furthermore, the petitioner had from time to time some distributions from a family trust called the K Trust, based in Jersey, to which we will refer in due course. There does not seem to be any dispute that the respondent had a net worth at the date of the marriage of approximately AUD $550,000, consisting of a house in Sydney, pension funds, investments and cash at bank. At that time, the petitioner had a beneficial interest in the K Settlement and some cash which she had generated in part by her savings whilst employed in Jersey. We have recorded these facts in relation to the parties' lifestyle during the course of the marriage because we heard a considerable amount of evidence in this connection, and not because we consider this to be material, with one exception to which we will come in due course at paragraphs 46–50, for the purposes of what we have to decide.

6 At the close of the three day hearing, we gave leave to the parties to file written submissions, and in the case of the respondent such additional written evidence as he wished, within two weeks. The respondent was required to deliver to the petitioner any additional evidence within two weeks to give her an opportunity to comment. These orders were made in an effort to be fair to the respondent who was representing himself.

7 Pursuant to that order, the respondent filed written submissions running to 283 paragraphs on 69 A4 typed pages and two lever arch files of documents, many of which were already in the Court bundles. We have reviewed all this documentation and considered the written submissions, many of which are unnecessarily vituperative about the petitioner and do the respondent no credit.

The Petitioner's Overall Position

8 The petitioner's open position was that the respondent should pay maintenance for each child at the rate of £600 per month and that it should be subject to automatic annual review; for her at the rate of £1 per annum, thus establishing the principle of spousal maintenance in case the respondent's financial position should change; and that there should be no lump sum payments from either spouse to the other. She expected to make submissions about costs.

The Respondent's Overall Position

9 The respondent claimed that the petitioner was a very wealthy woman with access to many millions of pounds; that she had always promised him that he would share in this fortune with her; that her home in Jersey would be available for the two of them if his business ventures failed; that she had cynically and wrongly abused the court process on divorce to conceal her wealth and cause him loss and damage; and that she had deliberately applied for a decree absolute so that he would have no opportunity of acquiring a reasonably priced property in the local housing market and no realistic chance of obtaining employment, the effect of which would be to drive him from the island. He claimed the petitioner had through her family connections prevented him from obtaining legal representation and had caused him to run up large legal fees. The respondent through his open position and pleadings stated that there should be no order as to costs and that should any costs be considered that he wished the right to claim these.

What level of maintenance?

10 The petitioner currently lives with the two children of the marriage in a property in Jersey owned ultimately by the Trustees of the K Trust. Both she and the children are beneficiaries of the Trust and she pays no rent for the property, although she is required to meet the outgoings incurred in respect of it. The parties' elder child is now aged 11 and attends a local school. She appears to be doing well, and causes no more problems to her parents than any 11 year old girl customarily does.

11 Her brother is nearly 10 years old. He is in a different position because he is a special needs child. He has been formally diagnosed with Microcephaly, autistic spectrum disorder

and attention deficit hyperactivity disorder. He suffers from long sightedness. He is progressing with language communication and social skills, although he remains significantly delayed. He is currently achieving academically the equivalent of a child some four years younger than him. He is exquisitely sensitive to loud and unanticipated noise in his environment, which can be a considerable source of distress. The medical reports show him to be a very dependent child requiring continuous supervision, who is easily distracted and cannot be relied upon to ensure his own safety. Although he is gaining some of the skills of daily living, Dr Jones, the consultant paediatrician, anticipates that he will have the need for continuous adult supervision throughout his childhood and adolescent years. He remains very reliant upon his mother, and upon his father when he is with him. Although he has become better at dressing himself, he cannot do up his buttons or shoelaces. He needs help in washing and with his toiletries. The petitioner said in her evidence that while she hopes that he will one day be able to live independently, she does not in her heart believe that he will. She told us that she could not imagine leaving him alone at home, even if he were unwell, because he has no sense of danger.

12 We have gone into this detail in relation to the second child's needs because those requirements emphasise that the petitioner will find it difficult to obtain remunerative employment. She is an intelligent woman, who has previously worked, firstly as a secretary and later as a personal assistant, but her formal educational qualifications tend to suggest that she is unlikely to obtain the type of employment which would remunerate her sufficiently to enable her to employ a permanent child minder for her son. She is presently unemployed and we do not consider that there will be substantially remunerative employment available to her in the foreseeable future, even though she may be able to obtain some limited part time employment.

