

IN THE FAMILY COURT

Neutral Citation: [2023] EWHC 942 (Fam)

SITTING AT THE ROYAL COURTS OF JUSTICE

B E T W E E N:

CG

Applicant

- and -

SG

Respondent

**IMPORTANT NOTICE**

This judgment was delivered in private. The judge has given leave for this version (but no other version) of the judgment to be published.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mr Nicholas Yates KC and Mr Christian Kenny** (Counsel instructed by Vardags, Solicitors) appeared on behalf of the Applicant wife.

**Mr Patrick Chamberlayne KC and Ms Laura Heaton** (Counsel instructed by Withers LLP, Solicitors) appeared on behalf of the Respondent husband.

Written Judgment of His Honour Judge Edward Hess  
(Sitting as a Deputy High Court Judge) dated 10<sup>th</sup> March 2023

1. This case concerns the financial remedies proceedings arising out of the divorce between Ms SG (to whom I shall refer as “the wife”) and Mr CG (to whom I shall refer as “the husband”).
2. The case proceeded to a final hearing over six days on 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> March 2023.
3. The **representation** before me was as follows:-

- (i) Mr Nicholas Yates KC and Mr Christian Kenny (Counsel instructed by Vardags, Solicitors) appeared on behalf of the Applicant wife. Earlier in the proceedings she had instructed Stowe Family Law LLP, Solicitors.
  - (ii) Mr Patrick Chamberlayne KC and Ms Laura Heaton (Counsel instructed by Withers LLP, Solicitors) appeared on behalf of the Respondent husband. Earlier in the proceedings he had instructed Mishcon De Reya LLP, Solicitors.
4. Both parties have been legally represented before me admirably well at the highest possible level; but it has, of course, come at a substantial cost. The wife has incurred a total of £1,202,096 and the husband a total of £1,894,817, a total of **£3,096,913** in **legal costs**. In light of the respective financial circumstances of the parties, and subject to any inter partes costs order I may in due course make, the husband has in fact paid all of these costs.
5. The court was presented with an **electronic bundle** running to 856 pages and a number of other documents have been exchanged during the final hearing. I have considered all the documents presented to me, including the following:-
  - (i) A collection of applications and court orders.
  - (ii) Material from the wife including her Form E dated 22<sup>nd</sup> February 2021, various replies to questionnaire and her section 25 narrative statement dated 26<sup>th</sup> January 2023.
  - (iii) Material from the husband including his Form E dated 22<sup>nd</sup> February 2021, various replies to questionnaire and his section 25 narrative statement dated 16<sup>th</sup> January 2023.
  - (iv) Material from various experts, in particular reports from three forensic accountants: Ms Kate Hart of Quantuma Advisory Limited, Mr Andrew Strickland of Scrutton Bland and Ms Faye Hall of Evelyn Partners.
  - (v) A properly completed ES2 document (with a number of revisions as the case progressed).
  - (vi) Selected correspondence and disclosure material
6. I have also heard **oral evidence** from the husband and from Mr Strickland and Ms Hall. The wife offered herself up for cross-examination, but in the event the husband's legal team did not wish to challenge her written evidence so (by agreement) it was not necessary for me to hear from her directly.
7. I have also had the benefit of full **submissions** from each team of Counsel in their respective opening notes and their closing partly oral and partly written submissions.

8. The **history of the marriage** is as follows:-

- (i) The wife is in her sixties. She did (many years ago) qualify as a nurse, but she has not worked outside the home during the marriage and has acted as primary carer for the children as they grew up.
- (ii) The husband is also in his sixties. He has had a long and largely successful career in financial services and, from everything that I have read, is well respected in this field.
- (iii) Both parties were brought up in the same country which is where they met, started a relationship and then married in 1990. They moved to England shortly after the marriage and have been based here ever since, although also owning property overseas and (to some extent) living an international lifestyle.
- (iv) The marriage produced several children, all now more or less independent adults.
- (v) Unfortunately, in October 2020, the marriage broke down and the parties separated. The husband remained in the family home. The wife moved into rented accommodation. The wife's living costs have been substantially met by the husband since separation, as have her legal costs. The wife's Form E suggests that the precise date was 15 October 2020 and, since she was unchallenged, I propose to adopt this date as the date of separation.
- (vi) Divorce proceedings were commenced in January 2021. Decree Nisi was ordered in December 2021. Decree Absolute awaits the outcome of the financial remedy proceedings and is not, in itself, controversial.

9. The **financial remedies proceedings chronology** is as follows:-

- (i) The husband issued Form A on 27<sup>th</sup> April 2021.
- (ii) Forms E were exchanged in February 2021.
- (iii) A First Appointment was heard by me on 30<sup>th</sup> June 2021. Amongst the directions I made was for a SJE valuation of the husband's interest in G LLP. The SJE selected was Ms Kate Hart of Quantuma Advisory Limited. The case was timetabled towards a private FDR before Sir Paul Coleridge, initially planned for 15<sup>th</sup> September 2021. This was later moved to 15<sup>th</sup> October 2021 and then moved again to 30<sup>th</sup> June 2022.
- (iv) On 3<sup>rd</sup> May 2022, because of some criticisms made by the husband about Ms Hart's approach and conclusions, the matter was restored to court (in part in response to a direct request from Ms Hart to the court). After a fairly intense dispute before me, in which Ms Hart actively participated, a

way forward was found to retain Ms Hart as the SJE and to retain the private FDR date of 30<sup>th</sup> June 2022 and this went ahead as planned. It would, I think, be fair to say that, notwithstanding the finding of a way forward to retain Ms Hart as SJE, the husband had substantial criticisms of her approach and conclusions.

- (v) Sadly, there was no agreement at the private FDR and the case came back to court before me for a post pFDR directions hearing on 6<sup>th</sup> July 2022. On this occasion I made further directions in relation to Ms Hart's involvement and listed the final hearing for six days in March 2023. By then the husband had already made his post-FDR open offer (on 1<sup>st</sup> July 2022) and I directed the wife to make her open offer by 21<sup>st</sup> July 2022.
- (vi) Not long after the July 2022 hearing the wife changed her legal representation. New Solicitors (Vardags) and a new team of Counsel were instructed. The new team failed to make their open offer as directed and so on 3<sup>rd</sup> November 2022 the husband made a D11 application for this to happen. I granted the application on 17<sup>th</sup> November 2022 and the wife made an open offer on 25<sup>th</sup> November 2022. It is apparent from the wording of the offer that in the time between July and November 2022 the wife's new legal team had sought further accountancy advice from Mr Andrew Strickland of Scrutton Bland and the offer made reflected his view of the case, which was to place a far higher figure on the value of the husband's interest in G LLP than that of Ms Hart.
- (vii) After a further period of discussion, on 19<sup>th</sup> January 2023, the wife's new Solicitors issued a *Daniels v Walker* application, seeking to distance themselves from the evidence of Ms Hart as SJE, and seeking instead to rely upon their partisan accountancy expert, Mr Andrew Strickland of Scrutton Bland. I allowed this application on 30<sup>th</sup> January 2023 (a transcript of my judgment to this effect has been produced) and Mr Strickland thus became the main expert witness in the case on behalf of the wife.
- (viii) In response to this, on 6<sup>th</sup> February 2023, the husband's Solicitors then issued their own *Daniels v Walker* application, likewise seeking to distance themselves from the evidence of Ms Hart as SJE, and instead seeking to rely upon a partisan accountancy expert, Ms Faye Hall of Evelyn Partners. I allowed this application on 9<sup>th</sup> February 2023 and Ms Hall thus became the main expert witness in the case on behalf of the husband. I have not seen a transcript of this hearing, but I dare say one could be produced if necessary. I was critical on this occasion of the wife's opposition to the husband having his own expert as this possibility, in the promotion of fairness between the parties and observing what Mostyn J had said in *E v L* [2021] EWFC 60, had been part of my decision to allow the wife to have her own expert on 30<sup>th</sup> January 2023.
- (ix) I took the case management decision to proceed at the final hearing with the oral evidence of Mr Strickland and Ms Hall, both to be subjected to cross-examination; but to leave the evidence of Ms Hart in its written state,

still evidence in the case, but not subjected to cross-examination. Having now completed the trial I am satisfied that this was a proportionate and helpful methodology in this case (where each party was substantially apart in figures from the SJE and had wished to distance themselves from the SJE) and that the two partisan experts were able to assist the court in their evidence with all the issues of principle arising and give their own critique of the views of the SJE.

