S v T

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Ramsden
Judgment Date:	15 January 2019
Neutral Citation:	[2019] JRC 3
Date:	15 January 2019
Court:	Royal Court

Text

[2019] JRC 3

ROYAL COURT

(Family)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Grime **and** Ramsden

Between
S
Petitioner
and
T
Respondent

Advocate C. R. G. Davies **for the Petitioner**.

Advocate B. J. Corbett **for the Respondent**.

Authorities

Miller v Miller; *McFarlane v McFarlane* [2006] UKHL 24.

S -v- T (Matrimonial) [2018] JRC 093.

Rossi v Rossi [2006] EWHC 1482 FAM.

Matrimonial Causes Act 1973.

White v White [2001] 1 AC 596.

Hart v Hart [2017] EWCA Civ 1306.

Sharp v Sharp [2017] EWCA Civ 408.

V v V (prenuptial agreement) [2012] 1 FLR 1315.

Charman v Charman [2007] 1 FLR 1246.

Work v Gray [2017] EWCA Civ 270.

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

Norris [2002] EWHC 2996 (Fam).

Vaughan [2007] EWCA Civ 1085.

Rapp v Sarre [2016] EWCA Civ 93

Matrimonial — judgment on the respondent's claim for ancillary relief

CONTENTS

The COMMISSIONER:

1 This is the Court's judgment on the respondent's claim for ancillary relief. The assets of the petitioner are substantial, and accordingly, of the three distributive principles, namely need (generously interpreted), compensation and sharing (as identified in *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24), the Court is concerned with the sharing principle, on the basis that it is probable that sharing, whether equally or not, would cater automatically for the parties' needs. The issue of compensation does not arise.

2 Particular features of the case are the very significant investments the petitioner has made in businesses that are currently loss-making, which restricts the liquidity available to meet any order the Court may wish to make, and whether equality of division should be departed from because of the petitioner's special contribution.

3 The task of the Court is first to assess the financial resources of the parties and secondly, to distribute it. Before doing that, we give a potted history of the marriage and of the proceedings.

History of the marriage

4 The parties, who were in their thirties, were married in England in 1995 and they have one, now adult, son A, who was born in 1996. At the time of the marriage, the respondent was a

captain in the Army and the petitioner (who holds a number of financial qualifications) worked in corporate finance and financial services. She came to the marriage owning a property, Property A, with a mortgage of £90,000 and with debts of some £10,000. The property was put into their joint names and was subsequently sold in 1998 for £192,000. Their next home in England, Property B, was then acquired, again in joint names. The respondent came to the marriage with no debt, and with some £30,000 in PEPs, ISAs and cash.

5 In or around 1996, the petitioner started her own company, Company A to work on her idea that technology could be used to solve the problems that financial businesses have with payrolls. In 2000, she launched the first international internet payroll application service provider, which she tells us was the first of its kind in the world. The respondent, who had risen to the rank of major, then left the Army to work in the petitioner's business in an administrative role.

6 The business had financial difficulties in 2002/3, at which point the respondent left to qualify as a barrister and in 2004 was employed by Siemens. He re-joined the business of the petitioner in 2006, again in an administrative role. It was re-structured and began to grow again to the point that it needed equity funding to support that growth.

7 In or around 2008, the petitioner secured equity funding from Company U in the US. B, a software engineer, who had joined her business in or around 2002 as her chief technical officer, told us that at the time of the equity funding from Company U, the growth of the business was exponential and by 2009, Company A was delivering expert solutions to clients in more than 160 countries employing some 200 people. The petitioner informed us that she became recognised world-wide as a very successful entrepreneur, winning a number of awards.

8 In 2010, the relationship with Company U deteriorated and following a failed management buy-out she and B were placed on gardening leave, subject to wide restraint in trade provisions and the respondent was made redundant.

9 The petitioner had an idea for a new payroll platform and she moved to Jersey (with the family) and B (who was to take a minority interest) to develop it in response to the Island's drive to attract digital technology. The parties acquired Property C, through a company Company L which was owned jointly, as the family home for £1.8 million with a mortgage from Barclays Bank of £1.7 million, which the petitioner was able to occupy with her family as a “J Category” essential employee.

10 A new company was formed, Company B and equity funding secured from the Company V. Because of the restrictions to which they were potentially subject, the petitioner and B arranged for the respondent to be the shareholder in Company B, along with Company V and another minority investor. The terms upon which the respondent holds those shares is

one of the issues in this case, albeit a minor one. The respondent was again employed in an administrative capacity.

11 The relationship with Company V did not go well, and by early 2011, Company B was in urgent need of further funding; indeed, a point was reached when it was unable to meet the salaries of its staff. Company V were unwilling to provide that funding, but the petitioner then met C, a Jersey-based businessman and investor, who was prepared, as he put it in evidence, to invest in the petitioner.

12 A new company, Company T was formed, owned as to 60% by the petitioner and 40% by a company owned by C, together with a new subsidiary, Company H and, by an agreement dated 9 th November, 2011, Company B sold its intellectual property to Company H in return for a capped share of any profit derived from that intellectual property. The respondent was employed by Company T as its company secretary. B ceased to be involved at this point. Company B changed its name to Company D, with the respondent remaining as the sole director.

13 As the respondent put it in his affidavit of 19 th July, 2017, the petitioner escaped from the *"live"* problems of Company D, leaving him to deal with numerous *"bitter disputes with disgruntled former members of staff, creditors and [Company V]."* Those issues resulted in over 25 court and tribunal appearances in Jersey and the United Kingdom.

14 In May, 2014, Intuit Inc. the US owners of Quickbooks approached the petitioner, and made an offer to acquire Company T. The marriage between the petitioner and the respondent was clearly under strain at that stage, in that there was a short period of separation that summer, but they reconciled and what was clearly a complex transaction was completed on 19 th December, 2014.

15 The purchase consideration of £44 million included a figure of £2 million which was to be paid to Company D to enable all of its creditors to be paid off, so as to ensure that there could be no challenge to the intellectual property that Company H had acquired from it. That transaction has given rise to an allegation by the petitioner of financial misconduct on the part of the respondent, which we will need to determine.

16 The net consideration received by the petitioner on completion was £22,885,915, of which £14 million was paid to her in cash, and the rest in Intuit shares, the sale of which was restricted – one half until December 2015 and the remainder until January 2016. Because the petitioner is in dispute with Smith & Williamson, her accountants at the time, she says she is unable to disclose precisely how much the shares she received in Intuit were ultimately sold for. According to the respondent, they were trading at $93 at the time of completion and she received her shares at $88.04. He says they were sold above $100, and accordingly some $4 million in uplift was received by her, bringing the total consideration she received from the sale to some £27 million.

17 The petitioner utilised the cash proceeds of the sale to pay off the mortgages on Property C and Property B (£2.24 million), the mortgage on Property C then being in default, and according to the respondent, she then spent some £900,000 refurbishing Property C. She gave the respondent a cheque for £250,000, she says by way of gift, as between wife and husband and he says, as a thank-you for the work he had done on the sale to Intuit. She also purchased him a Patek watch.

18 The petitioner was retained by Intuit as an employee until 6 th January, 2017, at a salary of £10,957. per month including bonuses, under covenants effectively not to engage in payroll work. Apart from being required by Intuit to deal with the unpleasant task of the redundancies which followed the sale, she told us in evidence that she was effectively paid to “sit on the beach” and she set about creating structures to fund a number of projects which we will detail shortly. The respondent was also retained by Intuit as a consultant for a period of six months for the sum of £7,500 gross per calendar month.

19 There was a short period of separation over Christmas 2015, and the parties finally separated in May, 2016. The respondent returned to live in the United Kingdom, where he lives in rented accommodation and where he has set about qualifying as an English solicitor.

20 One of the consequences of the petitioner selling her business is that she has lost her essential employee status, and is no longer able to reside at Property C. She currently resides in Guernsey, and has business interests there and in France.

Procedural history

21 The petitioner filed her divorce petition in 2016 on the grounds of the respondent's unreasonable behaviour. Whilst not accepting the particulars of conduct contained in the petition, the respondent gave notice that he did not intend to defend the case and the decree nisi was granted in 2017.

22 In her affidavit of 21 st September 2016, in response to the respondent's application for interim spousal maintenance, the petitioner exhibited a report from Smith & Williamson to the effect that with her monthly outgoings and capital expenditure, her then current average spend was between £100,000 and £150,000 a month, or between £1.2 million and £1.8 million per annum.

23 On 5 th December 2016, the petitioner was ordered to pay interim spousal maintenance to the respondent of £3,575 per month, which was subsequently increased on 7 th July, 2017 to £5,725 per month, to cover the respondent's rental costs. She was also ordered to pay the respondent £45,000 towards his legal fees.

