OUTER HOUSE, COURT OF SESSION

[2018] CSOH 47

F96/14

OPINION OF LORD ERICHT

In the cause

R

Pursuer

against

R

Defender

Pursuer: Innes; Beveridge and Kellas
Defender: Cheyne; Turcan Connell

15 May 2018

Introduction

[1] The parties married on 20 May 2000 and separated on 4 April 2009, which is the relevant date for the purposes of section 10(3) of the Family Law (Scotland) Act 1985. The wife was the pursuer and the husband the defender.

[2] There were two adopted children of the marriage: a son born in 2004 and a daughter born in 2005. They were both adopted on 9 August 2007. Residence and contact were determined by interlocutor of this court on 4 March 2015.

[3] The case called before me in relation to decree of divorce and financial provision. Both parties consented to divorce on the basis of two year separation.

[4] However, parties were in dispute on various matters of financial provision. The proof on financial provision ran for ten days. The parties' financial position was complex. This was in part due to them having embarked during the marriage on a major construction project of a holiday house in Italy (the "Italian Property"). This project was funded from assets and loans and had involved the transfer of substantial sums abroad to meet purchase and construction costs. Further complications were caused by the international nature of the parties' careers and investments. They had bank accounts in various countries and denominated in various currencies, and transfers between these accounts often involved currency conversion.

Legislation

[5] The *Family Law (Scotland) Act 1985* provides:

> "9 Principles to be applied.
> (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
> (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage ..;
> (b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
> (c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years.. should be shared fairly between the persons; …
>
> (2) In subsection (1)(b) above and section 11(2) of this Act—
>
> 'economic advantage' means advantage gained whether before or during the marriage … and includes gains in capital, in income and in earning capacity, and 'economic disadvantage' shall be construed accordingly;

'contributions' means contributions made whether before or during the marriage..; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family."

Section 10 provides:

"10 Sharing of value of matrimonial property.

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property….shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage….. —
   (a) before the marriage so far as they relate to the matrimonial property, and
   (b) during the marriage ,which are outstanding at that date.

(3) In this section 'the relevant date' means whichever is the earlier of—
   (a) subject to subsection (7) below, the date on which the persons ceased to cohabit;
   (b) the date of service of the summons in the action for divorce.

(4) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act 'the matrimonial property' means all the property belonging to the parties or either of them at the relevant date which was acquired by them. (otherwise than by way of gift or succession from a third party)—
   (a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or
   (b) during the marriage but before the relevant date…..

(6) In subsection (1) above 'special circumstances', without prejudice to the generality of the words, may include—
   (a) the terms of any agreement between the persons on the ownership or division of any of the matrimonial property ..
   (b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the persons during the marriage ;
   (c) any destruction, dissipation or alienation of property by either person;
   (d) the nature of the matrimonial property the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
   (e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce ".

Credibility and reliability of parties

[6] The defender's general overarching position was summed up in his averment on record that "the defender is concerned that the pursuer has taken action throughout the marriage to utilise his assets and capital to her advantage and to her family's advantage". I did not find his evidence on this general position to be either credible nor reliable. In the witness box, he made wild and extravagant speculative allegations with no foundations in the evidence, for example that the basement of the parties' holiday house in Italy was used for illegal purposes. A particular example of his lack of credibility and unreliability in respect of his overarching position arises in relation to his statement in the witness box that long before they got married the pursuer had planned to get his assets when they separated. The defender's evidence (in a document referred in his affidavit) had been that he started going out with the pursuer in June of 1997. That is consistent with the pursuer's evidence that they started going out in June 1997 and met at a party at the defender's brother's house. The defender had been divorced previously and had entered into a formal separation agreement with his previous wife dated 30 October 1996. In the witness box the defender stated that, although he had thought that the pursuer came on the scene later than that, it was the pursuer who had got him to sign that separation agreement in 1996 : she had been involved with his finances at that stage and had been ecstatic as she got to know where his money was. The defender's insistence that the pursuer was plotting to deprive him of his assets by becoming involved in the financial aspects of his previous failing marriage before she was even going out with him is inherently unlikely and is an example of how his evidence is distorted by his belief that the pursuer has been plotting to deprive him of his assets.

[7] On the other hand, there were also difficulties with the general credibility and reliability of the pursuer. The pursuer was not entirely straightforward in her financial dealings. For example, she maintained that she was entitled to a share of the rents for a property at Goswell Road, London, and yet she had not accounted to the Inland Revenue for this as her income. Further, the pursuer failed to disclose certain assets in the current proceedings and the defender discovered these through his solicitors' investigations or commission and diligence procedure.

[8] In these circumstances, it is necessary to assess the credibility and reliability of both parties not in general terms, but specifically in relation to each matter under dispute and in the context of the other oral, affidavit and documentary evidence about each matter.

Agreed matrimonial property

[9] The parties are joint owners of a property in Italy. The land was bought by them by a preliminary contract of sale with completion on 26 November 2004 and they thereafter constructed a house on it. The parties were agreed that the Italian Property should be sold and I shall provide for this in the order. The pursuer's evidence was that the contents were all matrimonial property other than a desk and unspecified items in the lounge. Counsel for the defender made no submission in relation to the contents. I shall order sale of the proceeds other than the desk, which is the only item of the contents which the pursuer specified as belonging to her.