- (x) Narrative section 25 statements were exchanged in January 2023 and a final hearing has taken place before me in the Royal Courts of Justice on the six days long since identified in March 2023.
- (xi) The submissions were concluded by the end of the court day on 8<sup>th</sup> March 2023 and I have therefore had just over a day to produce this written judgment on the morning of 10<sup>th</sup> March 2023. The parties will be attending at 2.00 p.m. on 10<sup>th</sup> March 2023 to deal with consequential matters.

10. In dealing with the case, I must, of course, consider the factors set out in **Matrimonial Causes Act 1973, Section 25 and Section 25A**, together with any relevant case law.

11. Matrimonial Causes Act 1973, **Section 25**, reads as follows:-

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B 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 or 24B 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.

12. Matrimonial Causes Act 1973, **Section 25A**, reads as follows:-

- (1) 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.
- (2) 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.

13. In this case none of the **children of the family** are under 18 and, although the parties are both supporting them financially to some degree, that is of no real significance in the context of the task I have to perform. I am pleased to note that each party has only praise for how the other has been a good and loving parent to all the children.

14. The bulk of the argument in this case relate to the computational part of the case, the analysis of the “**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**”. A great deal of work has gone into this and many of the figures are not controversial; but I do need to

deal with a number of important disputed issues, which I do as follows. If I do not specifically mention an item which is in my asset schedule it is because it is not controversial between the parties.

15. In carrying out this task I propose to adopt the standard approach to valuation, which is to **value assets at the date of the trial**: see, for example, Lord Mance in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24. Mr Chamberlayne initially sought to argue that a slightly different approach in this case might be justified by the wording of paragraph 6 of my order of 30<sup>th</sup> January 2023; but (having heard my provisional response to this argument) he has not pursued it and it is common ground that I should follow the standard approach here.

16. In carrying out this analysis, it is an important element of my task here to **distinguish between assets which are matrimonial and those which are non-matrimonial**. In this context I record the following propositions of law:-

(i) In the words of Mostyn J in *JL v SL* [2014] EWHC 3658: “A key component of fairness is drawing the distinction between matrimonial and non-matrimonial property...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...These arguments do not apply to property received or created outside the span of the partnership, or gratuitously received within the partnership from an external source. Such property has little to do with the endeavour of the partnership and the equal sharing principle as explained by Lord Nicholls just cannot apply to it on any moral or fair basis...For obvious reasons the span of the partnership is looked at *de facto* and not *de jure*. It is not looked at from the date of the marriage to the date of decree absolute. Rather it is measured from when the cohabitation began on a permanent basis until the date of the separation. Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard...This seems to me to mandate that the court should always attempt to determine the partition between matrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided equally and there should usually be no sharing of the non-matrimonial property”.

(ii) This case gives rise to the issue of **post-separation accrual**. In this context I have considered the leading authorities on this subject, and in particular I want to note the contributions from Nicholas Mostyn QC (as he then was) in *Rossi v Rossi* [2006] EWHC 1482, Roberts J in *Cooper-Hohn v Hohn* [2014] EWHC 4122, Charles J in *H v H* [2007] EWHC 459, Wilson LJ (as he then was) in *Jones v Jones* [2011] EWCA Civ 41,

Roberts J in *C v C* [2018] EWHC 3186 and Singer J in *S v S* [2006] EWHC 2339. The following propositions, pertinent to the present case, can be derived from these judgments:-

- (a) Assets acquired or created by one party after separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.
- (b) If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation it may be too close to the marriage to justify categorisation as non-matrimonial. How close is 'too close' can create some differences of judgment. Mostyn J in *Rossi* suggested: "*Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation*". The 12 month period, although perhaps a helpful rule of thumb in cases where the income concerned falls into a grey area where it is partly or wholly earned before separation but paid after separation, but has been thought by some to be too arbitrary. Roberts J in *Hohn* suggested, less formulaically, "*Thus what I have to decide is whether and to what extent the new work and new investments created by the husband in the period after the parties separated falls to be considered in the character of matrimonial property in which the wife should be entitled to a share or whether some or all of it falls at a point too distant from the essential character of the matrimonial partnership to qualify.*"
- (iii) These propositions have not been controversial before me and I propose to follow them in determining the case.

17. I shall start with the **real properties** (all of which are, it is common ground, matrimonial property):-

- (i) It is common ground that the family home in England (**the 'FMH'**) is worth £17,500,000 gross or **£13,839,565** net, after the deduction of the mortgage redemption figure and a figure for notional sale costs. It is also common ground that this is currently in the joint names of the parties; but should be transferred to the husband as part of my order. For the purposes



of my asset schedule, I shall therefore include it as an asset of the husband at the net figure. Further, it is common ground that the wife will incur a CGT liability on the transfer of **£108,303** and this figure needs to be included in her column on my asset schedule.

- (ii) It is common ground that the first overseas property (the 'Y property') is worth £3,420,597 gross or **£2,694,017 net**, after the deduction of the mortgage redemption figure, a figure for notional sale costs and an estimated tax cost of £111,794. It is also common ground that this is currently in the husband's sole name; but should be transferred to the wife as part of my order, with the mortgage redeemed and the tax liability paid. For the purposes of my asset schedule, I shall therefore include it as an asset of the wife at the net figure and then include two lump sum payments from husband to wife to redeem the mortgage (**£526,528**) and pay the tax debt (**£111,794**). My order will need to take into account, by the inclusion of an appropriate formula, the fact that the final tax figure may be higher or lower than £111,794 and that there will need to be an account and reconciliation of the actual figure in due course.
- (iii) It is common ground that the second overseas property (the 'Z property') is worth £4,223,185 gross or **£3,224,565 net**, after the deduction of the mortgage redemption figure, a figure for notional sale costs and an estimated tax cost of £537,258. It is also common ground that this is currently in the husband's sole name and is to remain in his sole name. For the purposes of my asset schedule, I shall therefore include it as an asset of the husband at the net figure. My order will need to take into account the fact that the final tax figure may be higher or lower than the identified amount and that there will need to be an account and reconciliation of the actual figure in due course.

18. I next turn to **artwork**. It is common ground all the artwork is matrimonial property and that two tranches of artwork (valued by the SJE valuer at **£145,500** and **£171,200** respectively) should be included in the wife's column in my schedule and a third tranche (valued by the SJE valuer at **£18,650**) should be included in the husband's column in my schedule. My order will need to include property adjustment orders to reflect this division.

19. I next turn to various **shareholdings of the husband**. Although there was at the outset of the final hearing some difference both on the share price to be applied and also some difference as to whether particular shares should be regarded as matrimonial or non-matrimonial, in the course of the hearing the differences have narrowed. Accordingly, the figures and their categorisation for the husband's shares in various investments have all, in the end, been agreed and appear collectively in my asset schedule below in accordance with the agreement. It is also common ground that the husband owns a further investment worth **£84,014** and some shares worth £610,410 gross or **£603,599 net**. The parties have not agreed, however, whether these assets should be categorised as matrimonial or non-matrimonial. Having heard the competing arguments on this I have reached the following conclusions:-