24 The petitioner's affidavit of means was filed on 16 th December, 2016, and the respondent's on 12 th December, 2016.

25 On 15th August, 2017, the case was referred up to the Royal Court by the Registrar because the petitioner had had three firms of advocates representing her and was now representing herself and was wishing to raise the issue of the respondent's conduct, including financial conduct. At that point a final hearing date had been fixed for the two weeks commencing 12 th February, 2018.

26 Despite allegations of physical abuse and assaults made by the petitioner against the respondent, including complaints made by her to the police, for which the respondent was required to attend for an interview with the police (by whom no action was taken), the petitioner made it clear before the Royal Court that she was not pursuing those allegations for the purposes of the respondent's ancillary claims, although she was pursuing allegations of financial misconduct.

27 The petitioner disclosed that on 11 th July, 2017, she had placed her assets into a trust known as Trust A, but at a directions hearing on 30 th September, 2017, Advocate Davies, for the petitioner, made it clear that the trust had not been established to defeat the respondent's financial claims and could be looked through for the purpose of those claims. At the same time, there was a lack of clarity as to the assets within the trust structure, and the petitioner proposed that she instruct BDO to prepare an interim and final report on the value of the assets within that trust structure, which report Advocate Davies submitted would address many of the questions in the respondent's schedule of deficiencies. Advocate Corbett agreed to the production of such a report, which she said would be an essential precursor to any alternative dispute resolution that might take place (it did not).

28 On the 30 th September, 2017, and to allow for the preparation of the interim report from BDO, the Court vacated the hearing dates of February 2018. On 12 th October, 2017, the Court ordered *inter alia* that:-

BDO's interim report was filed on 9 th March, 2018 and took as the valuation date 31 st August 2017.

> *"2. The Petitioner shall, within seven days, instruct BDO at her cost to provide an interim and final report:*
>
> *(a) enabling the reader to look through the structure of Trust A and to understand the nature of the assets ultimately held through that structure;*
>
> *(b) on the true net value of all of the assets ultimately held within Trust A and the likely cost of realising those assets;*

(c) on the true net value of any other assets or investments held by the Petitioner, either directly or through companies outside Trust A structure but excluding (i) the former matrimonial home, Property C, (ii) the ski chalet and (iii) her personal chattels;

3. …..

4. …..

5. the reports to be provided by BDO shall, inter alia, confirm what the estimated taxation position is, both now and ongoing, and specifically what taxes would be payable by Trust A, the companies or the petitioner from the proceeds of any liquidation or realisation of the companies or their underlying assets."

29 New final hearing dates were fixed for 23 rd April – 2 nd May 2018. However, on 15 th March 2018, the petitioner applied for an adjournment of the final hearing, on the grounds that she wished to raise two allegations of physical assaults by the respondent, in which she said he injured or exacerbated pre-existing injuries to her neck, which may have financial implications in relation to her future care and which were relevant therefore to the respondent's ancillary claims. The final hearing dates were vacated, and a fact find ordered in relation to those allegations to take place on the three days commencing 10 th October 2018, with the final hearing postponed to the eight days commencing 19 th November 2018.

30 On 22 nd May, 2018 the Court ordered the petitioner to make a further payment of £100,000 towards the respondent's legal costs, refused an application by the respondent for an interim lump sum payment and an application by the petitioner to review downwards the amount of spousal maintenance paid to the respondent, and this for the reasons set out in the Court's judgment of that date *S -v- T (Matrimonial)* [2018] JRC 093.

31 Also on 22 nd May 2018, the Court granted a delay to the filing of the BDO final report (referred to as "the supplementary report"), due to be filed on 31 st May 2018, to 5 th October 2018, essentially for two reasons:-

(i) so that the supplemental report could take into account the accounts of those companies involved to 30 th June 2018, and

(ii) to enable BDO to fill in a number of what they described as *"holes"* in the interim report. They said there were a number of areas where either third party external reports, i.e. property valuation reports, were not available or where other professional advisers were not able to provide them with the relevant figures, i.e. tax liabilities. With the delay, and with assistance, they should be able to remove many of these *"holes"*.

32 At the close of the fact find hearing, the Court found for the reasons set out in an unpublished judgment of 12 th October 2018 that the petitioner's allegations were not proved, and that the respondent had not caused harm to the petitioner's neck.

33 The BDO supplemental report was not filed on 5 th October 2018 for reasons which the petitioner explained as follows:-

(i) She was in dispute with the trustee of Trust A, which had retained the books and records without undertaking any accounting work.

(ii) Her chief financial officer was dismissed over the summer, taking with him relevant information and data.

(iii) She was continuing to experience difficulties in resolving taxation issues, partly due to the litigation with Smith & Williamson over their fees, which was ongoing.

34 The BDO supplemental report with the valuation date of 30 th June 2018 was eventually filed on 2 nd November 2018, from which it was clear that a number of documents requested from the petitioner, in particular updated valuations, had not been provided to BDO. At a directions hearing on the 9th November 2018 the respondent was understandably reluctant to seek an adjournment of the final hearing for these documents to be produced by the petitioner, and in the view of the Court it was not practicable for that information to be provided in good time for the final hearing, then barely a week away.

35 The final hearing took place over the six days commencing 19th November 2018. The Court heard evidence from the petitioner and a number of other witnesses, called on her behalf. The Court also heard evidence from the respondent and an employee of Smith & Williamson, called on his behalf. The principal testimony was that of the petitioner and the respondent and we will refer to the testimony of the other witnesses only to the extent that it is relevant to do so.

Financial resources

36 The financial resources of the parties are to be assessed as at the date of the hearing (see *Rossi v Rossi* [2006] EWHC 1482 FAM.). At the date of the hearing, there were two trust structures in place, the first being the Trust A structure. Trust A is a Guernsey proper law discretionary settlement established by the petitioner on 11 th July 2017, with a Guernsey regulated trust company Albany Trustee Company Limited (“Albany”) as trustee. Following the dispute with the petitioner over its fees, and at the time of the hearing it was in the course of retiring in favour of Intertrust Guernsey. The beneficiaries are the petitioner, A, the petitioner's mother and the children and remoter issue of A.

37 In effect, the petitioner settled an existing corporate structure which she had created and funded following the sale to Intuit. Ignoring a Guernsey holding company formed in July 2017, the holding company within the Trust A structure is Company I, which was incorporated in Jersey on 3 rd February, 2015. It is to that entity that the petitioner has lent substantial sums. The assets it directly holds are two portfolios with Investec Wealth and Investment ("Investec"), the first, the execution only account, having assets of $2.7 million as at 31 st August, 2017 and the second, the defined mandate account, having assets of £9.7 million as at 31 st August, 2017.

38 Below Company I are four companies as follows:-

(i) Company J, incorporated in Jersey on 17 th March 2015, which owns a commercial property in Guernsey now known as Property D, an English residential property Property F, the former matrimonial home in England called Property B, a Guernsey residential property called Property G and a second Guernsey residential property called Property H.

(ii) Company K, incorporated in Jersey on 8 th June 2015, which owns a number of horses.

(iii) Company M, a French registered company which owns a sixteen bedrooms Property J with twenty acres of land in Normandy (Property J)/

(iv) Company N, a French registered company which owns a stud farm building and land called Property I situated 30 miles from the Property J.

(v) Company O, a French registered company which operates the stud farm (currently loss making) and owns a number of horses.

39 All of these investments and the stud farm business have been financed by loans by the petitioner to Company I, the value of which exceeds the value of the assets held within the structure (as ascertained by BDO), so that the petitioner's interest lies in her loan account and the extent to which it is recoverable, rather than in her capacity as a beneficiary of Trust A. Advocate Davies accepted that we could look through the Trust A structure and in any event it was clear that through her loan account the petitioner was in a position to procure that the assets within that structure were dealt with in accordance with her wishes. In practice the same applies to the assets within the Trust B structure.

40 The second structure is Trust B, established by A also on 11 th July 2017, again with Albany as trustee. As with Trust A, it is a Guernsey proper law discretionary settlement, with the beneficiaries being A and his issue, the petitioner and her mother. The respondent was not a beneficiary, but there is a power to add beneficiaries. Ignoring the Guernsey incorporated holding company, A effectively settled the shares in two companies the petitioner had established for him:-

(i) Company P which was incorporated in Jersey on 15 th May 2015, and which from office premises at Property C is developing a game, an educational portal and a car app, the latter to be used in connection with the car storage business operated by Company Q.

