



Neutral Citation Number: [2018] EWFC 81

Case No: BV16D15290

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MR JUSTICE FRANCIS

Between :

ABX

Applicant

-and-

SBX

Respondent

- and-

DX

Intervenor

Miss Nichola Gray (instructed by **Payne Hicks Beach**) for the **Applicant**
Mr Michael Glaser QC (instructed by **Stewarts Law**) for the **Respondent**
Mr Brent Molyneux QC (instructed by **Alexiou Fisher Philipps**) for the **Intervenor**

Hearing dates: 14-18 May 2018

Judgment Approved

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

Mr Justice Francis :

Introduction

1. In this Judgment I shall refer to ABX as “the husband” and I shall refer to SBX as “the wife”. This is my Judgment in relation to the husband’s application dated 31 May

2016 for a financial remedy order although, in reality, the true applicant is the wife. This is also my Judgment in relation to the wife's application dated 20 June 2017 for an order pursuant to section 37 of the Matrimonial Causes Act 1973 against the husband's father DX, who, very clearly contrary to his wishes, has been brought into this unfortunate litigation, which has cost him some £100,000 in legal fees.

2. In this case the husband and the wife between them have incurred costs of almost £1.1m. I dare say that, by the time my Order has been implemented, that sum will be somewhat larger. According to whichever schedule is to be preferred, a subject to which I obviously return, the total net assets in this case are somewhere between £1.5m and £5.4m, although it is common ground that significant parts of those assets are currently illiquid and some of them may never be realised. Whilst costs of this level are not at all uncommon in what might be termed the "very big money" cases, it will be obvious to anybody reading this Judgment that the costs incurred in this case are wholly disproportionate to the size of the assets, whichever version of the asset schedule is ultimately adopted. I have been able to form a clear view as I have heard the evidence in this case as to how and why the parties have been unable to settle a case that is not, at the end of the day, particularly complicated. Their failure to settle is in spite of the fact that they attended a Private FDR before extremely experienced and highly regarded leading counsel. I also venture to suggest that were the *Calderbank* provisions still applicable the parties might have been forced to take a very different attitude towards this litigation. I say this because a party who turned down an offer that they failed to beat, under that regime, could be staring at a substantial costs order. I recognise all of the pitfalls that were associated with the *Calderbank* principles, but I fear that there are cases where litigants now feel able to continue without the sanction of costs, save in cases of serious litigation misconduct.
3. The position in relation to the section 37 application is even more dire: this issue occupied days of court time and far more money has been spent on the issue than the value of the transaction which it is sought to set aside. It would not be an exaggeration to say that it is plainly absurd to spend more on an issue than the monetary value of the issue (perhaps unless some fundamental principle is at stake).

Relevant background

4. ABX and SBX, both nationals of a mainland Continental European country, were married in October 2010, having co-habited since 2005, first in Continental Europe and then in London. Both the husband and wife are aged 38. They have three young children under the age of six. My starting point is, of course, that these three young children are the first consideration of the court. Two of the children attend a prep school in London and youngest attends a nursery in London and will start in reception in September this year. It is anticipated that the 2 older children will remain at their prep school until they are at least 11 years old and that the son will remain at his current school until he is either 11 or 13, depending upon the senior school choices that are made for him. The geographical location of the schools is relevant to the housing issue which I have to deal with.
5. The marriage ended when the two older children were under four and when their son was only two. It is obvious that the ending of a marriage with such young children would be a severe blow to anyone. For the wife in this case the blow was all the more

severe because she had been diagnosed in 2009 with a disabling disease. I return to deal in more detail with the wife's health later in this Judgment.

6. Fortunately, the parties have been able to agree future arrangements in respect of the children. The children will spend (a) Friday to Monday in week one and (b) Thursday in week two with their father. They will spend all other time with their mother. The children's school holidays will be shared equally from September 2018.

Litigation conduct

7. This is not in any sense a conduct case and neither party has run it as such (although the wife has run an argument in relation to add-back). However, there are two aspects of the husband's litigation conduct which need to be mentioned from the outset of this Judgment. I have little doubt that, had things been handled differently by the husband (and those acting for him), the litigation could have taken a different, and less adversarial, course. I cannot and of course do not make any criticism of the husband for his decision to end the marriage. It is not the business of judges in these cases to engage in such things. However, the manner in which the husband chose to inform the wife of the end of the marriage, if true, is remarkable, although I appreciate that the parties' positions differ. On 5 January 2016, the wife received a letter from the husband's solicitors setting out that he considered that the marriage had irretrievably broken down. The wife told me that "this came completely out of the blue and without warning, which was traumatic for me". The husband disagrees and said in evidence that he informed the wife of his intention to divorce in person on 5 December 2015, as also recorded in the agreed chronology, having first discussed the deterioration of the marriage in Summer 2015. The letter from the husband's solicitors enclosed draft particulars of unreasonable behaviour without giving the wife any time at all to come to terms with the news that she had received (the fact that it came just after the Christmas and New Year festivities would have ended could only have added to the trauma). The husband's solicitors attached a draft divorce petition to their letter. I have read the particulars and they are, to be fair to the husband, perfectly anodyne. As it turned out, however, the husband was already engaged in an affair and it would have been easy, and in my judgment the right thing to do, to invite the wife to petition him on the grounds of his adultery.
8. It will rarely be appropriate to send a draft petition at the same time as informing the surprised recipient of the shock news. Certainly, in my judgment, it was likely to cause offence, and in the event did cause offence, to send a draft petition in the way that he did. Of course, there can be cases when such action would be necessary, for example to secure a jurisdictional advantage, but no such situation applied here.
9. On 26 May 2016, the husband's solicitors sensibly wrote to the wife's solicitors asking for confirmation that the wife would not make any application to the court prior to at least 1 June so that they could try to resolve finances through a voluntary process. The following day, the wife's solicitors quite properly wrote to the husband's solicitors confirming that the wife would not take any steps to issue a Form A before receiving the husband's response (by 1 June) about agreeing a timetable for voluntary disclosure. On 1 June the husband's solicitors informed the wife's solicitors that the husband had unilaterally lodged a Form A at court. As is evident from the Form A (which appears in the bundle at pages C8 to C12) the husband in fact issued his Form A on 31 May, i.e. the day BEFORE their agreed deadline. When I heard in court

about this unfortunate series of events, I made it clear that I was likely to be critical of the husband's solicitors in relation to their part in this and I gave them the opportunity of making representations to me, either orally or in writing, giving any explanation that they may wish to offer.