- (i) The investment worth £84,014 was purchased by the husband in May 2022. As set out above, the parties separated on 15 October 2020, so the purchase was made some 19½ months after the separation.
- (ii) The shares worth £603,599 net were purchased in two tranches. The first tranche (costing \$500,000) was purchased in January 2022. The second tranche (costing \$180,000) was purchased in September 2022. The purchases were thus made, respectively, 15 months and 23 months after the separation.
- (iii) Mr Chamberlayne’s contention is that the timing of these purchases, in the context of the legal tests set out above, place these assets firmly in the category of post-separation non-matrimonial assets, since they were (on any rational view) plainly purchased after the separation with income received after the separation. This is, for me, prima facie at least, a very persuasive argument.
- (iv) Mr Yates’ contrary contention in his opening note was “*H says they were acquired from his post-separation income and are, therefore, non-matrimonial. However, there is no evidence to support that and, in any case, the income generated post separation is matrimonial having been generated by the continuum matrimonial business*”. In cross-examination he persuaded the husband to accept that there had been “*no tracing exercise*” as to the precise source of the monies used for the purchases and that the source could have been generated from the success fees paid to the husband’s business by two of its clients. Mr Yates’ categorisation of these success fees is that they represent the continuum of the matrimonial business. For me, the weakness of this argument is underlined by the observation (which I shall develop further below in the context of the G LLP issue) that the husband provides professional services to clients for which (if things go well) he receives a success fee. The professional services which led to the substantial success fees referred to above were themselves all carried out after the separation (late 2020 and 2021) and were paid partly in the business y/e 31<sup>st</sup> March 2022 and partly in the business y/e 31<sup>st</sup> March 2023. The facts presented here are not in the category of the difficult bonus cases where the work is done all or partly before separation, but the remuneration received after separation. In the present case the work was done and the payment received after the separation date. Further, I do not accept that the words “*continuum matrimonial business*” are correctly used here. The fact that the husband had (he entirely accepts) long-standing business relationships with both clients prior to the separation date does not change this. I accept the pertinence of Mr Chamberlayne’s comparative analysis that for a divorcing barrister, whilst he may have a long-standing business relationship with a particular instructing solicitor, if his instructions are received on a case and the work done and the brief fee paid after the separation then the pre-existing long-standing business relationship does not prevent the earnings being post-separation earnings.

- (v) For the reasons set out above I have therefore decided to categorise the investment worth £84,014 net and the shares worth £603,599 net as non-matrimonial assets.

20. I next turn to various **trust interests of the husband**. These are interests in two trusts (the A Trust and the B Trust). In the early stages of the dispute the existence and value of these interests were the subject of fierce argument; but, in the end, it has been accepted that they are entirely non-matrimonial, are not subject to the sharing principle and have no claims against them in this case – and with that the heat has rather gone out of the argument. In relation to the A Trust the husband has a potential interest in **£1,458,062** net specifically earmarked for him and a further **£5,473,536** in which he is one of a number of possible discretionary beneficiaries, but in relation to which he has made it clear he wishes to earmark for his children (and I accept that is his genuine present intention). In relation to the B Trust the husband is, again, one of a number of possible discretionary beneficiaries and (he told me and I accept) this is likely to be treated as an asset of one of his parents during their lifetime; but he may thereafter receive something. It is not necessary for me to dwell very long on its value, save to note that this trust represents the assets of one of the husband’s parents, who was a person of some wealth, and the value of the trust is likely to be measured in tens of millions of pounds. It may be that in due course the husband receives a substantial sum from this source, but this will certainly be in the category of post-separation accrual.

21. I next turn to the issue which has taken up most of the time at the final hearing – the **value of the husband’s interests in G LLP**.

22. I accept the view of Mr Strickland that the task upon which I am engaged here is to seek to identify a value for the interests on the basis defined by the International Valuation Standards 2022: “*Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.*”

23. I remind myself that, whilst the exercise of valuing business interests is a potentially important exercise in financial remedies cases and is frequently attempted, it can be “*among the most fragile valuations which can be obtained...there is likely to be no obvious market...even where valuers use the same method of valuation they are likely to produce widely differing results...the acid test of any valuation is exposure to the real market, which is simply not possible*”: see Lewison LJ in *Versteegh v Versteegh* [2008] EWHC 935. This observation is particularly the case when what is being attempted is an enterprise valuation, and I have to weigh the views of the experts in this context.

24. I also remind myself of the principle clearly established in the Court of Appeal in *Waggott v Waggott* [2018] EWCA Civ 727, where Moylan LJ said: “*Is an earning*

*capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share? In my view, there are a number of reasons why the clear answer is that it is not”.*

25. Against this background, I shall begin by providing an outline sketch of the G LLP business.
26. G LLP is a limited partnership engaged in providing professional services in the financial advisory sector. There is a working capital base, but all (100%) of the profits (after payment of employee bonuses) are distributed to the partners at the conclusion of each financial year. The trading year runs to 31<sup>st</sup> March and, typically, the profit distributions are made a few months later once the annual accounts are established and approved and the employee bonuses determined.
27. G LLP was established in the late 2000s and in its earlier days the husband had two partners. Both of the other partners have since left the firm and (save the external investors, who provided the majority of the underlying working capital), the husband is the sole partner. The husband thus has an entitlement to approximately 95% of the profits of G LLP in a personal capacity, the external investors have the remainder. If and when the external investors are paid back their capital the husband will be entitled to 100% of the profits.
28. The external investors in G LLP consist of companies which between themselves own the other 5% of the profits of G LLP. The husband owns a small percentage of one of those companies ('K Ltd'), but the shareholders of these companies are otherwise friends and family members of the husband who have invested capital at different stages to provide working capital for his business. These companies are contractually entitled to an identified profit share each year until the capital is repaid and there are provisions for how the capital repayment might be calculated. In August 2022 an arrangement was made (and recorded in writing in a letter dated 3<sup>rd</sup> August 2022) whereby G LLP (i.e. the husband) acknowledged an obligation to repay £4.4m by way of capital repayment to these companies and proposed to begin repaying the capital. It was proposed to pay approximately £400,000 forthwith, a further c£400,000 after the 31<sup>st</sup> March 2023 and a further £2m after 31<sup>st</sup> March 2024 and the remaining £1.6m at an unspecified date thereafter. The first £400,000 has been paid. Mr Yates has suggested that the August 2022 arrangement unnecessarily overpays the investors and should be regarded in the context of the present case as an attempt by the husband to prefer the investors at the cost of the wife. There is indeed a case for arguing that the investors' strict entitlement (at the moment) is a lower figure than £4.4m but (having listened to the husband's explanation as to why he did this) I am satisfied that it was not an unreasonable thing for him to do in the context of the reputational consequences of his actions and also in the context of the investor expectations and I have not been persuaded that it was litigation driven, i.e. motivated by his interests in the present case. Certainly, the case against the husband has not been put on the basis that what he has done puts him at risk of a *Norris* add-back on the grounds of wanton

or reckless behaviour. I propose to deal with the case on the basis that the capital acknowledged as being owed to the investors in August 2022 is a legitimate call on the capital of the business.

29. There was a time when G LLP (consistent with its higher active partner numbers) had a far larger turnover than it does currently.
30. The turnover is made up of success fees and retainer fees. The success fee income in the last two years has been predominantly the success fees paid by two clients. No success fees are expected in y/e 31<sup>st</sup> March 2024. In very broad terms (certainly in recent years) the retainer income represents a break even figure with the success fees contributing all or most of the profits.
31. Once the 5% profit entitlement of the external investors is removed, the remainder is taken by the husband as his income, of course then subject to tax. He draws in advance only £200,000 per annum. He took all his profits for y/e 31<sup>st</sup> March 2022 and expects to do the same for y/e 31<sup>st</sup> March 2023.
32. The approach of Ms Hart to valuing the business has (in summary, in her final report) been as follows:-
- (i) She has identified an EBITDA of £1,067,000 per annum.
  - (ii) She has identified a Multiplier of 2.5.
  - (iii) She has therefore identified an 'Enterprise Value' of  $2.5 \times £1,067,000 = £2,667,500$ .
  - (iv) She has identified 'Surplus Working Capital' of £8,800,000.
  - (v) She has added the Enterprise Value to the Surplus Working Capital to reach a Partnership Value of £11,467,500, rounded to £11,500,000.
  - (vi) Of this figure she attributes **£8,758,000** to the husband's direct interests and **£51,000** to his interests through his interest in K Ltd.
33. The approach of Mr Strickland to valuing the business has (in summary, in his final report) been as follows:-
- (vii) He has identified an EBITDA of £2,700,000 per annum.
  - (viii) He has identified a Multiplier of 5.5.
  - (ix) He has therefore identified an 'Enterprise Value' of  $5.5 \times £2,700,000 = £14,850,000$ .

- (x) He has deducted a '2024 shortfall' figure of £1,485,000 to reach an Enterprise Value of £13,365,000.
- (xi) He has identified 'Surplus Cash' of £8,200,000.
- (xii) He has added the Enterprise Value to the Surplus Cash to reach a Partnership Value of £21,565,000, which he has rounded down to £21,500,000.
- (xiii) Of this figure he attributes **£18,800,000** to the husband's direct interests and **£50,000** to his interests through his interest in K Ltd.