(ii) Company Q, incorporated in Guernsey on 13 th June 2016, which operates a currently loss making car storage business in Guernsey trading as Property D from the premises owned by Company J. This company offers car storage for the luxury car market, organises events, tours and track days for the same market, and can also help broker deals for the sale and purchase of very high end value cars.

41 All of the activities within the Trust B structure have been financed by the petitioner or by Trust A. As security for the monies lent to Company Q, the petitioner has been issued preference shares. There is a third company within the Trust B structure, namely Company R, incorporated in Guernsey on 13 th July 2017, which is dormant.

42 We have already mentioned the rate of expenditure of the petitioner as disclosed in her affidavit of 21 st September 2016. In her affidavit of 8 th November 2018, sworn in support of the final hearing, she estimated the current cost of her supporting the businesses within the Trust A and Trust B structures at £123,000 and €100,000 per month, which, at current exchange rates, amounts to combined expenditure of some £2.53 million per annum. She said it was impossible to say when that burden would reduce. She estimated that she was supporting the salaries of some 30 staff overall employed within these structures, including 12 employed at the stud farm in France and seven at Company P. There were now some 39 horses at the stud farm and in other locations.

43 The respondent had elected not to appoint his own forensic accountant and so was dependent on the accuracy and thoroughness of the exercise conducted by BDO. BDO was in turn dependent on the information given to it by the petitioner. In particular, D of BDO explained that in carrying out this kind of exercise, BDO would not itself instigate valuations; it was dependent upon the petitioner to procure the same.

44 The interim report of BDO disclosed that:-

(i) The petitioner had not provided an independent valuation of Property F, because she said it had been recently purchased, or of Property C

(ii) The petitioner did not provide an independent valuation of Property D, which had been shown at its acquisition cost on 11 th August 2016 less estimated sales costs. Substantial sums had been expended on its refurbishment by Company Q for its car storage business, but the effect upon the value of the freehold owned by Company J was unknown.

(iii) The petitioner did not provide an independent valuation of Property G, which was shown at its acquisition cost on 31st May 2016, less sale costs.

(iv) Independent valuations had been procured for the Property B and for the French properties, with the Property J being valued at €696,000, some 29% less than the purchase price of €973,000 paid for the property in mid 2015. Such a reduction seemed curious to the respondent, in the light of the information he had obtained from the Internet, which would indicate a 5% increase in French house prices in both metropolitan and rural France between 2015 and mid 2018. As he pointed out, the Property J is in a wealthier part of Normandy.

(v) The petitioner had not provided an independent valuation of the other assets of the three French companies other than the horses owned by Company O. She did provide a schedule of the antiques and the value attributed to them when they were acquired with the Property J.

45 The supplemental report of BDO (with a valuation date of 30 th June 2018) disclosed that:-

For all of those assets for which there are no independent or updated valuations, BDO had to rely on the information provided by the petitioner.

(i) There continued to be no independent valuations of Property F, Property G, Property D and Property C.

(ii) There was no updated valuation of Property B and Property I. There was an updated valuation of the Property J showing no change in its value.

(iii) There was no independent valuation of Property H, although admittedly it had been very recently acquired.

(iv) There was no independent valuation of the fixtures, fittings and antiques held at the Property J.

(v) There were no estimates to complete development works being undertaken at Property G and Property H and the market values of those properties when completed.

(vi) There were no estimates of the current and ongoing tax position and liabilities of Trust A.

(vii) There were no detailed fixed assets registers for Company Q or any formal valuation of the intellectual property held by Company P.

46 Company I had by 30 th June 2018 acquired three high end value cars, for which no formal valuation had been provided, and which had been included by BDO at cost as follows:-

(i) Ferrari F430 Scuderia 16M Spider-£238,386;

(ii) Aston Martin Vanquish S ultimate coupé—£176,445; and

(iii) Aston Martin Vanquish S ultimate volanté—£184,215.

47 The petitioner had established the Trust B companies using her words "to support A in his ambition to become an entrepreneur himself", something that was put in train before the parties' separation, with Company P being incorporated on 13 th May 2015 (when he would have been eighteen). The respondent regarded that company as a holiday project, and not in any way intended to distract A from his ongoing education, but using his words it had *"morphed"* into something else. At the time of the parties separation the relationship between the respondent and A had broken down.

48 The petitioner and A worked closely together as co-directors of the Trust B companies, but sadly that relationship severed in the summer of 2018, when he was suspended from the Trust B businesses and is subject to a formal disciplinary process. Sadly for the petitioner, A is now completely estranged from her, but reconciled with the respondent. The petitioner tells us that she has taken over control of the Trust B companies, although we doubt that there has ever been a time when she was not in control.

The BDO supplemental report

49 Notwithstanding the deficiencies in the information provided to BDO by the petitioner, the parties and the Court had no option other than to work from BDO's supplemental report. Its findings can be summarised as follows:-

(i) The petitioner had lent a total of £19,521,873 to Company I to finance its various activities.

(ii) Based upon current market values, only £16,878,021 of that loan was recoverable, Trust A effectively having a nil value.

(iii) Based upon a forced or immediate sale valuation, only £14,390,483 of the loan was recoverable.

50 Apart from Property C, the ski chalet and the petitioner's personal chattels, which were excluded from the BDO report, it had identified the following further assets of the petitioner:-

(i) A loan to Company L which in turn owns Property C of £3,328,941;

(ii) A loan to Company Q of £207,860; and

(iii) Preference shares in Company Q totalling £610,570.

51 Company L also had loan obligations to Company J, but the market value of these assets of the petitioner as per the BDO Supplemental report was as follows:-

(i) The loan to Company L was valued at £2,267,766, assuming a sale value of that property of £2.4 million.

(ii) The loan to Company Q was valued at £49,878.

(iii) The preference shares in Company Q were valued at nil.

52 If you then add the value of these assets to the market value of the petitioner's loan to Company I, the report concluded that as at the BDO valuation date of the 30 th June, 2018, the total was £19,195,665 or £16,109,408 if subjected to a forced or immediate sale.

53 The BDO report noted that as at the valuation date of 30 th June, 2018, the Investec execution only account was worth $1.13 million, down from £2.7 million as at the 31 st August, 2017, but by the time of the final hearing, virtually all of that had gone. The defined mandate account was still worth £9.1 million at the date of the final hearing, but the whole account had been pledged as security for a loan of £2 million by Investec to Company I. At the rate that the petitioner was depleting capital, that account would be exhausted within two or three years. D estimated that between 11 th July 2017 when the two trusts were established and 30 th June 2018, the date of the valuation for the supplemental report, some £2.6 million had been expended which, from an accounting point of view, could be characterised as losses, although the petitioner would not accept them as such.

54 The petitioner informed us that the roof of the Property J in France was in the course of being entirely replaced, improvements were being carried out to the stud farm and Property G was being entirely refurbished. A further £783,778 was required to complete these works.

55 The ski chalet turned out to be a small apartment owned jointly with friends of the parties, so that the quarter share owned by each of the petitioner and the respondent was worth some £18,380.

56 The value of Property C was entirely absorbed by the petitioner's loan to Company L. We were told by the petitioner that she had received an offer of £2.6 million for this property, which she had turned down, on the basis that a higher sum could be achieved. D said in evidence that if he had known of this offer, he would have increased the value of Property C in his report from £2.4 million to £2.6 million, which would have increased the amount recovered by the petitioner under her loan, and similarly, it would have increased the amount recovered by Company J under its loan, and therefore, by a relatively small amount, the market value of the petitioner's loan to Company I.

57 In her affidavit of means of 16 th December 2016, the petitioner had listed a number of high end value cars as assets of hers, which were not included in her schedule of assets produced for the final hearing, including two Lamborghinis, then valued by her at £285,000 each. At the hearing, the petitioner produced a fixed asset schedule from Company Q as at the 30 th June 2018 comprising a list of cars with their owners and location and values apparently obtained from Sotheby's, which she said had been compiled by A and her chief financial officer. This showed the three cars owned by Company I located at Property D, and three cars owned by the petitioner, namely an Aston Martin V12 Vanquish valued at £150,000, an Aston Martin Vanquish carbon edition coupé valued at £135,000 and a Mercedes AMG G 63 AMG4-Matic (G-waggon) valued at £100,000 also located at Property D. However, the following cars, including the two Lamborghinis, were listed as being owned by A but located at either Property D or at Property C:-

There were three cars shown as being owned by Company Q, namely a Galaxy Tiltbed Transporter valued at £14,450 located at Property D, a Porsche Cayenne 955 valued at £14,000 located at Property D and a Range Rover Sport HSC TBV6 valued at £19,000 located at Property H and two cars shown as being owned by and in the possession of A namely a Range Rover Autobiography valued at £80,000 and an Audi R8 V10 Spyder valued at £100,000.