[10] The following items of matrimonial property were also agreed:

(a) The pursuer had an interest in the Shell Contributory Pension Fund with the value of £125,565.

(b) The defender had an interest in the Shell Contributory Pension Fund and Shell Overseas Contributory pension fund with a total value of £295,439.

(c) Joint bank account with HSBC ending 983 with balance of £34,410.90.

(d) Joint bank account with Bank of Scotland ending 546 with balance of £9,384.88.

(e) Joint bank account with UniCredit Banca Di Roma ending in 104 with a balance equivalent to £19,685.50.

(f) Joint UniCredit Banca Di Roma deposit account ending 232 with a balance of £21,379.

(g) The pursuer's Credit Suisse "Red Geese" Euro current account ending 42-2 with balance of equivalent of £1,516.29.

(h) The pursuer's Credit Suisse "Red Geese" US dollar account ending 780 with balance equivalent to £3,085.25.

(i) Joint TD Ameritrade share trading account with balance equivalent to £14,169.

(j) The pursuer's Halifax Guaranteed Saver Account ending 545 with a balance of £9,698.76.

(k) The pursuer's Credit Suisse "Red Geese" Safekeeping account with a balance of £35,418.

(l) The defender's ABN AMRO current account ending 084 with a balance of the equivalent of £6,708.78.

(m) The pursuer's and defender's Halifax Shell Sharesave account each with a valuation of £9,750.

(n) The pursuer's interest in Baronsmead Second Venture Trust plc with a value of £14,446.

(o) The defender's 99 Shell US shares with a value of £3,980.27.

(p) The defender's 108 Shell UK shares with a value of £1,652.20.

(q) The increase in the defender's Barclays Endowment Policy during the marriage of £3,776.21.

(r) The defender's savings with Intelligent Finance with a value of £29,950.

(s) The household contents of the Italian property

(t) The household contents of the Aberdeen property

Disputed matrimonial property

Intesa Sanpaolo account

[11] The pursuer gave evidence that her mother had gifted her a flat in Milan on 2 August 2006. Her position was that it was normal in her family that significant gifts of property were made within the family to hand down family properties for further generations. The pursuer's position was that it was understood that although the flat was a gift, the income would remain her mother's. The pursuer wrote an undated letter to her mother in the following terms:

> "Dear Mum,
>
> You gave me your flat …
>
> You explained to me the reasons for which you decided to do this, reasons which I share.
>
> You also explained to me, and I fully agree with this, that all the costs relating to the gift are at your expense, in the same way that every future expenditure or cost will be at your expense, including any tax liability, while all advantages and income from

> the flat itself will be to your benefit, which you will be free to manage at your full discretion.
>
> I will grant you specific power of attorney so that you can make every suitable arrangement/use that you think appropriate in respect of the flat (including resale at your absolute discretion; in that situation, the income will remain yours in its entirety).
>
> If resale does not happen, the flat should be considered as having been given in respect of my share of inheritance.
>
> [Signature]"

[12] The pursuer's evidence was that shortly after the gift was made, the property was rented out and the rental income was paid into an account with Intesa Sanpaolo in the name of the pursuer. The pursuer's position was that although the account was in her name she did not use the account. Her mother used the account and drew money out of it periodically by bank card. The pursuer submitted an income tax return to the Italian tax authorities in respect of the income from the flat.

[13] The pursuer submitted that the balance at credit of this account at the relevant date should be excluded from the division. Her reason was that it contained rental income from a property gifted by her mother on the basis that her mother would continue to enjoy the rental income for the remainder of her life.

[14] The defender submitted that as the sum at credit at the bank account was income acquired during the course of marriage and saved in an account it had acquired the character of capital and was therefore susceptible to sharing between the parties.

[15] It was a matter of agreement that the sum at credit at the relevant date was the euro equivalent of £12,015.70.

[16] It is clear that the flat itself is not matrimonial property as it was acquired as a gift. The dispute between the parties was the sum in the bank account at the relevant date.

[17] It is difficult to make much sense of an arrangement whereby a gift is made of property, but the donor retains the right to the income, and yet it is the recipient and not the donor who pays the tax on the income. No evidence was led as to how the situation would be treated in Italian law. It seems to me that the key element in analysing such a transaction is who pays the income tax on the income. As a matter of principle, a person does not pay income tax if they are not entitled to the income. What arrangement the person then makes with a third party so that the third party can have access to the person's income is a separate matter.

[18] Accordingly, I find that the sum of £12,015.70 in the Intesa Sanpaolo bank account is property of the pursuer acquired during the marriage and is therefore matrimonial property.

Flat in Switzerland

[19] The parties were in dispute as to whether the pursuer owned a flat in Switzerland.