34. The approach of Ms Hall to valuing the business has been radically different from that of the other two. She does not accept there is a meaningful EBITDA separate from the husband's own earnings, not agreeing that, for a buyer of the business, his role could be performed by an employee on a salary of £800,000 per annum (which the others have assumed in reaching their EBITDA figures). She does not accept the multipliers, being particularly unimpressed by Mr Strickland's 5.5 figure. Further, she has concluded that the 'Surplus Working Capital' and 'Surplus Cash' figures advanced by the other experts are flawed, concluding that there is in reality little or no surplus cash once the balance sheet is properly analysed, either on the basis of a going concern or on a closing down basis. The following extracted passages from Ms Hall's written report, supported by her oral evidence, identify her views:-

- (i) *"(I have considered) whether there is a market value of [G LLP]. I conclude that the Partnership is a "singleton" business which is dependent on [the husband]'s continued involvement. The revenue earned by [G LLP] is only partly recurring in nature and is almost exclusively generated by [the husband]. I further conclude that a willing purchaser of a professional services business would ensure that any acquisition would be structured such that key fee earners or partners were tied in to enable a continuation of the existing income streams. Ms Hart acknowledges that her valuation assumes that [the husband] would enter into such an agreement. As I cannot envisage a willing buyer to entertain a transaction to acquire [G LLP] without onerous tie-in obligations, which would be contingent on future performance (or [the husband] being willing to enter into such an agreement with such conditions) I consider that the business has no market value to a third-party investor. I also consider the current and future value of the Partnership to [the husband]. I conclude that while [the husband] could continue earning a future income from [G LLP] (until retirement), he could similarly do so without [G LLP], that is to say without him being attached specifically to [G LLP]. I consider that any such future income would be dependent primarily on [the husband]'s future endeavours (whether within or outside of [G LLP], as a sole proprietorship) and not dependent upon [G LLP]. I consider that the current value of the Partnership to [the husband] relates specifically to the Partnership's current available distributable profits which have arisen from the current financial year, but which have yet to be distributed*

*(specifically up to 31 March 2023). Accordingly, I consider the value of the Partnership to [the husband] to be £2.63m, before tax, comprising £2.5 million of distributable profits plus £100,000 relating to [the husband]'s investment in [K Ltd] and £33,000 relating to [the husband]'s capital account.”*

- (ii) *“The ‘surplus cash’ figures calculated by Mr Strickland include amounts due to external investors and cash held temporarily pending distribution to [the husband]. I do not consider that these balances can be considered surplus or could conceivably be available to a potential buyer. I note that despite Mr Strickland adding “surplus cash” to arrive at his partnership value” he appears to recognise that most of the cash on the balance sheet would not be available to a buyer, stating: ‘I recognise that the likely structure of a transaction would be for most of the cash on the balance sheet to be distributed to the partners in the form of undrawn shares of profit. These amounts would be taxable as income on the members in their profit-sharing ratios for the year ended 31 March 2023, to the extent that they represented the profits for that year’.”*
- (iii) *“The phrase ‘singleton’ business refers to a business whereby the operations, profit and success of the business is reliant upon one individual. On the basis of the financial information set out above, in my opinion, the Partnership is a singleton business in terms of its current operations which are dependent on the client relationships of [the husband]. Furthermore, the information set out above highlights that [the husband] is responsible for generating the vast majority of the Partnership’s fee income and (as a result) [the husband] has received the majority of the financial reward generated by the Partnership’s success”.*
- (iv) *“As a result, in my opinion the business could only be sold with his continued involvement and on the basis of onerous retention obligations and a deferred consideration structure/earn-out arrangement. As noted above, both Ms Hart and Mr Strickland appear to concede that an earn-out or other similar arrangement may be necessary. However, a scenario without these obligations is not one that a willing purchaser would consider, nor would [the husband] subscribe to a transaction with these obligations (i.e. why would [the husband] hand over his income stream to a third party so that they could share in the future reward generated solely by him?).”*
- (v) *“As a result of the above, I cannot ascribe a market value to this business as I don’t consider that one exists on a standalone basis (without [the husband]). [G LLP] is a “singleton” business whose success is reliant on a single individual, [the husband]. Sales of professional services firms are necessarily structured to tie key fee earners to the business post-acquisition to ensure a continuation of the revenue streams purchased. As I cannot envisage a willing buyer to entertain a transaction to acquire [G LLP] without onerous tie-in obligations, which would be contingent on future performance (or [the husband] being willing to enter into such an agreement with such conditions) I consider that the business has no*

*market value to a third-party investor”.*

- (vi) *“As [G LLP] is reliant upon the husband's expertise and client relationships, I consider that any future income [the husband] derives from the business will be as a result of his future endeavours and not any separable goodwill or other assets held by [G LLP]. [The husband] could similarly achieve the same future profits outside of [G LLP] as a sole trader and as such [G LLP] has no additional value to [the husband] over and above the income which he continues to derive from it (some of which is currently represented by the Partnership's reserves which are distributable to [the husband]).”*

35. An important part of the analysis carried out by Ms Hall (which, having heard her evidence and that of the husband, I accept) is that there are only two fee earners in the business (the husband and another individual) and that the husband earns approximately 90% of the fees within G LLP. He is able to do this because it is his business contacts, knowledge and reputation, gained through decades of work and experience, that are the reason why large corporate entities come to G LLP for their advice rather than another corporate finance adviser. The husband is able to delegate some of the implementation and execution work to other employees, but the work is brought in because of him. It is a curious feature of this case that this 90% figure (although in my view very important and given by the husband to Ms Hart when she was first instructed and apparently also given to Mr Strickland when he was first instructed) makes no appearance in either the report of Ms Hart or that of Mr Strickland. In a particularly telling part of Mr Strickland's evidence it emerged that, if he read the note about the 90% analysis, he had not had it in mind when he wrote his report. The transcript reads:-

- Q. What I was asking is whether in fact you felt you had all the information you needed to come up with the figures we've just looked at?
- A. I felt -- I felt confident in those numbers, my Lord.
- Q. Right. Now, at the time of writing this report, did you know how many staff, including [the husband], were at [G LLP]?
- A. I -- I had that information, my Lord. I also had the information from the website, which -- which I recognise show -- shows a different structure. But I had -- I had the staff numbers and also the website information.
- Q. All right. What were the staff numbers?
- A. Ten.
- Q. Ten. And I don't think, unless I've got it wrong, that you mentioned that in this report, did you?
- A. I -- I -- I really cannot recall. I mean, it's -- it's -- certainly, if it -- if -- if -- I -- I see no reason why I would have mentioned it.
- Q. No? Don't you think it's quite important in a services based business to work out what the --
- A. I suppose.
- Q. -- what the engine room is?
- A. Well, part of the source information I suppose, my Lord, was actually the report of Kate Hart, and that report provided information based on their discussions and that would include the staff numbers.



- Q. Right. Did you know how many fee-earners were at the firm when you wrote this report?
- A. No, I -- I didn't know -- I'm not -- I didn't know the roles, but I'm not quite sure what a fee-earner is in this -- in this --
- Q. It's somebody who earns revenue.
- A. I -- I do appreciate that. I'm assuming if you've got ten employees that eight people will be fee-generating. Now, is that what you mean by "fee-earner"?
- Q. Yes, it is. So that was your assumption that there were eight fee generators and two non-fee generators?
- A. Yes.
- Q. I see. And where did you get that from?
- A. That was just an assumption that I made.
- Q. How can you assume that?
- A. It's -- well, you have a small team of ten people. The main focus of the team, my Lord, would be on client service; that's very clearly what this business model is all about. But you would need some back office administrative support.
- Q. Yes. And did you ask how many fee-earners there were?
- A. I did not, my Lord.
- Q. No. Did you find the answer to that question in Kate Hart's report, how many fee-earners there were?
- A. In Kate Hart's report, she referred to [the husband] as being responsible for 90% of the revenue --
- Q. Well, she didn't, no.
- A. Oh, I do beg your pardon. I thought -- the time of this report --
- A. Yes.
- Q. -- were you aware that [the husband] was responsible for 90% of the fee revenue?
- A. I -- I was not aware of that figure, my Lord.
- Q. Did you ask?
- A. I did not ask.
- Q. Did you ask for the information which would enable you to carry out the calculation?
- .....