10. On 21 May 2018, I received an email from the partner with conduct of the husband's case at Payne Hicks Beach explaining that the issuing of the financial remedy proceedings was in no way intended to upset or prejudice the wife and was merely done "to put a structure and timetable in place". It was explained to me that the letter written by Payne Hicks Beach to Stewarts on 23 May 2016 was a holding letter written without the husband's solicitors having had the opportunity to take his instructions. The husband's instructions were later taken and a Form A was issued. Whilst I am prepared to accept that, at the end of the day, solicitors are only as good as the instructions they receive from their client, I regard it as plainly wrong that the husband's solicitors should have acted in this way. Quite what advantage they, or the husband, thought that they could secure is beyond me. Certainly, at an earlier directions hearing, the husband's counsel had attempted to present the husband as the applicant. I am not sure whether there is any real advantage in being the applicant, and in some ways there is a disadvantage, but I know that there is sometimes a perception by the advocates that there is an advantage in opening the case and then in making the last closing submission. At that earlier directions hearing I put the husband's counsel on the spot by asking whether it was conceivable, in any circumstances, that the husband would be seeking a transfer of assets from the wife to him or would be seeking a periodical payments order from the wife. It was conceded that it was not possible that such an order would be made and I therefore ruled that the wife would henceforth be treated as the applicant. In my judgment the applicant should (absent special circumstances) be the person actually seeking an order in his or her favour, not the person who is in every respect the natural Respondent but who happens to have stolen a march by issuing first.
11. As I have already said, I do not in any sense regard it as conduct that would be inequitable to disregard for the purposes of the ancillary relief application. I do, however, wish to say that I regard the conduct of the husband's solicitors in acting in this way as having been likely to exacerbate the difficulties between the husband and the wife. This is contrary to the duties of solicitors in such cases, particularly having regard to the fact that this very well-known and highly regarded firm is a member of Resolution. The Resolution website sets out the history of this important organisation of which most family law solicitors are members. The website refers to the first gathering of an influential group of family lawyers who "believed that there was a better way of conducting family law cases and of serving their clients. They wanted to improve the practice of family law to prevent the legal process increasing acrimony between separating couples and to avoid family law being seen as simply another type of litigation." The Resolution code of practice states that Resolution members will "reduce or manage any conflict and confrontation; for example, by not using inflammatory language". I cannot find any justification for the way that the husband's solicitors behaved in acting as they did in relation to the issue of the Form A. If, although this has not been suggested to be what actually happened, they had a client who insisted on the issuing of the Form A in circumstances where it had been agreed by the other side that they would not do so, then at the very least, I would expect them to contact the solicitors acting for the wife (and I observe that the personnel in these

firms would have been very well known to each other) and explain that, contrary to what had been said in an earlier letter, they were on instructions to act in a particular way. In reality, I expect that, in this case, had the husband's solicitors advised the husband against the course of conduct that was adopted, they would have been able to deal with things differently. Plainly I cannot and do not wish to know what advice was given; that is obviously subject to legal professional privilege.

12. On 8 June, the wife's solicitors not unreasonably complained about the issuing of the Form A, only to be met with this response: "... there is no merit in further discussing the events leading up to the current position and whether an application should or should not have been made". The reassurance, later in the letter, that the husband's "genuine desire is to endeavour to resolve matters amicably and away from the court procedure if at all possible" must have had a hollow ring to it when read by the wife.
13. The consequence of the events that I have described above has, in my judgment, significantly contributed to the fact that this couple had become locked in contested litigation from the outset and any possibility of trust was removed. To make matters worse, there were in due course contested occupation order proceedings, even though the husband, on his own case, was now rarely using the matrimonial home. I cannot understand why, in cases when there is sufficient money, one of the parties does not move out of the matrimonial home. Sometimes it may be because there would be a perceived advantage or disadvantage in relation to occupation long-term of a property. In other cases there will be some perceived advantage or disadvantage in relation to contested issues relating to where, or with whom, the children might live. But here, the husband had effectively moved out to live with his new partner but wanted to reserve to himself the right to come into the home when it suited him. In my judgment, the wife's health played an important part in all of this. Her solicitors' letter dated 20 July 2016 informed the husband's solicitors that, over the weekend of 9 and 10 July, the wife suffered a worsening of her disease which required her to attend the urgent care centre at a Hospital on 11 July, where she was prescribed medication to improve the symptoms. In spite of this, the husband's solicitors replied indicating that the wife's application for an occupation order "will be robustly defended". The husband went on to challenge the medical evidence that the wife's stress levels needed to be reduced. Furthermore, I am told that the husband refused even to move out of the matrimonial bed for some 10 weeks following his admission of the affair.
14. On 22 September 2016, DJ Alderson heard the contested occupation order application and made the order as requested by the wife. The husband was ordered to pay her costs. I am told that the total cost of the occupation order proceedings was £100,000. I regard this as an egregious waste of money and it demonstrates at best a severe lack of judgment on the part of the husband, at worst it reflects a callous and bullying attitude. I note that the District Judge found that "the husband has litigated in an inflexible and controlling way which has been done purely to further the views of the father and not that of the family as a whole".
15. With all of the above background, one can begin to understand how it has been that this couple have spent over £1 million of their precious resources on litigating this case. I have some sympathy for the wife when she referred, in her statement dated 6 August 2016, to her husband's actions as "calculated and manipulative and were demonstrative of a hostile and bullying approach". I very much hope that some lessons can be learned about how not to commence divorce and financial remedy

proceedings, albeit that one might have thought that these lessons had been learnt many years ago.

The former matrimonial home

16. The former matrimonial home, where the wife still lives with the children, is situated London. The property was purchased for £2,950,000 (plus costs) in Autumn 2013. The purchase was funded as follows:

Mortgage	£2,065,000
From the husband's father	€ 320,000
From the husband's mother (via the husband's father)	€ 400,000
From the three children's funds	£ 520,200

17. Accordingly, neither the husband nor the wife made any capital contribution at all to the purchase price. A declaration of trust was drawn up reflecting the fact that each child acquired a 5.43% share in the property. The parties are agreed that the children continue to have this share in the property, which needs to be properly ring-fenced. The husband also entered into loan agreements with each of his parents in respect of the above funds. Importantly, the wife does not suggest that the loan agreements are shams, but nor does she accept that they need to be repaid.
18. The property has five bedrooms, together with a disused sauna and gym, and consists of approximately 3,000 ft.² of living space. The property is situated in London. It has throughout been the husband's case that the wife is over-housed in this property and that, in any event, its retention is unreasonable. In support of his case that retaining the property is unreasonable he relies, in particular, on the fact that there is a mortgage of £2.076 million and also to the very substantial debts which the parties have incurred (primarily their legal fees).
19. The wife is critical of the husband for allowing the mortgage to climb back up to its current level. At one point the mortgage had been reduced to £1.8 million. The wife asserts that the husband deliberately allowed the sums due under the mortgage to rise at the same time as he was commencing his affair. The husband responds by saying that it was sensible tax planning to allow the mortgage to rise in this way. Certainly, the husband has secured for himself remarkably advantageous tax arrangements. Because he maintains that he is domiciled in mainland Continental Europe, and he was formerly paid offshore, he only paid tax to HMRC on the funds remitted to the UK. Accordingly, the husband contends that it would be foolish for him to bring money into the UK and incur a tax charge of 45% (the tax rate applicable of course, to other people earning sums such as he does). I do not think that this case is greatly

assisted by me going very far into this issue because I am faced with the facts as they are. Although I can understand why the wife has the suspicions that she has vocalised, I am not prepared to find, on the balance of probabilities, that the husband deliberately allowed the mortgage to rise, whilst conducting his affair, with the intention of “doing the wife down”. I can see the obvious sense in paying a low rate of interest on borrowing rather than incurring 45% with HMRC by remitting funds onshore. This is, however, a clear example of the mistrust that has arisen in this case.