[20] The pursuer's position was that the flat was owned by her father. Her father provided an affidavit and also gave evidence by videolink from Switzerland. His evidence was that he had bought the flat in December 2010. He rents it out as a holiday property when he does not need it for his family. A contract of the sale of the flat to the father in December 2010 from a third party was produced to the court. The father gave evidence that under Swiss property law the entire block was owned by a company and the owners of the individual flats owned shares in the company. The chairman of the company was Mr Savoy. The pursuer produced a letter from Mr Savoy confirming that to his knowledge the pursuer has never had a share certificate in the company for the past 18 years and that there was no trace of such a certificate or lease at least since 1997. The father's evidence was that he

rented the flat out for holiday lets himself through an agent, but sometimes got help from the pursuer who had put the property on an internet site for him. The internet site advertised holiday lets. The pursuer explained in her evidence that she did so on a website of which she had been a long-term member and accordingly the website listed her as the "owner".

[21] The defender's position was the flat was owned by the pursuer as she was listed as owner on the internet letting site. The defender stated in evidence that he could see no reason why the father would want to buy another property when he was in his eighties. The defender did not accept the letter from Mr Savoy as being accurate: the father knew Mr Savoy well and had power over him.

[22] I accept the evidence of the pursuer and her father, supported by the contract of sale document and the letter from Mr Savoy, that the Swiss flat is the property of the father and not the pursuer. The father gave his evidence in a convincing manner, and it was supported by documentation. I find him to be a credible and reliable witness. I accept that the explanation for the pursuer being listed as "owner" on the website is not that she actually was the owner, but that she was the person who was listing the property on that website on behalf of the owner. Accordingly, I find that the flat in Switzerland is not matrimonial property.

"Quick" Swiss Bank account

[23] The defender claimed that the parties had a Swiss bank account in the name of "Quick". The pursuer and her father gave evidence that that account was her father's. The defender led no independent evidence in favour of his contention. As I have found her

father to be a credible and reliable witness, I find that the "Quick" account belonged to him and not the parties.

Property in Goswell Road

[24] The pursuer's position is that £1,218 due to her from her brother in respect of rents of a property at Goswell Road, London are matrimonial property. The pursuer produced accounts resulting in that figure. The defender disputes the amount.

[25] There is also a dispute as to whether the defender invested personally in the property, and the defender seeks for this to be taken into account under section 9(1)(b). The defender seeks payment of the value of a one sixth interest in the property, which he values at one sixth of £950,000 less purchase costs (without any deduction for mortgage due to lack of any evidence as to mortgage) which comes to £141,498. He also seeks reimbursement of his purchase cost of £16,835. He also seeks a one sixth share of rental income which he estimates as £2,000 per month for 17 years totalling £68,000.

[26] The pursuer gave evidence that in 1999 the pursuer's brother was working abroad and wanted to invest in rental property in London. She agreed with her brother that she would participate to the extent of a one third share of the equity of the property and the rental profit. A mortgage was obtained for £220,000. The pursuer contributed £24,751 being one third of the balance of the purchase price and her brother contributed the other two thirds. At that time the pursuer and the defender were engaged. The pursuer funded part of her share by borrowing from the defender, and he paid this into her brother's account. She could not remember why she had to borrow the money, nor whether she paid it back. The rental payments and payments for outlays were made through her brother's bank account. The brother paid tax on the entire profits. However, she was entitled to

one third of the profits. Her agreement with her brother was that she would receive an accounting for her share of the profits when it reached £5,000. She received payment into her HSBC account of £2,000 in July 2000, £1,800 in October 2001. That account became a joint account in March 2004 and she received a further payment of £500 into it in December 2007. The agreement between her and her brother was formalised in writing on 21 June 2001 in the following terms:

> "This letter confirms the agreement reached verbally and by e mail in August 1999 with regards to the property at [Goswell Road] which encompasses a two bedroom flat and a parking space:
>
> 1. The property is under the legal and tax ownership of [the pursuer's brother]. The main purpose of the property is to provide income to [the pursuer's brother] and [the pursuer] in the form of rent.
>
> 2. [The pursuer] is joint owner of equity in the property equal to one third of its value (including its contents). The remainder two thirds belongs to [the pursuer's brother].
>
> 3. [The pursuer] managed the purchase and furnishing of the property and is now its administrator being in the possession of a Power of Attorney from [the pursuer's brother].
>
> 4. [The pursuer's brother] is responsible for ensuring all tax matters are kept up to date and Income Tax is paid as per the relevant UK legislation. [The pursuer] will not be held responsible for any failure in the part of [the pursuer's brother]. to do this (eg penalties for late return of tax forms, failure to disclose relevant information, etc.)
>
> 5. All income from the property is to be deposited directly to [the pursuer's brother]...
>
> 6. [The pursuer] is to provide full accounts of all expenditures to [the pursuer's brother] quarterly or as otherwise required.
>
> 7. Net revenue from the property is to be split according to the equity ownership (66.6% to [the pursuer's brother], 33.3% to [the pursuer]). This will hold whether the net revenue is a positive or negative figure.
>
> 8. The net revenue is to be calculated as follows:
>   - Income from rental of flat and/or parking place
>   - Less agency fees

- Less expenses connected with the maintenance of the property and other miscellaneous items (breakdown to be provided by [the pursuer])
- Less income tax at the actual rate paid
- Less mortgage interest (the burden to be split 140/220 by [the pursuer's brother] and 80/220 by [the pursuer])

9. [The pursuer] will ask [the pursuer's brother] to transfer revenue from the property on an ad hoc manner as and when this accrues. [The pursuer's brother] will automatically transfer these moneys whenever they reach £5,000 whether the transfer has been requested or not.

