OUTER HOUSE, COURT OF SESSION

2021CSOH6

F28/19

OPINION OF LADY WISE

In the cause

LWT or T

Pursuer

against

GPT

Defender

Pursuer: Brabender QC, Shewan; Morton Fraser LLP
Defender: Mitchell QC, Malcolm; Levy & Macrae

29 September 2020

Introduction

[1] This is an action of divorce, the pursuer ("Mrs T") having married the defender ("Mr T") in June 2006. Mr and Mrs T separated on 5 April 2019 and they have not lived together as husband and wife since that date, which is agreed to be the "relevant date" for the purpose of identifying and quantifying their matrimonial property. When the parties separated, they were in the process of selling their family home and had contracted to purchase a new and substantial property. The purchase of the new property was halted and the family home was sold, with both parties then securing rented accommodation pending the outcome of these proceedings. While the main issues in dispute between the parties had a number of smaller controversies within them, both the care arrangements for their

children and the claims for financial provision on divorce remained in contention at the proof. The nationwide restrictions imposed to combat the spread of the virus known as Covid 19 were put in place before parties had completed their submissions following the evidential hearing. I proceeded by allowing further written submissions from both sides and then made certain interim orders so that matters would be regulated while I was considering my decision

[2] So far as the merits of the divorce action are concerned, on the basis of the affidavit and oral evidence led, I am satisfied that the marriage has broken down irretrievably and there is no prospect of reconciliation. The basis for divorce is undefended and decree will be pronounced when orders for financial provision are made. There were 8 days of evidence followed by both oral and then written submissions in this case. Affidavits were lodged from all witnesses other than skilled witnesses who had prepared reports. The dispute relating to the care of the children narrowed considerably during the course of the proceedings. There was also agreement on the nature, extent and value of much of the matrimonial property and during the proof certain additional agreements were reached on the value of the relevant business entities. The effect of there being significant non matrimonial property referable to the period of the marriage was contentious. Where there were issues of credibility and/or reliability of any witness I will address those in context.

The financial provision dispute

(i) The statutory framework

[3] The legal framework within which financial provision on divorce disputes operate is that contained in the Family Law (Scotland) Act 1985 ("the 1985 Act"). The provisions of sections 8-16 of the Act are relevant to financial provision on divorce (or dissolution of civil partnership which is not relevant here). Section 8(2) of the legislation provides that before

making any order for financial provision the court must be satisfied both that it is justified by the principles listed in section 9 of the Act and reasonable having regard to the parties' resources. Section 9 has five principles. They relate to both marriage and civil partnership but as this is a divorce I will restrict any references to that situation. Insofar as relevant to these divorce proceedings only three principles are directly or indirectly applicable, namely:

(a) The net value of the matrimonial property should be shared fairly between the parties to the marriage,

(b) Fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family, and

(c) ….

(d) A person who has been dependent to a substantial degree on the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than 3 years from the date of decree of divorce, to the loss of that support on divorce.

[4] The court's initial task is to conduct a process of identifying the matrimonial property, which is defined in section 10(4) as:

> "…all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party) – (a) before the marriage for use by them as a family home or as furniture and plenishings for such home; or (b) during the marriage but before the relevant date"

The Act does not give any guidance as to how the value of an item of matrimonial property or partnership property is to be ascertained. While value for this purpose may not always be equiparated with market value, it is customary to use the construct of the hypothetical willing seller and purchaser and what price they would agree on the relevant date for the item in question is invariably used (*Sweeney* v *Sweeney 2004 SC* 372 at 380). Section 10(5) makes clear that the proportion of value of life policies and pensions relative to the period of the marriage until the relevant date constitute matrimonial property. Once the value of each item or asset has been determined and a total value calculated, matrimonial debts must be deducted to achieve a figure for the net value of the matrimonial property. Matrimonial debts are those of either party and incurred before the marriage if they relate to matrimonial property or are otherwise incurred during the marriage and *"which are outstanding"* at the relevant date. Contingent liabilities such as notional liability to tax on the possible sale of an asset are not matrimonial debts to be deducted from the value of the matrimonial property (*Sweeney* v *Sweeney 2004 SC 372).* When the calculations are complete, a schedule of matrimonial property can be drawn up. The court then requires to determine whether the value of the matrimonial property should be shared equally or in such other proportions as may be justified by special circumstances [section 9(1)(a), section 10(6)]. Equal sharing is the norm and the existence of special circumstances does not inevitably lead to an unequal division of value – *Jacques* v *Jacques* 1997 SC (HL) 20. Section 10(6) includes a non-exhaustive list of special circumstances that may be taken into account in determining the division of value and which can include the consequences of realising an asset. Importantly, when assessing how to reflect the economic advantages and disadvantages gained or sustained by parties either before or during the marriage, the court must, in terms of section 11(2) have regard to the extent to which:

> ".any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise."

Conduct of either party is not to be taken into account unless it has adversely affected their financial resources (section 11(7)).

[5] The issue of division of value is essentially one for the court's discretion and other decisions taken at first instance are usually no more than examples that may be of little assistance without a grasp of the underlying factual matrix. There is authoritative dicta on the distinction between the correct approach to valuation of matrimonial property and the separate discretionary task of the division of value taking account of special circumstances – *Sweeney* v *Sweeney (No 1) 2004 SC 372, (No 2) 2006 SC 82-* which is all applicable to the present case. Some benefit can also be derived from examples of the utilisation of principle 9(1)(b) such as *Wilson* v *Wilson 1999 SLT 249* notwithstanding the fact sensitive nature of each dispute. Finally, the last stage is to consider the parties' present and foreseeable resources before deciding what order or orders to make. It was agreed at the submissions stage in the present case that there would require to be a further hearing in this case to confirm the specific orders to be made, including timescale for payment, after the determination in principle is known. To the extent that valuation of assets was agreed, that agreement is reflected (together with the figures following determination of the disputed valuation issues) in the schedule of matrimonial property that appears towards the end of this opinion.

(ii) Background and ownership of the relevant companies

[6] By far the most significant and valuable matrimonial assets were shares held by the pursuer in a number of companies that operated and continue to operate businesses under franchise arrangements. Mrs T's interests in two of the companies do not constitute matrimonial property as they were formed prior to the parties' marriage. The incipience of her business interests is detailed in her Affidavit no 67 of process and was spoken to in evidence by both parties and by JF , who had invested in the pursuer's businesses over the years. In essence, after initially considering teaching, the pursuer left university after

6 months and began working full time for {the businesses} in Giffnock. In 2004 she undertook a franchisee course with {the businesses}and decided to pursue business interests in that capacity. She knew JF informally and he made her aware from an early stage that he would invest in her business. JF was and is a dentist by profession and he has never taken an active role in the businesses in which he has invested. The first outlet opened by the pursuer with the assistance of funding from JF was in Kilmarnock and opened in September 2004. By that time the pursuer was in a committed relationship and cohabiting with Mr T, who had proposed marriage. She and JF set up a company, TF Limited, one of the two non-matrimonial companies referred to above, in which the pursuer has 51% and JF 49% of the issued shares.

[7] In November 2005 the pursuer opened an outlet in Ayr, again with backing from JF and the second non-matrimonial company, TF (Ayr) Limited was formed. By the time TF (Clydebank) Limited incorporated the third outlet was opened in November 2006 Mr and Mrs T were married. In 2007 TF (Govan) Limited was formed and in 2009 an outlet in Irvine was opened, again with a company, TF (Irvine) Limited being created. Mr T, who had previously worked in the licensed trade, gave up his employment and took over running TF (Ayr) Limited around the time of the parties' marriage. From that point the defender was heavily involved in the business as a whole. Each time a new outlet opened up he took more and more responsibility. The growth of the business coincided with the birth of the parties' first child and Mrs T became less actively involved in the day to day running of the business. Between 2006 and 2010 she had developed a strong reputation as a successful franchisee and had won a number of awards. Her position was that thereafter the defender gradually effectively excluded her from her own business over a period of years, but the context of that complaint is the current highly acrimonious nature of the marriage breakdown.