20. The property was valued in February 2018 at £2,827,500. I note that this is slightly less than the purchase cost five years ago. Doubtless this is a reflection of, inter-alia, SDLT changes and uncertainties surrounding Brexit. In an email dated 28 June 2018 (in other words after the case had concluded but prior to delivery of this Judgment) the husband’s solicitors referred to the fact that, “[the mortgagees] with the help of independent surveyors have since valued the property (as part of the mortgage valuation process) as being worth £3.25 million”. It was plainly correct to bring this to my attention, not least as it affects the prospects of the mortgagees being persuaded to extend the mortgage term. However, I agree with the submission made by the wife’s solicitors in their email dated 2 July 2018 that I should continue to rely, for valuation purposes, on the single jointly instructed expert referred to above.
21. The importance, however, of the £3.25 million figure is that this means that the parties no longer need to find £200,000 immediately on the renewal of the mortgage as a capital repayment in order to reduce the loan to value ratio of the mortgage to the required level (65% LTV). This is a significantly better position than the one that pertained before the hearing concluded. Instead, it appears that the existing mortgage amount can in effect be rolled over. Under the mortgagees’ terms, the mortgage can be extended for a period of five years. In revised open proposals produced on the penultimate day of the final hearing the husband has, to his credit, indicated that he is willing to provide his guarantee for this mortgage for the offered term of five years. However, the offer is made on the basis that there is an order for sale of the property in April 2021.
22. The mortgagees’ offer is for a five year interest only mortgage, being a variable tracker, fixed to overnight LIBOR. There is a renewal fee of 0.35% which will be added to the mortgage capital. The interest rate charged will depend on the assets under management as follows:
 - i) assets under management below £516,250: 2.75%
 - ii) assets under management of £516,250 or above: 2.25%
 - iii) assets under management above £1,032,500: 1.75%

The extent of the assets under management depends upon the intervener, DX. Presently he has significant assets placed with the mortgagees. However, at the hearing, DX made it clear that he was not prepared to give any further financial support to this family. I deal later in this Judgment with the application by the wife to set aside the disposition from the husband to his father, but I find it more likely than not that DX will be true to his word in this regard and will not wish to offer further financial assistance to the husband or the wife. I am quite sure that DX has found it unpleasant to be involved in his son and daughter-in-law’s financial dispute, not to

mention the very significant expense to which he has been put. I therefore proceed on the basis that an interest rate of 2.75% is most likely. This will equate to £4,732 a month in interest. Plainly, if DX leaves funds with the mortgagees with the effect that the mortgage interest is reduced, this will greatly benefit the family.

23. The wife is extremely keen to retain the home. The husband has produced a number of property particulars for areas in south-west London where similar sized properties are slightly less expensive. The wife says, and I accept that this is the case, that she has a number of friends in the area of the matrimonial home and has a network of people that she does not wish to leave. She also says, again not unreasonably, that it is better for the children to remain in their family home if they can. Given the upheaval to which the family has been subjected, I have no doubt that it would be preferable, the first consideration of the court being the welfare of the children, for the wife and children to remain in the former matrimonial home for the time being if that is possible. A considerable amount of time was spent during the hearing examining particulars of other properties and addressing issues such as the length of time that it takes to get from various areas to the children's schools. At the end of the day, I am not sure that a detailed analysis of property particulars is all that helpful. It is axiomatic that, if the property cannot be afforded, it has to be sold. It is also axiomatic that decent family homes can be purchased in west or south-west London for substantially less than the value of this property. I accept that family homes in areas of south-west London are cheaper than they are in the area of the matrimonial home. Moreover, the properties which the husband puts forward are significantly smaller than the matrimonial home. For the moment, at least, the parties are both working on the basis that the matrimonial home is to be retained. It is difficult to predict what the situation will be in 3 to 5 years' time but it does seem likely that the property will then need to be sold. That decision, as discussed below, will depend in large measure upon how much of the outstanding funds due to the husband are paid out to him over the next three years.
24. As I address in the next section, when dealing with the husband's current circumstances, the husband appears to be well housed at the moment and for so long as he is with his current partner, for his partner owns a property in a highly desirable part of London as well as a substantial home in the countryside. From the children's perspective, to see their mother "downsizing" whilst seeing the luxurious properties where their father resides might be quite difficult for them to understand. Moreover, the husband's case, which appears to be correct, is that if the former matrimonial home is sold there is insufficient capital to purchase a new property. This would mean that the wife, and the children when with her, would be in the uncertain rental market. The evidence that was produced in court demonstrates that renting could cost at least as much as servicing the mortgage. In due course, when the wife is able to purchase a property, she will of course incur substantial SDLT costs as well as all the other costs associated with moving. Additionally, if the former matrimonial home is sold then sale costs of somewhere between 2% and 3% would doubtless be incurred.

The Wife's section 37 Application

25. S37 MCA provides:
- (1) For the purposes of this section "financial relief" means relief under any of the provisions of sections 22, 23, 24, 27, 31 (except subsection (6)) and 35 above, and any reference in this section to defeating a person's claim for financial relief is a*

reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions.

(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—

(a)

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c)

and an application for the purposes of paragraph (b) above shall be made in the proceedings for the financial relief in question.

(3)

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) as is reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied –

(a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or

(b)

of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

26. By an application dated 20 June 2017, the wife seeks an order pursuant to section 37 of the Matrimonial Causes Act 1973, “that the transfer by the husband to his father in the sum of €344,542.69 on 1 July 2016 be set aside... and that the husband and his father, the second respondent, do pay the costs of and occasioned by this application”. On the face of her application the wife asserted that, “this order is sought because the wife considers that the sum of €320,000 loaned to the husband by his father did not

need to be repaid at all. If the court found that there was a need for repayment, the wife considers that repayment did not need to take place at this time nor with interest.”

27. This issue has caused the joinder of DX, has occupied hundreds of pages of text and, literally, days of court time. In spite of the fact that the wife, throughout her presentation, refers to an “alleged” loan, she has also consistently said that she accepts that the loan agreement dated 10 August 2013 is not a sham. The loan agreement refers to the principal of €320,000. It records that interest of 3% shall be due on the loan from 1 January 2014 onwards and that it shall be payable until repayment of the loan amount. It records that “no repayments shall be due until 31/12/2020, at which date the loan shall be repaid in full, unless otherwise agreed upon by the parties.”
28. The wife asserts that the loans which the husband’s parents have made to the husband and wife are “clearly part of a wider inheritance tax planning scheme”. She asserts, and this is not contested, that from 1 January 2009, under the tax law of the Continental European country a parent could give, tax-free, to his or her child the sum of €400,000 every 10 years. I accept that it is perfectly likely that ABX’s parents may have decided to advance sums to their son (and perhaps other children) to utilise these tax-free amounts under that tax law. The wife’s case in this regard is supported by the fact that €320,000 came from his father and €400,000 came from his mother. I accept that this is consistent with gifts pursuant to the tax rules. It may be that the €320,000 loan would have been forgiven by the husband’s father before the formal repayment date. It may also be that the €400,000 from the husband’s mother would similarly have been forgiven before the formal repayment date. However, unless and until the loans are forgiven they remain due as a matter of simple contract. If I were in any doubt at all about this, that doubt is dispelled by the fact that the wife accepts that the loan agreements are genuine documents. That concession having been made, it seems to me that her claim pursuant to section 37 is dead in the water save in respect of one issue. That issue is that the loan was repaid in July 2016 rather than December 2020.
29. There is a long history in this case of the husband’s father having lent money to the husband. A table of these loans is set out in Mr Molyneux QC’s opening note at paragraph 11. It is not necessary for me to repeat that table here. The point that Mr Molyneux makes, and which is not contradicted, is that all 12 of the loans made by DX to the husband (in respect of the husband’s investments into business share schemes) were repaid early. Moreover, DX said in evidence, and I accept, that, “in the case of every loan, I made it clear verbally that the loan was to be repaid as soon as possible”. Not only did I find DX to be an honest and credible witness, his statement about early repayment is supported by a letter that he wrote to the husband on 2 August 2013 when he said, “I assume you’ll be able to repay the funds committed by us in the foreseeable future”. His case is also supported by history, as in the actual early repayment of other loans.
30. DX said that he required repayment in July 2016 rather than in December 2020 because he wished to lend money to his daughter to enable her to purchase a home. He said:
“The reason why I have requested an early repayment from you is founded in the fact that [the husband’s sister and her husband] have bought a house, and just like you have struggled to obtain the required equity. I have therefore granted to [the sister’s husband] , who is acting as the buyer, two loans in the total amount of €360,000. The

chronological link results in the fact that I received your payment on 1/7/2016 and the payments to [the sister's husband] happened on 14/7 and 25/7."