10. Should [the pursuer's brother] decide to take residence in the property, he will pay to [the Pursuer] a sum equal to 33.3% of the rent as per current market rates, less of any maintenance costs less 80/220 of the mortgage interest.

11. Should either party decide to sell its equity stake in the property, the other will have first refusal on the outright purchase of the property. In this case the value will be determined by use of a Property Surveyor. Should [the pursuer] be the buyer, matters will be organised so as to minimise Stamp Duty costs.

12. Neither party may choose to sell its equity stake in the property for a minimal period of five years from the purchase date of January 21st 2000 unless mutually agreed.

13. Should both parties choose to put the property on the market, the net proceeds from the sale will be split according to the equity holding (66.6% [the pursuer's brother] and 33.3% [the pursuer]). Any contents which will not be sold with the property are to be split amicably between the parties on a 2:1 basis according to the original purchase price.

14. The net proceeds from the sale will be calculated as follows:
    - Sale price
    - Less any agency fee
    - Less solicitors costs
    - Less ancillary costs."

[27] The pursuer's brother gave evidence which supported that of the pursuer. He stated that neither the pursuer nor the defender had at any time made any mention of the defender having contributed to the purchase price. The purchase was funded to the extent of £220,000 by a mortgage with Birmingham Midshires but no paperwork in relation to the mortgage application was before the court.

[28] The defender's position in evidence was that he had paid £14,030 to the pursuer on the basis that the pursuer and the defender would own a joint one third share of the property. He produced bank statements vouching these payments. He also incurred £2,805 on his visa card to help furnish the property.

[29] It was agreed by Joint Minute that the value of the property was £365,000 at the date of marriage, £550,000 at the relevant date and £950,000 at 31 October 2016.

[30] It appears to me from the information available to me that that the position was that the mortgage was in the brother's name alone. He repaid part of the mortgage in 2009 and the correspondence from the Birmingham Midshires Building Society in relation to that was addressed to him alone and not to him and the pursuer as joint borrowers. It is therefore rather surprising to find that the pursuer and the brother treat each other as joint borrowers. In an email of 22 May 2009, after the part repayment, the pursuer asked the brother "How much my share of the mortgage was at the time we purchased it and how much is it now?" On the same day he replies saying "The mortgage at the time of purchase was for 220,000 GBP (of which your share was 80,000 GBP). Currently the mortgage is 160,000 GBP (your share has remain unchanged so is still 80,000 GBP)".

[31] No evidence was led nor were any submissions made about the status of the property in English law. Accordingly I am not in a position to say whether a trust has been constituted by English law. It may or may not be that under English law a trust has been created in favour of the pursuer by the 2000 document. It may or may not be that under English law an implied trust has been created in favour of the pursuer and the defender by contributions to the purchase price. This court simply does not know.

[32] The pursuer's position on the Goswell Road property is highly unsatisfactory. If her account of the nature of her investment is true, then it would appear that she has not disclosed the true nature of the transaction to either HMRC or the mortgage lender.

[33] She claims that she is entitled to income from the property but that it is not her but her brother who is liable for the income tax on it. She offered no explanation as to who would pay the Capital Gains Tax on any sale, nor any Inheritance Tax, but the logic of the pursuer's position is that it would be her brother who would be liable. Her position on tax is not consistent with her position on ownership.

[34] Further, there is documentary evidence which tends to show that the pursuer has accepted in the past that she and the defender invested jointly. In 2002 the parties drew up informal wills and in connection with that exercise listed their various assets. The one third of Goswell Road is listed as being owned jointly by the pursuer and the defender.

[35] The difficulties in regard to the Goswell Road property arise from the failure on behalf of the pursuer, the defender and the defender's brother to give proper legal effect to whatever their intention was in relation to Goswell Road. It would have been an easy matter for them to do this: a solicitor would have been involved in the conveyancing of the purchase of the property and could easily have drawn up the necessary legal documentation defining the legal and equitable ownership of the property. Had this been done, it would be clear from the legal documentation whether the pursuer and defender were joint owners of one third, or if the pursuer was the sole owner of one third. This would of course have meant that the pursuer would not have been able to make the arrangement she did with her brother that he would pay income tax on her income. It would also have meant that the mortgage lender would have been informed about the true position about the borrowing

being joint, rather than it being left under the wrong impression that the brother was the sole borrower.

[36] A divorce action is not the appropriate place to make any redress in respect of any failure to properly document a property investment. The Goswell Road property is not matrimonial property. It was acquired prior to the marriage and not for use as a matrimonial home. Nor is it appropriate in all the circumstances for redress to be given under section 9(1)(b). That subsection provides for the taking into account of any advantage derived from the contributions of the other person, not for the rectifying the lack of proper legal documentation giving effect to the intention of the parties in respect of a pre-marital property investment which may have been joint or may have been by the pursuer alone.