[8] After Irvine, outlets in Greenock, Johnstone, Renfrew and Stevenston were opened, with a new Limited company being formed each time with the pursuer and JF as shareholders on the same basis as before. Two business in Northern Ireland were then incorporated, one known as TF (Northern Ireland) Limited and the other TF (Downpatrick) Limited. The pursuer and JF each own 39% of the issued shares in the two Northern Ireland companies, with Mr JM owning the remaining 22%. Mr JM swore an affidavit (no 53 of process) and gave evidence in the defender's case. He explained that he had worked part time in the businesses when still at school and then on a full time basis from 2010. He knew both Mr and Mrs T but from 2010 his main dealings were with Mr T who he described as the "driving force" of the business, his understanding having been that Mrs T had minimal involvement. On the occasions that he had seen Mrs T she had never expressed any concern about decisions he or Mr T had taken. It was clear also from the evidence of GS , an accountant and the financial controller for all of the TF companies, that she and other relevant employees all reported to Mr T. They assumed that for matters requiring the consent of a Director, Mr T would speak with his wife. GS had previously worked for the chartered accountancy firm instructed by the business and she knew that the partner there would send documents to Mrs T for signature. Her impression had been that the parties were content that Mr T "got on with it" in terms of deciding all business matters.

[9] All of the TF companies mentioned thus far were successful and grew during the period of Mr T's stewardship. Two further companies were later incorporated. First, in August 2016 TF (Property) Limited ("the property company") was formed, with the defender for the first time being allocated a shareholding. He held 51% of the issued shares at the relevant date, with JF owning the remaining 49%. Mr T and JF were the two directors of the company at all material times. The property company was involved in the construction of three units at Stevenston, all intended to be let, one as an outlet. As at the

relevant date, the property company owed substantial sums to the TF companies owned by Mrs T and JF and had given a guarantee in respect of a loan from HSBC to TF (Northern Ireland) Limited. Finally, on 25 August 2018, less than 8 months before the parties' separation, they formed a company called TF (TH) Limited ("TH"). Each party held 50 shares in TH at the relevant date and both were directors of the company. TH represented a new venture for the parties in that it was a move to a different type of franchise than the primary business. Three Franchise Agreements were entered into by the company but by the relevant date only one had opened. The master franchise holder of TH in the UK (Mr SK) also holds a large number of other franchises in the UK and the parties had been involved with him over the years in the TF companies of which the pursuer is the franchisee. By the date of proof SK had assumed operation of one of the three TH outlets and intimated termination of the agreement in respect of another. The significant issue of contention between the parties during the proof was the significant debt due by TH to the main TF companies and the property company, together with a guarantee in respect of a loan from HSBC to TH and a guarantee for the rent due by that company. The impact on valuation of the TF companies of such liabilities became the single biggest disputed issue as the proof evolved.

[10] On the issue of who was responsible for all of the above, while I am satisfied that the pursuer feels that her husband is to blame for her lack of engagement in the business in recent years and that she felt controlled, it appears that her response to that was to devote herself to her sports training. That is not intended as a criticism and I do not doubt that the pursuer really did feel as powerless as she maintains in her affidavit evidence. She knew that she and JF owned the business and that the defender had no rights of ownership at all. The difficulty was that she felt unable to assert herself until the marriage was over. I accept that the defender was keen to control matters and that he did not see the need to involve the

pursuer in decision making, notwithstanding her legal ownership and her position as sole franchisee. However, as the pursuer and JF were the Directors of seven of the companies they owned, with all of the rights and duties that flow from such offices, I conclude that the pursuer accepted the situation, perhaps reluctantly, rather than disrupt the status quo.

(iii) Valuation dispute

[11] The pursuer led evidence from two witnesses on the valuation issue that remained in dispute. First Mr Alan Creevy, a commercial surveyor of considerable experience and expertise and secondly Mr Alan Robb, a chartered accountant and expert witness known to the court. The defender led valuation evidence from Mr Greg Rowand CA, a similarly experienced and skilled witness in forensic accounting matters. Mr Creevy had been instructed to value TH as at the relevant date and as at the end of January 2020. He spoke to his report no 6/108 of process, to which his curriculum vitae was appended detailing his 30 years' experience as a commercial surveyor, an arbiter and an expert witness. Mr Creevy has particular expertise in the hospitality and leisure sector. He considered that the most likely purchaser of the TH business would be either a new entrant to the market or an existing operator, which would include the franchisor (SK). He had examined the Head Lease for the premises of which TH UK and Ireland was the tenant or "mid landlord". That company had sublet to the parties' company TH, which became the sub-tenant or tenant. The sublease commenced in October 2018, with a right to terminate in 2033. There was a rental guarantee for £900,000 provided by TH to the mid landlord. The annual rent was £75,000 and Mr Creevy could not recall seeing previously a rental guarantee for more than three times the annual rent. In his experience, the purpose of a rental guarantee was to provide security for the early years, during which the business was more likely to fail. Any incoming sub-tenant would have to have substantial collateral to satisfy the bank in relation

to the rental guarantee. Mr Creevy was not surprised to learn that Royal Bank of Scotland had wanted the £900,000 for the rent guarantee placed in an escrow account, which had led to a move to HSBC as lenders. The entity giving the guarantee would normally have to illustrate that they can pay the full sum due.

[12] Mr Creevy had also examined the relevant Franchise Agreement for TH and summarised the details in his report. A royalty of 4% was payable to the franchisor at the relevant date and this had now increased to 5%. There were also transfer restrictions, common in such agreements, although these had little impact on the valuation as the business was not generating any profit. It was typical of Franchise Agreements that the franchisor imposes restrictions to protect the brand. Mr Creevy considered the TH outlet to be a secondary location as it is in an area of lower population and traffic than a primary location such as a major roundabout on a busy main road. This would affect the value per square metre, although the premises were at least on the main road. Mr Creevy's view was that an incoming (sub)tenant would have to have a similar covenant to the outgoing one and so would have to be in a position to take on the rent guarantee. Any other arrangement would be too risky. As at the relevant date Mr Creevy considered it unlikely that someone would purchase the TH business. It had been trading for a very short period and was loss making. The figures were a little better by January 2020 but he considered that it still did not have the potential to trade at a profit. The lease required that the premises trade as a TH outlet and if it was not trading the fixed assets would be worth no more than £40,000 in a sale. In essence the negotiating position of the franchisor would be very strong if the franchisee wanted out of the business. Mr Creevy had undertaken a valuation of the business as at the relevant date and found it to have a nil value then and as at January 2020. That was agreed in a Supplementary Joint Minute of Admissions.

[13] Mr Rowand's report was put to the witness, for comment about his opinion that as at the relevant date TH was likely to continue to trade. Mr Creevy drew a distinction between what something costs and what it is worth and he continued to maintain that the business had a nil net value. While it had a 4 month track record of sales, those would have to be at the level of £1.5 million per annum to achieve a profit. The rent was high and the projections (which the witness had not seen) would have predicted much higher sales than were being achieved. The affidavit of the franchisor SK (no 57 of process) was put to Mr Creevy, who indicated that SK's evidence that if Mr T no longer wanted to run the TH business there would be a conversation between the franchisee and TH UK about the terms of any sale did not alter his opinion of value. Neither did SK statement that the TH business was satisfactory at present alter Mr Creevy's opinion. In reaching his view he had analysed in detail the sublease, the Franchise Agreement and the various restrictions, including the right of first refusal to the franchisor on a proposed sale and the action that could be taken on termination of the Franchise Agreement. The view he had expressed was in relation to market value, not how a special purchaser such as the franchisor might approach a purchase. The restrictive covenant imposed on TH franchisees was to avoid them opening up "copycat" outlets without permission of the franchisor.