(i) BMW Z3 2.0 roadster –value £6,000 (located at Property C)

(ii) BMW e46M3 convertible 3.2 —value £23,000 (located at Property D)

(iii) Porsche Boxter Spyder 981 —value £90,000 (located at Property D)

(iv) Lamborghini Murcielago LP670–4 SV coupé —value £350,000 (located at Property D)

(v) Lamborghini Aventador LP700–4 Pirelli edition coupé —value £300,000 (located at Property D)

(vi) Mercedes AMG SL65AMG —value £37,000 (located at Property D)

(vii) Morris Traveller —value £15,000 (located at Property C)

58 The petitioner explained that she had not included the value of the cars listed under A's name, but located at Property D or at Property C, in her schedule of assets because of his apparent claim to ownership of them, as shown by this schedule, but:-

(i) When pressed she produced overnight copies of three registration documents, showing that the two Lamborghinis were registered in her name in January and October 2016 respectively and the Porsche Boxter Spyder was registered in her name as of 21 st December, 2015.

(ii) It was clear that all of these cars had been purchased with her funds or funds

derived from her.

(iii) She was adamant that at no time had A been gifted any of these cars, let alone the two Lamborghinis.

(iv) All of these cars were at Property D or Property C and therefore effectively in her possession or under her control.

(v) Apart from this one copy schedule, we were not aware of any claim by A to the beneficial ownership of any of these vehicles other than the two in his possession, if the schedule could properly be described as a claim by him to such ownership.

59 We conclude that these cars listed in A's name, located either at Property D or Property C and valued at £821,000, should be included as assets of the petitioner.

Schedules of assets

60 Working from the schedules of assets produced by the parties (which were not agreed), the BDO current market valuations and looking through the Trust A structure, we determine that the assets of the parties are as follows:-

Petitioner

Loan due by Company I	£16,878,021
Loan due by Company L	£2,267,766
Loan due by Company Q	£49,878
Bank accounts	£192,716
T RBS pension	£425,000
Vantage pension	£58,233
Ski apartment quarter share	£18,380
Fine art, antiques and clocks situated at Property C	£98,000
Jewellery situated at Property C and Property J	£65,000
Two Rolex watches	£35,000
A Patek watch	£14,000

A diamond necklace		£19,000
Cars		£1,206,000
Total		£21,326,994

Respondent

Bank accounts	£62,287
T RBS pension	£274,130
Army pension	£239,658
Vantage pension	£15,036
Investments	£10,894
Quarter share of the ski apartment	£18,380
Patek watch	£21,000
Pocket watches	£100
Silver	£7,500
Painting	£7,000
Furniture	£2,000
Carriage clock	£2,000
Barometer	£1,000
Aston Martin DB7 2003	£59,990
Motor bikes	£48,800
Total	£769,775

61 In addition to the furniture, paintings and chattels disclosed by the respondent, the petitioner sought to add to his list of assets £100,000 for household contents, which she had taken from his affidavit of means of 12 th December 2016. However, looking at his affidavit of means, it seems to us that this represented his estimate of his half share of the household possessions acquired by the parties during their marriage, and we do not think

he has £100,000 worth of household contents in addition to the chattels he has listed. In so far as his Aston Martin is concerned, we have accepted the somewhat higher valuation placed upon it by the petitioner.

62 The respondent informed us that he had recently paid for a dental operation for A which cost some £20,000, but we have not adjusted either banking figures, on the basis that they are likely to be fluid.

63 From the total of her assets, the petitioner seeks to deduct potential liabilities she has for fees being claimed by Smith & Williamson (£158,060) and Hatstones (£24,344). She is liable to pay BDO's fees for the production of their report of £18,000 and claims a tax liability of £15,470. We are prepared to accept these deductions, which come to £215,874, from her assets of £21,326,994 giving her a net asset position of £21,111,120.

64 The petitioner also seeks to deduct £310,000 in respect of French wealth tax and English inheritance tax, upon which we heard no expert evidence at all. She told us in evidence that if the valuations she had obtained for the two French properties were accepted by the French tax authorities, then no French wealth tax, apparently 4% of the purchase price of each property, would be payable. If not, it would be. The respondent observed that the two valuations produced by the petitioner for BDO happened to come just under the threshold for payment of wealth tax in France. We could only speculate in discussion what the English inheritance tax liabilities, if any, might be. All of this is far too nebulous to justify a reduction from the value of her assets.

65 The respondent has a car loan liability of £15,128 bringing his net asset position down to £754,647, giving rise to a combined total of the net assets of the parties of £21,865,767. To that must be added the value of a strip of land adjacent to Property B which remains in the joint names of the parties, upon which they have placed a value of £60,000, a joint account with £33,490, which they have agreed should be divided between them equally, and the funds left in Company D of £63,507, the right to which is in dispute, bringing the total net assets of the parties up to £22,022,764.

Open positions

66 The petitioner's open position was as that the respondent should have transferred to him the following properties, to which we have attributed the market valuation less selling costs as advised by BDO, and cash:-

(i) Property C £2,400,000

(ii) Property F £573,300

(iii) Property B £749,700

(iv) Strip of land attached to Property B valued by the parties at £60,000£60,000

(v) The petitioner's quarter share in the ski apartment £18,380

(vi) Half the joint account £16,745

(vii) £500,000 in cash£500,000

TOTAL £4,318,125

67 Adding the value of the assets already owned by the respondent this would give him £5,072, 772 or 23% of the total assets.

68 The respondent's open position was that he should receive the same assets, save that the cash should be increased to £5,600,000 and in addition, he sought the transfer to him of the Ferrari 430 Scuderia, the Lamborghini Murcielago SV670 and the Morris Traveller valued at £565,000. Adding the assets already owned by him this would give him £10,737, 772 or 48% of the total assets.

69 Thus, both parties agreed that the respondent should have Property C, Property B (and the adjacent strip of land) and Property F transferred to him, but they differed over the amount of any lump sum to be paid, in practice out of the Investec defined mandate account of £9 million (secured as to £2 million), with the petitioner offering £500,000 and the respondent asking for £5,600,000. They also differed over the transfer of three cars valued at £565,000.

Legal principles to be applied

70 Articles 28 and 29 set out the powers of the Court to order a transfer of property or the making of a lump sum or sums, the opening language of which is the same for both articles:-

> ***"Where a decree of divorce or nullity of marriage or judicial separation has been made, the Court may, having regard to all the circumstances of the case, including the conduct of the parties to the marriage in so far as it may be inequitable to disregard it, and to their actual and potential financial circumstances ….."***

71 Section 25 of the Matrimonial Causes Act 1973 contains similar, but not identical language, and the list of factors set out in that section have been applied by the courts of Jersey when exercising powers to grant ancillary relief upon divorce or judicial separation:-

> ***"(1) It shall be the duty of the court in deciding whether to exercise its powers … and, if so, in what manner, to have regard to all the circumstances of the case,***

first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18 .

(2) As regards the exercise of the powers of the court in relation to a party to the marriage, the Court shall in particular have regard to the following matters –

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contribution which each of the parties had made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring ."

72 The House of Lords decision of *White v White* [2001] 1 AC 596 established the principles of fairness and non-discrimination and the yardstick of equality, although it pointed out that the yardstick of equality did not inevitably mean equality of result (page 605). It was the yardstick against which the outcome of the section 25 exercise was to be checked. It was recognised that the source of the assets might be a reason for departing from the yardstick of equality (page 610) although the importance of this source will diminish over time (Page 611).

73 The sharing principle applies with less force to non-matrimonial property, namely property which is not the product of matrimonial endeavour. The distinction between non-matrimonial property and matrimonial property is relevant as explained in the judgment of Moylan LJ in *Hart v Hart* [2017] EWCA Civ 1306 at paragraph 62:-

"62 The classification of property as non-matrimonial and matrimonial is relevant in the application of the sharing principle because the court is seeking to establish the extent to which the current assets owned by the parties comprise or reflect the product of marital endeavour and the extent to which they do not. This arises because, as explained below, the sharing principle applies with force to matrimonial property but does not apply, or applies with significantly less force, to non-matrimonial property .

63 The court's approach to non-matrimonial property has developed in the years since the decision in White. In that case such property was viewed as a contribution made by one spouse. The weight to be given to it would depend on the circumstances – such as the 'nature and value of the property, and the time when and the circumstances in which the property was acquired': (Lord Nicholls (p.994) .