JUDGE HESS: Well, okay, just so I understand. The 90% figure comes in from Faye Hall's report?

A. That's my understanding.

JUDGE HESS: But is that the first time you read about the 90% figure?

A. I think that is the first time I read it.

.....

Q. Yes. So when you're valuing a service company, let's just say for the sake of argument it's got ten people on the payroll. Company A, or business A that you're asked to value has one important fee-earner, but several other very significant fee-earners. Let's say man A earns 30%. And the other people earn between them -- the other nine people earn 70%.

A. Yes, yes, yes.

Q. That's proposition A.

A. Yes, yes.

Q. Which you're asked to value. Proposition B is that 90% of the profit is earned by -- sorry, 90% of the revenue is generated by one man, who happens to be over sixty years old, and the other 10% is attributable to the other members of staff. Now,

do you value the two businesses the same?

A. No, no, I would not -- I would not, my Lord.

Q. Well then why didn't you think it important to know what [the husband] did in this

business?

A. I -- I've -- I -- I knew, my Lord, that [the husband] was -- played an absolutely central

role in the business, and that was the basis of my valuation. And that's why I applied a 5.5 and said, because of [the husband]'s pivotal role, it would be 7.25 if that

issue could be resolved.

.....

Q. But you've produced a valuation, three reports --

A. Yes, yes.

Q. -- the original one plus addendum and then another one, without ever knowing or even enquiring what proportion of the business comes from him, did you?

A. I -- I did not know the precise percentage.

Q. Furthermore, you did then know the percentage when you saw Faye Hall's report?

A. I certainly did.

Q. And did you change your mind in the joint statement?

A. Faye Hall's report of 90:10 was not -- was not inconsistent with the -- the suppositions -- the conclusions I had broadly reached having -- having seen the other documentation. So no, I didn't -- it wasn't -- it wasn't a moment on the road to Damascus, if I can put it like that. It didn't suddenly make me think, oh, there's something different here.

Q. Right. So, I mean, really, Mr Strickland, you're telling the judge, are you, that back when you did your original report, yeah, about 90%, that would have been a reasonable figure, without mentioning it in your report?

A. I -- it was absolutely clear, my Lord, to me that [the husband] had played an absolutely essential role in this business. When one says about 90%, I don't know whether that relates to chargeable value, chargeable time.

Q. It's sloppy, isn't it, Mr Strickland? It was a sloppy approach from your part?

A. I don't think that's a fair -- fair representation, my Lord.

36. I was left with the clear view that Mr Strickland had not properly or adequately analysed the important facts here. In contrast, when Ms Hall gave evidence on this subject, my impression was that she was on top of the subject and presented a credible and reliable picture. I have not been persuaded by Mr Strickland that there is any enterprise value to this business which could be sold. The exercise being carried out by Mr Strickland was, in reality, very close to a disguised valuation of the husband's earning capacity, the very exercise which the Court of Appeal in *Waggott* made clear should not be contemplated by the court.

37. Further, I did not find myself persuaded by Mr Strickland's attempts to explain why I should conclude that there was 'surplus cash' in the business. A good amount of time was spent at the hearing analysing this aspect of the case and, in the end, I was persuaded by the view expressed by Ms Hall to the effect that: "*The 'surplus cash' figures calculated by Mr Strickland include amounts due to external investors and cash held temporarily pending distribution to [the husband]. I do not consider that these balances can be considered surplus or could conceivably be available to a potential buyer.*"

38. In conclusion I propose to adopt Ms Hall's valuation figure for the husband's interest in G LLP, that is £33,000 in his capital account and £100,000 to come to him as a result of his shareholding in K Ltd. I propose to include the figure of **£133,000** in my schedule.

39. I shall finish on this topic by making some brief comments on three matters relevant to this topic:-

- (i) First, I want to mention the 'Build and Bequeath' model about which the husband spoke passionately in his evidence. What he meant by this was that his model of running a business was to behave in the way which providers of professional services traditionally behaved. The providers of the services would give loyal and reliable service to the clients and, when they wished to retire, they would bequeath their practice to another generation, and would not seek to monetise it by packaging the service in a modern corporate way and selling it. The husband had a nostalgic view as to how this was done in better days in the financial world and that many of the difficulties of the modern financial world were caused by the general abandonment of this practice. He told me this was how the matter was dealt with when his previous partners left the firm (and I accept this evidence). I was quite able to believe the husband when he said this is what he intends to do with his practice at some, as yet unidentified, stage in the future. I was able to believe also that the old-fashioned decency which perhaps lies behind this philosophy has contributed towards his good reputation in the financial world and perhaps has helped him get work which he might not otherwise have got. Having said all this, the husband's views on this subject did not play a major part in Ms Hall's analysis and have not played a significant part in my analysis of whether the business is actually realistically saleable. The court's approach should be to deal with a case on the basis that a party will reasonably maximise their financial position, including (notionally or actually) being expected to sell business interests if they reasonably can at the maximum amount reasonably attainable, just as they are expected (in a different context) to maximise their earning capacity. I have approached the case in this way, but have (as set out above) accepted Ms Hall's view on whether a realistic sale price can be established on the evidence

- (ii) Secondly, the husband told me about an approach by another partnership to merge their businesses a few years ago. I note that this subject had not been disclosed to any of the experts prior to the husband's oral evidence; but I accept the husband's evidence that no capital was offered and that the talks came to nothing. In the circumstances, I have not been persuaded that this development has any meaningful effect on any issue in the case before me.
- (iii) Thirdly, it has been drawn to my attention that in the past G LLP was involved in litigation for which there are reported judgments. Mr Yates sought to persuade me that some of the contents of these judgments ran contrary to what the husband said to me in the present case. I confirm that I have read these judgments and I do not agree with Mr Yates' suggestion. Indeed, in some ways the contents of these judgments corroborate what the husband has told me about G LLP. Overall, though, I have not found anything in these judgments which has a significant bearing on my present task.

40. Having made these determinations I am now able to set out my computational assessment of the assets and debt in this case and am able to identify a dividing line between matrimonial assets and non-matrimonial assets.

41. The situation can be summarised as follows:-

### **MATRIMONIAL ASSETS/DEBTS**

#### **Wife**

Y property <sup>1</sup>	2,694,017
Lump sum to redeem mortgage on Y property	526,568
Lump sum to pay tax on Y property	111,794
Artwork held in FMH (per SJE report)	145,500
Artwork & Jewellery (per SJE report)	171,200
CGT on transfer of FMH	-108,303
Joint overseas bank account	6,308
Bank accounts in sole name	0
Credit card liabilities in sole name	-92
Investment	45,000
Outstanding Legal Costs (per Form H1) <sup>2</sup>	0
<b>TOTAL</b>	<b>3,591,992</b>

#### **Husband**

<sup>1</sup> This figure is based on an agreed value of £3,420,957 less notional sale costs at £88,578 less the outstanding mortgage of £526,568 less CGT of £111,794 = 2,694,017

<sup>2</sup> This figure is based on a total of incurred fees of £1,202,096, all of which have been paid

FMH <sup>3</sup>	13,839,565
Z property <sup>4</sup>	3,224,565
Lump sum to redeem mortgage on Y property	-526,568
Lump sum to pay tax on Y property	-111,794
Artwork held in Z property (per SJE report)	18,650
Marital investments and shareholdings <sup>5</sup>	12,067,232
Monies owed by sibling	207,019
Interest in G LLP	133,000
Joint bank account in England	6,885
Bank accounts in sole name	332,406
Credit card liabilities in sole name	-2,771
Outstanding Legal Costs <sup>6</sup>	19,354
Pension	342,297
<b>TOTAL</b>	<b>29,549,840</b>

### NON-MATRIMONIAL ASSETS

#### Husband

Non-marital investments and shareholdings <sup>7</sup>	3,950,675
Interest in A Trust (appointed fund) <sup>8</sup>	1,458,062
Potential interest in A Trust <sup>9</sup>	5,473,536
<b>SUB-TOTAL</b>	<b>10,882,273</b>
Interest in B Trust	Unknown <sup>10</sup>
<b>TOTAL</b>	<b>10,882,273 plus unknown</b>

42. Reminding myself of the principle set out above that: *“the court should always attempt to determine the partition between matrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided*

<sup>3</sup> This figure is based on an agreed value of £17.5m less notional sale costs at 3% less the outstanding mortgage of £3,135,435= £13,839,565. It is agreed that no CGT arises.