[14] Under cross-examination Mr Creevy said he was unaware when the TH brand started operating in the UK. When told it was not until 2017 he thought that made sense given the small number of outlets. He would expect it to want to expand further in this country and agreed that the parent company would not want to see a site failing because of the need to protect the brand. In assessing the TH business Mr Creevy had taken the view that everyone in the local area would want to try it initially and so thought the first few months would if anything be more profitable than subsequently. He agreed that a large part of the start-up costs was what was paid to the franchisor and that thereafter a percentage of

gross sales without reference to costs would be paid over to the head franchisor who in turn would have to pay something to the Canadian company. Mr Creevy was unable to comment on the suggestion that Mr SK, after a long business relationship with the parties through the TF businesses, wanted to offer the first UK TH franchise to Mr T. He agreed that Mr SK's's company was the most obvious purchaser for the parties' TH business and acknowledged that Mr SK had said that he had no cause for concern in relation to the TH business. There was a difference between the situation being satisfactory for the franchisor, who was receiving payments, and the business being satisfactory overall. Mr Creevy agreed that if someone was willing to put money into it, the TH business could of course continue, but he maintained that the profit trajectory was not good. He agreed that if sales were going down the royalty payments would be less and that only on closure of the business would any damages be payable.

[15] Alan Robb CA gave evidence and spoke to his report no 6/106 of process, which had 23 appendices. So far as the TH company was concerned, he had noted that the management accounts of the company included an asset described as "goodwill" of £415,427. That majority of that figure comprised fit out costs, with a finder's fee, tax on the lease and the franchise fee making up the remainder. Mr Robb had considered the Franchise Agreement for the TH company and noted that it was between the franchisor and all of the TF companies as well as TH. Mr and Mrs T were described as principals and had a potential liability in damages if the company failed. That potential liability was calculated in Appendix 3 of Mr Robb's report as £713,061 at the relevant date and £630,174 currently. The impact of the failure to open the two other outlets that the deposits paid were not recoverable, but damages had not been sought by the Franchisor. Mr Robb had taken the goodwill figure out of the accounts and deducted the known liabilities. Mr Robb explained that his valuation of the TF companies was based on a hypothetical willing buyer willing

seller approach. The issue with TH was the knock on effect it would have on the TF companies if the inter-company loans were not recoverable and the guarantees were called up. Therefore a purchaser of the TF companies would have to ascertain the level of the potential liabilities. The first issue was the likelihood of repayment of the intercompany loans. Apart from a VAT repayment being used to pay the loan from TF Ayr, none had been repaid. In Mr Robb's opinion a purchaser would take the view that none of the other intercompany loans would be repaid. He thought that the willing seller would also need to consider the potential for repayment. The HSBC loan facility was £800,000 of which £332,000 had been drawn down at the relevant date and not repaid by the date of proof. In Mr Robb's view a purchaser would take into account that "only part of the loan will be repaid" because, he said there was a possibility or likelihood that TH would be unable to make the loan repayments. On the rent guarantee a potential purchaser would take into account that HSBC had guaranteed 10 years rent (£900,000) and that this was secured by a floating charge as detailed in paragraph 2.9 of Mr Robb's report. The witness considered that, although there had been no default on the rent, a buyer would take this into account.

[16] Mr Robb considered that a buyer of the TF companies would also take into account all potential claims for damages because although TH was still trading Mr Creevy had indicated that it was unlikely to become profitable. When asked about the anticipated position of the defender's expert that part of the purchase price might be held in an escrow account to take account of the contingent liabilities Mr Robb commented that the seller would not receive the escrow amount immediately but may receive it later and it was uncertain. The money could be held for many years, given the length of the period of the rent guarantee. Mr Robb accepted that it was always possible that the seller him or herself might take on the inter-company loan liability, although of course that would reduce the

amount received. Similarly, if the seller took on the guarantee by securing a discharge of the floating charges he would have to put aside a sum that covered the level of the guarantee. Mr Robb was, however, clear about what he thought would have happened on a sale of the main TF companies at the relevant date to reflect all of the contingent liabilities. He said "in reality it is most likely that sums would be put in an escrow account". So far as apportionment of the contingent liabilities was concerned, Mr Robb appreciated that such liabilities could fall on certain of the companies and not others but he assumed that they would be shared equally for the purpose of his valuation. If someone was buying just one of the companies the relevant amount would either have to be released from the relevant contingent debt or the money representing the exposure would have to be put into an escrow account.

[17] In relation to the two Northern Irish TF companies in each of which Mrs T owned 39% of the issued shares, Mr Robb had applied a minority discount of 30% on the valuation of her interest. Appendix 4 to his report was a spreadsheet breaking down his valuation and although the figures had later changed through discussion and compromise, the structure remained the same. It was noteworthy that some of the companies, such as the Clydebank company, had very few net assets other than loans due to them and only a small amount of cash in the bank. No interest was accruing on any of those loans and Mr Robb was unaware of any particular terms for repayment. The issue of a significant dividend would require repayment of at least some of the intercompany loans.

[18] Mr Robb was asked about the tax implications of Mrs T selling her shares under reference to paragraph 9.4 of his report. He explained that the pursuer would qualify for Entrepreneurs Relief which would reduce Capital Gains Tax (CGT) to 10% if she sold the shares to a third party. However, if she simply restructured the business entities with JF

that might be seen as CGT avoidance and so the relief would be refused and income tax of 38.1% would be charged if it was deemed to be a dividend.

[19] After he had seen Mr Rowand's report (no 7/189 of process) Mr Robb had produced a letter (no 6/142) summarising the differences between the two reports and he adopted that as part of his evidence. These included issues such as the valuation multiple, minority discount and the TH liabilities. On the last of those, Mr Robb accepted that he had double counted by deducting the full balance of the HSBC loan and he had agreed to reduce that from £332,000 to £187,000. After he had seen Mr Rowand's supplementary report (no 7/190) Mr Robb had then produced a schedule of values illustrating a mid-point value for each of the companies as a compromise to reflect that he and Mr Rowand might continue to have differences but to show how the company valuations would look if each agreed to meet the other half way. The schedule was ultimately agreed as representing an agreed schedule of values, with two sections, the first ignoring the TH liabilities and the second listing all of the relevant liabilities and contingent debts that remained the subject of dispute. Mr Robb's position was that the mid-point valuation was reasonable but that all of the liabilities should be included as deductions. He agreed that if TF (TH) Limited was sold one would need to know the price being paid and the terms before the impact could be ascertained. If it was simply closed the damages provisions could be triggered.

[20] Under cross-examination Mr Robb agreed that in his schedule he had also "split the difference" on the issue of the deduction of tax on a possible sale of the relevant businesses. He had not isolated the issues of difference between him and Mr Rowand; he had taken a broad brush approach and assumed that a mid-point between the overall differences in their figures would be reasonable. That left the issue of the TH liabilities as the single difference between the two experts. On those, Mr Robb had taken the management accounts figures for the inter company loans, for the HSBC loan he had taken the total figure and divided it

between the companies who could become responsible. The rental guarantee and the TH franchise contingent debts were also included as unresolved in principle. Taking each of these in turn, Mr Robb agreed that the inter-company loans were on any view debts due as at the relevant date, but that the HSBC loan and the rental guarantee were contingent liabilities so far as the main TF companies were concerned. They could crystallise in future, but that would depend on events that may or may not occur. Mr Robb had assumed for valuation purposes that a purchaser would deduct both of these and contingent damages due by TH at their full value.