64 The introduction of the sharing principle in Miller raised the issue of what property was within the scope of this principle. The House of Lords did not directly answer this question but approached the exercise of the statutory discretion from the same perspective as that set out in White, namely whether the existence of such a contribution justified a departure from equality. It is, however, clear from Miller that, as expressed by Lord Nicholls, 'there is a real difference, a difference of source, between' matrimonial and non-matrimonial property. Accordingly, when exercising the statutory discretion, the court did not have to 'treat all property in the same way': Lord Nicholls (Paragraph 22). Lady Hale observed that, in White, 'it was recognised that the source of the assets might be a reason for departing from the yardstick of equality' though 'the importance of the source will diminish over time' (paragraph 148) .

65 A possible interpretation of Miller could have been that the sharing principle applied only to matrimonial property. This was, however, not the conclusion reached by this court in Charman. The principle applies to 'all ***the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality' (paragraph 66)*** .

66 … .

67 The exercise on which the court is engaged, when applying the sharing principle in this context, is, therefore, to determine whether the current assets owned by the parties, or within the scope of section 25(2)(a), comprise the product of marital endeavour. The court must then decide how that determination should impact on the court's award. This raises (a) an evidential issue, namely a factual determination which has been described in terms of identifying whether property is matrimonial or is non-matrimonial but which, in my view, is often more nuanced than this because property can be a combination of the two; and (b) an evaluative or discretionary issue, namely the manner in which the factual determination is weighed when the court is undertaking the section 25 exercise and deciding what award to make .

68 Put in simple terms, the court ultimately has to decide, as part of the

discretionary exercise, how to weigh or reflect the existence of non-matrimonial property when determining the award. A key question which has emerged, and which is engaged in the current case, is whether this should be undertaken in a formulaic manner or whether the court can adopt a broader approach ."

74 His judgment goes on to hold at paragraph 84 that the Court is not required to adopt a formulaic approach, either in determining whether the parties wealth comprises both matrimonial and non-matrimonial property, or when the Court is deciding what award to make. Quoting from paragraph 88:-

"The principle which is being applied is that the sharing principle applies with force to matrimonial property and with limited or with no force to non-matrimonial property ."

75 Advocate Davies argued that the parties had decided during the marriage to keep the bulk of their assets separate, and the manner in which parties organise their assets was of relevance, she said, in the search for fairness. She cited the case of *Sharp v Sharp* [2017] EWCA Civ 408 where the issue was whether it was inevitably the case that the matrimonial assets of a divorcing couple should be shared between them on an equal basis, where the marriage had been short, there were no children, the couple had both worked and maintained separate finances, and one of them had been paid very substantial bonuses during their time together. The English Court of Appeal found the case to be in a very small number of cases where the identified factors justified a departure from the equal sharing principle. The facts of the case before us are very different, in that this has been a long marriage and the parties have a child. We also reject the petitioner's evidence that the parties had decided during the marriage to keep the bulk of their assets separate; we find that there had been no discussion about the separation of assets, let alone a decision.

76 Furthermore, Advocate Davies argued that words and conduct of the parties lead to the inevitable conclusion that neither party ever felt that the respondent would share in the sale proceeds of Company T beyond the payment made at the time of the sale in December 2014. The Court, she said, should not interfere with this intention of the parties, beyond that which is necessary to meet the respondent's needs in a way that is fair. She referred to the increasing amount of weight that the Court is now placing on prenuptial agreements, which shows the importance of autonomy, citing the judgment of Jowells J in *V v V* (prenuptial agreement) [2012] 1 FLR 1315. However the evidence of the words and conduct of the parties does not lead us to the conclusion that the parties felt that the respondent would not share in the proceeds of the sale of the Intuit shares that ensued after the completion date. We find that the respondent regarded these shares as family property from which he would benefit and to which he felt he had contributed over many years. The respondent did not regard himself as having no claim to them should the parties separate. Furthermore, this is not a case where there was a prenuptial agreement or anything similar.

77 In this case, we are not dealing with assets brought into the marriage or inherited during the marriage. The petitioner sold her interest in Company T to Intuit in December 2014 well

before the parties separated, and her entitlement to the wealth that she received then and which was subsequently realised when she could sell the restricted shares all derived from that sale agreement. That sale agreement was itself a culmination of many years of work. All of that wealth constitutes matrimonial property, namely the product of marital endeavour to which the sharing principle applies with force.

78 In *Charman v Charman* [2007] 1 FLR 1246, the English Court of Appeal, building on what had been said in *White v White* and *Miller v Miller*, concluded in paragraph 64 that a "proper evaluation under section 25(2)(a) of the parties' different contributions ….. should generally lead to an equal division of their property, unless there was a good reason for the division to be unequal."

79 We are concerned with the issue of the parties different contributions and whether the petitioner's contribution was sufficiently special or stellar to justify departure from an equal division. In *Miller v Miller*, Baroness Hale said that the question of contribution should be approached in much the same way as conduct, namely that it should be taken into account only in so far as it may be inequitable to disregard it. Quoting from her judgment in *Miller v Miller* at paragraph 146:-

> ***"146 In my view, the question of contributions should be approached in much the same way as conduct.*** Following White's case, the search was on for some reason to stop short of equal sharing, especially in 'big money' cases where the capital had largely been generated by the breadwinner's efforts and enterprise. There were references to exceptional or 'stellar' contributions: see *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FCR 331, [2002] Fam 97. ***These, in the words of Coleridge J in*** *G v G (financial provision: equal division)* [2002] EWHC 1339 (Fam) ***at [34]***, [2002] 2 FLR 1143 ***at [34], opened a 'forensic Pandora's box'.*** As he pointed out:
>
> ***'[W]hat is 'contribution' but a species of conduct?*** … Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences. First, they call for a detailed retrospective at the end of a broken marriage just as a time when parties should be looking forward, not back … But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? … Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? … It is much the same as comparing apples with pears and the debate is about as sterile or useful .'
>
> ***A domestic goddess self-evidently makes a 'stellar' contribution, but that was not what these debates were about.*** Coleridge J's words were rightly influential in the later retreat from the concept of special contribution in

Lambert's case. It had already been made clear in White's case that domestic and financial contributions should be treated equally. Section 25(2)(f) of the 1973 Act does not refer to the contributions which each has made to the parties' accumulated wealth, but to the contributions they have made (and will continue to make) to the welfare of the family. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares ."

80 In the same case, Lord Nicholls put it this way at paragraphs 67 and 68:-

"67 On this I echo the powerful observations of Coleridge J in *G v G (financial provision: equal division)* [2002] EWHC 1339 (Fam) ***at [33]–[34]*** , [2002] 2 FLR 1143 ***at [33][34].*** Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life.

68 This approach provides the principled answer in those cases where the earnings of one party, usually the husband, have been altogether exceptional. The question is whether earnings of this character can be regarded as a 'special contribution', and thus as a good reason for departing from equality of division. The answer is that exceptional earnings are to be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise. The wholly exceptional nature of the earnings must be, to borrow a phrase more familiar in a different context, obvious and gross. Bodey J encapsulated this neatly when sitting as a judge in the Court of Appeal in *Lambert v Lambert* [2003] 4 All ER 342 ***at [70].*** He described the characteristics or circumstances which would bring about a departure from equality 'those characteristics or circumstances clearly have to be of a wholly exceptional nature, such that it would very obviously be inconsistent with the objective of achieving fairness (i.e. it would create an unfair outcome) for them to be ignored ."'

81 As to whether such an approach could be regarded as discriminatory, the English Court of Appeal expressed this view, with which we concur, in the case of *Work v Gray* [2017] EWCA Civ 270:-

"92 We turn next to consider whether the concept of special contributions, as (we emphasise) currently applied, is discriminatory. We would suggest that the fact that there has only been one reported case since Charman in which special contribution has resulted in an unequal division of matrimonial property makes it difficult to sustain the submission that the manner in which it is being applied is discriminatory .

93 If the concept was being applied more broadly, there would clearly be a risk

that it would be discriminatory. But, as Wilson LJ said in *K v L* ***(para 15):-***

'…. ***The law does not abjure all discrimination.*** On the contrary it is of the essence of the judicial function to discriminate between different sets of facts and thus between different claims.'

What is unacceptable discrimination is explained by Lord Nicholls in White (p. 605). Accordingly, the mere fact that one party has made a financial contribution and the other has not is of no significance in the s. 25 exercise .

94 However, the court is still mandated to consider the parties' respective contributions. In order to ensure fairness, for the reasons articulated, in particular, in White and Miller, the courts have confined the concept of special contribution so that it reflects a significant, substantive difference, which does not require extensive evidential investigation. Moreover, such a significant, substantive difference gives rise to a special contribution irrespective of whether the contribution has been made by the husband or the wife ."

