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IN THE FAMILY COURT SITTING AT KINGSTON-UPON-THAMES

Neutral citation: [2023] EWFC 307 (B)

Case No: ZZ21D65712

The Matrimonial Causes Act 1973

The marriage of BC and SC

Before :

DEPUTY DISTRICT JUDGE HOLMES-MILNER

Between :

BC

Applicant

- and -

SC

Respondent

Ms Judith Murray KC and Ms Jennifer Lee of counsel for the Applicant

Ms Victoria Francis of counsel for the Respondent

Hearing dates: 1st to 3rd and 8th November 2023

JUDGMENT

WRITTEN JUDGMENT HANDED DOWN ON 12th DECEMBER 2023

Deputy District Judge Holmes-Milner:

Introduction

1. This is an application for a financial remedy. Its portal number is 1635-7659-8858-0147.
2. The applicant is BC. The respondent is SC.
3. I shall refer to the applicant as “H” below and to the respondent as “W”.

Corrections and revisions to my draft judgment

4. I circulated a draft judgment to the parties by email on 29th November 2023.
5. Both counsel provided lists of typographical corrections for which I am grateful and which are mostly accepted.
6. Counsel for W submitted, on 5th December 2023, a request for clarification of various elements of the draft judgment.
7. I replied by email the following day to the parties: “Ms Francis raises 6 matters: A. The costs of £19,689; B. CGT liability on the FMH; C. Conveyancing fees; D. 'Mortgage-free'; E. Clean Break; F. Children's Funds. It seems to me that she may well be right about A and C, given my reasoning, and I would expect H to make sensible proposals for the payment of CMS for Child B before I make a final order so I invite any brief submissions in reply on behalf of H in response to items A, C and E.”
8. Counsel for H submitted, on 11th December 2023, submissions in reply.
9. In consequence of the further written submissions, I decided to revise some elements of my draft judgment as set out below. The key revisions were as follows:
 - a. W’s agreed costs liability (£19,689) should not, in fact, be deducted from the lump-sum payable to her;
 - b. The FMH should be transferred to W subject to her discharging H from the mortgage by 31st August 2024 and H must pay W a lump-sum of £177,000;
 - c. It was noted that H offers to pay £650 per month as child maintenance for Child B, which should begin in January 2024;
 - d. By way of clarification, H should pay the full CMI in respect of the mortgage on the FMH in December and January 2024;
 - e. H will pay the conveyancing costs in respect of the property and share transfers;
 - f. The appropriate pension “impairment enhancement” is 30%.

Representation

10. H was represented by Judith Murray KC leading Jennifer Lee. W was represented by Victoria Francis of counsel.

Summary

11. In summary, I have concluded that:
 - a. The value of the matrimonial assets is £1,996,926 (which includes the proceeds from the critical illness policies, the net proceeds of sale of

- Property 1 and a higher valuation on the shares in Company A Ltd but excludes the net proceeds of sale of Property B);
- b. Each party's liabilities should first be discharged from the matrimonial assets;
 - c. Each party then requires £725,000 to satisfy their housing needs;
 - d. W has a mortgage capacity of £175,000;
 - e. Probably, H does too;
 - f. Both parties will have to resort to mortgage borrowing to buy an appropriate property;
 - g. As much as possible of the balance of the proceeds of H's critical illness policies should be preserved for his future income and healthcare needs;
 - h. However, some recourse has to be made to them to re-house W;
 - i. In very approximate terms, W is entitled to just under £650,000 from the matrimonial assets;
 - j. If W wishes to seek to re-mortgage and stay in the FMH, then she should be allowed to, subject to various matters (eg property and share transfers, indemnities, financial adjustments) below;
 - k. There should be a clean break as to capital and income;
 - l. There should be a pension share, as agreed;
 - m. The appropriate pension "impairment enhancement" is 30%.

The hearing

12. The hearing took place over four days: 1st, 2nd, 3rd, 8th November 2023.
13. The first three days had initially been listed for trial of a preliminary issue involving interveners. The preliminary issues (which I explain below) were resolved by consent.
14. I therefore agreed to use the hearing, at the parties' invitation, as the final hearing which was already listed on 11th and 12th January 2024.
15. Partly because I gave time on the first morning for settlement discussions and partly because special measures were deployed in order to facilitate H's giving of evidence, an additional day was required to complete the evidence and receive oral submissions.
16. I dealt, on the first morning, with:-
 - a. H's application to adduce medical evidence (which was refused for reasons I gave ex tempore on the day); and
 - b. W's application to admit additional documents into the bundle (which was allowed).
17. For completeness, two orders will be made consequential upon this hearing:-
 - a. the first, which I will draft and upload to the Portal, to vary a consent order which was filed in September or October 2023 by which the parties agreed to dispose of the preliminary issues and agreed directions for the final hearing;
 - b. the second, which I invite counsel to seek to agree, a final order disposing of the application in consequence of this judgement.
18. Two additional matters were agreed between the parties at the outset which therefore I was not required to rule upon:-

- a. it was agreed that two accounts held at the Nationwide in H's name belong to the children;
 - b. the parties agreed a method for dividing up the family gold.
19. Each of the parties gave evidence and was cross examined. No other witnesses were called.
20. Counsel for each party prepared helpful opening notes supplemented by oral submissions.

Background

21. The relevant background is as follows.
22. H was born in 1976 and will shortly be 47 years old. W was born in 1976 and is 47 years old.
23. The parties have two children, Child A, who is no longer a minor, and Child B, who is under 18.
24. The parties knew each other at school. They did not co-habit.
25. They were married in 2002 and separated in 2021 (they dispute which month).
26. This was a long marriage.
27. A divorce petition was presented by H on 1st September 2021. Decree nisi was pronounced by District Judge Phillips, sitting at Birmingham Civil and Family Justice Centre, on 26th October 2021.
28. H applied for a financial order by Form A dated 1st November 2021.
29. The parties both filed Forms E and raised questionnaires which have been answered.
30. The FDA was held on 16th February 2022.
31. As a result of the order made that day, H's parents and sister were joined as interveners. The issue which involved them, amongst others, concerned disputed loans made to H for the purpose of property acquisitions. Those loans were the subject of written loan agreements, the validity of which was disputed by W. The interveners claimed repayment of loans amounting to approximately £165,000, some dating back over 20 years.
32. The private FDR was held on 8th November 2022. At a directions appointment on 6th April 2023, District Judge Hartley directed that there should be a preliminary issue hearing in respect of the loan agreements and the beneficial ownership of Property 1.
33. To their great credit, the parties were able to compromise the preliminary issues. Given the apparent level of suspicion if not antipathy, that must have required considerable time and effort on the part of their legal representatives.
34. It was agreed that H should pay the sum of £164,871 to the interveners in settlement of their alleged loans together with a contribution towards their costs in the sum of £19,869. The costs were to be paid by H in the first instance and reimbursed to him by W.
35. The issue of the beneficial ownership of Property 1 was to be determined at the final hearing without joining the children, on the basis set out below.