[37] Accordingly I find that the Goswell Road property is not matrimonial property and I make no section 9(1)(b) adjustment in relation to it. I do however find that the sum due to the pursuer from her brother in respect of profit as at the relevant date is matrimonial property. This would be the case whether or not it was a joint investment with the defender: it is either a sum belonging to the pursuer which was acquired by the pursuer during the marriage or a sum belonging to them both. In the absence of any documentary evidence that the figure in the accounts is wrong, I accept the figure due at the relevant date is that set out in the accounts, that is £1,218.

[38] It follows from the above that I will make no adjustment in respect of the one-sixth share of rents since 1999 which the defender says are due to him as owner of one sixth of the property. Any right to these rents flows from any right he may have as owner, not from his marriage. If any such right exists, this matrimonial litigation is not the place to seek to vindicate any such rights. Nor will I make any adjustment for reimbursement of any

purchase costs by him, or of the value of the property. Again these matters flow from the property investment transaction (if any), not from marriage.

The pursuer's interest in the Shell Performance Share Plan

[39] As at the relevant date, the pursuer had an interest in the Shell Performance Share Plan. She had vested shares at that date with a value of approximately £2,000. However, the parties were in dispute as to her entitlement in respect of 2007, 2008 and 2009. Counsel for the pursuer submitted that as the awards were subject to conditions, the shares had not vested as at the relevant date, and accordingly did not "belong" to her at the relevant date within the meaning of section 10(4) of the Family Law (Scotland) Act 1985. She referred by way of analogy to *S* v *S* 2012 GWD 14-282. She further submitted that *esto* they were matrimonial property, it was impossible to place a value on them at the relevant date.

[40] Counsel for the defender accepted that it could not be said that the pursuer had a vested right, but submitted that she had a contingent right to the shares and had thus "acquired" (within the meaning of section 10(4)) property which belonged to her. The property which she had acquired was the right in expectation to the shares. That right was capable of being valued. The defence expert witness Dr Pollock gave evidence of a value of the rights at the relevant date, based on their probability of vesting: in other words, he calculated the contingent interest. The court should accept Dr Pollock's valuation.

[41] I was referred to the Rules of the scheme as at 2010, which both parties treated as the Rules applicable to the pursuer's options.

[42] The Rules provided that the company could grant an Award. The shares would vest at a later date. "Vesting" was defined as "a Participant becoming entitled to have the Shares transferred to him subject to these rules".

[43] Rule 5 provided:

> "**No transfer of awards**
> No Awards nor any rights in respect of it can be transferred, pledged, encumbered, assigned or otherwise disposed of.
>
> A Participant must not create, buy or sell any derivative involving an Award or any Shares subject to it. If an Award or rights in respect of it are transferred or if such a derivative instrument is created, bought or sold the Award will lapse.
>
> This rule 5 does not imply to the transmission of an Award or the death of a Participant to his personal representatives."

[44] Rule 10 provided that as follows:

> "10 Vesting of Awards
>
> Except where rules 13, 14 or 16 apply, an Award shall Vest on the latest of the following:
>
> (a) The date on which the extent to which any Performance Condition or other condition set out under rule 3.2 is satisfied or waived has been determined; or
> (b) the Qualifying Dates.
>
> To the extent that an Award has not lapsed or Vested on that date, it will lapse on that date."

[45] Rule 13 provided for the lapse of an award if the employee ceased to be an employee. Rule 14 provided for the award vesting on the death of the employee. Rule 15 provided for the lapsing of awards on the misconduct of the employee.

[46] In respect of the awards granted to the pursuer in 2007, 2008 and 2009 there were two performance conditions. The vesting of half the awards was linked to Shell's business performance over a three year period, with the remaining half linked to the relevant total shareholder return, again assessed over a three year period. As at the relevant date, the performance assessment periods to determine vesting for the 2007, 2008 and 2009 awards had not yet finished for any of these: the assessment period for the 2007 awards did not end until 1 January 2010, with the 2008 and 2009 awards later than that. Accordingly all of these

awards remained unvested as at the relevant date. In the event, the conditions were met and the shares vested in due course.

[47] Dr Pollock is a practising actuary who qualified as a Fellow of the Faculty of Actuaries in 1975 and has extensive experience of acting as an expert witness. In a report contained in a letter of 25 April 2017 he agreed that taking the realisable value as £2000 for 2006 and nil for the other grants was one approach. However, he pointed out that this ignored the fact that had the pursuer remained in employment and fulfilled the vesting criteria, then the awards would have generated value for her in due course. He calculated the value as:

(600 + 750+750) x £15.47= £32,487

600, 750 and 750 were the number of share options granted in 2007, 2008 and 2009 respectively. £15.47 was the share price at the relevant date. He stated that the court may need to consider this value, albeit that it would need to be reduced for taxation and face further restrictions if the underlying performance criteria were not met. In cross-examination Dr Pollock departed from that valuation on the basis that he had not seen all relevant documentation. He had what he described as a "stab" at a calculation, which he worked out for the first time in the witness box. The method of his calculation was that he calculated the probability of the award vesting at 85%. He then applied 85% to the awards made. He indicated that a further reduction of 40 or 45% would have to be made for tax, depending on the pursuer's tax position.