<sup>4</sup> This figure is based on an agreed value of £4,223,185 less notional sale costs at £232,275 less the outstanding mortgage of £229,086 less tax of £537,258 = £3,224,565

<sup>5</sup> This is a combined total of marital investments and shareholdings worth £45,000, £1,055,563, £9,880,833, £426,384 and £659,452 (all net).

<sup>6</sup> This figure is based on a total of incurred fees of £1,894,817 less a total of fees paid of £1,194,171 = £19,354

<sup>7</sup> This is a combined total of non-marital investments and shareholdings worth £84,014, £2,539,709, £112,184, £603,599 and £611,169.

<sup>8</sup> This interest has a gross value of £1,509,156 less tax of £51,094= £1,458,062

<sup>9</sup> This interest is subject to a letter of wishes written by H in which he purported to direct this interest towards the children of the family

<sup>10</sup> The value of this fund has not been quantified within these proceedings, but it is likely to be a portion of a large figure, i.e. a figure measured in tens of millions. This interest is unlikely to be realised during the lifetime of one of H's parents.

*equally and there should usually be no sharing of the non-matrimonial property”, if I simply apply the mathematics of dividing the matrimonial assets equally (for illustration at this stage) then that would require an equalising lump sum from the husband to the wife of **£12,978,924**, calculated as follows:-*

	<b>Wife</b>	<b>Husband</b>
Own matrimonial assets	3,591,992	29,549,840
Lump sum from H to W	12,978,924	-12,978,924
<b>MATRIMONIAL ASSETS</b>	<b>16,570,916</b>	<b>16,570,916</b>
<b>% MATRIMONIAL ASSETS</b>	<b>50%</b>	<b>50%</b>

43. Are there any other factors here that point to a different outcome? Save for an additional offer made by the husband giving the wife slightly more than 50% of the matrimonial property, none have been argued in this case; but I should nonetheless look, at least briefly for completeness, at the other section 25 factors.
44. In relation to **“the income, earning capacity...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”** and **“whether it would be appropriate to require periodical 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 following picture emerged:-
- (i) I find that the husband is likely to continue to work in his present capacity for G LLP for at least the next few years and, on his track record, he may well earn a substantial, though variable, income commensurate with what he has earned in recent past years.
  - (ii) Given the wife’s age and the long absence of remunerative employment it is (correctly) not argued here that she has any meaningful future earning capacity.
  - (iii) Despite the substantial difference in earning capacity, it has not been argued that this is a case for periodical payments to be ordered in the context of the obvious fact that the level of capital produced by an equal division of capital here is such that (on any view) the wife’s income needs will be met from a sensible deployment of her capital. It is common ground that this is a case for a clean break on the basis that the wife will, once the capital is divided, be able to adjust without undue hardship to the termination of his or her financial dependence on the husband.
45. In relation to the **“financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future”** assessed in the context of the **standard of living** that the parties jointly enjoyed

during the marriage, the **ages of the parties**, the **duration of the marriage**, the respective **contributions** of the parties and the **loss of potential pension benefits** arising from the divorce, I have the following observations:-

- (i) Plainly the wife has the need for a good home in this country, and arguably a holiday home overseas as well, and an income from which to meet her reasonable living costs.
- (ii) It has (correctly in my view) not been argued that the level of capital produced by an equal division of capital here is such that the wife's reasonable needs, in terms of both capital and income, cannot be met from her half share.

46. Neither **conduct** nor **disability** play a role in this case.

47. I next turn to the **open positions of the parties** before me.

48. The **wife's open position** is, in headline terms, as follows:-

- (i) The FMH should be transferred to the husband, with him being responsible for the mortgage.
- (ii) The Y property should be transferred to the wife, with the mortgage redeemed by the husband and any tax arising on the transfer paid by the husband.
- (iii) The Z property should be retained by the husband, with him being responsible for the mortgage on it and any latent tax.
- (iv) The joint bank account overseas should be transferred to the wife.
- (v) The joint bank account in England should be transferred to the husband.
- (vi) There should be an equalising lump sum payment from the husband to the wife, calculated at £22,061,673 at the time of the offer letter and £20,859,703 at the conclusion of the case.
- (vii) The payment of the lump sum should be expressed as a series of non-variable instalments, the first instalment of £5 million within 28 days of the order being approved, the wife being "*open to discussion as to the timing and quantum of the remaining instalments*", but with interest to run upon any unpaid sums at 8% per annum (i.e. the court judgment rate) from the date of the court order until the date of payment.
- (viii) The wife should retain the contents of the Y property.
- (ix) The husband should retain the contents of the FMH and the Z property,

save for certain specified items.

- (x) All other assets and debts should remain as they stand with mutual clean breaks.
- (xi) The offer letter said: “*Our client is happy to include an agreed form of wording in the consent order in relation to confidentiality*”.
- (xii) There should be no order as to costs.

49. The **husband’s open position** is, in headline terms, as follows:-

- (i) The FMH should be transferred to the husband, with him being responsible for the mortgage.
- (ii) The Y property should be transferred to the wife, with the mortgage redeemed by the husband and any tax arising on the transfer paid by the husband.
- (iii) The Z property should be retained by the husband, with him being responsible for the mortgage on it and any latent tax.
- (iv) The joint overseas bank account should be transferred to the wife.
- (v) The joint bank account in England should be transferred to the husband.
- (vi) There should be an equalising lump sum payment from the husband to the wife, calculated at £12,591,193 at the time of the offer letter and £12,969,243 at the conclusion of the case.
- (vii) In addition to the equalising lump sum the husband offered to pay an additional lump sum of £275,000 (the purpose of this offer was to give the husband cover in the event that I found that one of the success fees was a matrimonial asset, which he argued I should not, but he made clear that he would stand by this additional offer even if I agreed with him on the categorization of the success fee, which I have).
- (viii) The payment of the lump sum should be expressed as a first instalment of £1,171,149 within 28 days of the order being approved, a second instalment of £5 million by 31<sup>st</sup> July 2023 with the remaining balance being paid by 31<sup>st</sup> July 2024. The offer is silent on the question of interest, but (by implication) I assume what is meant is that interest should run at the court judgment rate from the due date of payment until the actual date of payment.
- (ix) The wife should retain the contents of the Y property.
- (x) The husband should retain the contents of the FMH and the Z property, save for certain specified items (i.e. what the wife has requested).



- (xi) All other assets and debts should remain as they stand with mutual clean breaks.
- (xii) The offer letter said: *“The Minutes of Consent Order shall contain a standard confidentiality clause. Our respective clients will also endeavour to agree a brief summary to provide to their children regarding the outcome of the proceedings”*.
- (xiii) The issue of costs should be considered after judgment is delivered. I note the contents of the husband’s Solicitors letter of 2<sup>nd</sup> March 2023 which states:-

*“The parties' Forms H1 dated 17 February 2023 indicate that the total costs both parties will have incurred between 15 July 2022 and the final hearing amount to approximately £1.722m – split as to approximately £977,000 incurred by your client and £745,000 incurred by my client. As shown by the enclosed net effect schedules, under my client's proposal (before any costs order is made) your client would receive net assets totalling just over £16.6m. By contrast, had your client accepted my client's open proposal dated 1 July 2022, your client would have received net assets totalling just under £17m without incurring any further legal costs. In other words, my client's open proposal on updated figures entails a lower sum due to your client than she would have received had she accepted my client's proposal dated 1 July 2022 – and this is even after inclusion of my client's further offer to give your client a 50% share of the net success fee from his FY23 distribution and before taking account of the enormous costs incurred by both sides since then in consequence of your client's decision not to accept that offer and instead to further extend this already protracted and costly litigation. A net effect schedule summarising my client's proposal dated 1 July 2022 and this proposal (before any reduction for legal costs) is enclosed for reference. As such, as a result of the wasted time and costs that your client's approach has caused, if my client's position as to the appropriate division of the net matrimonial assets is endorsed by HHJ Hess at the Final Hearing, my client will seek an order in these terms for the total amount of £1.722m to be borne by way of a deduction from your client's lump sum, as it is clear to my client that these disproportionate legal costs should never have been incurred by either party in the first place”*.