The parties

36. After leaving school, both parties attended university and continued a long distance relationship.

37. H qualified as a chartered accountant. He trained at X accountancy firm and worked for some years in employed practice (at Y firm and then Z firm). In 2017 he decided to undertake consultancy work and, for this purpose, set up a limited company, Company 2 Ltd, on 25th September 2017. In April 2019, he set up his own tax advisory company, Company 1 Ltd. In March 2019, he and a friend, set up Company 4 Ltd in order to focus on tax planning services. By that date, he had handed in his resignation with Z firm and was on gardening leave.
38. By late 2020, H says that his health was deteriorating and he was experiencing weight loss. He was diagnosed with stage 3 bowel cancer in early 2021. It must have been a terrible shock for the family. H underwent surgery in 2021 involving a proctocolectomy with the formation of a permanent ileostomy (stoma bag).
39. H says that he vacated the FMH in mid-2021, following an argument with W. Initially, he moved to rented accommodation which was already tenanted by him in order to be close to his treating hospital. In 2021, H commenced chemotherapy treatment. This was completed in September 2021. In October 2021 he commenced radiotherapy treatment. This was completed in November 2021. H now lives in high quality rented accommodation close to the FMH.
40. H undergoes check-ups at hospital every 3 months (the check-up cycle would normally be 6 months but he has a heightened risk of recurrence). His tumour was categorised as Stage 3b. One of 12 lymph nodes was affected. The surgery involved a “R1 resection” meaning some non-clearance of the tumour so aggressive chemotherapy and radiotherapy (“adjuvant therapy”) had to be undergone. In itself, that treatment increases risks of other cancers. The evidence in the bundle indicates a 50% recurrence risk in 5 years, which is improved because of the adjuvant therapy by 15% – 20%.
41. Company 1 Ltd is the main vehicle through which H works.
42. W has a degree in Business and Economics. She is employed as a teacher at a school near the FMH. This is a state secondary school for pupils in years 7 to 13. Pre-separation she was working three days per week. She initially found additional employment for two days a week teaching maths at a second school. That was a temporary position until the summer of 2023. To her credit, since September 2023, she has been employed full time at her current school and obtained promotion to Head of a year group.
43. Both the children attend or attended a school near where W works, a prestigious selective state school with an impressive academic record and good sporting facilities. Both boys have played sports both at school and for a local club which speaks to their sporting abilities. Child A left school in the summer of 2023 and is now in the first term of a four year degree at university. Child B is a Year 11, so will be sitting the GCSE public examinations in the summer of 2024. Child B intends to stay at the same school in the sixth form and also to attend university.
44. H sees the children frequently but W is the principal carer for Child B.
45. As I have indicated, there is a dispute between the parties as to the date of separation. They also dispute each other’s characterizations of the marriage and the circumstances which led to its disintegration. I am not convinced that much of the history illuminates the issues which I have to decide, save in four respects.
46. First, W says that H took responsibility, almost exclusively, for family finances including completing and filing her own tax returns. I accept that evidence. After they were separated, she says, she was compelled to start her own, informal,

forensic investigations into the matrimonial assets and the history of property transactions, details of which I set out below.

47. Secondly, W says that H's decision to move out from the FMH and to end their marriage was a surprise. She suggests that H removed himself with little or no explanation as to his reasons and ultimate intentions. W says that she did not finally realise that the marriage was over until July 2021 when H convened a conference call with the 2 children. H accepted that he first told W that he wanted a divorce in July 2021. H says that this was a difficult marriage throughout its course. He describes a "tumultuous relationship" before they were married which did not improve afterwards. Essentially, he says many of his financial decisions were taken in order to keep W, who was domineering, contented and to avoid recrimination. He left, he said, following a serious incident in the course of which he was attacked by W and she tried "to grab my stoma bag". W disagrees. W admits that they had "ups and downs" and a separation in 2011 but did not want the marriage to end. To some extent, she blames the difficulties on H's excessive consumption of alcohol and difficulties with H's mother. On her case, one day in May 2021 H went out, saying that he was visiting a priest at his parents' house but left the FMH never to return. It seems likely that the argument in May 2021 which H says led him to move out of the house (whatever the events, as to which I am unable to make any findings) resulted from a lack of communication. It seems likely that H had already by then decided to leave the marriage, a decision which he did not communicate to W for some months.
48. Thirdly, H received £1,409,110 by way of two payments in March and June 2021 being the proceeds of critical illness insurance policies. Whether these monies represent a matrimonial asset is dealt with below. The receipt of the first tranche was a factor in H's surreptitious decision to leave, W believes. She is probably right. I formed the impression that H had decided to leave but kept W in the dark.
49. Fourthly, there then ensued an unfortunate deterioration in relations involving allegation and counter-allegation of theft and document non-disclosure. By May 2021 matters were sufficiently strained between the parties that H called the Police to inform them that he intended to attend at the FMH in order to collect some belongings. W says that on one occasion he attended with a stranger to her as a sort of chaperone. The parties dispute which documents H removed and which documents he left behind. The financial information was, essentially, in the knowledge of H. It seems to me that W's evident distrust and suspicion within these proceedings should be seen against that context. I consider this further below.

The issues

50. The parties have provided me with an agreed statement of issues at pages 32 and 33 in the bundle. I shall not recite the list here. I return to it later.
51. The parties have agreed a mechanism for pension sharing. W seeks spousal periodical payments which I decline to order for the reasons below. The principal dispute between the parties (in my view) therefore relates to capital.

Survey of assets

52. On the basis of the latest version of the agreed ES2, the non-pension assets on H's case are valued at £1,757,637 and on W's case at £1,990,369. Of course, H says that a substantial proportion of the non-pension assets are non-matrimonial.
53. It may be helpful to begin with an outline survey of the real property assets in the arena and owned by H or W if only to introduce the properties which were the subject of dispute at trial. Some, it is agreed, are co-owned by the children.

Asset	Value	Comment	Agreed?
FMH	£472,879	Net equity; title in joint names and jointly owned	Agreed
Property 3	£81,348	Net equity of approx. £216,000 but 50% owned by children	Agreed
Property 4	£24,837	Net equity of approx. £51,710 but 50% owned by children	Agreed
Property 5	£49,973	Net equity of £117,802; title in joint names but 50% owned by children	Agreed
Property 1	£54,118 (H) or £128,911 (W)	Net equity of £149,586 but H says 50% owned by children	Value agreed; ownership disputed
Property 6	£118,370 (H) or £126,174 (W)	Net equity; owned by HSAA	Parties disagree as to marginal rate of income tax if dividend paid to H
Property 2	£105,142	Net equity; in H's name	Valuation agreed but H says is entirely non-

			matrimonial
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54. In addition to real property assets, there is £35,199 in an Aegon ISA, credit balances in bank accounts and business assets and debts due to H.
55. The business assets are as follows:

Company	Shareholding
Company 1 Ltd	H is the sole shareholder
Company 2 Ltd	H and W are equal shareholders
Company 3 Ltd	Owned by Company 2 Ltd
Company 4 Ltd	H is a 50% shareholder