[21] Mr Robb was asked about the accounting treatment of the contingent liabilities by the TF group of companies prior to the relevant date. He agreed that, taking TF(Ayr) Limited as an example, in the accounts to 31 October 2018, the Directors Report for which had been signed on 12 June 2019, the only liability in the balance sheet was a deferred tax liability. No mention was made of the contingent liabilities in respect of TH. It was put to the witness that Financial Reporting Standard 102 (FRS 102) advised that contingent liabilities must be included in company accounts or subject to a note thereto unless they were regarded as remote. Mr Robb agreed that remote in that context would mean that it was unlikely the liability would have to be paid. If it was likely to crystallise it would have to be noted. He agreed that the lack of a note in the Ayr accounts was typical of how the contingent liabilities had been treated in the accounts of the other relevant companies. A guarantee of a tenant's liabilities was a very common occurrence, albeit that the period of the guarantee under discussion was for a longer than usual period. It represented a form of insurance for the landlord. Mr Rowand's position that in a real life commercial transaction it was highly unlikely that a willing seller would agree to deduct the full extent of a contingent liability was put to Mr Robb who agreed, reiterating that an escrow account would likely be the resolution between buyer and seller. It was likely that the purchase

price for the relevant companies would have two components, first an upfront payment and secondly sums in an escrow account, the second being the contingent part of the price. The amount held in escrow could range from zero to the full amount of the contingent liabilities. The maximum possible liability under the rental guarantee could be easily calculated, while the potential liability in terms of the Franchise Agreement was more complicated. The contingency giving rise to a possible claim was closure of the business after which a formula would be applied to the last 3 years trading. The gross sales for those 3 years would be known and so used to calculate the sum. The better the trading figures the higher the sum payable would be. While that might seem counterintuitive, it was designed to compensate the Master Franchisor for loss of a share of profit, royalties and advertising. The witness agreed, however, that the oddity was that if sales were increasing the business was less likely to close and on closure through a lack of successful trading the damages would be lower. He accepted that the figures he had inserted for the contingent liabilities would not necessarily be those that pertained. An alternative to an escrow account was a new guarantee by the sellers. Mr Robb agreed that ultimately all that was between him and Mr Rowand if the mid-point valuation was accepted was the treatment of the TH liabilities for valuation purposes, although the impact on the figures was considerable.

[22] In re-examination Mr Robb confirmed that he had relied on Mr Creevy's report in relation to the likelihood of the contingencies crystallising. He had not been engaged in the accounting treatment of contingent liabilities for the purpose of statutory accounts and did not feel it was of particular relevance in assessing market value. Contingent liabilities are usually disclosed in accounts unless they are unlikely to crystallise. His attention was drawn to an example of cross guarantees within the TF companies (Ayr and Northern Ireland) being included in the accounts even though it was unlikely these would be called up because the company value exceeded the sums due to the bank. He agreed this was an

example of a contingent liability being stated even where the likelihood of crystallisation was remote. He explained the HMRC treatment of a retained right where a seller sold an entity but did not have access to the full purchase price for say 10 years. The seller's right to the money was an asset on which he/she would have to pay tax, with a final reconciliation, resulting in a rebate or further payment, being carried out when the amount received was known. The tax charged would be only 10% and most such sellers would pay it rather than seek to defer as it will trigger the relevant tax relief on deferred consideration. He agreed that in a negotiation where there was a contingent liability the buyer would calculate the price at maximum value (of the liability) and the seller would want the opposite. If the money was placed in an escrow account it would of course earn interest, but where interest rates were very low this would again be part of the negotiation. The longest period of using an escrow account Mr Robb had experienced was with Employee Benefit Trusts (EBTs). As there had been a dispute about whether these were legitimate and viable, the monies tended to sit in an escrow account until determination, with HMRC insisting on the full amount of potential tax, interest and penalties going on deposit. When asked in terms whether he considered the issue of contingent liabilities to be a valuation issue Mr Robb responded that he thought it was, albeit that the issue of how contingent the liabilities were would be a matter for the court. He said that Mr Rowand had assumed that TH would continue to trade and repay the inter-company loans and bank borrowings and he disagreed with those assumptions.

[23] Greg Rowand CA gave evidence in the defender's case by which time the issue was very clearly focused solely on the remaining contentious issue about the liabilities. He adopted his reports and was directed to the section on the various liabilities of TH.
Mr Rowand had seen the Franchise Agreement and other material listed in his report 7/189 of process. He had information that TF (TH) Limited was trading as at the relevant date. He

considered the bank loan, the rent guarantee and the exposure to damages all to be potential liabilities so far as the other TF companies were concerned. It might never crystallise and even if it did, the amount of the liability as at that point could not be calculated. Such contingent liabilities would not be included in the balance sheet of any of the relevant companies. In Mr Rowand's view it was highly unlikely that a seller of the TF companies would agree to a wholesale deduction from the price of these contingent liabilities. There were two main ways in which the problem could be resolved. First, an amount representing the potential liabilities could be ring fenced and placed into an escrow account as part of the transaction, or the selling shareholder could agree to assume some or all of the potential liabilities. Unless deduction of the potential liabilities still resulted in a seller receiving the price they were looking for they would not accept that.

[24] Having explained that the form in which the contingent liabilities would be taken into account would be a matter for negotiation, Mr Rowand explained that it was too difficult to say what the outcome of that negotiation would be. The rent guarantee and the potential liability for damages were particularly difficult to estimate in terms of potential liability. The HSBC loan was at least known, but at the relevant date there was no way of knowing how much would be outstanding at any unknown future time of default. The contingent liability would only normally crystallise on such default and that had not happened at the relevant date. Similarly, with the rent guarantee, the potential liability will decrease each year and as at the relevant date the rent was being paid. There were formulaic calculations for the potential exposure to damages if the TH business closed, which included taking account of monies that might have become due to TH UK in the 36 months leading up to closure. While Mr Robb had sought to quantify the potential liability by extrapolating the figures from the first 4 months of trading, Mr Rowand pointed out that such a calculation was based on the business having then closed which it had not. You would have

to hypothesise that TH closed on the relevant date for Mr Robb's figures to work. As none of the contingent liabilities had crystallised at the relevant date they could not be deducted from value.

[25] Under cross-examination Mr Rowand agreed that so far as the inter-company loans were concerned, he had assumed these were all recoverable, which had included consideration of the entity owing the money. There was no holding company for the TF businesses but they were connected due to the commonality of the shareholders. He had seen correspondence referring to the "TF Group" and Mrs T was a shareholder in both TH and the TF companies, together with Mr T and JF respectively. He agreed that the accounts of each individual company did not identify the debtor on each of the inter-company loans. In section 8 of his report he had included loans from connected companies, but this included amounts due from TH (Cumbernauld) and TH (Paisley) and were deposits for those stores. The witness explained that he understood the TH company had been set up to purchase and develop three stores and he had seen a schedule where they were grouped together. There was some evidence that the TF companies traded as a group and typically "inter-company loan" was a description used where there was a group structure.