[48] The question for the court is whether the unvested shares were matrimonial property. That turns on whether the options "belonged" to the defender at the relevant date within the meaning of section 10(2). It is clear from the terms of the Rules that until the shares vested the pursuer had no right to the shares and could not realise them nor transfer

them. As at the relevant date, it was not possible to know whether the shares would vest as it was not possible to know whether the conditions would or would not be fulfilled. In my opinion in these circumstances the unvested shares were not matrimonial property.

Matrimonial liabilities

Agreed matrimonial liabilities

[49] The following matrimonial liabilities were agreed in the Joint Minute:

(a) A debt of £10,000 due by the parties to the defender's brother.

(b) The outstanding balance on the defender's Barclaycard credit card amounting to £4,188.48.

(c) The sum of £346,985 due by the defender to Intelligent Finance in respect of a loan secured over his property at Aberdeen ("the Aberdeen house").

(d) A debt due by the defender relative to the Shell Executive Loan Plan Agreement in the amount of £11,000.

(e) The sum of £146,499 due by the pursuer to Birmingham and Midshires in respect of a loan secured over her property at Kew.

Loan from the pursuer's father of €50,000

[50] The parties were in dispute about the amount of £45,557 being the sterling equivalent of €50,000.

[51] The pursuer's evidence was that in 2008, the build of the Italian Property was progressing and the parties needed to put further cash into it. As they were reluctant to cash in shares, the pursuer and the defender agreed to ask the pursuer's father to lend her money so that they could inject cash into the building project without having to realise other

investment. Her father agreed to make a loan of €50,000 which was paid on 18 November 2008 directly into the parties' joint account with Unicredit bank. Her position was that the loan had been repaid by her to her father after the relevant date.

[52] The defender's position was that there was no loan from the pursuer's father and that the pursuer was deliberately attempting to falsify the loan's existence so as to gain advantage over the defender. The defender maintained that there was no credible evidence in relation to the loan and that there was no document of loan. Nor was there any reason for the loan to have been made as the evidence was that it was the father who was supervising the building project, and in many cases paying for the work and then seeking reimbursement of expenditure from the parties.

[53] I accept the evidence of the pursuer on this matter. Her account was supported by that of her father, whom I found to be a credible and reliable witness. It was also supported by documentation. The pursuer has produced a bank statement from the UniCredit account showing payment of €50,000 from her father into the account on 18 November 2008. An email from her father to her dated 24 September 2008 referring to him instructing payment on 17 November 2008 uses the heading "Euro loan". I do not find it in any way surprising that in a family transaction such as this there was no formal loan agreement, particularly as the email documents the transfer as being a loan.

[54] Accordingly, I find that the loan of £45,557 was a matrimonial debt. As the entire loan was repaid by the pursuer, the pursuer is to be regarded as having the whole of this liability at the relevant date.

Loan of £10,000 from defender's brother

[55] As indicated above, it was agreed in the joint minute that as at the relevant date the parties' matrimonial liabilities included a debt of £10,000 due by the parties to the defender's brother.

[56] The loan had been made in 2004 and was used in the purchase of the Italian Property. It was repaid by the pursuer after the relevant date in three payments which were vouched by the relevant bank statements, that is £3,000 on 7 October 2009, £2,000 on 27 November 2009, and £5,000 on 14 January 2010.

Loan of €10,000 and £75,000 from defender's brother

[57] This was a matter of dispute.

[58] The pursuer gave evidence that the parties had borrowed money from the defender's twin brother. The loans were applied to the purchase of the Italian Property. The loans were €10,000 and £75,000 (in each case including interest). The pursuer provided bank statements vouching that payments of the amount of the loans net of interest (i.e. €9.500 euros and £71,000) were paid into the pursuer's father's account and the Credit Suisse account ending in 42-89 respectively. These loans were repaid in various tranches, namely four payments into the bank account of the brother and his wife and the final tranche being sent to their solicitor.

[59] The brother's wife gave evidence supporting the account of the pursuer. The wife confirmed that she and her husband lent €9,500 and £71,250, and that €10,000 and £75,000 was to be repaid including interest. She explained that in August 2005 she and the defender's brother returned to live in the UK and wanted to buy a house. They asked for the two loans to be repaid. Four repayment instalments were made into their bank account

totalling £40,000. The final instalment was repaid by the pursuer's father sending £42,000 to their conveyancing solicitor. The defender's position was put to her in cross: that the brother's wife was colluding with the pursuer; the three instalments paid by the pursuer were not loan repayments but were payments being made by the pursuer to her; and the loan did not exist but was just a pretext for the pursuer transferring money to her father. She rejected the defender's position.

[60] The pursuer's father acknowledged that the payment had been made from his bank account to the solicitor but due to the passage of time could not remember why.