31. DX told the court, and I have no reason to doubt this, that he could have made funds available to his son-in-law without requiring repayment from the husband, but that this would have meant liquidating other resources which he did not wish to liquidate. The wife would have me believe that the repayment was the consequence of some sort of agreement, or even conspiracy, between the husband and his father that his father would artificially demand early repayment in order to defeat the wife's claims. At one point I did consider whether it was possible that the husband and his father had had such a discussion, possibly at a dinner where the husband introduced his parents to his new partner. Having heard the way that DX dealt with that suggestion, namely that he would be appalled at the thought of discussing such financial matters in front of somebody that he had never met before, I am completely satisfied that DX was telling me the truth.
32. The wife brings the application pursuant to section 37 and she has to prove it. She falls well short of satisfying me that the repayment was for any reason other than that put forward by DX. It must be a remarkable feeling for DX to have given his son and daughter-in-law so much consistent financial help, only to find himself dragged into their proceedings because his son fulfilled a contractual obligation to repay a debt a little over four years early (but in circumstances where there was a history of early repayment and where early repayment was requested by the father for a legitimate and compelling reason).
33. The wife asserts that I should rely on the presumption contained in section 37(5). In answer to that I say as follows:
 - i) in the summer of 2016 when the loan was repaid, the husband was earning between £862,000 and £948,000 gross per annum. A considerable part of this was not subject to tax because it was not remitted to the UK.
 - ii) in the summer of 2016 the husband had about £1 million in cash and equities;
 - iii) in the summer of 2016 the husband was entitled to about £721,000 worth of unvested equity in Business R;
 - iv) in the summer of 2016 the husband had an investment portfolio with Business R with a value of about £1,500,000;
 - v) the family was living in a property thought by them at the time to be worth about £3 million with about £1 million of equity.
34. Accordingly, it is my judgment that the early repayment by the husband to his father of €320,000 plus interest could not, at the time paid, have had the effect of defeating the wife's claims. It was, I dare say, beyond the comprehension of anyone at that time that the parties would spend over £1 million in costs and deplete their estate to such an extent.
35. Accordingly, the wife's application for an order pursuant to section 37 MCA is dismissed.

36. I end this section by observing that the suspicion that surrounded the repayment by the husband of this money was probably fuelled by the litigation conduct of the husband referred to at the start of this Judgment. Had the parties been able and willing to attend an early “three room” or “round table” meeting with their lawyers in a non-combative manner, rather than being locked into contentious litigation, it may very well have been possible to discuss and explain this process. I do not necessarily blame the wife for being concerned about the husband’s actions, considering how he started this litigation.

The wife’s current circumstances and future needs

37. The wife continues to reside at the former matrimonial home and, as set out above, would like to remain. In 2009 she was diagnosed with a disabling disease. [The judge recorded the history and the symptoms of the disease and the medical treatment she received].
38. A consequence of the wife’s ill-health is that, by agreement, she has not worked full-time since April 2011. The wife works for a company in London and she presently works at 70% capacity. Having read and heard what I have about her, and also having regard to her significant childcare commitments, I am completely satisfied that she is working as many hours as it is reasonable to expect of her. The wife’s basic gross salary (at 70%) is £109,200 gross or £60,100 net. In recent years she has also received a bonus of between 30% and 50% of her salary. She anticipates that this will be at the lower end of this range moving forwards. Importantly however, the wife said in evidence, and this was not challenged, that at a recent review she has been told that her employers “would not see her on the path to being promoted further” and that she needed to look for other employment. She said that she has been contacting head-hunters but that it is not easy, especially as she has the medical conditions already referred to. One might have hoped, in an age which proscribes discrimination, that her medical condition would not count against her but I recognise that if, as I am sure she will, she declares her medical difficulties, her earning capacity is doubtless compromised. I say this for two reasons: the first is that she will be less attractive to prospective employers; the second is that she will be unlikely to work 100%. In my judgment I must proceed on the basis that her earnings will continue at their current level. In a case where it is agreed that there will be a substantive periodical payments order in her favour, there can obviously be a review in the event of a significant change in circumstances. However, the threat to her future earning capacity is something that plainly influences the term, if any, that should be imposed in respect of her claim for periodical payments. It also restricts the wife’s ability to accumulate capital or to save for her later years.
39. The wife has been on an unpaid leave of absence between 10 April and 2 June 2018. This has been in order to deal with the stress of the final hearing as well as to give the wife time with the children in the school Easter holidays.
40. The wife’s revised budget shows a claimed need of £225,519. As is so often the case, “need” is a relative concept, but I accept that the parties lived well during the marriage. Inevitably the budget includes a significant amount of discretionary expenditure such as £25,000 on clothes, shoes etc., £30,000 on travel, holidays, leisure and entertainment, and numerous other items. One of the controversial issues on which some time was spent in court is the cost of the children’s nanny. The nanny

was described by the wife as “an amazing English career nanny”. The wife would like to retain her, for the time being at least. I remind myself that the children are aged 6 (the twins) and 4 and that they are the first consideration of the court when I apply, as I do, the statutory criteria set out in section 25 MCA. I accept that the nanny is able to assist the children with their homework and is of far greater help to the family generally than an au pair or less well qualified nanny would be. The wife said that she would look to reduce the nanny’s hours after about September 2019, allowing the nanny perhaps to have another job during the mornings. Given the upheaval to which this family has been subjected and given the importance to the wife’s health of reducing stress wherever possible, in my judgment it is reasonable for the nanny to be retained at the current level of salary for another year, and I think that the wife’s target of reducing the nanny’s hours and salary in September 2019, to coincide with the start of the school year, is a sensible one. If the nanny’s hours can be reduced with a commensurate cut in her pay then it is obviously desirable for her to remain with the family if possible. As the children get older they will not need a career nanny and I should have thought that after three years or so it would be possible to manage with an au pair or similar, but for now I am sure that the nanny’s assistance is much needed in the home.

The husband’s current circumstances and future needs

41. Until early 2017, the husband was employed at a financial services firm based in London, referred to in these proceedings as ‘Business R’. This employment came to an end on 5 May 2017, the husband having given his notice of resignation in March 2017. The husband forfeited certain deferred compensation when he left Business R. He has now entered into an agreement with a Continental European partner pursuant to which he is now the managing director of a newly established company, C Ltd, of which he is the sole shareholder. The wife complained about the fact that the husband changed his employment contemporaneously with the breakdown of the marriage. However, in my judgment, the wife has failed to establish that the husband changed jobs for pernicious reasons. The terms of his new employment are that he will receive a fixed salary of €750,000 per annum. This equates to £357,000 net pa. The employment will be terminable on six months’ notice but if his contract is terminated before 31 January 2021, he will receive the balance of the salary which he would otherwise have received for the remainder of the three years, capped at €1.5 million. Through his company, the husband will further become a shareholder in the Continental European company. He will be required to invest around €500,000 in return for a percentage of the shares in the business. *[The Judge records further details of the husband’s commercial arrangements regarding C Ltd.]* The husband has estimated that the shortest time scale for a return on his investment would be about 6 ½ years. Accordingly, I proceed on the basis that, for the next 6 years or so, the husband will receive his salary of £357,000 net pa from C Ltd, together with outstanding monies in Business R (addressed below).
42. *[The Judge records further details of the husband’s commercial arrangements.]*
43. When he was with Business R, the husband received a basic income of £135,000 gross per annum plus a discretionary profit share. A table of actual gross cash received by the husband demonstrates the following:
2013: £307,072
2014: £331,355

2015: £433,611

2016: £567,049

These sums would of course be subject to income tax insofar as funds are remitted to the UK.