[26] In considering the viability of TH Mr Rowand had seen projections for the business that he understood had been prepared for the bank and he had spoken to Mr T. The loans had been provided to TH as long term funding and the projections showed them increasing as new stores would open. This was illustrative of an understanding between the different entities that the loans would only be repaid in the medium to long term, which would in turn depend on the financial viability of TH in the future. He agreed that a purchaser of the TF companies at the relevant date would be unlikely to agree a long term repayment plan and so it seemed likely that an escrow account would be used for these too. The purchaser would put the sums in an account and pay over to the seller only if the loans were repaid. It

would be a formal arrangement. The alternative would be renegotiated terms. If it was an escrow account the seller would receive cash at the value under deduction of an agreed amount representing some or all of the contingent liabilities at the date of sale and a right to the remainder in the escrow account. Whether the seller ultimately received the sums in the escrow account would depend on the viability of the debtor (TH) and the witness accepted he would consider a professional report on viability as part of any material supplied. He had been aware that Mr Creevy had prepared a report and had highlighted that he had not seen it, but he was aware of what Mr Robb had said about it. The witness agreed that the willing buyer would not ignore the contingent liability of the rent guarantee and that professional advice on the likelihood of it being called up should be considered. He could not say how much would be placed in an escrow account; it would be a matter of negotiation. The liabilities were joint and several across the companies and the rent guarantee and the potential damages under the Franchise Agreement would not expire until 2028. He agreed that the Master Franchisor had a right of first refusal to purchase TH but no obligation to do so.

[27] In re-examination Mr Rowand agreed, on being reminded of the terms of the Franchise Agreement, that on any sale of TF (TH) the seller would have to go first to TH (UK) and offer the business. In any negotiations that followed, assessment of the future of the business, including consideration of any projections, would be important. Mr Rowand agreed that each of the four liabilities and contingent liabilities was slightly different and that each would have to be considered by the buyer, but it was simply not possible to say how exactly that would be done as it would depend on the mind of the purchaser and various other circumstances. The most likely outcome was either that the price would be split as explained or that the seller would retain the liabilities. I was concerned to know whether the position between the two experts was really as diverse as their evidence and I

asked Mr Rowand whether he could come up with a figure that might represent taking fair account of the contingent liabilities. He was clear that he could not place a value on any reduction from the value to take account of these and that it would not be treated that way but would be resolved differently. It would not be quantified in the valuation.

[28] On the basis of the evidence led, I had, by the time the defender lodged a Minute of Amendment in June 2020, decided that neither the value of the TF companies nor the value of the property company should be reduced by the value of the TH liabilities. My reasons for rejecting the contention that they should be so deducted are as follows. First, and most importantly, as narrated above the position ultimately adopted by both Mr Rowand and Mr Robb was that on a sale of the TF companies at the relevant date, the spectre of the TH liabilities would be resolved by placing a suitable amount of money in an escrow account. In other words the contingent liabilities would be dealt with not by a deduction in the price (value) but by holding on deposit a significant amount of the purchase price. By doing so, the purchaser would have the security of knowing that the money was available should TF (TH) be unable to meet its debts and one or more of the other companies ended up having to take on the relevant liability or liabilities. The seller would have the comfort of knowing that full value would ultimately be received if TH continued to trade and pay its debts. Secondly, and related to that, Mr Robb's approach was internally inconsistent. His approach of deducting the full amount of the TF companies' potential liabilities illustrated in his summary of the figures at 6/143 presupposed that the purchaser would succeed in reducing the price by the full amount of those liabilities. That did not sit well with his ready agreement in evidence that the result of negotiations between buyer and seller would be to have the sums that could later crystallise into an escrow account. In fairness to Mr Robb the point he seemed keen to make was that a purchaser would not and could not ignore these significant contingent liabilities and I accept that without hesitation. The difficulty with his

figures, however, is that they represent what might have been the hypothetical purchaser's opening position to the seller, not the agreement that would ultimately be likely to be the conclusion of negotiations.

[29] The primary evidence on which the pursuer (and Mr Robb) relied to support a contention that the contingent liabilities should be deducted in full as part of the valuation of the TF companies was that of Alan Creevy. The argument was that if Mr Creevy was right to be so pessimistic about the viability of TH then a purchaser might take the view that the business was so perilous that any purchaser of the TF companies should assume that it (TH) would fail almost immediately. Mr Rowand did not have access to Mr Creevy's report when he prepared his own and surprisingly it had not been shown to him before he gave evidence. Nonetheless, it is important in my view to understand that Mr Creevy's main conclusion was that TF(TH) had no net market value as at the relevant date or at the date of proof. His evidence was not that it was about to cease trading on the relevant date in a way that the liabilities would then fall to be paid by the TF companies. He acknowledged that if the parties no longer wanted to be involved in the TH business the most likely outcome would be that Mr SK would discuss the terms on which he would be prepared to let them out of the arrangement. Mr Creevy accepted also that Mr SK would be unlikely to let the business fold in a way that might adversely affect the TH brand. Accordingly, it was not Mr Creevy's evidence that as at the relevant date TF (TH) was about to close or fail immediately. His evidence was that he did not see it becoming profitable. In my view, while it was a fledgling business that had been trading for only 4 months and had no market value, its relationship with the franchisor cannot be ignored in assessing its viability. The crux of the matter is whether it was likely to fail in such a way that the TF companies would have to meet its liabilities in full.

[30] Mr Rowand's approach was to look at the undisputed facts. These included that TF (TH) was trading at the relevant date and continued to trade at the date of proof, HSBC had not sought repayment of the loan and the rental guarantee had not been called up and the franchisor had not sought damages in terms of the Franchise Agreement. He had commented on and challenged Mr Robb's approach in his Supplementary Report 7/190 of process, at paragraphs 27-37 and in his oral evidence. It was suggested that Mr Rowand's approach was fundamentally flawed in the absence of consideration by him of Mr Creevy's report. I reject that contention. It is for the court to assess all of the evidence and to take into account, where appropriate, that one expert may not have had available to him an opinion that another expert found useful. Mr Rowand freely accepted that it would be useful to have the views of a specialist commercial surveyor such as Mr Creevy. As already indicated, however, Mr Creevy was instructed primarily to value TH and not to assess the risk of immediate closure as at the relevant date for the purpose of a valuation of the TF companies. The evidence of Mr SK and the information Mr Rowand gleaned from the defender himself was to the effect that the trading TH outlet was operating satisfactorily and the available documentation all supported that Mr SK would step in if the parties wanted to walk away from TH. That evidence is equally important in considering the issue of the different approaches taken by Mr Rowand and Mr Robb. I accept Mr Rowand's reasons for separating the contentious potential liabilities from the issue of valuation. They were not included in the relevant balance sheets as likely to crystallise. The TF companies (and the property company) were informally connected but for Mr Robb to be correct about deduction of the TH liabilities, in a sale of only one of them, say TF Ayr, valued by Mr Robb at over £2 million, the seller would agree to deduct from the sale price the whole of the TH liabilities of £2.5 million (see paragraph 30 of 7/190). Mr Rowand also pointed out that very substantial bank borrowings of TF (Northern Ireland) were secured by an unlimited cross

guarantee for £2.6 million by the Scottish TF companies, but no deduction for that potential liability had been made by Mr Robb in his valuation exercise. Only Mr Rowand appreciated from the outset that neither the purchaser nor the seller of the TF companies would concede/succeed outright in the issue of the contingent liabilities when assessing price.

[31] Neither Mr Rowand nor Mr Robb was willing to offer a view on what the sum placed in the escrow account might have been at the relevant date or to calculate how the matter might otherwise be compromised by the willing buyer and willing seller. Accordingly, I conclude that as at the relevant date, the value (and so the sale price) of the TF companies and the property company would not be reduced by any portion of the contingent liabilities or the intercompany loans. Most if not all sums due in terms of those potential liabilities (and the inter-company loans due) would be placed in an escrow account to deal with the risk that some or all of them might crystallise. The approach I have taken accords with the general rule that contingent liabilities do not normally reduce the net value of a company, either in general commercial valuation or in proceedings of this type (*Liquidator of the Ben Line Steamers, Noter*, 2011 SLT 535; *Sweeney* v *Sweeney* 2004 SC 372). Accordingly, had the companies been sold as at the relevant date the total value of the relevant interests held by the parties (not all of which were matrimonial property) would be £6,976,605, of which a sum not exceeding £2,460,426 would have been separated out and held in an escrow account.