Legal principles

56. The court is required to have regard to the factors at section 25 of the MCA 1973.
57. The relevant provisions of section 25 are as follows:

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A, 24B and 24E above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1) (a), (b) or (c), 24, 24A, 24B and 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters – a. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire; b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; c. the standard of living enjoyed by the family before the breakdown of the marriage; d. the age of each party to the marriage and the duration of the marriage; e. any physical or mental disability of either of the parties to the marriage; f. the contributions which each of the parties has made or is

likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family; g. the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; h. in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

58. I remind myself that:

- a. In exercising its powers, the court must have regard to "all the circumstances of the case", as well as to a list of specifically identified matters. The first consideration must be given to the welfare of any children who have not yet reached the age of 18, but thereafter (and in no specified order or hierarchy) to the matters set out in section 25(2)(a)-(h) of the MCA 1973.
- b. One of the paramount considerations, in applying the s25 criteria, is to seek to stretch what is available to cover the need of each for a home.
- c. Three key principles (or "strands") which justify the making of orders under Part II of the MCA 1973 are needs ("generously interpreted"), compensation for relationship-generated disadvantage and sharing of the fruits of the marital partnership.
- d. The starting point in every case must be to establish the financial positions of the parties. Only then can the task of deciding how the available resources should be allocated be commenced, and the launch pad for that determination is section 25 of the MCA 1973.
- e. The ultimate objective of the application of the three principles of need, compensation and sharing is to achieve a fair outcome. As to the sharing principle, as a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage.
- f. Equal sharing applies to matrimonial assets but generally does not apply to non-matrimonial assets. However, that does mean that non-matrimonial assets are ignored or quarantined. They will be taken into account where the other party's financial needs require.

59. In the words of Lord Nicholls in *White v White* [2000] UKHL 54:- *...a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination". In Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24:- *"This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals...The*

parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.

60. Further, in the words of Mostyn J in *JL v SL* [2015] EWHC 360:- *Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination.*
61. One obvious reason to depart from equality is that one party needs more capital for a particular reason.
62. Finally, the Matrimonial Causes Act 1973, Section 25A, reads as follows:- (i) *Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24 or 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable. (ii) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.*

The witness evidence

63. There was a great deal in issue between the parties. However, only some of the disputes of fact are relevant to the financial remedy and the principal matters, at least in terms of value, depended almost exclusively on H's evidence. I deal with them below.
64. H presented as highly-motivated, talented and entrepreneurial. He has an impressive record of setting up and successfully running businesses. He is obviously devoted to his children. He is to be commended for his fortitude in the face of his recent medical history. It was not comfortable for him to give evidence at such length. He gave his evidence in a relaxed, conversational but considered manner.
65. There were, however, some features of his evidence which were not entirely satisfactory, especially from a Chartered Accountant and tax specialist.
66. Firstly, the income tax arrangements involving himself, W and the children. He declared to HMRC (at page 582 of the bundle) for the purposes of income tax that Property 2 was beneficially owned between him and W as to 50% each. Yet within these proceedings he insists that the property is solely-owned beneficially by him and non-matrimonial. If so, the tax treatment was surely incorrect.

67. Secondly, H persisted in asserting to me that there was, somehow, a difference between “income and capital rights” in respect of real property such that one may simply elect to treat them separately for the purposes of income tax, CGT and inheritance tax. He considered that it was open to him to treat the rental income from a property for tax purposes as accruing to any member of his family who he might elect independent of its legal or beneficial ownership. I pointed out to him that whilst it may be possible to, for example, assign the benefit of a rental income stream (which was not the case here) the right to income in fact devolves on the legal or beneficial owners (depending on any agreement between them).
68. Thirdly, he created a loan instrument dated 31st August 2010 which retrospectively purported to create repayment obligations to his parents in respect of monies lent, even on his case before the marriage (when he purchased Property 2) and in 2008 (for the purchase of the FMH). Using that document, which was not one of the “disputed loan documents” and, as I find, was located by W soon before the hearing, H was able to register a restriction in respect of Property 2. It seems likely that this was done at a time when the marriage was in difficulty in order to discourage W from making a claim upon it. He said: “This was put in place to protect the position when I left the FMH ... the document was drafted in haste ... it doesn't follow the flow of funds but was to protect my parents' loans”. Again, that explanation is unfortunate. H then insisted that he tried to register a restriction soon after the date of the agreement but there were delays within HMLR. It does not really matter much but I think that, too, is wrong. Probably, H was the master of the timings as it suited him. W knew nothing of any of this. The sums said to have been loaned to H (eg £65,000 towards the purchase of the FMH) in the 2010 instrument were inconsistent with his and his parents' later case (that £45,000 was lent by his sister and mother). At trial, W introduced these documents with my permission. She was criticised for late disclosure but I accept her explanation. I do so because plainly these documents cast doubt on H's and H's parents' case in the preliminary issues. Given the age of some of the loans, W's challenge to them was entirely unsurprising. W's decision to settle the preliminary issues was plainly pragmatic but arguably may, actually, have been generous to the other parties.
69. Fourthly, when in 2015 H wished to raise a loan to be secured against the same property, he applied to HMLR to cancel the restriction stating “Loan Agreement has been paid off.” That is plainly inconsistent with the case which he and his parents asserted in the intervener proceedings. It was another example of his, perhaps, expediency.
70. Fifthly, in a response to a questionnaire dated 16th March 2022 (page 148 of the bundle) he gave plainly incorrect information as to the source of the funds used to purchase Property 1. In cross-examination he accepted this was an error on his part. At best this was careless.
71. Sixthly, his evidence betrayed a rather casual attitude to funds held on trust for the children. When HMRC questioned him in correspondence about rental income attributed to his sons, he quickly paid money into their bank accounts over a few short months in 2019 (page 608) having paid no rent to them beforehand. That money was later withdrawn to pay for family holidays in Dubai and Mauritius. The shuffling of monies between accounts was therefore solely for the sake of appearances. If the money was genuinely the children's, to have used it for a

family holiday would have been a clear breach of trust. When questioned about this, H answered “A couple of thousand pounds between parents and their children is neither here nor there”. I disagree.

72. I do not mean to criticise H unduly. Many of his property transactions were informal. There was an element on his part of seeking to regularise that informality, perhaps to avoid conflict between his parents and W. There was also an element of expediency. In his mind, I suspect he did not think these acts were irregular. I also recognise that he has recently been through an incredibly stressful experience over the past couple of years, the consequences of which still endure and which have had a catastrophic effect on his health and well-being.
73. Nevertheless, to the extent that an issue depended upon H’s evidence alone, I consider it necessary to look for proper corroboration within the documents before accepting his case. In the context of his significant inaccuracies listed above, that was the safest way for me to determine the facts.
74. W presented as serious, capable and conscientious. She is also devoted to her children. W’s evidence suggested that she was keen to instil financial independence and responsibility in her children yet remained very protective and keenly involved in the day to day detail of their lives. I have to say, because I think it explains some of the suspicion and rancour between them, that the parties have very different personalities.
75. H’s behaviour after he moved out of the FMH, notwithstanding that he was undergoing life-saving treatments at the time, appears to have excited her suspicions. The course of this litigation has done nothing to reassure her. At times her suspicions were justified; at other times not. She did give evidence in a rather defensive manner. She presented as sceptical of H’s evidence to an extent which led her to dispute it almost reflexively. She appeared suspicious of and frustrated by him. She frequently tried to anticipate the question by answering before the question was completed and/or to second-guess the point which counsel may or may not have been aiming to establish. That said, I found her to be an honest and reliable witness when she gave evidence.