44. The husband has a continuing interest in a venture of Business R called “D venture” and in deferred equity in Business R. There is a substantial dispute between the parties as to the value of this interest. What is clear, however, is that the husband has no control over the dates on which proceeds from “D venture” are realised or when distributions are made to him. The proper way to deal with this is for the wife to receive sums when the husband receives them. Moreover, a considerable amount of time was taken up in court in trying to value these assets. The wife sought to persuade me that I should take a multiple of X against the amount invested in order to ascertain the sums likely to be payable to the husband. Whilst I recognise that it is possible to demonstrate that, historically, an average multiple of X has been achieved, I cannot base my Judgment upon what is little better than speculation.
45. I am afraid that, at times, I wondered whether the wife was adjusting the expected multiple in order to fit her case that she could retain the matrimonial home. Indeed, when she re-worked a worked example that she produced as a spreadsheet demonstration of how this could be done, she found herself having to increase the multiple in order to make the sums work. However, it is obvious that we live in particularly uncertain times so far as the future performance of the UK, Continental European and worldwide economies are concerned. The political uncertainty that abounds in the UK is manifest. Whilst, on the one hand, I plainly have a duty to do my best to ascertain the future value of these assets, in my judgment it would be wrong as matter of principle to order the husband to make lump sum payments to the wife based upon anything other than the actual value and actual date of receipt.
46. There are three categories of investments falling in over the next five years. The first is an agreed figure of \$261,238 in respect of investments. Based on the exchange rate taken at the date of the hearing, **this equates to £187,523.**
47. The second category is fund investments of Business R. The wife asserts that these have a value of \$3,436,745. This value is arrived at by her using a multiple of X, that being the exit multiple achieved across all current funds against the amount invested. The husband asserts that the best guide to the quantum of the payments which he may receive is the valuation from Business R dated 31 December 2017. This shows a gross value of \$1,970,674. The notes to the annual accounts of Business R include the following:
[The extract refers to past performance not being representative and to historic markdown of investment funds]
I am told by Miss Gray for the husband, and accept (although they are not in the bundle), that the “Risk factors” information runs to 26 pages.
48. The wife then asserts that no tax is payable on these funds when realised. This is because she says that if these funds are paid offshore to her, she is able to remit them onshore without incurring a tax liability. It seems to me that this is a remarkable tax loophole but given that both parties accept that, on advice, it exists and is legitimate, then I would not stand in the way of the wife receiving lump sums into an offshore account. Any part of the funds remitted onshore will be taxed at the husband’s

marginal rate of 45%. The husband says that there should be deducted from the value of the sums received the “remittance charge” (by which I think he means the “non-dom charge”), which will amount to £240,000 over five years. It does not seem to me to be correct to treat this as a deduction against the funds in Business R due since it is likely that the husband will continue to pay the non-domicile charge given the value of the benefit of that to him. He will pay that out of future income and not from resources already accrued but not realised.

49. Accordingly, in carrying out my duty to compute the value of the assets, I find that the likely sum from the fund investments in Business R is in the region of \$2 million (rounding up the sum of \$1,970,674) which equates to about **£1.45 million gross**. However, as I have said, the actual sum received could be substantially more, or possibly less.
50. The third category is the ‘D venture’. This has a predicted value of about \$400,000 which equates to about £290,000. The husband asserts that the value is \$341,000 or £245,000. The difference of £45,000 is not particularly large and, of the purposes of computation, I take the midpoint, being **£267,500**.
51. The sum of the estimated value of these three illiquid assets is £1,905,023.

The capital assets summarised

52. In addition to the disputed assets in Business R referred to above, the parties have other assets, the value of which is agreed. I summarise the parties’ assets as follows:

Equity in matrimonial home	£157,475
Joint bank accounts	(£863)
Husband’s current realisable bank accounts and investments	£178,844
Husband’s investments falling in over the next five years (see discussion above)	£1,905,023
Wife’s bank accounts	£608
Sums owed to the husband by C Ltd	£278,100
Agreed liabilities (including costs)	(£733,910)

Pensions	W: £204,172 H: £55,052
TOTAL	£2,044,501

53. I recognise that there is uncertainty over the “investments falling in over the next five years” and that the sum could be significantly different from the above estimate.
54. The pensions total of £259,224 is obviously illiquid at least until the parties reach the age of 55 (under current legislation). Sensibly, no one is suggesting that a pension sharing order should be made.
55. It is agreed that the husband has a capital commitment in respect of his funds in Business R in the sum of \$119,909. This equates to about £86,000.
56. The husband asserts that he owes his mother €464,000. The wife accepts that the husband’s mother lent the husband €400,000. This loan is evidenced by a signed loan agreement which the wife does not assert is a sham. The loan agreement requires the husband to repay his mother €400,000 (plus interest, hence the enhanced sum of €464,000) by 31 December 2020. The wife asserts that, pursuant to the law of the Continental European country, monies may periodically be transferred from parents to their offspring without incurring a tax charge. She asserts that the husband’s mother intends to forgive this loan and to gift the money to him in accordance with the tax law. However, I note that the loan is documented in the loan agreement and forms part of the declaration of trust in respect of the matrimonial home. Whilst I accept that the husband’s mother might gift the money to her son, and I must also accept that the loan is what might be termed “soft”, I am satisfied that it is correct for me to treat this as a genuine obligation to repay his mother in accordance with the loan agreement. Given that the wife does not challenge the veracity of the loan agreement or the declaration of trust, I do not see how I could do otherwise and I am afraid that I find the wife’s case in this respect to be at best confused and at worst duplicitous.
57. The combined effect of the liabilities respectively to Business R and the husband’s mother is to reduce the asset pool by approximately £500,000. This means that the likely remaining assets in the case are something close to £1.5 million. I remind myself that the parties have spent £1.1 million between them on costs. In reality, it must be hoped that the husband will pay his commitments to Business R and the sums due to his mother from his future income. I am satisfied that the debt to the mother, whilst genuine, is not pressing. I doubt whether the husband’s mother would sue him for the debt, although I have not heard from her and cannot say that with any certainty. For my own part, I regard the needs of the wife and children as more pressing than the need to repay this debt in the short term. I expect that the husband will be able to persuade his mother to wait a short time until he can repay her, presumably with interest, but that is a matter for him and his mother to resolve. So far as my computation is concerned, the loan is genuine and must be repaid.

58. The largest of the disputed liabilities is the un-crystallised tax on the husband's assets in Business R. In reality there is no dispute here. It is agreed by both parties that, if the husband remits the money to the UK, it will be taxable in his hands at his marginal rate. It is also agreed by the parties that such lump sums as I order to be paid to the wife can be paid offshore with the tax liability being avoided. In other words, every pound received by the wife is worth a pound and every pound received by the husband is worth 55p (possibly less if NI is also payable). Given that the income now received by the husband is taxable at 45% plus NI, there is every sense in making as much as possible of the Business R money as is received being payable to the wife. Of course, I can only do this insofar as it is fair to the husband to be deprived of his capital. However, it is likely, although not certain, that the husband will accrue capital during the rest of his working life. He is plainly extremely gifted and I am satisfied on the balance of probabilities that he will continue to succeed in his business life. The wife, with her several difficulties referred to already, is unlikely to have the opportunity to accrue capital and I am satisfied that she is unlikely ever to be earning more than she needs to spend. In other words, she will not have the opportunity to accrue capital.