13 The petitioner's present income amounts to £600 per month from the respondent by way of maintenance for the children, £798 per month carers' allowance for her son, and £113 per week, which amounts to £489.66 per month by way of income support. If she were to gain remunerative employment earning more than £123 a week, she would lose the carers' allowance, and presumably her income support would be liable to review. She has no other source of income at present. The K Trust has paid money towards her legal fees for the present proceedings, by way of loan, but apart from the property which forms part of the assets of the Trust, there is a relatively small amount of income producing capital in the Trust and we discount that as a source of future income in the foreseeable future. According to her affidavit of means, the petitioner's monthly income needs amount to some £2,838, and her shortfall is being met by an increase in her overdraft at the bank. Although the parties have agreed to meet the cost of their daughter's school fees in equal shares, so far those fees have been paid in their entirety by the petitioner, with the benefit of a loan from the bank.

14 If the petitioner's current means are challenging, it appears that those of the respondent are not much better. Although he had lucrative employment as Global Head of Hedge Funds with ABN AMRO in Hong Kong in 2004, he subsequently left that company and invested most of his assets in an asset management business with several other partners. There

were difficulties arising from the split of that first partnership, and although new equity partners were found, the financial crisis of 2008/2009 caused further significant difficulties. The family moved to Jersey in 2009, but the respondent has not had any substantial remuneration since. He is the owner of a company called S Limited, which pays him a basic salary of £1,200 per month; he has received some salary payments from a company called T Hong Kong Limited, to which we will refer later, and some director's fees from the V Fund. His affidavit reveals that these payments have now ceased and for a significant period of time he did not receive any salary whatever for most of 2009, all of 2010 and part of 2011.

15 The respondent gave evidence before us. Initially, he said that he would not do so but wished to rely upon his affidavits. To that, Advocate Whittaker said she would wish to cross examine him and in accordance with the customary practice of this Court exemplified in *Pacific Investments Limited -v- Christensen* [1997] JLR 170, the Court indicated that cross examination would be permitted if the affidavits were to be relied upon. In the circumstances the respondent elected to give evidence and rely on his affidavits, which he did. He said in evidence that the sum of £600 by way of maintenance was offered, as part of his open position, having regard to his current income. If his circumstances improved, he would want to pay more. He intended to pay £600 per month whether he could afford to do so or not. He thought that the petitioner had access to funds, and that it would therefore be right to share the cost of their daughter's school fees.

16 Given the contentions of the respondent that the petitioner applied for the decree absolute in order to drive him from the Island and away from any relationship with his children; and that the effect of the application has been to reduce the respondent's housing prospects and opportunities for employment, it is necessary to say some words on this subject.

17 The divorce petition was filed on 2 nd February, 2011. It was eventually served on the respondent on 27 th May, 2011, and the decree nisi granted to the petitioner on 2 nd November of that year. The Act of the Court is instructive in that respect – “the Court… decreed that the marriage… be dissolved… unless sufficient cause be shown to the Court why this decree should not be made absolute within six weeks from the making thereof”.

18 Arrangements for the children were in dispute. These were eventually settled by consent on 30 th July, 2012. This cleared the way for the purposes of Article 25A of the Matrimonial Causes (Jersey) Law 1949 (“the Law”) for an application for a decree absolute. The petitioner made that application on 31 st August, 2012, and the decree nisi was made absolute on 3 rd September.

19 It must have been obvious to the respondent from the moment the decree nisi was granted, if not earlier, that sooner or later the marriage would be dissolved.

20 The petitioner in her evidence said that she had not been asked to delay any application

for the decree absolute, and as she had seen on disclosure a copy of the S licence agreement, she had assumed that the respondent's housing status was secure. She repeated that in cross examination. She wanted a divorce and she claimed she did not know that the application for a decree absolute would cause the respondent any housing difficulty. It was put to her by the respondent that he had made his concerns clear, but she said that all he had raised with her was the question of a passport application form which she had put by her bed, but he had said nothing to her about it. This of course would be quite different from housing status in any event.