The parties’ open offers

76. The open offers appear in the bundle (at pages 11-26).
77. Essentially, H offers (page 13) to give W his share of the equity in the FMH (approximately £474,000 between them), to pay her a lump-sum equal to £57,149 and let her retain all the family gold. The value of that offer to W on H’s figures, in terms of the sum which W would receive on divorce from the matrimonial acquest, would be about £583,000.
78. Conversely, W seeks (page 20) a transfer of the FMH mortgage free plus such lump sum as is difference between the mortgage redemption figure and £657,919 less £19,869 (being her agreed liability for the interveners’ costs of the preliminary issue which H has discharged). On that basis, W would have the net equity in the FMH plus £657,919 less £19,869, ie just under £1,111,000. She also seeks spousal and child maintenance in the sum of £2,000 per month until the youngest child completes tertiary education.

My findings

79. What follows is a list of my findings of fact on the issues which are relevant together with my reasons.

The assets

80. **Property 1 is jointly owned by H and W in equal shares. The children do not have any beneficial interest in it. The net proceeds of sale after discharge of CGT liabilities will be £128,911.** Reasons: Neither party wanted the children joined to this application. Whilst my findings do not bind them, the parties invited me to determine the issue and indicated that they would be bound by my findings. Title is registered in the joint names of H and W. Beneficial ownership is presumed to follow the legal ownership. There is no basis in this case for disapplying that presumption. There is no declaration of trust in favour of the children. There is no basis at all in the evidence for an argument that they hold by virtue of a constructive trust. H raises 4 arguments, all which are, in my view, without merit.
- a. First, he relies upon the fact that W has filed tax returns which reduced her income tax liability to 25% of the rental income instead of 50%. However, such returns are incapable of creating property rights in a third party. In any event, W says, and I accept, that H filed her returns on her behalf and she did not pay real attention to the detail. That is not a startling proposition given the nature of the relationship, H's job, the complexity of the family's property holdings and H's somewhat expedient approach to income tax.
 - b. Secondly, H says that Property 1 was purchased using funds which derived from a re-mortgage of Property 3 which was co-owned by the children at the time. That seems to be correct although the precise sum so used is unknown. It may have been as little as 25% of £11,250 (see page 617). Some £44,000 was raised by way of re-mortgage but not all was spent on the purchase of Property 1. Strictly, at the point of purchase, the children's share under a deed of trust was 12.5% each. Did that payment create a resulting trust and, if so, in what proportions? At the time, H held Property 3 upon trust for himself and the children. I conclude that H treated the funds from the re-mortgage of Property 3 as his and did not have regard to the issue of trusts or tracing. As a matter of law, the remortgage monies would have first attached to his interest in the net proceeds and, to the extent that he resorted to the children's (then) 25% share he may have committed a breach of trust by paying away trust monies in such circumstances.
 - c. Thirdly, H says that whenever family used to drive past Property 1, he would tell the children in W's hearing that it was theirs so that this somehow became party of the family narrative. That is an untenable basis for the disposition of an interest in land. While it may support a common understanding, the children would be wholly unable to show that they relied on that understanding to their detriment, an essential ingredient in a constructive trust.
 - d. Fourthly, H says that W's position, if upheld, will require the amendment to a number of tax returns at great expense including potential penalties.

That may or may not be the case. No doubt they have wrongly reduced their income tax liabilities through this device in the past. On H's own case this applies equally to the North Hyde Road property (see below). That is simply a consequence of the inaccurate information provided to HMRC.

81. **Property 2 which is solely owned by H legally and beneficially is non-matrimonial property.** Reasons: There is no dispute that this property was bought by H in December 2000 nearly two years before the marriage. As such it is clearly non-matrimonial in principle. W relies upon the fact (i) that it was re-mortgaged and the proceeds used for refurbishment of the FMH and the acquisition of other properties and (ii) that the rental income was declared to HMRC as the income of H and W, equally. Legally, the fact that remortgage monies may have been applied elsewhere and effectively gifted away does not affect the treatment of the balance of the net proceeds of sale. This remains non matrimonial albeit it has diminished over time. I have already indicated my disapproval of the treatment of rental income for tax purposes. Inaccurate tax returns are of no relevance in the absence of deeds of transfer or trust or the existence of grounds from which to infer or impute a constructive trust.
82. **The value attributable to the parties' shares in Company 2 Ltd which reflects the disposal value of Property 6 is £121,404.** Reasons: I have simply split the difference between the parties' calculation of the net proceeds. I am simply not in a position to calculate the appropriate marginal tax rate. The difference is de minimis.
83. **The value attributable to the parties' shareholding in Company 3 Ltd is £48,683.** Reasons: I adopt the figure in the accounts for shareholder funds. Current account balances do not give the whole picture.
84. **The value attributable to H's 100% shareholding in Company 1 Ltd is £200,000.** Reasons: I might have valued this shareholding at £93,112 for the same reason as above. However, that valuation has been deflated by payments made to YY Company (a company incorporated in the BVI and seemingly beneficially owned by ZZ, a long-standing friend of H) totalling £145,000 by Company 1 Ltd. The explanation for those payments, H says is this: "YY Company is a consultancy" which he employed to support his business in March 2021 as he anticipated taking time off work during and after treatment. H trusted ZZ to service his clients without poaching them. "We agreed a fixed fee retainer. It is an overseas company. I worked with ZZ at Y Firm. He was the year above me at university. He is my relative's best friend. We have a strong relationship. The arrangement is likely to come to an end soon." A contract was produced (at page 876). I find it a strange contract. It stipulates that YY Company will be paid an hourly rate to be agreed (clause 10), invoiced weekly or monthly with hours supported by timesheets. By clause 8 "hours of work for each assignment" were to be agreed. I have no evidence of the agreed rates or hours nor have I seen any timesheets. Those clauses are inconsistent with "a fixed fee retainer". It does also stipulate (clause 9) for a monthly retainer in the sum of £5,000 plus VAT but that is in addition to clause 10. If it was intended that YY Company be paid for the basic retainer regardless plus billed time then it is an extraordinarily generous arrangement given that the annual retainer exceeds Company 1 Ltd.'s profits in the year to April 2020 (page 214 at paragraph 70). It does not give the appearance