The husband's resignation from Business R

59. The wife asserts that the husband's resignation from Business R and the loss of the units in Business R and in 'D venture' in order to obtain a better overall level of remuneration, means that she should get a greater share of the remaining investments. In his section 25 statement, the husband has explained the reasons why he left Business R. He now has the benefit of a guaranteed income of €750,000 gross pa, paid onshore and then subject to tax: £357,000 net pa. His only guaranteed income from Business R was his base salary of £135,000 gross. The husband is now guaranteed an income until the end of January 2021, even if his contract is terminated before that date. Miss Gray, for the husband, forcefully asserts the husband is entitled, post-divorce, to make reasonable decisions in relation to his own career. She says that deferred compensation is an everyday feature of the financial services sector. She says that loss of deferred compensation is an everyday feature of moving jobs. She asserts, and I emphatically agree, that it would be an extraordinary application of section 25(2)(g) if the court fettered the ability of divorcing spouses to move jobs freely within the financial services (or any other) sector. I regard the idea that the husband changed jobs to do the wife down as fanciful. Quite apart from anything else, it would be deliberately inflicting harm on himself at the same time. In my Judgment, the change of jobs by the husband may point to the fact that the husband has considerable confidence in his new position at C Ltd. He is obviously an extremely intelligent and gifted person working within the investment industry and I have no doubt, having heard from him in the witness box, that he would have given the greatest possible consideration to this change of jobs and decided that it was in his financial interests to take this new position. He struck me as a man who would not make any important decision in a hurry, rather that he would carefully weigh up the pros and cons of any such decision, especially a financial one.
60. One consequence, however, of all of this is that the wife has a legitimate argument that she has a sharing claim in relation to at least some of the rewards from C Ltd. The reason I say this is because the husband gave up deferred compensation with Business R in order to secure the benefits associated with his position at C Ltd. It is, of course,

now well established that a wife, post-divorce, does not generally have a claim to share in the husband's income, save insofar as the rationale of need and compensation require it (and compensation, if not altogether dead, is a creature rarely seen in financial remedy cases and certainly has no application to the current case). I do think it relevant that the husband has foregone substantial sums (put at £2.2 million gross by the wife, but I do not make any finding as to the precise amount) in order to secure his new position in C Ltd. Given that this entitlement was earned by the husband during the marriage, the wife would have been likely to have been able to assert a sharing claim in respect of that money, had it not been forfeited as a consequence of the husband's career move. This gives me considerable confidence in being able to give the wife a share in excess of 50% of the current capital if I think it fair to do so.

61. I should also say, in relation to the husband's change of job, that it was not until the day before the FDR that the husband told the wife that he was going to leave Business R in order to join C Ltd. Unsurprisingly, this had the effect of de-railing the FDR.

The wife's add back argument

62. Mr Glaser QC on behalf of the wife invites me to add back the sum of £762,572. It is helpful in this context to begin with a reminder as to the applicable law. In *MAP v MFP* [2015] EWHC 627 (Fam), Moor J helpfully summarised the applicable law, with which I respectfully agree. The familiar words of section 25(2)(g) refer to "conduct that would be inequitable to disregard". As Baroness Hale said in *Miller/McFarlane*, for such conduct to be relevant it has to be "gross and obvious". Moor J also referred to the fact that there has to be "wanton dissipation of assets", and in this context referred to the court of appeal decision in *Vaughan* [2008] 1 FLR 1108. In *MAP v MFP*, the conduct complained about was expenditure on prostitutes and cocaine. The judge found as a fact that the husband had probably spent about £250,000 this way. The judge did not find, however, that the husband overspent to reduce the wife's claims. He found that this expenditure was down to the husband's flawed character, what he referred to as "the husband's Demons". The judge also found that he could not add back items of expenditure that were simply extravagant or part of the husband's obsession with perfection. In the end, the judge was not prepared to add back even the excessive and reckless expenditure on prostitutes and cocaine.
63. It is, of course, obvious that, in considering add back issues, each case will be very fact specific. I dare say that expenditure on prostitutes and cocaine in a different type of case could still be regarded by a judge as being susceptible to add back.
64. With that legal framework established, I turn to deal with each of the wife's asserted add back items. The first is the costs order of £50,000 which was made against the husband in respect of the occupation order (which resulted in a total loss to the family of some £100,000 when one includes the money spent by the husband in defending the application). The husband's response, with which I agree, is that this has already been dealt with by the District Judge in his order dated 22 September 2016 when he made a costs order. I have already been highly critical of the husband's lack of compassion and judgement in the way that he dealt with that application. The District Judge plainly took the same view and made a costs order. I do not see how I can take it into account all over again by adding it back into the schedule of assets and liabilities.

65. The second add back item is the husband's loan repayments to his father (€344,543 plus the remittance tax charge of £57,005 as a result). I have already dealt above with the section 37 application in respect of this money and I have declined to set aside the transaction. Even if the wife's section 37 claim had succeeded, it would only have resulted in a deferral of the repayment to DX until 31 December 2020. The wife accepts that the husband and his father executed a loan agreement on 10 August 2013. Furthermore, she recognises that the loan was expressly referred to in the declaration of trust relating to the ownership of the former matrimonial home, a document which was executed by both the husband and the wife. In my judgment it is plainly wrong for the wife to assert that the repayment of monies to DX could be added back when she agrees that her husband owed this money to his father. At best, her case is that, had the marriage subsisted, DX would have forgiven the loan as part of his inheritance tax plans. That may well be correct and it may even be the case that, once this case is over, the money will be transferred back to the husband. However, as a matter of law, the wife accepts that this money was due from her husband to his father. The most that I could do would be to add it back for a period of about two years, but the wife has already failed in her section 37 application in respect of these very monies.
66. The third add back claim made by the wife is the sum of £145,562. The wife has prepared an extraordinarily comprehensive schedule of the husband's expenditure since January 2015. These run to 56 pages of closely typed A3 paper and feature items such as the cost of a cup of coffee at Costa and Caffè Nero through to takeaway food, Uber trips, Netflix etc. I am told by Miss Gray, for the husband, that the wife has listed 1212 individual items of expenditure during 2017. Of these, she says, some 928 items (77%) relate to individual items of expenditure of less than one hundred pounds. The biggest single item of expenditure on the schedule is £14,890 which the husband spent on a holiday with the children in February 2017. What the wife has done is to compare the actual expenditure during this period with the budget put forward by the husband in his form E. It is clear from these schedules that the husband has spent a great deal more in this period than he said in his Form E he was going to spend. I accept that the schedules do, indeed, support the claim that the husband has spent some £145,562 more than his form E budget. However, in my judgment this falls very short indeed of wanton or reckless expenditure in the obvious and gross sense referred to in the cases quoted above. I go further than this: if I were to allow the wife's claim in this regard it would encourage litigants in all cases to carry out such an exercise and would greatly increase the costs of proceedings and the time that they would take to be heard. It would, in my judgment, run contrary to the Overriding Objective to encourage such behaviour. In fairness to the wife, when I asked about the cost of preparing these schedules, she told me that she had prepared them herself and had not paid her lawyers to do it. I fear that schedules of this nature exemplify the somewhat obsessive approach that has been taken to this litigation. I made it clear to Mr Glaser QC, on behalf of the wife, that I was not prepared to allocate very much court time to cross examination on a schedule of this nature.
67. Adopting the legal test so helpfully summarised by Moor J, I have no hesitation at all in dismissing this aspect of the wife's add back claim. However, this is not to say that the expenditure is to be disregarded. On the contrary, the fact that the husband has been willing to spend at this rate at such a critical time for this family encourages me to the view that I can err on the side of generosity when considering both (a) his likely

future remuneration and performance and (b) the amount of current capital as I should apportion to the wife; and (c) the level of periodical payments that I should order him to make to the wife.