21 It is clear that both the parties were aware of the housing rules. On 3 rd April, 2012, the respondent had sent an email to the petitioner in which he raised the prospect of a settlement of ancillary matters to include the capacity to allow him to purchase a home in Jersey through the petitioner's residential qualifications, prior to a decree absolute being granted. The respondent pointed out in this email that it would be in the best interests of the children as well as in the best interest of the parties that he be able to generate a living and provide a stable home. The respondent's awareness of the position is also demonstrated by a letter dated 15 th May, 2012, from his then lawyer to Advocate Whittaker in which it was said that the respondent was considered at that time to be locally qualified given his marriage, but that would change on the grant of the decree absolute. However it was thought that under the new law and regulations, his position would not be affected by the decree absolute and additionally he might potentially obtain a J category permission. On 15 th August, Advocate Whittaker wrote to the respondent's lawyer to ask for an update on his visa/immigration status; a reminder was sent on 29 th August. We have been shown nothing which suggests that any request was ever made to the petitioner not to apply for the decree absolute and indeed the correspondence seems to suggest that the respondent considered there were ways of dealing with the problem. In the circumstances, we accept that the petitioner did not apply for the decree absolute with any malicious motivation.

22 Furthermore, as will be apparent later in this judgment, it is obvious to us that the problem over the respondent's housing qualifications was not one which could be easily resolved. It is true that, while they were still married, he and the petitioner could together have applied to buy property. However they did not have the wherewithal with which to do so. Although the respondent may well have had assets available to him through the W Trust for the purposes of putting down a deposit to acquire a property, his lack of employment would suggest there might have been a difficulty in raising a loan from a commercial institution to complete any purchase. He is not the first, and regrettably he will not be the last person to find themselves on the wrong end of the housing regulations. We do not find this to be a complaint of any significance in this case, nor can we do more than note that his absence of housing qualifications does make his housing position more precarious and does affect his prospects of future employment adversely, although not necessarily fatally.

23 It is clear from what is set out above that money is tight for both parties. In the circumstances, the Court considers that the current level of maintenance which was set on an interim basis by the Court on 28 th November, 2011, ought to remain in place. That

maintenance is currently payable for the benefit of the petitioner and the children. We order that, subject to review as hereinafter mentioned, the respondent will pay to the petitioner the sum of £300 per month per child, to continue in the case of the elder child until she reaches the age of 16 or ceases full-time education (including tertiary education), whichever be the later, and in the case of the younger child until he attains the age of 18 or ceases full-time education, whichever be the later.

24 The maintenance will be subject to automatic review annually on the anniversary of this judgment in the same proportions as the Retail Prices Index in Jersey may have increased during the preceding 12 months. Both parties of course have liberty to apply in relation to the quantum of maintenance, based on a material change of circumstances.

Spousal Maintenance

25 The petitioner seeks an order for spousal maintenance at the rate of £1 per annum. The underlying rationale is that there should be an ability to come back to seek a review of that maintenance based on the change of circumstances if the financial position of the respondent should improve.

26 As against that possibility, it is desirable that there should be a clean break between the parties to the extent that this is possible. Having regard to all the material which will be considered under the heading of lump sum transfer below and also the current circumstances of the parties, the Court does not consider that there should be any provision for spousal maintenance and the application of the petitioner in this respect is hereby dismissed.

Lump Sum Payments

27 In his application for ancillary relief, the respondent seeks a lump sum payment from the petitioner. The respondent was slightly coy about the amount which he actually sought, but it appeared to be something in the order of £1,290,000 when he gave evidence, seemingly reduced to £900,000 in his written submissions sent to the Court after the hearing. His reasons for seeking such a payment were primarily that he was looking to house himself and to be a part of his children's lives in Jersey. For that he needed a three bedroomed house, with grounds and gardens particularly for the enjoyment of his son.

28 In order to understand how it is that the respondent felt able to make this application to the Court, it is necessary to review the evidence concerning three trusts from which the petitioner or the respondent and their children benefit.

29 We have already mentioned the K Trust. This was a declaration of trust made by a company called X Limited on 25 th February, 1993, with an initial trust fund of £10. The

named beneficiaries are the petitioner and Y, who was in fact removed as a beneficiary by Deed of Exclusion dated 18 th November, 2009. At the same time, the trustee added the two children of the parties' marriage as beneficiaries. The Trust is established under Jersey law and the Declaration of Trust confers on the trustees an absolute discretion as to both capital and income with the usual full powers of appointment and advancement. There is an express power conferred on the trustees to ignore the interests of any particular beneficiary in the exercise of their discretion.