of an arm's length, commercial arrangement. To make matters worse, in cross examination H said this: "It was on an ad hoc retainer basis, at £200 per day". I did not receive any evidence as to the charge out rates of YY Company or ZZ or their staff but I am quite sure that £200 per day is an unrealistic and arbitrary figure for an overseas-based (as H described it) tax consultancy services. It does not make sense without further explanation and documentation. Furthermore, suspiciously, the first payment to YY Company was not made for many months. None of this was satisfactorily explained. H also accepted that the YY Company payments will cease "soon" without saying when or why. No evidence was produced from YY Company or ZZ. Whilst YY Company was not joined as an intervener and fraud is not alleged by W, I am simply not persuaded that YY Company was contractually due those monies. I also think it unlikely that H would continue trading through Company 1 Ltd since March 2021 using the services of sub-contractors to such an extent that it made his company consistently loss-making and will eventually threaten its solvency. This is an example where my concerns about H's evidence mean that I should look for corroboration in the documents before accepting his evidence. The YY Company invoices prove nothing. There is no other corroboration so I reject his evidence. The payments to YY Company were not, in my judgment, payments made to a third party in the ordinary course of trading for good consideration. How should I treat what I consider to be overpayments made to YY Company? Some £145,000 was paid to it in total. Company 1 Ltd.'s profit before tax for the year to 30th April 2021 was £118,590. In the following two years, to 30th April 2022 and 30th April 2023, it posted losses of about £20,000 in each year. In consequence of those losses, shareholders' funds have been depleted to £93,112 as at April 2023. The monies paid to YY Company totalling £145,000 will, in my view, probably be paid back to Company 1 Ltd shortly but corporation tax will be applied at 25%, at the rate applicable in this tax year. On that basis £108,750 should be added to the shareholders' funds which I round down to £200,000. H's shareholding in Company 1 Ltd is therefore re-valued to £200,000. By way of a cross-check, I should consider how this will affect Company 1 Ltd's profits. Even adding back the £145,000 as additional profit since the start of the 2021-2022 tax year, the company's pre-tax profits will still have declined significantly - by well over 50% - when compared to 2020-2021. That is still consistent with H's case as to his diminished earning capacity but at a level where the company is ticking along.

85. **The value attributable to H's 50% shareholding in Company 4 Ltd is £5,585.** Reasons: I adopt the figure in the accounts for shareholder funds. Current account balances do not give the whole picture.
86. **The proceeds of the critical illness policies including any money owed to H by the Family X is matrimonial property.** Reasons: Neither counsel is able to point to direct authority on this point. In *Miller v McFarlane* [2006] UKHL 24, Lord Nicholls of Birkenhead distinguished between inheritances and gifts acquired during the marriage and property which is the product of the parties' common endeavour. The proceeds from these policies do not sit easily in either camp. The premiums for each policy were generated from household income and, indeed, each party has the benefit of such a policy (although W says that she has or is about to cancel hers on the grounds of expense). The first policy was taken out in 2003 in circumstances where H had just taken on a significant mortgage with a

relative. He described the purpose of the first policy as “for mortgage protection and income protection”. The second policy was taken out in 2015 or 2016 because H was thinking of leaving his employment and he wanted to replace an equivalent policy provided by his then employer. Personal injury damages in simple terms may consist of (a) damages for pain, suffering and loss of amenity (“PSLA”), (b) damages for past loss of earnings and other out-of-pocket expenses and care costs and (c) damages for future loss of earnings. Such damages are not assets comprising the product of the parties’ joint marital endeavour during the marriage but brought into the marriage unilaterally by one of the parties as a consequence of their injuries and are therefore akin to an external donation. It would be logical to distinguish between damages for past loss of earnings, care provided by the other spouse and past out-of-pocket expenses in the period that the marriage subsists on the one hand (which may well be matrimonial and subject to the sharing principle) as against general damages for PSLA or future loss of earnings (which do not seem capable of being categorised as matrimonial property) on the other. Indeed, the husband’s earning capacity was held not to be capable of being a matrimonial asset to which the sharing principle applies in *Waggott v Waggott* where Moylan LJ stated: “The sharing principle applies to marital assets, being the property of the party generated during the marriage otherwise than by external donation (*Charman v Charman (No 4)*). An earning capacity is not property and ... it results in the generation of property after the marriage.” I accept, of course, that had H’s policies paid out at a different time then there would have been little difficulty characterising the proceeds as non-matrimonial. I also accept the submissions of Ms Murray KC that the primary function for these policies was to protect against loss of future income arising from ill health and that that the proceeds should be available for other uses, eg medical treatment and care costs. However, the proceeds cannot be neatly characterised as a substitute for future income. In *Wagstaff v Wagstaff* [1992] 1 WLR 320, it was held that (a) the damages award resulting from a clinical negligence claim formed part of the matrimonial assets including damages for PSLA but (b) the fact that it has been received may indicate that one party to the marriage has specific needs which must be taken into account as part of the section 25 analysis and may weigh heavily in the balance and (c) there is no presumption that those needs will outweigh the needs of the other spouse. Per Butler-Sloss LJ: “The reasons for the availability of the capital in the hands of one spouse, together with the size of the award, are relevant factors in all the circumstances of section 25. But the capital sum awarded is not sacrosanct nor any part of it secured against the application of the other spouse. ... any calculations made in respect of the capital of the parties should reflect a substantial discount for the fact that the money was received as damages. In general, the reasons for the availability of the capital by way of damages must temper the extent of, and in some instances may exclude the sharing of, such capital with the other spouse. It is important to stress yet again that each case must be considered on its own facts.” And in his judgment, Lord Donaldson, MR, said: “... compensation is a financial asset which, like money earned by one spouse by working excessively long hours or in disagreeable circumstances, is (subject to human selfishness) available to the whole family before the breakdown of the marriage and, like any other asset whether financial or otherwise, has to be taken into account when the court comes to exercise its

powers in accordance with section 25 of the Matrimonial Causes Act 1973. In so far as it represents compensation for loss of amenity, as contrasted with pain and suffering, there might be a need to spend it on acquiring a replacement amenity, but this would be a financial need within section 25(2)(b).” In my view, I should adopt the *Wagstaff v Wagstaff* approach to the insurance monies. What I describe above as the logical approach (which otherwise would have guided me) is simply not consistent with *Wagstaff* where PSLA damages were held to be matrimonial. It is a function of the timing of H’s unfortunate diagnosis that the proceeds are in the arena today. In my view, *Wagstaff* offers the correct approach. I shall return to this below.

87. **The sum standing to the credit of H’s bank accounts is £20,000 and the sum standing to the credit of W’s bank accounts is £5,000.** Reasons: Bank accounts are necessarily fluid. The latest dates for the entries in the agreed ES2 are nearly 2 months old. I have rounded the figures.
88. **Cars:** The value of each party’s cars is minimal and should be ignored.
89. **CGT allowances:** Both parties enjoy the same £6,000 annual CGT allowance in this tax year. I disregard it.
90. **Gold:** The parties have compromised their respective claims to gold. The value is not agreed. I do not have any information as to the values of what each will retain. I realise that the gold is viewed by the parties as a different class of asset to investment assets. I disregard it.
91. If I were to have excluded the balance of the proceeds from the insurance policies, which I find to be £802,835 as I accept H’s figures, one would be left with the following summary.