(iv) Events following the conclusion of the evidence

[32] In June 2020, while the case was at avizandum, the defender lodged a Minute of Amendment proposing to introduce averments about the sale of TF (TH) Limited. I had made an order for sale of the business on the pursuer's motion and in terms drafted by the pursuer's side on 2 April 2020. Nonetheless, the pursuer opposed the motion for receipt of

the Minute of Amendment. I allowed it to be received and I gave the pursuer time to answer it. However I indicated to counsel that, as the sale had been anticipated at the conclusion of the proceedings I considered that it would be unfortunate to require opening up of the pleadings and a further evidential hearing. The parties are joint shareholders in TF (TH) Limited and it seemed to me that they ought to be able to agree what the terms of sale were and of the impact, if any, on the issues for determination by the court. On 10 July 2020 I allowed receipt of a second supplementary Joint Minute of Admissions (no 101 of process) in terms of which the parties agreed the pertinent facts in relation to the now concluded sale of TF (TH) Limited it was agreed that in light of that agreed evidence there was no need for additional proof.

[33] The relevant parts of the agreed evidence in relation to the sale of TF (TH) Limited are as follows:

> "In compliance with the Court's interlocutor of 2nd April 2020, an Asset Purchase Agreement was entered into between TF (TH) Limited as the seller, and TH UK & Ireland Limited as the buyer, whereby the business known as 'TH operating as a retail outlet from premises at Stenhousemuir, would be acquired by TH UK & Ireland Limited. The sale of the said business completed on 15th May 2020. In terms of the said Asset Purchase Agreement the price of £350,000, under the agreed deduction of £12,609.89 (rent arrears plus the VAT due thereon), being £337,390.11, was paid to the seller's solicitors on 15th May 2020. TF (TH) Limited and TH UK & Ireland Limited are currently in the process of agreeing a schedule of appointments in relation to the business which may render a balancing payment due by one of the said parties to the other.
>
> On or about 15th May 2020, from the price paid by TH UK & Ireland Limited a sum of £318,000 was paid to HSBC by the said BTO, Solicitors in full settlement of the loan due to HSBC by TF (TH) Limited, …
>
> The remainder of the price paid (£19,390.11) was retained by TF (TH) Limited and held in the hands of the said BTO, Solicitors subject to deduction of transaction fees.
>
> …
> As required in terms of the Asset Purchase Agreement, TF (TH) Limited have renounced any interest they may have in the Stenhousemuir premises in terms of the sublease between them and TH UK & Ireland Limited, with effect from 15th May 2020.

In terms of clause 8.2, of the Asset Purchase Agreement referred to in clause 4 hereof, the rental guarantee provided by TF (TH) Limited, through HSBC bank, to the head landlord FWRE Limited, is to be terminated and replaced by a guarantee provided by TH UK & Ireland Limited. Pending the necessary paperwork being finalised, and that guarantee being terminated, TH UK & Ireland Limited have granted an indemnity to TF(TH) Limited in respect of any sums falling due under the said guarantee post the completion date of 15th May 2020. That indemnity has been backed by an indemnity granted by TH UK & Ireland Limited's Bank, Lloyds Bank plc to HSBC, which was intimated on 11th May 2020. The position of HSBC is that, in light of that indemnity, should they be called upon to pay any sums pursuant to the rental guarantee they should have a right of recourse to Lloyds Bank plc for any sums paid.

As at the date of completion, being 15th May 2020, there were no sums due by TF (TH) Limited, or HSBC in terms of the rental guarantee.

In terms of clause 8.3. of the Asset Purchase Agreement referred to in clause 4 hereof, the existing Franchise Agreement between TH UK & Ireland Limited ('the franchisor') on the one hand and [the TF companies, TF Limited, TF (Property) Limited and each of the parties] has been deemed terminated with effect from 15th May 2020. No payment has been made by TF (TH) Limited or by any of the other companies listed as Principals and in which the Pursuer and JF have an interest, in consequence of the said Franchise Agreement. The said clause further provides that no further obligations or liabilities arise pursuant to the Franchise Agreement, on either party to the Franchise Agreement, or any of these companies as Principals, with effect from 15th May 2020.

The loans due by TF (TH) Limited to the TF companies listed in clause 10 of the Supplementary Joint Minute, number 70 of Process, remain outstanding in the total sum of £595,148 and as set out therein.

It is not anticipated that there will be any payment made by TF (TH) Limited to the TF companies listed at paragraph 10 of the Supplementary Joint Minute, number 70 of process."

[34] The background to the sale had been that, after he had given evidence but before the case was first at avizandum Mr Creevy had become aware of proposed heads of agreement for the sale of the TH franchise to TH UK and Ireland Limited. There seems to have been an initial suggestion that Mr Creevy be appointed to act in relation to the sale but the incidental order for sale of the parties' respective interests in TF (TH) Limited that I made on 2 April 2020 appointed, by agreement, a Mr Wiper of BTO solicitors to act on their behalf. On 10 July 2020 I heard arguments about the impact, if any, of the sale on the issues for the

court's determination. The pursuer contended that the sale of TF (TH) Limited did not and could not make a difference to the valuation of the TF companies as at the relevant date. As a matter of principle, I accept that argument. It was also contended for the pursuer, however, that the subsequent sale of TH could not even be used as a crosscheck on any decision I had reached about the relevant date valuation. In my view, it can be appropriate to use hindsight in relation to a business asset as a crosscheck on a relevant date valuation already carried out. In this particular case, TF (TH) Limited is an item of matrimonial property in which both parties continued to have an interest at the date of proof and in which both were involved as recipients of the sale price following the proof. The contentious issue is primarily the impact of the TH liabilities on the value of companies in which only the pursuer is a shareholder, although it impacts also on the value of the defender's interest in the property company. In my view it would be wholly artificial to ignore what has occurred recently when sense checking the decision not just on valuation but also on division of matrimonial property. As it happens, there is no significant difference between the decision in principle I had already reached in relation to the contingent liabilities and the position that now exists following the sale of the TH entity. It simply reinforces that, while the business had been assessed as having no net value both at the relevant date and currently by Mr Creevy, a deal was available on the basis that the UK Franchisor was willing to relieve the company of debt in order to move forward and continue trading. As Mr Rowand had anticipated, no damages under the Franchise Agreement became relevant and neither the rental guarantee nor HSBC loan crystallised so far as the TF companies' potential liabilities were concerned.

[35] The only matter about which there could now be a consequence for the TF companies relates to the intercompany loans. It was always accepted that these were in a different category to the contingent liabilities because they are loans due and included as assets of the

TF companies. Their continued existence and the agreement that TH is now unlikely to repay them requires to be taken into account. It tends to add some weight to the pursuer's arguments about realisability of her assets (including the incidence of tax). The general realisability of the assets of the TF businesses is something that can be taken into account as a special circumstance (1985 Act section 10(6)(d)). These, however, are matters that properly go to the division of matrimonial property and not its relevant date valuation and I will address them further in that section. But for the sale of TF (TH) Limited in May 2020 I would have considered how best to reflect the continuing impact on the TF companies (and the property company) of the contingent liabilities and the intercompany loans in determining how the matrimonial property should be divided. I would have shared the risk between the parties by ordering a significant sum of money to be held for them jointly so that they shared the risk of the TH company failing. That is no longer necessary. For the reasons given above, the events occurring while this case was first at avizandum have not altered my view that the appropriate valuation figures for all of the relevant companies are the mid-points agreed between Mr Rowand and Mr Robb without taking account of any of the TH liabilities. The value of the pursuer's interest in the two companies that do not form matrimonial property, TF and TF Ayr amounts to £488,654 and £931,972 respectively. The valuations of the pursuer's interest in the companies incorporated during the marriage are included in the schedule below.