82 A further factor which may justify a departure from equal division was identified by Baroness Hale in *Miller v Miller* at paragraph 148, namely that the nature of the assets where there are businesses which will be crippled or lose much of their value if disposed of prematurely in order to fund an equal division. She referred to the case of *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69. In that case, the husband had a successful career as an accountant, in addition to which, at a very early stage of the marriage, a company had been started in the services industry that had proved to be a successful venture, although it had yet to make any contribution to the parties' economy or their standard of living, because all of its value had to date been retained in the company. It was a long marriage with three children. Coleridge J found there was justification for departing from a broad objective of seeking to achieve equality. Quoting from page 77 of his judgment:-

"So is there any justification for departing from the broad objective of seeking to achieve equality in this particular case? I am urged to do so by Mr Raynor on behalf of the husband on a number of grounds .

I think there are factors which call for some adjustment. The first factor is the very nature of the assets in this case. As is apparent, there is almost no liquidity in this case at all. By the time the overdraft in this case has been subtracted from the available assets there is only a little over £65,000 available before payment of the very significant costs which have been incurred. The rest of the assets, apart from the two properties in which the husband and wife are living, are in one way or another tied up in the husband's business and ***professional life and to extract cash value from them is fraught with obstacles and problems*** ."

He went on to say, at page 78:-

"I am conscious also that it is not, numerically, precisely 50% of the value

> ***of the assets on the schedule (it is nearer 40%), but in my judgment the exercise upon which the court is engaged nowadays is not just one of adding all the assets together and dividing them simplistically by 2.*** The court has to look very carefully not only at the nature of the assets but also the steps necessary to achieve their liquidation. The target in all cases is fairness. In my judgment this is a fair figure .
>
> ***How and at what rate should that sum be paid?*** It is at this stage, as I have said, that the court needs to proceed with sensitivity and creativity so that the values upon which the court's assumptions have been made are in fact realised. That can only be done if opportunity is given for orderly and prudent disposal where appropriate. If that course is not adopted there is a danger that only fire sale values will be achieved which would greatly be to the detriment of the paying party, and so unfair ."

83 The facts of the case before us are very different, in that having sold out to Intuit, the petitioner has invested heavily, the respondent says recklessly, in loss-making businesses. Advocate Davies submitted that it would be unfair to award the respondent all of the "copper-bottomed" assets, leaving her with these loss-making businesses and no liquidity to fund them. The result would be a forced sale of those businesses and their assets at much lower sums and the redundancies of all of the employees within them. The petitioner emphasised her fiduciary responsibilities towards those employees. We accept that fairness requires us to have regard to the nature of the assets of the petitioner and to the issue of liquidity.

84 Advocate Corbett argued that money should be added back to the petitioner's side of the asset schedule before division, so that the respondent did not have to pay for or otherwise suffer from the petitioner's unilateral reduction of the marital acquest, which she said was in accordance with *"the Norris add-back principle"*, so called after the case of *Norris* [2002] EWHC 2996 (Fam) and the case of *Vaughan* [2007] EWCA Civ 1085, which approved it with the proviso that the reattribution of notional money back to a dissipater needed to be money which the dissipater does not require in order to meet their needs.

85 The recent Court of Appeal case of *Rapp v Sarre* [2016] EWCA Civ 93 demonstrated that in the alternative, the same principle can be achieved by adjustment of the percentages allocated to each party from remaining capital after dissipation, again so that the "victim" (here the respondent) does not lose out as the result of the dissipation of the other party.

86 Whilst the Court acknowledges these principles, it had no evidential basis upon which it could add back potential undervalues in the properties, in that the respondent had not adduced expert valuations of his own. Furthermore it had no evidential basis for assessing how much of the monies ploughed by the petitioner into these businesses could properly be described as money dissipated by her. As mentioned below, she was adamant that they would all ultimately be profitable.

Section 25 criteria

87 As with the fact finding hearing, the Court did not find the petitioner to be a reliable witness. In evidence, she seldom gave a direct answer to the questions put to her, had a tendency to lecture the Court as to the issues she said were important, and to decide what was or was not relevant. She was gratuitously offensive to the respondent, describing him as financially illiterate, barely able to use a laptop and of low calibre. When not in the witness box, she would react audibly to anything that was said with which she disagreed, so much so that she left the Court on two occasions at the point at which she was about to be removed.

88 On the other hand, the Court found the respondent to be a reliable witness, who gave his evidence in a polite and straightforward manner. Although describing how difficult the petitioner could be to work with, he volunteered that she was talented, creative and at times inspirational.

89 The petitioner said in evidence that it was insulting to someone of her acumen to be accused of pouring money down the drain. The stud farm was not, she said, *"a silly venture"* and would be self-sufficient next year. It aimed to sell ten yearlings a year, at £50,000 each, and had already achieved the first sale of £47,000. She was adamant that it would be profitable. She did not lose money on purpose, and would not have invested in any of her businesses if she did not think they would be successful.

90 She explained how the car storage business worked. It had a capacity of 106 cars, 20 of which were currently occupied, and following a recent trip to Dubai, another 30 cars would soon be stored there. The break-even point was an occupancy of 50 cars. If all the spaces were let, then the car storage business would make a net profit of £200,000 per annum, excluding any brokerage or other income. She had plans to roll out similar facilities in a number of other jurisdictions with whose authorities she was in discussion and she was in the process of launching a fund for those wishing to invest in high end value cars, which would be stored at Property D.

91 The petitioner said the respondent was fully aware, from before the separation, of the businesses she has established for herself and A and could not complain about their ongoing funding. We accept that some of the petitioner's businesses were started before the parties separated, namely the stud farm and Company P, but we accept his evidence that he had no notion of the extent of the funding that subsequently went into them.

92 In all she said the businesses within the two structures required a further £1 million of funding before becoming profitable, in addition to the cost of works needed to be carried out to the properties, as mentioned above, so that she needed a further £1.78 million of liquidity over the next year or so. We accepted her advice as to the financial needs and prospects of the businesses within these two trust structures, all of which she clearly controlled, as she was a proven entrepreneur.

93 As mentioned in the fact finding judgment, the petitioner, who is now 58, has suffered serious injuries in the past, in particular a car accident in 1987, when she broke her neck, back and left ankle, a riding accident in 1992, when she broke her collar bone and a very serious horse riding accident in 1993, in which her liver, lungs and spleen were crushed and indeed, in which she almost died. That, and the subsequent treatment, have had a deleterious effect on her health. She is unable now to ride (her lifetime passion) and is suffering discomfort on a daily basis. She says her back and neck are severely compromised and she is in constant pain. She has been warned that her prognosis is poor, and runs the risk of paraplegia at some point in the future. However we have no medical evidence before us as to her prognosis and have no reason to believe that a sharing order would not cater for her needs and for those of her mother who is now suffering from dementia and whose care costs the petitioner £5,000 per month (£60,000 a year).

94 The respondent, who is 56, will complete his training contract on 15 th November 2019, when he will be fully qualified as an English solicitor. He told us that at his age, he was fortunate to have found a training contract with X Law Firm. He is currently paid £1,551 net of tax per month, or £18,612 a year. Once qualified, his salary will go up to £35,000 per annum gross. He will be unable, therefore, to afford the standard of living he enjoyed in the latter part of the marriage, based on his earning capacity alone.

95 In terms of conduct, the petitioner makes three allegations of financial misconduct against the respondent, which we will deal with separately, but that brings us to the key issue of the parties' contribution to the welfare of the family, and in particular, whether the petitioner's contribution is such that it would be inequitable to disregard it.

96 Before dealing with the petitioner's contribution, we need to deal with the contribution made by the respondent, which the petitioner was prone to denigrate. Before A was born, the respondent's earnings were used to pay for works done to the family home, and when the petitioner started her own financial services business, the family lived on his salary as a major for a number of months. He paid for A's nursery fees, the cost of child minders, and, as acknowledged by the petitioner, on occasions he paid A's school fees. The petitioner was often away travelling, when he would have the sole care of A.

97 In 2011, when Company D could not pay its staff, he took on an equal liability with the petitioner for loans made on behalf of C of about £130,000. He then played a particularly difficult role in dealing with the creditors of Company D, whilst the petitioner pressed ahead with a new company financed by C. In 2013, he encashed a £13,000 life policy to help towards the family's finances, when money was tight; a small sum, but he said important at the time. Save for a short period, when he qualified as a barrister, he has worked throughout the marriage in the main for the petitioner's businesses in an administrative role. He paid £2,500 per month from his salary into the joint account. He told us that he paid the £10,000 yearly arrangement fee to Barclays Bank for the mortgage on Property C.

98 Of course in purely financial terms the respondent's contribution was less than that of the petitioner, but he described himself as *"a team player"*, and we agree. We accept his evidence as to the contribution he made and in the words of Baroness Hale in *Miller v Miller*, we find that he did his best in his own sphere.