Asset	Joint	H	W
FMH	£472,879		
Property 3		£81,348	
Property 4		£24,837	
Property 5		£49,973	
Property 1	£128,911		
Property 6	£121,404		
H’s bank account		£20,000	

W's bank account			£5,000
ISA		£35,199	
Company 2 Ltd	£0		
Company 3 Ltd	£48,683		
Company 1 Ltd		£200,000	
Company 4 Ltd		£5,857	
Sub-totals	£771,877	£417,214	£5,000
TOTAL	£1,194,091		
50%	£597,045		

92. However, as I include the insurance policy proceeds, the following summary results.

Asset	Joint	H	W
FMH	£472,879		
Property 3		£81,348	
Property 4		£24,837	
Property 5		£49,973	
Property 1	£128,911		
Property 6	£121,404		

H's bank account		£20,000	
W's bank account			£5,000
ISA			
Company 2 Ltd	£0		
Company 3 Ltd	£48,683		
Company 1 Ltd		£200,000	
Company 4 Ltd		£5,857	
Critical illness policies		£802,835	
Sub-totals	£771,877	£1,220,049	£5,000
TOTAL	£1,996,926		
50%	£998,463		

Housing needs

93. The assessment of needs involves an elastic concept but should, wherever possible, be “generously interpreted”.
94. Both parties have a need for a home. Their housing needs are the same.
95. Each has put forward property particulars. The range is, somewhat unhelpfully, between £450,000 and £1,100,000. SDLT and other purchase costs will be payable on their respective purchases.
96. Each party needs a 3 bed house with not too much work to be done.
97. In my view, that should be a property in a similar area as to the FMH.
98. I do not accept that W can be expected to re-locate near her school. She can be expected to downsize to a 3 bedroom house but not too far outside her local area. She has friends and a support network nearby. Some friends are within walking distance. H's properties are about 25 minutes away. W has family in London and where the FMH is situated is one motorway junction closer to them.

99. It is also reasonable for a school teacher in a state comprehensive to want to live out of catchment. She will continue to work at that school for the foreseeable future.
100. The FMH is an extended former council house. During the marriage, H had wanted to move to a more expensive area of that district. Whilst the FMH is too large for W's needs that was not the case in its unextended state.
101. A 3 bed house in or around the area of the FMH would be appropriate.
102. The properties proposed by H are in a significantly less salubrious part of that district.
103. Significantly, H has himself started renting in Beaconsfield. If he was living in an alternative location that may have added weight to his assertions.
104. A property which would satisfy the parties' housing needs would, in my view, cost between £635,000 and £700,000 (see pages 535 and 543). The property at page 541 in the bundle is likely the bare minimum which H would contemplate for himself. The cheaper of those two properties appears to have two double bedrooms and one box room/ study. As such its suitability is questionable. Nevertheless I think, doing the best I can, I would assess the housing need as somewhere between the two but nearer to the higher-priced property so, say, £675,000. The SDLT liability on that price would amount to £21,250. Conveyancing would be approximately £1,200. Removal costs would be additional.
105. In my judgment, each party will also need a modest lump sum of £25,000, for decorating work (which is almost always required), furnishing and a modest sinking fund or financial cushion to cover the cost of unexpected property maintenance, repairs and renewals and other necessary capital expenditure.
106. Each party's housing needs can be met with a sum of £725,000.

Liabilities

107. The liabilities are broadly similar but are disputed.
108. Essentially, W criticises H's legal costs and invites me, on well-established principles, to add back some of H's costs effectively so as to reflect over-spending.
109. On the other hand, H insists that money is borrowed from W's sister represent a soft loan. "She won't be repaying that", said H, and W's parents are wealthy and "benevolent".
110. I do agree that the cost spending in this case is problematic but in my judgment that results to a large extent from the intervener proceedings.
111. I decline to make an adjustment in respect of H's costs because the effect of my order is that W will be largely debt-free. And, in my view, each party needs to be debt-free. The liabilities should be top-sliced from the matrimonial assets and reduce the value of the pot to £1,811,551 (or £905,775 each).
112. I accept each party's figures for their liabilities: £92,133 for H and £93,242 for W. Note that, within that calculation I have removed £19,869 from W's liabilities in respect of the costs which she owes H. (I revisit this below).

Conclusion on non-pension assets

113. There are two main stages to every case: computation (what are the assets worth, income/ earning capacity etc), and distribution: *Charman (No. 4)* [2007] EWCA Civ 503 at [67].
114. In capital terms I should have one eye firmly on a starting point of equality.
115. I take the view that there is enough capital here for me to adjust the received portions in order for me to make a clean break order.
116. Each party's housing and capital needs can be stated as £725,000 plus a sum sufficient to discharge their liabilities.
117. W has a mortgage capacity of £175,000. H argues that, given her recent pay rise, her mortgage capacity will have increased slightly. W agreed but she also said that "taking on a mortgage of £1,200 per month will be a stretch". The letter in the bundle (at page 563) discloses that the likely repayments on a £175,000 mortgage will be £1,100 per month in the initial fixed rate period given her commitments including lease repayments on a second car. That is nearly 30% of her net income.
118. I certainly do not think the car leasing arrangement she entered into is unreasonable. Frankly a parent looking to acquire a car for a young driver is entitled to choose a modern, reliable, safe vehicle. I therefore question whether a larger mortgage will actually be affordable. I adopt the figure produced by her mortgage advisor.
119. I do not accept that H does not have a mortgage raising capacity. The document in the bundle (at page 506) is based on incorrect or out-of-date figures.
120. I am quite sure that his mortgage raising capacity is at least the same as W's.
121. Mathematically, £725,000 - £175,000 = £550,000.
122. W's capital needs adjusted for her borrowing capacity can be stated as £550,000. She also requires £93,242 to discharge her liabilities, giving £643,242.
123. Hence, W's needs assessed at £643,242 would be more than met by an equal division of the capital.
124. However, in my judgment the balance of the proceeds of the critical illness policies should be ring-fenced insofar as I am able to do so.
125. These policies originally yielded just under £1,410,000. Some £682,000 has already been spent on mortgage repayments, rental, legal costs and disbursements and loan repayments. Some of that money has benefited W.
126. Only £802,835 is left. I consider that as much of this as possible should be preserved for H's benefit. In my view, much of it will be required for income replacement over the rest of H's working life. He is not yet 47 years old. The Duxbury tables suggest that would yield an annual income of a little over £40,000 for life. Whilst he will also be able to draw a pension from age 55, care costs may well be required, particularly in later life. The parties' pensions are being equalised.
127. If I confine W to her capital needs in order to try to ring fence the critical illness policy proceeds then the outcome would be as follows once the liabilities have been paid (ignoring the agreed costs of £19,869 which affects the percentages immaterially):

H	£1,261,551	69.6%
W	£550,000	30.4%

Total	£1,811,551	

128. That outcome does involve some invasion of the critical illness monies.
129. However, I must stand back and have regard to the yardstick of equality and, clearly, it falls some way short of equality.
130. Nevertheless, I am satisfied that this outcome is fair. The outcome fairly reflects the balance of the parties' competing needs but especially H's arising from his medical condition, his reduced earning capacity and potential care needs. I am aware that H also benefits from the Property 2 worth in excess of £105,000. Although this is non-matrimonial, it will in fact enable him to re-house to the same standard as W, if not slightly higher, without depleting the rest of his capital.
131. So, in simple terms, W should receive £550,000 from the matrimonial assets after her liabilities are discharged:
132. If the FMH were sold, she would receive the entire proceeds plus an appropriate balancing sum.
133. Matters are not, however, so simple because W wants to retain the FMH and I think she should be allowed to if she can afford to. I say that for the reasons set out below. What follows is a somewhat complex analysis of how that could be achieved.