50. In view of the conclusions and findings I have made above **I propose to make an order** including the following provisions (which, I note, substantially adopts the husband’s proposals):-

- (i) The FMH will be transferred to the husband, with him being responsible for the mortgage, and giving suitable undertakings to obtain the release of the wife’s name from the mortgage within 12 months with an order for sale in default.

- (ii) The Y property will be transferred to the wife, with the mortgage being redeemed by the husband and for him to pay any tax arising on the transfer. I propose to include a lump sum order in the amount estimated as being the tax liability with a formula for an account and reconciliation to be executed if the estimate is not correct.
- (iii) The Z property will be retained by the husband, with him being responsible for the mortgage on it and any latent tax. I propose to include a formula for an account and reconciliation to be executed if the latent tax estimate is not correct.
- (iv) The joint overseas bank account will be transferred to the wife.
- (v) The joint bank account in England will be transferred to the husband.
- (vi) There should be an equalising lump sum payment from the husband to the wife, calculated at £12,978,924 (per my tables above).
- (vii) In addition to the equalising lump sum there will be an additional lump sum of £275,000 (as offered by the husband).
- (viii) The payment of the totality of lump sums should be expressed as follows:-
  - (a) There will be a first instalment of £1,250,000 within 28 days of the order being approved (which I hope may be today).
  - (b) There will be a second instalment of £5 million by 31<sup>st</sup> July 2023.
  - (c) The remaining balance will be paid by 31<sup>st</sup> July 2024.
  - (d) In order to encourage the earliest possible payment, and to compensate the wife for being without her capital in the meantime, simple interest will run on unpaid sums at 4% per annum from 28 days after the order is approved rising to the court judgment rate (currently 8% per annum) from the due date until the actual date of payment.
  - (e) I note that the husband has substantial assets, including non-matrimonial assets, from which to meet the payment and I express the hope that he will strive to make the payments at the earliest possible time and the interest rate structure is intended to encourage him in this regard – it may be that he can arrange his affairs to pay the sums sooner than the order provides and I am sure that would help to draw a line under the dispute.
- (ix) The wife should retain the contents of the Y property.
- (x) The husband should retain the contents of the FMH and the Z property, save for certain specified items (i.e. what the wife has requested).

- (xi) All other assets and debts should remain as they stand with mutual clean breaks.
- (xii) I am sympathetic to the idea that there should be a suitable confidentiality clause in the order and a recital to the effect that the parties will endeavour to agree a brief summary to provide to their children regarding the outcome of the proceedings.

51. On the basis of my asset schedule above this offer would leave the capital position of the parties as follows:-

	<b>Wife</b>	<b>Husband</b>
Own matrimonial assets	3,591,992	29,549,840
Equalising Lump sum H to W	12,978,924	-12,978,924
Additional Lump sum H to W	275,000	-275,000
<b>MATRIMONIAL ASSETS</b>	<b>16,845,916</b>	<b>16,295,916</b>
<b>% MATRIMONIAL ASSETS</b>	<b>51%</b>	<b>49%</b>

52. I am satisfied that this represents a fair outcome in all the circumstances of the case and I invite the respective legal teams to **produce a draft order** which matches these conclusions. Many of these terms were not controversial and I am hopeful that the legal teams will have responded to my suggestion that yesterday should be spent trying to agree the main structure of an order, the final parts of which can be added on receipt of this judgment so that the order can be approved today.

53. I see no reason also why **Decree Absolute** should not be applied for straight away and I am content for my order to contain permission for this application to be made, notwithstanding that more than one year has passed since Decree Nisi.

54. Two matters remain for discussion and determination: the issue of costs and the issue of publication of the judgment. I shall express here some provisional views and invite further submissions on either subject at 2.00 p.m. today.

55. My **provisional view on costs** is that the passage I have quoted above from the Withers' letter of 2<sup>nd</sup> March 2023 has some resonance here and plainly requires a response from the wife's team in view of my conclusions, albeit that the important evidence of Ms Hall was not available until fairly shortly before the trial. In this context I note FPR 2010, PD 28A, paragraph 4.4 and warnings in reported judgments such as those given by Mostyn J in *OG v AG* [2020] EWFC 52. In particular I note the following relevant texts:-

- (i) FPR 2010, PD 28A, paragraph 4.4 reads: *"In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties*

to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. **The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.** This includes in a ‘needs’ case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.”

- (ii) Mostyn J in *OG v AG* [2020] EWFC 52 said: “**The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband’s delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach. It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs.** This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing...I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs.”

56. My **provisional view is that this judgment should be published on TNA / BAILII**, but in a redacted and anonymised form which does its best to avoid any reader identifying the parties or the husband’s business. I will invite the legal teams to see if they can agree in due course on a form of the judgment which meets that aim. It may be that I will hear arguments from the press this afternoon against this provisional view and I will, of course, hear what they have to say on the subject.

HHJ Edward Hess  
Royal Courts of Justice  
10<sup>th</sup> March 2023

Supplemental Written Judgment of His Honour Judge Edward Hess  
(Sitting as a Deputy High Court Judge) dated 13<sup>th</sup> March 2023

1. This case concerns the financial remedies proceedings arising out of the divorce between Ms SG (to whom I shall refer as “the wife”) and Mr CG (to whom I shall refer as “the husband”).
2. The case proceeded to a final hearing over six days on 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> March 2023.
3. The **representation** before me was as follows:-
  - (i) Mr Nicholas Yates KC and Mr Christian Kenny (Counsel instructed by Vardags, Solicitors) appeared on behalf of the Applicant wife.
  - (ii) Mr Patrick Chamberlayne KC and Ms Laura Heaton (Counsel instructed by Withers LLP, Solicitors) appeared on behalf of the Respondent husband.
4. I delivered a written judgment at the end of the case on 10<sup>th</sup> March 2023. The background to the case and my decisions on the issues arising were fully set out in that judgment.
5. After handing down the judgment on 10<sup>th</sup> March 2023 two issues arose and I heard some argument on them. The purpose of this supplemental judgment is to deal with these issues: they are the issue of costs and the issue of publication/confidentiality.

### **Costs**

6. In my written judgment of 10<sup>th</sup> March 2023 I very substantially (if not absolutely entirely) accepted the position advanced by the husband. In that sense he ‘won’ the litigation, a fact which can be illustrated by my noting that on top of a more or less agreed structure of order and division of real properties and chattels:-
  - (i) the wife sought (by the end of the case) a lump sum of £20,859,703;
  - (ii) the husband offered (by the end of the case) a lump sum of £13,244,243; and
  - (iii) I made an order for a lump sum of £13,253,924.
7. It can further be properly said that what I ordered was more or less in line with what the husband’s open position had been since shortly after the pFDR. The pFDR took place on 30<sup>th</sup> June 2022 and the husband made two subsequent open offers:-

- (i) On 1<sup>st</sup> July 2022 the husband made an open offer which would have produced for the wife assets valued at a total of £16,956,770.
- (ii) On 2<sup>nd</sup> March 2023 the husband made an offer which would have produced for the wife assets valued at a total of £16,633,599.
- (iii) The wife's open offer of 25<sup>th</sup> November 2022 and her position at trial suggested that she should end up with assets valued at a total of c.£24,00,000.
- (iv) My order produced for the wife assets valued at a total of £16,845,916.