Special Contribution

99 Turning to the petitioner, and despite our reservations as to the quality of her evidence and the submissions of Advocate Corbett to the contrary, we do accept that the petitioner has made a special contribution to the welfare of the family, which it would be inequitable to disregard. C, B and E all gave evidence as to her unique talents, as did the respondent, and it didn't require extensive evidential investigation. She turned the business of the company, helped by additional finance of £5 million provided by C, into something worth £44 million in two to three years, an outstanding feat, based entirely upon her own entrepreneurial skill, a skill described by C in evidence as very rare. Quoting from paragraph 19 of his affidavit of 8 th November, 2018:-

> ***"19 ……[the petitioner] was 100% pivotal to the generation of all the value.*** Without [the petitioner], it would not have happened. [The petitioner] is an entrepreneur. One hundred percent of the product development and the eventual sale of the company was down to her. [The petitioner] is highly specialised. In fact, I would go as far as to say that she is unique in terms of her talent for product development and entrepreneurial skill. [The petitioner] has an ability to identify the needs of the market. These skills enabled her to generate £44 million, with the help of [C's] investment ."

100 He went on to say, we think correctly, that the respondent was supportive, but not essential to the business; he had no creative or strategic role, and no role in driving the business.

101 As to a guideline threshold for a special contribution, *Charman v Charman* provides some assistance where it was held:-

> ***"(1) The court was unable to identify any figure as a guideline threshold for a special contribution; a party's claim to have made a special contribution ought not to succeed by reference to something interpreted as effectively a presumption deriving from the court's identification of a threshold figure.*** However, the court was prepared to respond to the judge's call for guidance on the appropriate range of percentage adjustment to be made in which departure from equality was justified, although it ought to be borne in mind that fair despatch of some cases might require departure from the proposed range. It was hard to conceive that, where such a special contribution was established, the percentages of division of matrimonial property should be nearer to equality than 55% —45%; but also, following a very long marriage, fair allowance for special contribution within the sharing principle would be most unlikely to give

rise to percentages further from equality than 66.6% —33.3%. If the contribution was special, it followed that it was unmatched, and, in principle, the greater the wealth the greater the extent to which it was unmatched, and to which it called for an unequal division under the sharing principle .”

Distribution

102 There are sufficient assets in this case to allow for a clean break between the parties. Ignoring for these purposes the joint account, which it is agreed will be shared, and the Company D monies which we have yet to determine and which are *de minimis*, we agree with the parties that the respondent should have transferred to him:-

(i) Property C (£2.4 million)

(ii) Property B and the strip of land (together £0.81 million)

(iii) Property F (£0.57 million)

Total: **£3.78 million**

103 We have used BDO's market valuations net of selling costs in the absence of any evidence to contradict them. We think that Property J is worth more than £603,791, but we have no basis for saying by how much, and that Property C is worth more than £2.4 million, but being told of a verbal offer of £2.6 million without more detail does not provide a sure basis for a higher valuation. In any event it is very much swings and roundabouts.

104 The key question is how much of the Investec defined mandate account (worth £7 million net of the borrowing secured against it) should be paid to the respondent, and we regard the figure of £3 million as being fair; that leaves the petitioner with £4 million, up to £2 million of which she is likely to need to complete the repairs on the properties owned and to see her new businesses through to profitability. Such a division will more than cater for her needs, the needs of the businesses and avoid any question of forced sales and redundancies. The petitioner must therefore procure a payment to the respondent of a lump sum of £3 million.

105 The respondent also sought the transfer of three cars to him, which we think is fair, and the petitioner must therefore procure the transfer to him of:-

(i) The Lamborghini Murcielago LP670 —4 SV coupé (£350,000);

(ii) The Ferrari Scuderia (£250,000); and

(iii) The Morris Traveller (£15,000).

Total value—£565,000 (using the values in Company Q schedule the petitioner produced)

106 In the alternative, and at the election of the petitioner, she can procure the payment to him of an additional lump sum of £565,000 in lieu of the transfer of these cars.

107 In total, therefore, the respondent will receive properties worth £3.78 million, cash of £3 million and cars of £565,000 (or cash in lieu), which totals £7.35 million. Adding to that the assets he will be retaining of £0.75 million gives a final figure of £8.10 million or 37% of the total family assets, which is within the ranges advised in *Charman v Charman*.

Cross check for fairness

108 Advocate Davies warned against the respondent being given all, or an unfair proportion of the copper bottomed assets, leaving the petitioner with the risk laden assets and insufficient liquidity. With cash retained by her of £4 million there is no issue as to liquidity, but we have extracted out all of the assets (however held) which we think can be regarded as “copper bottomed” or relatively safe, namely:-

(i) Property C—£2.4 million.

(ii) Property B and the strip of land—£0.81 million.

(iii) Property F—£0.57 million.

(iv) Property J—£0.60 million.

(v) Property I—£0.40 million.

(vi) Property H—£0.74 million.

(vii) Property D—£2.20 million.

(viii) Cars—£1.91 million. This is taken from the Company Q schedule and comprises the three cars owned by Company I, the three cars owned by the respondent and the seven cars listed as owned by A but which we have found to be assets of the petitioner.

(ix) The Aston Martin and Motorbikes owned by the respondent—£0.11 million.

(x) The Investec portfolio net of borrowing—£7.0 million.

Total: £16.75 million.

109 Of those copper bottomed assets, the respondent would, under our proposals,

receive\retain:-

The petitioner will therefore be retaining 56% of the copper bottomed assets, including £4 million in terms of liquidity. If it were to be argued that the vehicles cannot be regarded as copper bottomed assets, and they are removed from these equations, then the respondent will be receiving/retaining 46% and the petitioner will be retaining 54% of the copper bottomed assets.

(i) Property C—£2.40 million;

(ii) Property B and strip of land—£0.81 million;

(iii) Property F—£0.57 million;

(iv) Cars—£0.67 million; and

(v) A share of Investec portfolio—£3 million.

Total—£7.45 million, which equates to 44% of the total value of the copper bottomed assets.

110 We are satisfied, therefore, that our proposed distribution of the family assets does not give the respondent an unfair proportion of the copper bottomed assets. It leaves the petitioner with more than half of the copper bottomed assets, together with sufficient liquidity to see the businesses through to profitability. It is also clear that this proposal would not require the forced sale of any of the assets within Trust A or Trust B structures or redundancies.

Financial misconduct

111 The extent to which financial misconduct should be taken into account in matrimonial proceedings was considered in depth by Sir William Bailhache, then Deputy Bailiff, in *J v H* [2014] JRC 140A. It suffices to quote from the concluding paragraph 39:-

> ***"In our judgement the 1995 Amendment is a signal to the court from the legislature that the court's approach to questions of conduct had to be revisited.*** For all the reasons which are set out above, we will depart from the decisions of this court on this subject prior to 1995. In our judgement, it is not appropriate or desirable to attempt any estimate of when it will be inequitable to disregard conduct but parties and practitioners should operate on the premise that the expression 'gross and obvious' or 'gasp rather than gulp' are good indicators. In the overwhelming majority of cases, conduct will not be relevant to the exercise of any judgment on an application involving Articles 27 to 29 of the Law, although, given the grounds for the divorce, it may still be relevant to questions of costs in relation to the divorce itself ."

112 In making allegations of financial misconduct against the respondent, the petitioner therefore has to show that he has conducted himself during the marriage in a way that is gross and obvious.

Loss of £63,507

113 When the sale to Intuit was completed in December 2014, as part of that completion £2 million had been paid to Hatstones on its undertaking to discharge the debts of Company D. Having conducted that exercise, Hatstones were left with a small residual sum, now held by Corbett Le Quesne in its clients' account, of £63,507. It was common ground that this sum should be paid to the beneficial owner of Company D. Both parties claim to be the beneficial owner.

114 It will be recalled that shares in Company D (then Company B) were put into the name of the respondent in or around 2010, when the petitioner had fallen out with Company U, because she and B were still in the employment of Company A and they were concerned that any new venture on their part might be in breach of restrictions in favour of Company A. The respondent said in evidence that he held the shares *"in the expectation"* that he would, in due course, transfer them to the petitioner and to B. When a new holding company, Company C was interposed, he held the shares in that holding company on the same *"understanding"*.

115 B told us that in order to get round these restrictions, and for it to work, these shares had to be the respondent's, but the intention was that the respondent would hold the shares for the petitioner and B. It was clear, he said, that it was their business. The petitioner says simply that the respondent was a bare trustee/nominee for her, although she acknowledged that there was no documentary evidence to that effect.