[61] On the other hand the defender in his evidence was adamant that no such loan had been made or repaid. He said that there was no need to take out a loan as the parties had sufficient cash. He made unsubstantiated and implausible suggestions that the payment from the father to the solicitor's account was a moneylaundering scheme; that the transfer to the solicitors was not from the father but was from the brother's wife; and that the brother's wife had falsely shown the transfer as coming from the father.

[62] The defender's brother's position in his affidavit was that his wife dealt with their finances. He was aware of just one loan, which he had consented to, to assist with the funding of the Italian Property but did not know how much it was for. He had understood from his wife that the whole loan had been repaid about the time that they returned to the UK and purchased their house. He had been unaware of the £10,000 loan referred to in paragraph [55] until after the parties had split up. In the witness box his position was that his wife had threatened to scupper his chances of a new job that he had been offered if he did not tell the truth rather than what he had said in his affidavit. He adopted his affidavit. He maintained that the managing partner of the solicitors had told him that there was no

record of the £42,000 coming in. No oral or documentary evidence was led from the managing partner.

[63] Assessment of the credibility and reliability of the witnesses on this matter was complicated by an unusual family dynamic. The pursuer and the defender's brother's wife were close friends and had been for many years. In each family, it was they and not their husbands who looked after financial matters. This friendship had survived despite the brother's wife recently discovering that the pursuer had had an affair with the brother many years previously. The brother and his wife had lent substantial sums to the defender to finance the current litigation. The brother's wife was visibly shocked to discover in the witness box that her husband was not supporting her account. Despite a warning from me at the end of her evidence not to discuss the evidence with her husband, it would appear that the brother's wife spoke to her husband before he gave his evidence.

[64] In view of that dynamic, it is important to test the witnesses' evidence against independent evidence. The independent evidence supports the account of the pursuer and the brother's wife. The pursuer's father was managing payment of the purchase and construction of the Italian Property and produced an account showing receipt of the sum of €9,500 on 24 August 2004. The sum of £71,250 was paid into the pursuer's Credit Suisse account ending 42-89 on 5 July 2004. This was vouched by the Credit Suisse Bank statement. In respect of repayment, a CHAPS payment of £5,000 was received into the bank account of the brother and his wife and is vouched by bank statement. On 30 June 2005 two payments were made into their bank account of £10,000 and £20,000 respectively. On 1 July 2005 a payment of £5,000 was made. These payments are vouched by bank statements which show them coming from the parties' bank accounts. I accept the evidence of the brother's wife that the reference on the transfer of the £10,000 and the £5,000 to a ski holiday is an error

carried over from a previous payment: the context (i.e. that it is one of three payments made in the same two days) is indicative of it being the loan being repaid in tranches, and the error about the ski holiday is not made in the other payment which is sent from a different bank. £42,000 was paid to the client account of the conveyancing solicitor by the pursuer's father on 22 August 2005. This was vouched by a contemporaneous document from the father's bank in Switzerland documenting a transfer of £42,000 from the father's account to the solicitor's bank account with the legend "Client Account for [name of brother]". There was no reason for the pursuer's father to make such a payment to the brother's solicitor other than as part repayment of the loans. The amount paid by the father was the amount required to complete repayment of both the euro loan and the sterling loan.

[65] Accordingly, I find that the defender's brother made loans to the pursuer and defender of €10,000 and £75,000 in 2004 which was repaid in full in 2005, with £42,000 of the repayment being effected by the pursuer's father paying £42,000 into the client account of the solicitor of the brother and his wife. As the loans were repaid in full before the relevant date, they are not a matrimonial liability.

Division of joint accounts after the relevant date

[66] The parties continued to operate certain joint accounts after the relevant date. Accordingly if each party now realised one half of the amount currently at credit in these accounts, they might not receive an equal division of the sum which was at credit in the relevant date. It is necessary to consider the movements on these accounts after the relevant date and to consider whether any adjustments require to be made to ensure that the parties receive their correct share of the relevant date value.

Joint accounts with HSBC ending 983 and Bank of Scotland ending 546

[67] As noted above (paragraph [10]), the sums standing to the credit of the joint HSBC and Bank of Scotland accounts at the relevant dated were £34,410.90 and £9,384.88 respectively, giving a total of £43,795.48. The HSBC account was closed on 5 January 2010. The Bank of Scotland account remained open. The bank statements were lodged as productions.

[68] The pursuer produced a detailed analysis of each transaction on these accounts after the relevant date.

[69] The pursuer's evidence was that the only payments credited to the HSBC account after the date of separation were her wages, rental income from the Kew property, and her child benefit. This was her main account from which she met domestic expenditure. Her position was that no credits made to that account after the date of separation came from the defender's funds: he was living in Holland and his wages were being paid into his ABN AMRO bank account in Holland.