30 It is understood that monies from an earlier trust settled by her father were placed into this Trust. In addition, following the death of her step-father, who was a local advocate until his death, the petitioner received the sum of £500,000 via a trust, which sum she herself added to the K Trust after her step-father's death, and before her marriage to the respondent. The unaudited financial statements for the K Trust as at 31 st December, 2011, show it to have quoted investments with a book value of £323,080, a loan due by the petitioner in the sum of £43,125, and a loan due by the company Z Limited, which is wholly owned by the Trust and which owns the property in which the petitioner lives with her children, in the sum of £321,630. The Trust's unaudited income account for the year to 31 st December, 2011, shows a net deficit of just under £8,000, largely comprising administration costs which exceed by a substantial margin the investment income which was £570. The unaudited balance sheet of Z Limited showed the value of freehold property at just under £300,000 but that value was stated at cost. There were no substantial other assets in the company, and the balance sheet revealed theoretically a shareholders' deficit of £23,973. However a valuation of the property owned by the company suggests an asking price for the real estate of £925,000 to achieve a figure in the order of £900,000 although the respondent has contended the parties agreed at a directions hearing that the property was worth £1.02 million. In terms of the overall value of the freehold property and the investments held by the Trust, it would appear that the Trust assets total not less than £1.2 million.

31 In the preliminary directions hearings before trial, the respondent contended that the petitioner had always indicated to him that she came from a very wealthy family and that there were underlying trusts from which she could expect to benefit. The petitioner denied having any knowledge of such potential benefit, but as a single judge I ordered in the directions hearings that letters be sent in a form approved by the Court to Investec Trust (Jersey) Limited which was understood to be the trustee of trusts from which the petitioner's mother benefitted, and which might therefore benefit the petitioner and her children. By letter dated 24 th July, 2012, Investec responded to the petitioner's enquiry to reveal that she did have an equitable interest in three trusts administered by Investec. In respect of two of these trusts, the petitioner had an equitable interest in reversion. The first trust was the A Settlement, made by the petitioner's late grandfather, the income from which was payable to the petitioner's mother during her lifetime, and after her death the petitioner would receive 50% of the capital. The second trust was the N Family Trust in respect of which the petitioner's mother was both the settlor and the life tenant. The petitioner has a vested interest in reversion in this Trust again upon the death of her mother. The capital value of both Trusts was said by Investec to be modest, and the trustee had power to advance capital to the petitioner's mother during her lifetime so that in any event it was possible that

the trust funds might be exhausted before the petitioner's interest vested in possession. In an earlier interlocutory hearing, the respondent indicated through counsel he wished to make no direct claim on these trusts.

32 The petitioner's mother is in her 60's with a substantial life expectancy. Given that she has a life interest in these trusts and that the petitioner's interest in reversion is unlikely to fall into possession for many years, the respondent did not contend that the value of the two trusts mentioned in paragraph 31 above should be taken into account.

33 He did however contend that the third trust disclosed by Investec was a material trust for the purposes of the Court's calculations of an appropriate lump sum award to be made against the petitioner. This Trust, the B Settlement, is discretionary in nature and the petitioner's mother, the petitioner and the petitioner's children are discretionary objects. It has been assumed by the respondent that the petitioner's half-brother is also a beneficiary of this Trust. The principal assets constituting the Trust fund are a very substantial property in Jersey with the chattels therein, that property comprising a manor house, some cottages and extensive land. The entirety of the property, including the chattels, has been made available to the petitioner's mother, who has her home in the main house and who is entitled under the arrangements which the trustee has put in place to such income, if any from the remainder of the real estate.

34 The trustee confirmed in its letter to the petitioner that the intention of the trustee was not to make any distributions or provide any other form of benefit to any beneficiary other than the petitioner's mother during her lifetime; but this is a discretionary trust and not a fixed interest trust and it therefore falls into a different category from the A Settlement and the N Family Trust.