Other valuation disputes

[36] There were few other disputed issues in relation to the identification and/or value of the matrimonial property that remained unresolved by the end of the proof. There was some evidence about the parties' liabilities arising from the breach of the missives they had entered into to purchase a new matrimonial home before the relevant date. The pursuer

gave unchallenged evidence that she had been required to meet the cost of a fireplace for the property after the relevant date and amounting to £3,800. There remained a sum of £20,000 due in respect of the breach of missives which would be settled from monies held back from the sale of the former matrimonial home. Accordingly, I have divided the liabilities for the abortive purchase of the new home at £13,800 to the pursuer and £10,000 to the defender. There was an ongoing dispute between the parties in relation to the division of contents of the former matrimonial home but neither side asked me to take this into account in a division of the matrimonial property. Some of the items about which there had been correspondence were of sentimental rather than financial value. It was indicative of the ongoing hostility between the parties that the pursuer had prior to proof refused to return to the defender a chanukiah, gifted to the parties by the defender's parents on marriage. This was ultimately resolved by agreement.

Calculation of the net value of matrimonial property

[37] The following schedule of matrimonial property represents both agreed figures and those on which I have made a determination on the evidence. It does not include the pursuer's shares in TF Limited or TF (Ayr) Limited, which as indicated do not form part of the parties' matrimonial property and are discussed separately below. Other than TH, shares with no net value at the relevant date have also been excluded from the schedule.

	Mrs T	Mr T
Matrimonial home	£136,322	£136,322
Contents	N/A	N/A
TF (TH) Limited	Nil	Nil
TF Clydebank Limited	£844,528	
TF Govan Limited	£770,227	
TF Irvine Limited	£642,213	
TF Greenock Limited	£785,861	
TF Johnstone Limited	£510,767	
TF Kilmarnock Limited	£529,393	
TF Renfrew Limited	£359,274	
TF Stevenston Limited	£668,949	
TF Downpatrick Limited	£62,047	
TF Northern Ireland Limited	£284,214	
TF Property Limited		£98,506
Directors Loan	£145,000	
RBS Joint Account and def's a/c	£26,465	£36,465
Porsche		£28,000
NS & I		£ 170
Pensions	£129,875	£175,649
Number Plates (2)		£6,800
Total (gross)	£5,952,238	£471,742
Less New home liabilities	(£13,800)	(£10,000)
Less Tax Liability	(£57,459)	
Total net:	**£5,823,876**	**£471,912**

Division of matrimonial property and defender's economic disadvantage claim

[38] On the basis of these figures, the total net value of the matrimonial property as at 5 April 2019 was £6,295,788. A number of issues arose in relation to the division of value of the matrimonial property. The most significant of these related to treatment of the two companies operated during the marriage first by the pursuer and then for many years as indicated under the control of the defender, which would not otherwise be taken into account, namely TF Limited and TF (Ayr) Limited. On the basis of the decision I have reached as to valuation the combined value of those of the pursuer's interest in those two companies as at the relevant date was, as already indicated, £1,420,626 (£488,654 + £931,972). The defender's position was that the value of those entities should be divided equally between the parties just as if the pursuer's shareholdings in them had comprised matrimonial property. The pursuer's position, at the other extreme, was that the defender should receive nothing under principle 9(1)(b) at all. Miss Brabender's position was that the defender's approach of sharing the value of those companies was lazy and unfounded in law and in fact. She contended that the pursuer had not gained any economic advantage from the contributions of the defender on the basis of the evidence led at proof. He had been paid for deliveries and tips from TF Limited in the early years and had received a salary from the Ayr company from November 2005. All of his work for the companies had been properly remunerated until he was dismissed after the separation. Both parties had worked in the business after marriage until 2010. The pursuer's direct involvement then reduced and effectively ceased in 2012. The pursuer's position was that she was thereafter excluded from decision making, while the defender indicated that she remained at least informed. Conversely, Mr Mitchell's position was that the two non-matrimonial properties should be treated as if they were matrimonial property because "they have for many years been part of the same omelette". All of the companies were effectively treated as a group

although not connected in law and no distinction had been drawn by the parties between the matrimonial and non-matrimonial entities during the marriage. The two non-matrimonial companies were formed while the parties were cohabiting in a property that the defender owned and had provided. The pursuer had contributed only a very small amount of money to start up TF Limited and the defender had been involved in that. TF (Ayr) Limited had been set up through bank loans and JF's investment. In short the defender's position on the two matrimonial companies was that "practically their entire value was established by the joint efforts of the two parties during marriage". The defender had been dismissed from his position in the business very shortly after the separation.

[39] In my view, both parties' positions are extreme, unrealistic and unreasonable. The whole scheme of the Family Law (Scotland) Act 1985 is to create a system of matrimonial property, the net value of which at the relevant date is to be shared fairly between the parties. While sometimes the distinction between matrimonial property and non-matrimonial property can seem arbitrary, there is no proper basis within the legislation to simply ignore the matrimonial property regime and treat very valuable items of non-matrimonial property as if they fell within the definition in section 10(4) of the Act. The legislation provides ways of dealing with property that is held in a non-matrimonial wrapper but which cannot be ignored because it represents in part or in whole the fruits of the labour of one or both of the parties during the marriage. Typically, corporate entities are vehicles that require to be examined in this context because incorporation prior to marriage will exclude the company or shares in it from the ambit of matrimonial property however much of the value may have been built up during the marriage. This case falls squarely within that paradigm. The provision through which the court can take account of situations such as the one in this case is through principle 9(1)(b) of the 1985 Act. That principle (the terms of which are narrated at paragraph [31] above), read with section 11(2), allows the

court to take into account not just the period of the parties' marriage but also earlier periods of cohabitation. The defender contributed to the creation of wealth within these non-matrimonial companies both before and during the marriage but particularly during the marriage and after the birth of the children. He was paid a salary but the value of the pursuer's interest in the companies, the wealth created, is something that the couple mainly built up during their relationship, first together and then for which the defender was the primary contributor. JF, on his own evidence, had no involvement throughout and benefitted from the wise investment that he had made in the business. He had complaints about how the defender had managed things, particularly latterly and in relation to the creation of the contingent liabilities, but he was a shrewd investor with opportunities to query the creation of those at the time. JF's animus towards Mr T postdates the parties' separation. In my view, it is wholly unrealistic to suggest that the pursuer has not gained any economic advantage from the very significant non-financial contributions of the defender given the value of her interest in these companies. That said, the evidence was in fairly general terms and it is surprising that no evidence was tendered to the court about the value, if any, of TF Limited and TF (Ayr) Limited as at the date of the parties' marriage or in the case of TF at the date of the commencement of their cohabitation. If the defender had led evidence to show that effectively the whole value of the entities by the relevant date had been created during the cohabitation and marriage with particular reference to the years of his stewardship, findings to that effect could have been made. In the event, I have only the general evidence of the dates on which the companies started and the parties' respective non-matrimonial contributions thereto. It is not unimportant that the pursuer was and remains the sole franchise holder for all the TF companies in which the parties were involved and her ability to develop those emanated from that source. JF was clear that he had been impressed by the pursuer and that his initial intention had been to invest in a business or businesses run by her. To put it another way, the business idea and the pursuer's initial ability to develop it did not emanate from the parties' life together, but from the pursuer's initiative as an individual with the support of a third party investor.