68. The fourth add back claim made by the wife is the cost of a skiing holiday. in February 2018, namely £40,010. Again, although doubtless extravagant, I do not find that this is an extravagance which falls into the wanton conduct category to justify an add back.
69. The fifth add back claim made by the wife is her costs of the section 37 application if she is successful. She estimates this to be £118,075. Since the section 37 application has failed I need say no more about this, although even had the claim succeeded it seems to me that this is an item which would have been better sounding in costs rather than as part of an add back claim.
70. Sixthly, the wife asserts that the husband has incurred an unnecessary tax payment of £57,005 as a result of the payment of the money to his father being classed as a remittance of money to the UK. The point here is that the husband has to bring money onshore in order to fund the payment to his father and this was therefore subject to the remittance charge. Since I have found that the repayment to his father was a legitimate payment, plainly I cannot add back the remittance charge relating to this repayment. It is possible that the husband could have repaid his father two years later from income already taxed in the UK, but he is going to have very significant demands on his income for the time being and I cannot allow speculation to cloud what I regard as a clear judgement in relation to this add back claim.
71. The seventh and final add back claim made by the wife is costs incurred in the Children Act proceedings. I do not see how I can begin to evaluate this aspect of her claim because I have not been troubled with the detail of the Children Act proceedings. Presumably, what the wife encourages me to conclude is that the husband behaved unjustifiably in relation to the children. I have no material whatsoever on which I could base such a finding. It can rarely, if at all, in my judgment, be appropriate to add back the costs of Children Act proceedings. There may be some cases where the same judge has dealt with both the children proceedings and the financial aspects so that that judge would, at least, be in a position to know what had happened. In the overwhelming majority of cases it is likely that different judges will deal with the two different sets of proceedings and the parties to such financial proceedings should never be encouraged to run through the detail of the Children Act proceedings. Again, it seems to me, that to do so would be contrary to the Overriding Objective. In any event, in the instant case, the parties were finally able to resolve their differences in relation to the children. The Wife asserts that the husband's decision to bring children act proceedings "was not only reckless from a cost perspective that will exacerbate the wife's levels of stress which will negatively impact on her and her ability to care for the children". Whilst I have, in other contexts, been critical of the husband's litigation conduct, I cannot pass judgement on what took place in the Children Act proceedings without reading into them and hearing evidence about them. Not only would this, of its very nature, cause the exact kind of stress which Mr Glaser rightly says is to be avoided, it would in my judgement be satellite litigation of the worst kind.

72. There is a further point which in my judgment needs to be made in relation to add back claims in cases such as this: as demonstrated by the schedules above, this is not in any sense a “big-money” case. Certainly, there are substantial incomes by any average standard but adding back capital where capital does not exist is something of a fantasy. What the judge is, in effect, being asked to do is to pretend that money which has been spent has not been spent and that it somehow still exists. In this case, I have to have regard to all of the matters as set out in section 25 of the Matrimonial Causes Act 1973. This, of course, includes the needs of the parties. If I were to add back the £762,572 sought by the wife, how would the husband be paying this?
73. I also observe that some context is given to the add back claim when I remind myself that the parties spent more than £1.1 million on costs in this case. If anything is to be classified as “wanton” then, in my Judgment, it is this extraordinary waste of money on legal fees.
74. Accordingly, the wife has not succeeded in any of her add back claims. I imagine that a very considerable amount of costs will have been wasted on this aspect of the case. I venture to suggest that there were very few cases indeed which do not fall into the “big money” category where arguments over add back are likely to be worthwhile.

The parties’ respective open positions

75. The husband made open proposals in June 2017. The wife failed to respond at all to that offer. The husband made a second open proposal on 23 February 2018. The wife responded to the second open offer on 21 March 2018. A very long time ago, in respect of the then current *Calderbank* provisions, it was explained that parties have a duty to respond to offers, even a bad or indifferent one. Rule 9.28 FPR 2010 provides:

Duty to make open proposals

- (1) Not less than 14 days before the date fixed for the final hearing of an application for a financial remedy, the applicant must (unless the court directs otherwise) file with the court and serve on the respondent an open statement which sets out concise details, including the amounts involved, of the orders which the applicant proposes to ask the court to make
- (2) Not more than 7 days after service of a statement under paragraph (1), the respondent must file with the court and serve on the applicant an open statement which sets out concise details, including the amounts involved, of the orders which the respondent proposes to ask the court to make.

Here, the wife completely ignored her obligation to respond to the June 2017 proposals. If it were her case that she had insufficient information, or that the offer was a poor one, it was still her duty to respond. Her failure to do so may have led to an increase in the costs of the proceedings.

76. The husband appropriately explained in his open offers that there was a paucity of realisable assets in this case. His point was forcibly made to me when I heard the pre-trial review in March 2018. At the end of that hearing I gave every possible encouragement to the parties to settle this case and avoid the costs (and heartache) of

this dispute. By the time this case was heard by me in May 2018, the husband's open position was that the former matrimonial home had to be sold and that the wife and children should move into rented accommodation. There will, of course, be many cases where renting is the only option. I am anxious to avoid the upheaval of such a situation in this case if at all possible. I say this for two obvious reasons: the first is that it would be contrary to the best interests of the children (my first consideration) to have to leave their home and suffer the insecurities of renting. The husband has offered to pay the rent but the fact is an assured short hold tenancy might well only last a year or so and then the wife and children would be moving again. Furthermore, in the light of the wife's health difficulties, discussed above, the stress of moving and the uncertainty of being in insecure accommodation is to be avoided if possible.

77. The wife seeks a transfer of the former matrimonial home into her own name. During the hearing I encouraged the parties to make a formal joint approach to the mortgagees to enquire whether they would be willing to grant a re-mortgage. I believe that this is an obvious step which should have been taken by the parties at an early stage in these proceedings. Just because parties and their lawyers may be locked in conflict does not mean that they cannot make a sensible joint approach to a mortgagee in an endeavour to resolve the case. It was obvious to me as soon as I read the papers in this case that one of the critical features was to be the retention of the former matrimonial home, if at all possible. It is remarkable that, at the beginning of this hearing, nobody knew the position that was being adopted by the mortgagees. The result of the joint approach to the mortgages has been most encouraging. As I mentioned above, the independent surveyors have valued the property, as part of the mortgage valuation process, at £3.25 million. This means that the parties do not now need to find about £200,000 on the renewal of the mortgage as a capital repayment in order to reduce the loan to value of the mortgage to an acceptable level. Instead, the existing mortgage amount can in effect be rolled over. Under the mortgage terms offered, the mortgage can only be extended for a period of five years. The husband only wishes it to be extended for three years. However, because of the terms of the mortgage offer, the husband has agreed to enter into a mortgage guarantee for a period of five years but on the basis that the property should be sold after three years. I imagine that, without the husband as guarantor, the mortgagees would be unlikely to agree to a transfer of the property into the wife's sole name. It is important that all of the husband's legal estate and beneficial interest is transferred to the wife to avoid adverse tax implications. In a letter dated 15 May 2018, the jointly instructed Chartered Accountants/Tax Advisers confirmed that if the husband retains a beneficial and/or legal interest in the property HMRC would be likely to consider funds remitted by the wife (*prima facie* tax free, see above at paragraph 48) and used to pay down the mortgage to be in some way benefitting the husband and hence taxable. Accordingly, if the former matrimonial home cannot be re-mortgaged and transferred into the wife's sole legal and beneficial name, then the figures on which I have based my judgment may no longer be sound. I would also want the wife to have the opportunity of trying to retain the property at the end of the three-year term were she able to enter into an arrangement with the mortgagees which no longer involved the husband. I do accept that it seems, at the moment at least, unlikely that the wife would be able to achieve this. However, I am satisfied that three years gives the wife and the children some breathing space to adjust to their new circumstances and for the wife to secure new employment. I am quite sure that she will find this easier without

having at the same time to worry about moving house and then to suffer the insecurity of being in rented accommodation.