35 There is no formal valuation of the relevant property. Mr Dale McNutt, one of the two client service directors of Investec gave evidence before us, having been subpoenaed by the respondent. He indicated that he would be surprised at a valuation of £10 million, and thought its proper value would be less than that figure, but he added quickly that he was not an expert in real property values. The respondent contended that the value to be attributed to the B Settlement, having regard to the chattels as well as the real estate, was some £11 million. He contended that as a discretionary beneficiary, the petitioner had equal rights with the other beneficiaries, and on that basis, he contended that, assuming there were six beneficiaries in all (the petitioner's mother, the petitioner, the two children of the marriage, the petitioner's brother and his child) the petitioner's interest was worth 1/6 of £11 million which could be grossed up to £2 million or so. His calculation of overall value was that the K Trust and the B Settlement provided the petitioner with assets of approximately £3 million. Given that he was looking to house himself in Jersey and be part of the children's lives, and based on an assessment he made that the children spent 57% of their time with their mother and 43% of their time with him, he claimed 43% of £3 million which amounted to £1,290,000.

36 We say immediately that in our judgment, even if the rest of the argument held good, which it does not, an arithmetical apportionment of assets based on contact time with the children would be wrong in principle. The mother has the benefit of a residence order. The children's home is with her. That is a separate matter from a division of assets, save that the court can take into account that there is merit in preserving that home for them and that, if it were possible to do so, there would be merit in a division of the matrimonial assets which took into account, as a need of the respondent, the need to provide satisfactory accommodation for the children of the marriage while he had staying contact with them. In any event, we doubt the respondent's figures as he would not have his children overnight for more than about one third of the year.

37 We also wish to record that it is not carved in stone that the respondent must have contact with the children simultaneously on every occasion. On a practical basis, this will be unlikely, especially as they get older. It may well be that two bedroomed accommodation will be sufficient in any event.

38 The alternative route for arriving at this type of figure was that he needed some £850,000 at least for proper accommodation; the parties had had a reasonable lifestyle in Hong Kong and Australia, and in the circumstances it was appropriate that he received an extra amount of money from the petitioner on top of the figure which would be needed for his housing.

39 The third trust which we had to consider in terms of the evidence put before us was a trust called the W Trust. In cross examination it was put to the respondent that the W Trust included assets of the marriage, to which he replied that it was a matter for the Court to decide whether it did or did not. The W Trust was established on 6 th June, 2011, by S Limited, a British Virgin Island company owned by the respondent, and is a purpose trust in respect of which the respondent is named as the enforcer. The purposes for which the Trust was established are to provide a mechanism for the control of the Controlled Company and the carrying out of the business plan. The Controlled Company is defined as T Capital Advisers Limited, a Cayman Island company, and any other company the whole of the issued shares of which form part of the trust fund. The respondent, as enforcer, has power by instrument to revoke the Trust in whole or in part whereupon the revoked whole or part immediately becomes vested in him, and also power to vary add or exclude any powers or provisions of the Trust provided that any such variation, addition or exclusion as was materially detrimental to the trustees also required the trustees' consent. The respondent also had power to ensure that the business plan was not changed without his consent. He had various other powers under the trust deed, and we shall refer simply to these three powers for present purposes:-

> (i) By Clause 6.1, the trustees are mandated to pay the income of the trust fund to or for the benefit of such of the objects or beneficiaries as the respondent might direct; and by paragraph 7.1, the trustees' powers to make any appointment of the trust fund or income for the benefit of any of the objects or any of the beneficiaries is subject to the approval of the respondent.

(ii) By Clause 3 of the First Schedule, the respondent has power to remove a trustee and to appoint a successor trustee.

(iii) By Schedule 3 of the trust deed, the respondent as enforcer has power to direct the trustees to appoint such directors of the controlled company as the respondent thinks fit, the business plan including provision that the day to day management of each controlled company should be left to the Board of Directors and the trustees would not be required to take any action in respect of or be responsible for any transaction entered into by the Board of Directors even if not for the commercial benefit of the controlled company.

40 The respondent is in fact a director of T Capital Advisers Limited and also of its 100% subsidiary, T Hong Kong Limited.

41 The structure of these arrangements leaves us in no doubt whatsoever that the assets of the W Trust are resources available to the respondent. The fact that the Trust was established some six days after the service of the divorce petition may or may not be a coincidence, but it has no bearing upon our finding.