[40] Taking all of the relevant evidence into account, I consider that, were the orders for financial provision to be made in this case without consideration of the very significant value of the two non-matrimonial companies, it would create an imbalance of economic advantage and disadvantage between the parties, to the unfair detriment of the defender. Section 11(2) of the 1985 Act empowers the court to correct such a resulting imbalance "… by a sharing of the value of the matrimonial property or otherwise". The extreme positions taken by each side in this case do not lend themselves easily to a rectification of the resulting imbalance by an unequal division of the matrimonial property and so I have decided that it should be reflected by a calculation that would in the first instance award Mr T a substantial additional capital sum. However, the matter does not end there because the pursuer has arguments that require to be taken into account as special circumstances that could justify unequal division of the matrimonial property in her favour. First, she contends that she will in fact require to realise at least part of her interest in the TF companies in order to raise the very significant capital sum due to the defender. It was argued that the consequences of realisation should be taken into account as a special circumstance justifying an unequal division of the matrimonial property. Ms Brabender proposed that this be reflected by, at least nominally, an award to her of a specific sum that would then be deducted from the monies she is due to pay to the defender. Secondly, there is the possible impact on the TF companies of the likely non-payment by TH of the inter-company loans. One difficulty with a precise calculation on such matters is that the pursuer advanced figures that were dependent upon the evidence led in her case about the value of the TF companies that I did not ultimately accept. Further, taking account of a special

circumstance such as the likely incidence of capital gains tax on a partial realisation of one side's assets is discretionary and there is no requirement to "compensate" the pursuer "pound for pound" in relation to her likely liability. I cannot calculate with certainty the tax reliefs and allowances that may be available to the pursuer. The vicissitudes of capital gains tax legislation (including available reliefs), the passage of time and developments with the business since the relevant date, coupled with the absence of detail about the pursuer's plans means that I cannot predict with accuracy a sum reflecting what the consequences will be for her. The liability is a contingent one because any number of circumstances could affect whether and to what extent it becomes due. The figure suggested by the pursuer on the basis of her lower valuation was estimated at £575,000 (which she suggested by divided equally between the parties at £287,500 each). So far as the likely non repayment of the inter-company loans is concerned, there was no evidence about how this would impact upon the TF companies going forward, such as the consequences of writing off some or all of the loans, but I consider it appropriate to take into account as a general factor the agreed position following the sale of TH. It seems to me that there is no difficulty in principle with notionally awarding the defender a capital sum to reflect the resulting imbalance of economic advantage and disadvantage and then offsetting any sums that represent the special circumstances that favour the pursuer in order to achieve a fair result. In the particular circumstances of this case that is the approach I will adopt.

[41] Taking a broad view of matters, and attempting to achieve an overall fair result, I intend to make an initial additional award to the defender under principle 9(1)(b) of £450,000. I will then reduce that by offsetting a sum to take account of the special circumstances in the purser's favour narrated above. The sum of £300,000 would be appropriate in my view to reflect both aspects of these special circumstances. The pursuer should not secure deduction of all of the tax estimated but not due nor the whole sums due

in terms of the loans that remain in the accounts as assets of the TF companies notwithstanding the agreed view that they may not be repaid. I have sought to take account of all of the arguments on the relevant principles of the legislation as applied to this case and to achieve an outcome overall where each party leaves the marriage with a fair share of the wealth created by their efforts during the period of cohabitation and marriage.

[42] A further matter relating to the division of matrimonial property relates to the defender's shares in TF (Property) Limited. There was initially a dispute in relation to this because the defender wanted to retain this asset. However, that company was funded by intercompany loans from the TF companies and it was not an income generating asset as at the relevant date. Ultimately, the defender did not oppose the pursuer's claim for a transfer of his shares in that company. There are very significant sums currently due by the property company to the TF companies (narrated in 6/142 of process and relative schedule and it seems reasonable that the pursuer should take over that asset. It was accepted that she would require to do so for current date value. The net current value of the defender's said interest (excluding the TH liabilities) is £111,193.

The orders for financial provision to be made

[43] On the basis of the decisions I have made above, the sum that the pursuer will require to pay to the defender (comprising a capital sum to reflect her retention of the vast majority of the value of the net matrimonial property, the balancing payment due in terms of principles 9(1)(a) read with section 10(1) and (6) and 9(1)(b) and the transfer to her of the property company) is calculated as follows. The total net value of the matrimonial property was £6,295,788. Equal sharing would result in each party having assets or a capital sum to the total value of £3,147,894 . The defender had assets to the value of £471,742 at separation, resulting in a capital sum payment to him on equal sharing of £2,676,152. However, Mr T

will receive an additional £150,000 (£450,000 – £300,000) to reflect the balancing payment under principle 9(1)(b) less the sum representing the special circumstances I have accepted. He would then be due a total capital sum of £2,826,152, but he has agreed to transfer his interest in the property company to the pursuer. In that event, she will require to pay him an additional sum of £111,193 and so the total sum due to him (rounded up to the nearest £) is £2,937,175 assuming that the share transfer takes place. The order for sale of TF (TH) Limited having been implemented there will probably be no other financial orders to make. The defender has been in receipt of an award of interim aliment but there is no sense in which he will continue to be dependent on the pursuer financially after divorce, assuming at least an initial instalment of capital is paid in early course. In short, on the basis that the pursuer will tender a reasonable plan for payment that includes a first instalment within 2 to 3 months, there will be no award of periodical allowance. If it is to be longer I will continue payments at the current rate of £2,000 per month until the first instalment is received. I accept that the pursuer does not have available resources that would permit her to make immediate payment of the whole capital sum. She will require time and advice to consider the best method of raising the necessary funds. I do not intend to reduce the capital sum otherwise due to reflect an absence of immediately available resources because there is ample wealth within the value of the businesses retained by the pursuer to allow the money to be raised. It was not suggested that the TF companies had reduced in value. As indicated, in addition to a period of time to raise the capital sum awarded the pursuer will require to consider whether to propose instalment payments with or without the accrual of interest, at the judicial rate or otherwise. Both sides require an opportunity to reflect on the decisions in principle that I have made before addressing that issue.

[44] Accordingly I will fix a By Order hearing for submissions to be made in relation to the precise orders that will give effect to my decision. For the avoidance of doubt, I have

decided not to grant perpetual interdict against the defender in terms of the pursuer's ninth conclusion. There were a number of complaints about the defender's behaviour during the course of the proof and I have dealt with the allegations in that section. By the end of the evidence, I was satisfied that the defender understood well the difficulties with his past behaviour and he has now been enjoying reasonably substantial contact with the children for some months. I am not satisfied that there is any real likelihood that the defender will revert to his previous behaviour such as would justify a perpetual interdict. If I am wrong about that, the remedies available to the pursuer on that matter do not end on divorce. As indicated in the section relating to the children in this opinion it is important that the parties try to move on and develop a cooperative relationship in future. Further, I consider that it would be unnecessary and inappropriate to grant perpetual interdict in terms of the pursuer's thirteenth conclusion now that TH has been sold and the defender has no ability to draw down any sums from the TF businesses.

[45] I will reserve meantime all question of expenses save insofar as already dealt with and I would expect to be addressed on that matter at the By Order hearing. There may well be other anonymisation issues that parties would wish to raise in this case if this decision is to be published and I would expect them to address me also on that matter. I will reserve meantime all question of expenses, on which I expect submissions at the By Order hearing.