116 In our view, for this strategy to work, the respondent could not have been the formal trustee/nominee of the petitioner and B, as that would have put them firmly in breach of the restrictions they were seeking to avoid. As B said, the shares had to be the respondent's. There was an understanding that the respondent would transfer the shares to them in due course, and they trusted him to do so, but an understanding is not legally enforceable. There is no documentation to support the notion that the respondent was a bare trustee/nominee, and accordingly, we conclude that in law, the respondent is the beneficial owner of the shares that remain.

117 In any event, the respondent said that the understanding over these shares changed in 2011, when the petitioner fell out with Company V and formed a new company, into which C could invest. The respondent was left as shareholder and sole director of Company D, to deal with its disgruntled former members of staff, creditors and investors. The petitioner did not want to have anything to do with Company D. Furthermore, he says that in conversation in early 2016, the petitioner had agreed that he could, in any event, keep this small

balance, a conversation the petitioner denies. We prefer the respondent's evidence in this respect.

118 It is difficult to see how the respondent's assertion as to the beneficial ownership of Company D, and thus his entitlement to this sum, can be described as misconduct of a gross and obvious kind or of any kind. He has a perfectly legitimate claim and we have found in his favour. We will order that this sum can be paid to the respondent.

The Loss of £591,000

119 We explained above that as part of the consideration paid by Intuit, £2 million was set aside to enable the creditors of Company D to be paid in full. This was important to Intuit, as the intellectual property it was acquiring derived from Company D. One of the creditors of Company D was Company H, which had discharged sums on behalf of Company D giving rise to an inter-company debt of £591,000. Company H was acquired by Intuit. The position is explained by the respondent in his affidavit of 19th July 2017 at paragraphs 30 – 32:-

> *"30 It is an incontrovertible fact that there were intercompany liabilities from Company D to Company H. Company H had assumed responsibility for/novated £591,367 worth of Company D's debts…..*
>
> *31 In accordance with the terms of the SPA, Hatstones made a payment of £591,367 from Company D to Company H on 19 December 2014 in order to discharge its undertaking to Intuit to do so.* Please see Hatstones' confirmatory *email dated 19 December 2014 in response to the Petitioner's request asking whether the funds had been received by Company H exhibited at page 31 of exhibit* ….
>
> *32 The money was never directly due to either the Petitioner or [C's company]: it was due to Company H as an intercompany debt.* The reality is that the receipt of £591,367 by Company H from Company D increased the Closing Cash balance, as defined by the SPA, and exhibited by footnote (1) of page 27 of exhibit PHCP 1. By increasing the closing cash balance on completion, both [C's company] and the Petitioner received greater proceeds from the sale of Company T because £591,367 had been received by Company H, one of the group companies being sold. Had it not been paid by Company D to Company H, £591,367 would have been deducted from the proceeds payable to both the Petitioner and [C's company] in their proportionate shares. The Petitioner has therefore already received her proportion of the £591,367."

120 The respondent exhibited a spreadsheet showing Company D's creditors, including this intercompany debt, a document which appears to have been created originally by the petitioner. He also exhibited the completion statement, which showed the payment to Company D of £2 million and the sum of £591,367 being added to the closing cash, for the benefit of the petitioner and C's company. Also exhibited to his affidavit were email exchanges concerning this transaction, and in particular, confirmation from C on 18 th

December 2014 that the intercompany debt of £591,367 was due.

121 It should be borne in mind that this was a complicated transaction, in which Shearman & Sterling LLP were acting for Intuit, Hatstone's and Smith & Williamson were acting for the petitioner and F, a commercial lawyer, was acting for C. We have seen the email exchanges between these firms and advisers in relation to this payment at the material time, which again confirmed the intercompany debt as being due.

122 The petitioner asserts that the respondent attempted to divert this sum of £591,367 from the proceeds of sale of the business by falsely claiming that there were intercompany liabilities owed by Company D, which she says was completely untrue. Intuit, she says, were refusing to return this sum, and quoting from her statement in relation to misconduct dated 6 th July 2017:-

> *"Had it not been for [the respondent's] attempts to divert this money, these sums would have been transferred to me as part of the overall consideration as had been originally negotiated and now it appears (due solely to [the respondent's] actions) I am unable to recover any of these sums*."

123 In her pleading on misconduct, the petitioner asserts that the creditors for which Company H had assumed responsibility, had been paid off, and there was nothing therefore to discharge. That may well be the case, but it would still leave the intercompany loan between Company D and Company H, as confirmed by C in his email of 18 th December, 2014.

124 We fail to see how the petitioner can make this allegation against the respondent, when there were four sets of professional advisers acting in the matter. Nor can we see that anything in this transaction went awry. There was indeed an intercompany debt, but the amount paid to discharge it was added to the closing cash balance for the benefit of the petitioner and C's company. It was openly discussed between the advisers at the time, and is clearly shown on the completion statement.

125 The petitioner called F in support of her claim. He raised no concern at the time of the transaction, but in December 2016, two years later, the petitioner raised it with him and he, in turn, raised it with G of Hatstone's, who closed the issue firmly in this way:-

> *"Sorry, but no way can Intuit be involved in any way*.
>
> *Company H owed Company D £2m, which Intuit agreed to fund*.
>
> *Intuit put Company H in funds to pay that at completion*.
>
> *It was paid to Company D by Company H*.
>
> *Company D then settled its creditors, which includes a repayment to Company*

H of sums owed by Company D to Company H. End of story.,

That is the end of it. No way can this translate into Intuit owing money to anyone.

I will raise it with Intuit if [the petitioner] really wants me to, but the response will be very simple!"

126 The most F was able to say was that he thought there may have been an overpayment to the benefit of Intuit.

127 However, this is a complaint made by the petitioner against the respondent for failing, she says, to manage the payment of outstanding creditors in breach of his fiduciary duties as a director of Company D and as of his duties to her as bare trustee. She goes so far as to allege that he was acting dishonestly although she does not, and indeed cannot, assert that he benefitted personally from this payment; on the contrary it was the petitioner and C who benefited because it was added to the cash balance on completion. We have found that he was not her bare trustee and we cannot see that he misconducted himself in any way over this transaction, let alone in a way that was gross and obvious. This allegation should never have been made and it does the petitioner no credit at all.

Loss of £250,000

128 After the sale to Intuit, and as mentioned above, the petitioner gave the respondent £250,000, which she alleges he has squandered with wanton/reckless expenditure.

129 The respondent has given us a breakdown of how this gift to him had been spent between January 2015, when it was made, and October 2017, and we can see nothing wanton or reckless in it. We accept his evidence in this respect and dismiss the allegation.

Ski apartment

130 As for the ski apartment, the petitioner has been paying the outgoings for some time, and is closer to the other owners. We think it would be preferable for the respondent to transfer his quarter share in the ski apartment to the petitioner, but freed from any obligation on his part to reimburse her for his share of the outgoings.

Conclusion

131 We will order that by way of a clean break:-

Or in the alternative, and at the election of the petitioner, she can procure the payment to

him of an additional lump sum of £565,000 in lieu of the transfer of these cars.

Subject to the above the parties will retain their own assets

(i) Corbett Le Quesne transfer the sum of £63,507 to the respondent.

(ii) The parties' current account be closed and the proceeds divided equally between them.

(iii) The T RBS pension will be wound up and its assets distributed to the parties in the proportions indicated in the Schedules of assets.

(iv) The respondent transfers his interest in the ski apartment to the petitioner, free from any obligation on his part to reimburse her for his share of the outgoings.

(v) The petitioner will transfer or procure the transfer to the respondent freed from any claim by the petitioner of:-

(a) Property C, or the shares in Company L.

(b) Property B and the strip of land.

(c) Property F.

(vi) The petitioner will procure a lump sum payment to the respondent of £3 million.

(vii) The petitioner will transfer or procure the transfer to the respondent of the following cars:-

(viii) The Lamborghini Murcielago LP670 – 4 SV coupé

(ix) The Ferrari Scuderia

(x) The Morris Traveller

132 A detailed order will need to be drafted. The Court has a particular concern in relation to Property C, as the process of its handover is capable of giving rise to further acrimony between the parties. The petitioner has asked for six months to vacate, but we think that is far too long, and that she should vacate as soon as possible, but no later than three months.

133 The respondent has no housing qualifications, and is not therefore able to take a conveyance of the freehold of Property C. We were also told that there might be some restriction over him taking the shares in the company, even if it is pursuant to an order of the Court and to enable him to sell, or be ordered to sell, the underlying realty. Inquiry must be made of the Population Office, so that the precise position can be ascertained before any final order is made. Steps will also need to be taken to deal with the issue of the insurance of the freehold, and of the petitioner's contents, pending her vacating the property.

134 There may well be further incidental issues for the Court to resolve.