42 The financial statements for T Capital Advisers Limited for the period 31 st May, 2005, to 30 th April, 2011, have been reviewed by a Hong Kong firm of certified public accountants. The accounts are not audited, but the accountants' report is that nothing has come to their attention that causes them to believe that the consolidated accompanying financial statements are not presented fairly, in all material respects in accordance with international financial reporting requirements. Their review was limited to enquiries of company personnel and an analytical procedure applied to financial data. The consolidated statement of comprehensive income for the six year period shows a loss of some US$3.4 million, and assets as at 30 th April, 2011, of just under US$275,000. That balance sheet is signed by the respondent as director.

43 In cross examination, the respondent was asked whether the company R Limited was a special company for the purposes of the W Trust. The response was that he did not know as he was not a director, and that he had not designated it as a special company. This was a surprising response as R appears to be the only client which S Limited has, S being owned by the respondent as well as being his employer. The respondent agreed that R was 100% owned by the trustees of the W Trust, and that it had assets of approximately US$ 189,000.

44 The Court has found it difficult to be certain as to what the value of the W Trust is, but it appears to have a minimum value of approximately US$ 200,000. Some, all or none of that value represents the assets which the respondent had prior to the marriage. Some, all or none of that value represents the savings of the respondent during the marriage. The reason it is impossible to indicate in which category the value of the W Trust falls is that at one stage during the marriage the respondent appears to have had very considerable

assets of not less than US$ 1.5 million; but unfortunately as a result of the difficulties in the business which he started in Hong Kong in 2005, and subsequently with the world economic downturn in 2008/2009, compounded by his living off his own capital since, one would have to determine from which notional pot of assets (pre or during the marriage) the various losses fall to be taken.

45 We consider it is unnecessary to make that determination. The petitioner agrees that although it is not a matrimonial asset, the K Trust is to be treated as a resource available to her, and we think that concession was rightly made. Although for reasons which we will shortly explain, we consider that the B Settlement should be disregarded in the current proceedings, we are left nonetheless with the position where the capital resources available to the petitioner through the K Trust are considerably in excess of the capital resources apparently available to the respondent from the W Trust. When we look at the K Trust, its principal asset is the property in which the petitioner lives with her children. It was clearly a pre-marriage asset. Equally clearly, it affords to the petitioner a home for her and the children. The Court considers that it is quite unclear at present, given the needs of the second child of the parties, whether it will reasonably be possible for the petitioner ever to gain remunerative employment. We are not prepared to contemplate making an order the effect of which might be to remove from the petitioner the home for herself and her children to which the respondent has made no contribution financially or otherwise, and which represents the benefit of a settlement and legacy respectively from the petitioner's father and step-father. Indeed, it is in our view very firmly in the interests of both of the children of the marriage that the petitioner should feel secure in her home for the rest of their childhood and adolescence, without fear for her financial future. To this we add that we found the petitioner's evidence to be given honestly and whenever there was conflict between her evidence and that of the respondent we preferred that of the petitioner. By contrast, we found the respondent's evidence to be unreliable and his responses dissembling. Two examples of the latter would be these. The first is his reluctance to accept in the first instance that the assets of the W Trust should be treated as an asset of the marriage and a resource available to him. The second, which came quite late in the course of his evidence, related to what one might think was a simple question as to which bank accounts he used today for the purposes of paying his outgoings. The Court was treated to a historical analysis of which bank accounts he had ever had, starting with the legacy account at C many years ago in which there is currently less than AUD$ 100. If it were necessary to find a third example, we would point to some extraordinarily circuitous responses given to the Court in connection with the T and W Trust arrangements. The respondent's approach was consistent with that taken by the trustees of the W Trust in their letter dated 30 th November, 2011, to his then lawyers asserting that the value of the Cayman company owned by the Trust – now known to be R Ltd – amounted to the Trust's holding of 100 shares of US$1 each. Like that letter, his answers in evidence prompted more questions rather than dealing with those put to him.

46 In his supplemental written submissions filed after the close of the hearing, the respondent placed some weight on the assertion that he had invested heavily in the T group of companies on the premise that the respondent and the petitioner would always have the property Q, owned ultimately by the K Trust, to rely upon, and as a fall-back in the event of a

rainy day. He asserted that the petitioner had agreed this, and that she was not unaware of what he was doing in relation to his business, and indeed has been aware of all the issues that faced the business and its financial situation since its inception.