8. In my judgment I noted the contents of the husband's Solicitors letter of 2<sup>nd</sup> March 2023 which stated:-

*“The parties' Forms H1 dated 17 February 2023 indicate that the total costs both parties will have incurred between 15 July 2022 and the final hearing amount to approximately £1.722m– split as to approximately £977,000 incurred by your client and £745,000 incurred by my client. As shown by the enclosed net effect schedules, under my client's proposal (before any costs order is made) your client would receive net assets totalling just over £16.6m. By contrast, had your client accepted my client's open proposal dated 1 July 2022, your client would have received net assets totalling just under £17m without incurring any further legal costs. In other words, my client's open proposal on updated figures entails a lower sum due to your client than she would have received had she accepted my client's proposal dated 1 July 2022 – and this is even after inclusion of my client's further offer to give your client a 50% share of the net success fee from his FY23 distribution and before taking account of the enormous costs incurred by both sides since then in consequence of your client's decision not to accept that offer and instead to further extend this already protracted and costly litigation. A net effect schedule summarising my client's proposal dated 1 July 2022 and this proposal (before any reduction for legal costs) is enclosed for reference. As such, as a result of the wasted time and costs that your client's approach has caused, if my client's position as to the appropriate division of the net matrimonial assets is endorsed by HHJ Hess at the Final Hearing, my client will seek an order in these terms for the total amount of £1.722m to be borne by way of a deduction from your client's lump sum, as it is clear to my client that these disproportionate legal costs should never have been incurred by either party in the first place”.*

9. In my judgment of 10<sup>th</sup> March 2023 I suggested that the “*passage I have quoted above from the Withers' letter of 2<sup>nd</sup> March 2023 has some resonance here and plainly requires a response from the wife's team*” and Mr Chamberlayne on behalf of the husband strongly argued that I should make an inter partes costs order, suggesting that a figure of £1,309,718 was appropriate and mathematically justifiable. I had suggested that the wife's legal team needed to respond in the context of FPR 2010,

PD 28A, paragraph 4.4 and warnings in reported judgments such as those given by Mostyn J in *OG v AG* [2020] EWFC 52 about the duty to negotiate openly, reasonably and responsibly. Mr Yates on behalf of the wife has duly responded, both in written and oral submissions.

10. After reflection on the competing arguments I have decided in the end to **make no order as to costs**. The reasons for that decision are as follows:-

- (i) The relevant rules for me to be applying on this issue are to be found in FPR 2010 Part 28 and they read as follows:-

“28.3 ...

*(5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.*

*(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).*

*(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to—*

*(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;*

*(b) any open offer to settle made by a party;*

*(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

*(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;*

*(e) any other aspect of a party’s conduct in relation to proceedings which the court considers relevant; and*

*(f) the financial effect on the parties of any costs order.”*

- (ii) FPR 2010, PD 28A, paragraph 4.4 reads: *“In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. **The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.** This includes in a ‘needs’ case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made*

by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.”

- (iii) Mostyn J in *OG v AG* [2020] EWFC 52 said: “***The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband’s delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach. It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing...I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs.***”
- (iv) Before FPR 2010 Rule 28 existed in its present form (i.e. pre-2006) a court dealing with a financial remedies case would, once judgment had been given, look at the without prejudice correspondence and a party who could establish that a Calderbank offer had been made by them which was equal or more favourable to the other party than the outcome of the case ordered by the court, would properly be able to claim to be the ‘winner’ of the litigation and typically seek an inter partes costs order having their costs paid from the date of the relevant Calderbank offer. As a public policy decision, by the introduction of the new rule, which came to be in FPR 2010 Part 28, that approach was disavowed. Rightly or wrongly, the typical approach in civil litigation where the loser pays the costs of the winner was specifically disappplied in financial remedies litigation.
- (v) The wording of FPR 2010 PD 28A, paragraph 4.4, which was introduced in 2019, did not reintroduce (directly anyway) the rule, even as a starting point, that the loser pays the winner’s costs. What it did was to emphasise and underline the duty to negotiate openly, reasonably and responsibly. It is important to note that there is a distinction to be made between openly maintaining a reasonable position which is ultimately rejected by the judge and openly maintaining an unreasonable position which is ultimately rejected by the judge.
- (vi) Although I have ultimately and clearly preferred the evidence of Ms Hall over that of Mr Strickland, it does not follow from this determination that the wife’s decision to rely upon the view of Mr Strickland to underpin her open offer of 25<sup>th</sup> November 2022 and her open position at all subsequent times was either unreasonable or irresponsible. Mr Chamberlayne’s suggestion that Mr Strickland’s report was so obviously wrong that no reasonable litigant would rely upon it is, in my view, overstating the position. It was only when the



two experts were subjected to robust cross-examination that, for me, the view of Ms Hall became manifestly preferable. It does not therefore follow from the fact that I have preferred the husband's case that the wife was being unreasonable or irresponsible in her open position or was guilty of any conduct which might place her in any of the Rule 28.3(7) categories.

- (vii) To this can be added that, because of the sequence of production of expert reports in this case described in my main judgment, it can reasonably be said that the 'financial landscape' did not become clear in this case until very late in the day. Ms Hall's report is dated 21<sup>st</sup> February 2023 and the meeting between Ms Hall and Mr Strickland, which crystallised the issues upon which they differed, did not occur until 23<sup>rd</sup> February 2023. The final hearing began on 3<sup>rd</sup> March 2023, just over a week later.
- (viii) The wife's conduct has been further criticised by Mr Chamberlayne on the basis that (either by virtue of my order of 6<sup>th</sup> July 2022 or by virtue of FPR 2010 Rule 9.27A(1)(b)) she should have made an open offer by 21<sup>st</sup> July 2022. She did not in fact make an open offer until 25<sup>th</sup> November 2022 and this was after the husband had made a formal application to force her hand. The answer to this is, in my view, adequately (and colourfully) set out in Ms Vardag's email dated 2<sup>nd</sup> November 2022 when she said: *"The papers we received from our predecessors were in, one might say, a right old mess, and arrived in a very drip-fed manner...some of the issues, particularly pertaining to the valuation...need to be carefully weighed in an informed manner. Of course we could send you an open offer. Rather than being the subjects of some sort of enforcement of course we could do that. But without having enough time to inform ourselves and make a considered proposal any such offer will be rather like Austin Powers' Dr Evil saying 'one billion trillion dollars' rather than something that might genuinely drive settlement. Please don't make us go through the pantomime of producing an offer just to produce one."* Of course, the purpose of Rule 9.27A is to promote negotiation and settlement, but if (as here) there is a particular and good reason for holding back for a period then it is difficult to regard that as being regarded as bad conduct.

### **Publication / Confidentiality**

11. In my main judgment I expressed the provisional view, which was not opposed by either party, that my judgment should be published on TNA / BAILII, but in a redacted and anonymised form which does its best to avoid any reader identifying the parties or the husband's business.
12. At the handing down of the judgment on 10<sup>th</sup> March 2023 Mr Brian Farmer of the

Press Association appeared in the court and asked to have permission to report the judgment and to name the parties. Mr Farmer, who is of course very well known in the court, articulated with great courteousness, skill and persuasiveness the arguments which found favour when he articulated the very same arguments before Mostyn J in *Gallagher v Gallagher* (No.1)(Reporting Restrictions) [2022] EWFC 52. Mr Chamberlayne strongly argued that I should not contemplate the publication of the names of the parties and that the published judgment should be in a redacted and anonymised form, indeed he urged me to stick with my provisional view. Mr Yates expressed neutrality on the issue, but (I note) the wife had earlier willingly consented to a confidentiality clause in my order.

13. This dispute engages an issue which is, of course, currently subject to a public debate in which there are strong and contrary views held. The ones set out above of course contrast with the views expressed in the Court of Appeal by *Thorpe LJ in Clibbery v Allan* [2002] 1 FLR 565, at [105]: “*all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge.*” The views of Thorpe LJ might properly be described as the orthodox views on this subject.
14. At the time of writing this judgment, the financial remedies world awaits the possibly imminent findings of the Financial Remedies Court Transparency Group chaired by HHJ Farquhar which may in due course find their way into some changes to the rules to clarify how these issues should be determined. In view of the imminence of these possible developments I choose not to enter this debate, but instead (and until there are some approved rule changes) to keep to my provisional view, which is to follow the orthodox view described by Thorpe LJ above. I therefore invite the parties to unite around a version of my judgment which best meets the test of anonymity set out above.
15. In view of these conclusions I invite the parties’ legal teams to finalise a draft order in the terms discussed on 10<sup>th</sup> March 2023, as added to by this supplemental judgment, and to submit that final draft to me for approval in Word format alongside photographed or scanned versions of the signature boxes.

HHJ Edward Hess  
Royal Courts of Justice  
13<sup>th</sup> March 2023