78. The husband seeks the wife to give an undertaking that she will use the lump sums that I order the husband to pay her to reduce the mortgage.
79. The husband now offers to pay the interest due on the mortgage until 1 October 2021.
80. So far as lump sums are concerned, the wife seeks a payment of £2.065 million (based on the actual amounts the husband receives) . The husband says that the first £86,000 received should be used by him to discharge his tax liability. Thereafter, he says that the net receipts should be shared equally between the parties until 1 January 2020. From January 2020 he says that the next £400,000 received should be used to repay his loan to his mother. Once the loan has been repaid, he says that the net receipts should again be shared.
81. The husband offers periodical payments of £55,000 per annum to the wife for herself on the basis of what he refers to as “an extendable term”. This, he says, should be reduced pound for pound by the sums spent by him servicing the mortgage. The wife seeks periodical payments of £100,000 per annum, plus payment of the mortgage interest. The worst-case scenario for the cost of the mortgage is 2.75% which, on current interest rates, equals £4,732 a month. This is £56,784 a year, which is in fact more than the periodical payments offered by the husband for the wife. The wife says that the periodical payments order should be on a joint life basis.
82. Child maintenance has been agreed between the parties at the rate of £15,000 per child per annum. The husband says that this should continue until the end of secondary education, the wife’s that it should be until the end of tertiary education, to include a gap year.
83. So far as the nanny is concerned, the husband offers to pay her salary, capped at £41,434 gross per annum until 31 July 2020, after that the amount that he offers to pay falls to £20,000 per annum.
84. The husband offers to pay the school fees together with agreed extras. The wife also seeks the cost of extra tuition and school uniforms.

My decision

85. In arriving at my decision, I of course have regard to the menu of items listed in section 25 of the Matrimonial Causes Act, my first consideration being the welfare of the children whilst still minors. My power to make these orders is derived from sections 23 and section 24 of the Matrimonial Causes Act.
86. So far as the house is concerned, my intention is to transfer the legal and beneficial interest into the sole name of the wife, but of course subject to the declaration of trust in favour of the children. However, if this is impossible, because of the approach of the mortgagees, then I shall order the beneficial interest to be transferred to the wife

(subject to the children's interest) with the legal interest remaining in joint names. I accept the husband's undertaking to guarantee the mortgage for a period of five years. His undertaking is qualified in that he contends there should be an order for sale in three years' time if the wife is unable to continue with the mortgage without the husband's guarantee. I take the view that the husband's position here is reasonable. In a case where I have valued the assets at something below £2 million (heavily qualified in terms of likely realisable value of the deferred assets), for the wife to live in a property worth about £3m million is, on the face of it, remarkable and untenable. However, in an era of cheap borrowing and expensive rentals, it seems to me that the best financial option for this family is for the wife and the children to remain in the former matrimonial home for the time being. I have set out above why I believe that it is in the best interests of the wife and children from an emotional and welfare point of view. It is not easy to predict the lump sums that will be received over the course of the next three years but it may well be that the wife will be able to reduce the borrowing on the home to a sufficient extent that she will be able to negotiate a fresh mortgage in three years' time. If she is not, then I am afraid that she will have to sell the property and move to a smaller property. It must be hoped that sufficient monies will have been received by that time to enable the wife, with the benefit of the equity in the former matrimonial home, to purchase a property for herself and the children to live in.

87. I have said that I regard the husband's position in relation to the term of his guarantee to be a reasonable one. I also have to bear in mind, however, that I cannot force him to give an undertaking. It is therefore of some comfort to me to know that he agrees that it is fair for him to have to give this guarantee for about three years.
88. At the moment, as set out above, the matrimonial home has only about £150,000 of equity in it (subject of course to sale price if sold).
89. The wife will receive the following lump sums: she will receive 60% of the gross amount received by the husband from the assets referred to above under the heading "husband's investments falling in over the next five years". This is on the basis that she will be paid offshore and then be able to remit the monies to the UK tax free. Of his 40%, of course, the husband will then lose almost half in tax and, possibly, NI. For the avoidance of doubt, she will receive 60% of the gross amount whenever it falls in.
90. Insofar as the husband funds capital calls, he will do so on the basis that he will receive the entirety of the return on the additional capital that he invests.
91. On the basis of my assumed valuation of £1,905,023 for these deferred assets, the wife would, accordingly, receive £1,143,014 net. Of course, if the funds generate more then she will receive more, and the opposite obviously also applies. The husband will receive £762,009 gross, which nets down to £419,105. This disparity is justified by the fact that (a) the wife has a sharing entitlement in the Business R funds and also the C Ltd funds, for the reasons set out above; and (b) the husband is young and has the chance to accumulate more capital, as discussed above, whereas the wife almost certainly does not have that opportunity.

92. The wife will be expected to use all lump sums received towards the discharge of the mortgage, once she has discharged her outstanding costs. I would hope that she will offer an undertaking in this regard.
93. The husband will pay the interest due under the mortgage until 30th September 2021. Plainly, if he is able to persuade his father to leave funds at the mortgagees, he will derive the benefit of the reduction in the interest rate. His father may be more inclined to help if he knows that it is his son who derives the benefit, but he is of course under no obligation to help. I recognise that the husband will have significant calls on his income for the next three years, but as I have set out above, during the whole of this period his income is guaranteed.
94. In three years' time, the wife may be able to assume control of the remaining mortgage and remain in the property, and I hope that she can. It will depend on how much has fallen in under the capital scheme set out above. If she cannot do so, then she will need to move. In any event, the husband's obligation under the mortgage will fall away. Whether, and if so to what extent, he will have to fund alternative housing costs for the wife and children after that will depend on how much capital the wife has accrued. By requiring her to use all of her lump sum payments to repay the mortgage (and her costs), there is no risk that her capital will be dissipated (other than in costs accrued to date). My hope is that she will move to independence so far as housing is concerned, but that hope is founded on the assumptions set out above which, as I have said, are far from certain.
95. As regards spousal periodical payments, I am completely satisfied that a joint lives order is appropriate. It is impossible to predict the wife's future health and career pattern. These three young children are her priority and the court's first consideration. In spite of the trend against joint lives orders, there are special circumstances which compel me to order one in this case. Obviously, if circumstances change, the parties can re-visit the situation. I would hope in future that they will consider mediation or arbitration rather than the expensive and cumbersome process on which they have been engaged now for years.
96. The husband will make periodical payments to the wife in the sum of £50,000 pa on a joint lives basis. Together with her income and the provision set out below, she will be able to live reasonably well, albeit not at the level that she seeks. In making the order for periodical payments I must of course have regard to the husband's needs as well. Whilst I have studied the budgets with care, it is important in these cases to take a holistic approach and to take a view as to a proper global sum, rather than descend into a micro analysis of a lawyer driven schedule.
97. The husband will pay the nanny's salary at the current rate until 30th September 2019 and thereafter at half that rate. If the parties cannot agree the term of that rate then I shall decide it, but it seems that she (or her successor) will be needed for some years at the reduced rate. If the wife chooses to top up the nanny's salary above the sums paid by the husband after that date then she is of course free to do so.
98. The husband will make periodical payments to the wife for the children at the agreed rate of £15,000 per child per annum. This should continue into tertiary education at half of that rate.

99. The husband will pay or cause to be paid school fees as agreed. The issue of tertiary education fees will be addressed at the relevant time.
100. I am willing to hear submissions as to costs, but my Judgment assumes that there will be no order. I think that this properly reflects the fact that I have taken the costs debts into account as liabilities. I have also taken into account the unreasonable position that the husband and wife has taken at different times and in different ways through this litigation.