47 In her evidence the petitioner said quite the opposite. She indicated that at one point the respondent did ask her to complete his tax return for him, but she did not have the information to be able to do so. She had a rough idea of how much he earned, but after 2005, she did not really know at all. This evidence is supported by a contemporaneous email from her to him dated 29 th May, 2007. She said that she did not particularly want him to place his assets into T. She would have preferred him to be employed by the bank, but he was passionate about going into this business. She told us that she took advice about obtaining a divorce in 2007/2008. However, she decided to try to make the marriage work – it was alright for a while, but then the problems returned. She said that the property Q was her home. She felt safe there and it was her security. She denies that she ever told the respondent that it was their family home. At the conclusion of her evidence she said that she thought that the respondent was irresponsible with his investment in T, especially after the loss of his first partners. She thought he should have got a job.

48 We accept substantially the evidence which the petitioner gave. It certainly seems less than credible that she would have told the respondent in 2007/2008, when she was taking advice about divorce, that the property Q would be available as a backup for them in the event of a rainy day, and therefore he could continue to invest assets in T. We found her generally to be a careful witness who was prepared to make concessions in her evidence from time to time, even though it might have suited her purposes better not to do so.

49 The petitioner agreed that they had a good standard of living when in Hong Kong, and indeed had lived reasonably well in Australia before that. However she said she did not know the total level of their expenditure as the respondent was in charge of the family finances. When in Australia, she had an income from the K Trust which she used to buy presents and clothes. She agreed that the respondent gave her cash to buy food and to use on other necessaries, and indeed that as from 2004 he made her an allowance. We do not think that the parties' lifestyle in Hong Kong was in any sense a mutual decision reached in reliance on the property Q as a backup.

50 For all these reasons, but particularly having regard to the interests of the children which are overriding interests, we take the view that there is no justification in seeking to adjust the property interests of the petitioner before the marriage, namely her interest in the K Trust, and we have given the respondent for these purposes a notional credit that the assets in the W Trust reflect his pre-marriage assets, which again are undisturbed.

51 We have indicated that the B Settlement is to be disregarded and we now give our reasons. The Settlement is a discretionary settlement as indicated above. The trustees have made it plain that they regard the Settlement as one which is primarily to be applied for the benefit of the petitioner's mother during her lifetime. That indication by the trustee to

the Court is to be taken with a dose of appropriate realism. In other words the Court is not simply to assume that because the trustee says that that is its present intention, in fact that is its only intention. We must have regard to the reality of the Trust position. In the course of giving his evidence, Mr McNutt, on the part of the trustee, agreed that there was nothing in the terms of the Trust to say that the petitioner could not benefit from it. He indicated that the trustee would have regard to the wishes of the settlor, the terms of the trust deed and the merits of any request. He gave no credence to the terms “primary beneficiary”. He agreed that if either the petitioner or any person on behalf of the minor beneficiaries asked for a benefit for those beneficiaries, the trustee would give due consideration to such a request. In fact he was not aware whether there was a letter of wishes, but he indicated that if the petitioner was suffering hardship, there was the possibility that the trustees would exercise their discretion in her favour. He indicated that if an order of the Court were made against the petitioner that she pay £1 million to the respondent, and she applied for benefit from the trustees, the trustees would consider the interests of all the beneficiaries in adjudicating upon that request.

52 The respondent took this evidence to show that the trustee would treat all beneficiaries equally, and the Court should therefore assume that this Settlement was a resource available to the petitioner. As he put it, the petitioner “has access to tens of millions of pounds so she can fund these necessaries”. He submitted that the beneficiaries were to be treated equally and that the petitioner's mother had no special powers. He relied upon *BJ -v- MJ* [2011] EWHC 2708 (Fam) and upon *Whaley -v- Whaley* [2011] EWCA Civ 617; and upon the fact that there was a large sum of cash within the B Settlement as well as the substantial property which was occupied by the petitioner's mother. He asserted that it would be in the best interests of the children that he should be provided with housing.