Sale or transfer of the FMH

134. The next issue is whether the FMH should be transferred to W or sold.
135. The FMH represents housing in excess of W's needs. I agree that she is "over-housed". There is no warrant here for a Mesher order.
136. However, if W wishes to and can remain living there subject to discharging the mortgage then that is something I would consider, in part for Child B's sake at least for the rest of this school year. H said that it would be better for Child B not to have to move house "for his GCSEs or A levels" and "I don't want the children to have to move in an ideal world". Sensible parents, if they can afford it, would prioritise the children's welfare in issues such as this.
137. W's housing and capital needs adjusted for her borrowing capacity are £550,000.
138. If the FMH were transferred to her (subject to her discharging H from the mortgage, see below) then she would have £472,879 of net proceeds towards that total. That would require a balancing sum to her of £72,121 (allowing for the £5,000 in her bank accounts) plus the £93,242 for her liabilities, ie £165,363.
139. I was previously of the view that W's agreed liability for H's costs in the sum of £19,869 should be deducted at this point so that the balancing lump-sum required from H to W when adjusted for her costs liability would be, in principle, £145,494 (subject to an additional adjustment explained in paragraph 151).
140. I have re-visited this. I agree with counsel for W that if I then deducted the agreed liability for costs then W's capital needs, simply put, would not be met. I see the force in counsel for H's submission that the courts have rejected the suggestion that conduct can only be relevant in a sharing case and that it could not reduce the

miscreant party's needs. Nevertheless, I am compelled to the view that these costs should not be deducted. I have attempted to assess the capital sum required to re-house W, I have compared different quality houses. I have arrived at a figure for re-housing need. That embraces the housing needs of a minor. These costs will make a real difference to W's ability to re-house. I have decided that they should not be deducted. The balancing lump-sum should remain at £165,363 (subject to an additional adjustment explained in paragraph 152).

141. In order to re-mortgage, W would need to raise £398,351. There will be a shortfall. On her current salary, the mortgage repayments may be unaffordable. Nevertheless, I am prepared to allow W until 31st August 2024 to discharge H from the mortgage, failing which the FMH should be sold in order to relieve H from his mortgage covenants. I select that date as it would allow Child B to complete his GCSE exams with minimal disruption. H accepted in evidence that it would be sensible for Child B to remain in the FMH until the end of this academic year.
142. Whether W can persuade her family to assist her with the balance required to redeem the mortgage, I cannot say. Mortgage lenders will generally not be prepared to lend where part of the deposit is funded by third parties. I certainly do not factor in that possibility as a resource to which she can probably appeal. In the same way, I do not factor into H's resources monies previously lent to him by family members and now repaid. Every family has different priorities and financial arrangements. One particular feature, which is apparent sitting in this jurisdiction, is that parents seek to play an even hand between their children and balance any money advanced during the parents' lifetimes. It is an easy accusation to make that soft loans do not need to be repaid. The reality is that whilst repayment may be postponed they are seldom forgotten or forgiven and are often a source of family discontent and, once, repaid are gratefully received and reapplied.

Income

143. W's most recent payslip discloses a net monthly income of £2,916.65.
144. In my view, she enjoys job security and has real promotion prospects to a senior leadership role or departmental head. I am not at all convinced given her likely workload and personal commitments that she should undertake tutoring work in addition to her current duties. However, I do not need to decide this because I do not consider that there should be any spousal maintenance on the facts of this case.
145. I have considered her statement of outgoings. These are currently put at £5,627 per month plus the current monthly mortgage instalment ("CMI"). Some further substantial downward adjustment will be required. W says that she tries to live within her net income but sometimes has to dip into her savings. Nevertheless she has been able to afford decent holidays in 2022 and 2023 with both of the children. She will of course receive sufficient capital with which to rehouse herself (with no mortgage if she down-sizes) and a modest capital cushion and her share of the gold.
146. Child B will be leaving school in two years. Both the children are very well provided for and, as a matter of law, are entitled to all of the assets held upon trust

for them, both capital and income, when they reach their majority. H accepts that each of the children has about £25,000 in a Nationwide Building Society account. Into those accounts rental income is being or certainly should be paid. Despite H's insistence that the property transactions involving the children are for the purposes of inheritance tax planning, he must understand that the assets are held upon trust for the children such that they vest when they are 18.

147. For the next two years that Child B remains at school, H will remain liable for CMS. There is, strictly, no necessity for W to continue to support Child B financially at university.
148. W's gross salary equates to about £51,500. Since separation, she has increased her working hours and is now working five days full time. She continues to receive child benefit for her youngest child and very modest maintenance from H. Given the level of her earnings some of the child benefit will be recouped by HMRC.
149. In my view, so long as H begins to pay a proper amount by way of child maintenance for Child B until the CMS obligation lapses (and whilst £109 per month is plainly insufficient given H's assets and W's caring responsibilities his offer to pay £650 per month which should begin in January 2024 seems to me to satisfy that test) she will be able to adjust to financial independence without undue hardship save in one respect (see the following two paragraphs) since her net monthly income will be in excess of £3,500 while child maintenance and child benefit are in payment.
150. Realistically, the FMH will take some months to sell. W is contractually liable for the CMI between the date of the transfer to her and the re-mortgage or sale. Were I to have ordered that the property be sold immediately, it would still take a number of months before completion especially in the current climate. H would be liable to pay at least a proportion of the CMI in that time. The interest element within the CMI will be considerable and will reduce the redemption figure. In my judgment, H should pay the CMI in full in December 2023 and January 2024.
151. Rather than requiring H to pay periodical payments after the transfer of the FMH to W to allow her to discharge the CMI, it makes sense in my judgment to require H top up the lump-sum to W by a capitalised sum which represents a contribution towards the CMI between transfer of the FMH to W and its sale or redemption which he would otherwise have been ordered to make as periodical payments.
152. The balancing figure required to be paid to W to satisfy her capital needs is £165,363 (see paragraph 140). I round that up to £177,000 (an uplift of about £11,500 which I arrive at by calculating 50% of the CMI over 6 months, by which time Child B will have finished at school). This uplift is in lieu of spousal maintenance. Counsel for W makes 2 points here: W's net income is still insufficient to discharge 50% of the CMI whilst meeting outgoings; the house may not sell by July 2024 whereafter she would be liable for 100% of the CMI. The answer to these points is as follows: in January 2024, H will pay both the CMI plus agreed maintenance; W is then effectively liable for 50% of the CMI for 6 months; the August 2024 redemption date is a back-stop; in reality, she will be able to decide sooner whether she can re-mortgage or whether she needs to sell; any sale can be timed to coincide with the end of Child B's school term and, in reality, GCSE pupils leave school after their GCSE exams have finished; I am sure that W would be able to postpone repayment of family debts for a little while if necessary to cover any cash flow problems.