53 The Court is firmly of the view that Mr McNutt's evidence does not assist the respondent in the way he suggested. In our view, Mr McNutt's evidence was consistent only with the responses which would one would expect any trustee of a discretionary settlement to give. As a matter of law, due consideration would be given to a request for benefit made by an object of the discretionary trust, but in giving consideration to that request, the trustee would be expected to have regard to the interests of all the beneficiaries, including any wishes which have been expressed in relation to the Trust by the settlor. The Court considers that Mr McNutt's evidence that the trustee had not taken the step of notifying the petitioner that she was in fact a beneficiary of the B Settlement and had never paid her anything out of the Trust, coupled with the fact that the petitioner's mother was given the use of the most substantial asset of that settlement exclusively, pointed to a substantial justification of the statement made by the trustee that its present intention was only to benefit the petitioner's mother during her lifetime. The Court accepted the evidence of the petitioner that she did not know until August of this year that she was a beneficiary of the B Settlement (or indeed of the other two settlements in which she has a reversionary interest). Her lack of knowledge shows that the trustee would be likely to have considerable regard in our view to the interests and wishes of the petitioner's mother in relation to the B Settlement and although the mother did not give evidence before us, we consider that there is no evidence that she has shown signs of showering substantial benefits upon her daughter. We noted that according to the petitioner her mother finds coping with the petitioner's son difficult (and

she is not in any way to be blamed for that); that on her mother's divorce from her step-father, the petitioner stayed with her step-father; and indeed that her mother was not in the Island to support the petitioner at the time these proceedings went to trial. All these facts tend to go to support a conclusion that firstly the trustee would be liable to pay considerable regard to the wishes expressed by the petitioner's mother insofar as the trustee had discretions to exercise under the B Settlement, and secondly that the wishes of the petitioner's mother would not include making any distribution to the petitioner for onward payment to her former husband, the respondent. We noted that the petitioner had told us that her mother was very cross that she had been drawn into these divorce proceedings through the requests made by the respondent for information about the B and other settlements. She was said to be *"fuming beyond belief";* distressed was not the word to describe her reaction. Accordingly to the petitioner, her relationship with her mother had been adversely affected as a result, and her mother had told her *"it's not my divorce".* Indeed the petitioner told us that she had not previously considered that her mother's financial affairs were any of her business. She had one discussion with her mother on this subject and her mother had told her precisely that.

54 The petitioner's mother is in her mid-60's and in good health. We are entirely satisfied that there is no prospect whatsoever of the trustee realising the residential property in which the petitioner's mother lives in order to make a cash sum available to the petitioner for her to pay an award in favour of the respondent. We also do not think it is credible that the trustee would make any payment out of the more limited cash reserves in the B Settlement for the same purpose, because we do not consider that such a payment would have the support of the petitioner's mother. Given the mother's apparent good health, age and prospective longevity, we do not think it is right to attribute any part of the B Settlement to being a resource available to the petitioner, and in reaching that conclusion, we note in passing that those responsible for the administration of the income support scheme have reached the same conclusion because the evidence is that these trusts have been disclosed, but nonetheless the petitioner is in receipt of the full income support allowance. Furthermore she has of course received no benefit from the B Settlement so far. It is impossible to think of the B Settlement either as a matrimonial asset or as a resource which is available to the petitioner.

55 For all these reasons, we consider that the respondent has no claim for a lump sum payment against the petitioner, and his application for that relief is dismissed.

School Fees for the Parties' Daughter

56 As a result of the respondent's current financial circumstances, we have resolved to make no order in relation to payment of school fees for the elder child of the marriage. We note that the respondent has agreed that he should pay 50% of these fees, and also has agreed the school which the daughter is to attend. Although we make no order in this respect, we anticipate that the respondent may well wish to make this contribution, which is not for the petitioner's benefit but for their daughter's benefit. If ultimately the fees cannot be paid, then

it would seem to follow that the parties will have to agree alternative schooling arrangements, which may well be to her disadvantage. However, in that context there is an unknown factor, which the Court finds difficult to assess. It appears that the petitioner's mother may have made a contribution at some previous juncture to the cost of the girl's schooling at a local school. If that is so, she might be prepared to make some contribution in relation to the more modest charges at a different local school. At the end of the day however, the question as to where the parties' daughter goes to school is a matter for the parties to agree with their joint parental responsibility, and if it cannot be agreed, the matter would have to be returned to Court for adjudication. A material factor within that adjudication of course would be the cost of schooling. We do not consider it appropriate to make an order in this respect at the present time.

57 The arguments over costs were left over and the parties will have to fix a date, if necessary, for submissions to be made on that issue.