153. H's income needs are far more difficult to assess. His earnings derive from his companies.
154. His current disclosed earnings are very modest - less than £1,000 per month at the moment, he says. I accept that his earning capacity is diminished in the short and medium term. I accept that he will be required to undergo constant surveillance including regular scans, blood tests and tumour markers and that there is a significant chance that further surgical or other intervention is going to be required, sadly.
155. In addition to this he has to cope with using a stoma bag. I was able to observe the extent to which in the course of giving evidence he was disrupted as a result. I don't think he was exaggerating. He explained that even the diagnosis of cancer itself was something within his community which was problematic: "cancer is a cultural stigma" he said.
156. His earnings in the year 2020-2021 are likely to prove a high water mark. He was once certainly capable of earning in excess of £10,000 per month. I do consider that W is unduly optimistic about his ability to return to his pre- diagnosis working patterns, hours and earning capacity.
157. I am quite sure that he will continue in business with some success. The device of using subcontractors to cover for him while he was ill which was entirely sensible seems to have meant that his customer base has not been too badly eroded. With the benefit of the balance of the critical illness policy proceeds, in my view he will be fully able to discharge his outgoings. He will be able to afford a mortgage free property.
158. His legitimate drawings on his company to pay for his business expenses also relieves him of some of the expenses of day-to-day life and I take this into account too.
159. It seems to me that his earning capacity is at least that of W and potentially more.

Clean break

160. There should be a clean break as to capital and income.
161. H must transfer the FMH to W and in addition pay a lump-sum of £177,000 to her within 28 days of the order.
162. W must use her best endeavours to release H from the mortgage. If she cannot do so by 31st August 2024 then the FMH must be sold (of course W would retain the net proceeds).
163. W must transfer to H her interest in Property 1 and her shares in Company 2 Ltd subject to suitably-worded tax indemnities. H will pay the conveyancing costs in respect of the property and share transfers.

Pension

164. I am asked to determine the appropriate "impairment enhancement" which should be adopted for H's pension. H suggests 20% and W suggests 43.5%. I am simply

not equipped by evidence, expert or otherwise, to adopt any other than a mid-point figure, namely the 30% adopted by the pensions expert.

Revisiting the agreed issues

165. For completeness, I now return to the agreed issues.

- 1) The children do not have a beneficial interest in Property 1 which is a matrimonial asset.
- 2) H's critical illness payout is a matrimonial asset.
- 3) The funds paid by Company 1 Ltd to YY Company should be added back to Company 1 Ltd's balance sheet net of corporation tax.
- 4) The value of the parties' business interests based upon the companies' respective assets and liabilities is set out above.
- 5) This is not necessary in the light of my finding at (3). I would not have been able to determine this issue on the evidence, in any event.
- 6) The £164,871 paid to the former interveners in September 2023 is no more a resource available to H than the loans to W from her own family.
- 7) H's earning capacity is considered above.
- 8) H's current earnings consist of salary and dividends which he chooses to pay himself dependent upon the profits of the companies.
- 9) W's current earning capacity is fairly reflected by her current salary but there is scope for it to increase in the future.
- 10) Each of the parties' housing needs would be satisfied by lump-sum of £725,000.
- 11) W's borrowing capacity is £175,000. H's is similar.
- 12) The parties should have to borrow to provide housing.
- 13) There should be transfer of the FMH to W and an order for sale if she cannot redeem the mortgage by 31st August 2024.
- 14) Other than to discharge her liabilities, W does not have other capital needs.
- 15) The parties' respective reasonable income needs are dealt with above.
- 16) Subject to H within 28 days from the final order (and subject to decree absolute) (a) transferring the FMH to W and (b) paying to W a lump-sum of £177,000 and subject to (c) W discharging H from the mortgage by 31st August 2024, there should be a clean break as to capital and income.
- 17) The parties have agreed as to the division of the gold and chattels.
- 18) W will transfer her shares in Company 2 Ltd to H. H should indemnify her against any personal tax liabilities arising from her shareholding or its transfer.
- 19) It is W's responsibility to prepare and file her tax returns. H must provide her with all documents necessary for so doing. The court has no jurisdiction to make directions about the children's tax returns.
- 20) The pension sharing order is agreed. The appropriate "impairment enhancement" is 30%.

Application of section 25

166. Dealing with the section 25 matters:

- a. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire – see above
- b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future – see above
- c. the standard of living enjoyed by the family before the breakdown of the marriage – see above
- d. the age of each party to the marriage and the duration of the marriage – see above
- e. any physical or mental disability of either of the parties to the marriage – see above in respect of the applicant
- f. the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family – see above
- g. the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it – not relevant
- h. in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring – not relevant

Summary

167. Each of the parties' housing needs can be satisfied for £725,000.
168. The parties require a sum sufficient to discharge their respective liabilities (which should be top-sliced from the matrimonial assets).
169. Allowing for W's liabilities (£93,242) and her mortgage capacity (£175,000), W's "needs" can be fairly stated as follows: $£725,000 + £93,242 - £175,000 = £643,242$.
170. The FMH should be transferred to W subject to her discharging H from the mortgage by 31st August 2024. If that is not feasible then it must be sold and the mortgage redeemed.
171. H must also pay W a lump-sum of £177,000. That figure takes account of :-
 - a. The value of the equity in the FMH (£472,879), the benefit of which is transferred to her
 - b. W's bank account credits (£5,000)
 - c. A capitalised sum assisting W to cover the current monthly mortgage instalments until sale or redemption (£11,500)
172. I have not, in fact, decided to deduct W's agreed costs liability to H (£19,869).

173. H must make child maintenance payments as directed by CMS. His taxable income should increase substantially in the New Year.
174. W must transfer to H her interest in Property 1 and her shares in Company 2 Ltd subject to suitably worded tax indemnities
175. On the above basis there should be a clean break as to capital and income.
176. There should be a pension share as agreed. The appropriate pension “impairment enhancement” is 30%.

Other matters

177. Counsel for W raises one final matter: “W asks the court to clarify how it can be confident that the children will have free access to the funds from age 18 and consider whether the order should” deal with their funds. The answer is this: neither child is a party to this application; however, H has explained his position under oath; he acknowledged that there is no deed of trust which postpones the vesting of assets in the children at a later age than 18; the beneficial interests in property and bank credits belong absolutely to each of the children once they attain their majority; Child A has already attained his majority.

Disposal

178. Counsel are requested to draft an order to give effect to this judgment for my approval.