[70] She stated that she transferred £27,000 into the joint Bank of Scotland account in the period between the relevant date and the transfer to the defender from the relevant date. These transfers were made from the joint HSBC account under a reference containing the defender's name. Her evidence was that the defender had during that period made a series of withdrawals from the HSBC account, for matters such as payment of bills for his credit card, mobile phone, the monthly mortgage on his property at Aberdeen and other bills, and occasional withdrawals of relatively small amounts of cash from ATMs. The total sum withdrawn by him over that period was £30,647. When that sum is deducted from the total of £43,796 that leaves £13,148. Accordingly her position was that £30,647 should be allocated to the defender and the £13,148 be allocated to her.

[71] I accept the evidence of the pursuer on this matter. Her evidence is consistent with the bank statements. Accordingly I will allocate £30,647 to the defender and £13,148 to the defender.

Joint Unicredit Account ending 104

[72] This was the joint bank account which the parties used in relation to the construction of the Italian Property. The balance at the relevant date was £19,685.50 (see paragraph [10] above). The pursuer's evidence was that after the relevant date she continued to apply the funds in that account towards the Italian property, and used all of the funds in that account for that purpose. The pursuer produced the bank statements and a detailed analysis of each transaction on the accounts after the relevant date. This showed that sums were paid from this account for completion of the construction work on the Italian Property, and thereafter on its maintenance costs. It also shows that rental income from holiday lets of the Italian Property was paid into this account.

[73] I accept the evidence of the pursuer on this matter. Her evidence is consistent with the bank statements. The Italian Property is matrimonial property. What has happened is that joint matrimonial property in the account has been applied to joint matrimonial heritable property which is to be sold and the proceeds divided equally between the parties. As the post-relevant-date expenditure was for the Italian Property and will be accounted for by the division of the proceeds of the sale of that property, no adjustment is required to the relevant date figure.

Joint Unicredit Account ending 232

[74] I accept the pursuer's evidence that on 10 June 2009 $14,027.36 was transferred from this account to the Unicredit Account ending 104. I also accept her evidence that $20,000 was transferred from this account temporarily to her father on 12 March 2010 but then returned to her HSBC bank account on 19 November 2012 and 4 March 2013 and from there to the Unicredit 104 account and was then applied to the maintenance of the Italian Property. Her evidence is vouched by bank statements and her detailed analysis.

[75] However, in her detailed analysis the funds are treated as coming from her personally rather than as repayment of the temporary loan. In order to correct this, she should be taken to have retained $20,000 (sterling equivalent of £12,593 at the relevant date) with the remainder being split evenly between parties. The effect of this is that she should be treated as having retained £16,986 and the defender £4,393.

Ameritrade account

[76] The parties had a joint account with TD Ameritrade. This was an on-line share dealing account.

[77] The sum of $20,907.34 (equivalent of £14,169) standing to the credit of the account at the relevant date was retained by the pursuer. By July 2009, the value of the shares had risen to $29,720.88. On 29 July 2009 the pursuer transferred $29,000 into the parties' joint Unicredit account ending 232. The account was closed in 19 August 2009 with the residual balance of $720.88 also being paid into that joint account.

[78] These proceeds were then used to fund the construction of the Italian Property.

[79] I find that no adjustment requires to be made to the allocation of the Ameritrade account in respect of post-separation dealings. The proceeds went into a joint account and

were used largely to pay interest charges on the joint account and any balance ultimately to the funding of the Italian property

[80] I also heard evidence about the circumstances of the closing of the account and the payment of the final balance of $720.88 into the joint Unicredit euro account.

[81] The pursuer's position in evidence was that she drafted and printed out a letter to Ameritrade closing the account and both she and the defender signed it. Her position was that the defender signed because he agreed with her that there was no point in keeping the account as it had so little money in it. The defender's position was that the pursuer had a track record of taking all of the financial decisions during the course of the marriage and this extended to encashing assets without his knowledge or consent. The signature on the letter closing the account was not his and the finger of suspicion pointed in the direction of the pursuer as a person with the access, motive and opportunity to forge the defender's signature. In support of his position, the defender led an experienced and well-qualified handwriting expert, Dr Kathryn Thorndycraft who was of the opinion that it was a high probability that the signature was not his. Dr Thorndycraft had not examined the original signature but only a copy of it. She agreed with counsel for the defender that seeing the original document would only have enhanced her conclusion: seeing the original would allow her to see if there had been any hesitation when trying to draw the signature. In cross she agreed she could not rule out that the signature was genuine.

[82] Looking at all the circumstances, I do not find it proved that the defender's signature was forged by the pursuer. Dr Thorndycraft's opinion was not determinative of the matter as she had not examined the original signature and she accepted that she could not rule out it being genuine. Looking at the wider circumstances, it seems to me that the pursuer had no motive to commit this forgery. The amount of money at stake, when converted from

dollars, was worth a mere few hundred pounds and was insignificant in the context of the parties' whole assets. The pursuer did not gain personally from that few hundred pounds: it went into the parties' joint account and was used for joint purposes. In these circumstances I accept the evidence of the pursuer that the defender signed the letter.

Parties' proposals for an unequal division of the matrimonial property

[83] Both parties sought an unequal division of the matrimonial property in terms of sections 9 and 10 of the Act. Parties were agreed that the law on section 10 was as set out in *Jacques* v *Jacques* 1997 SC (HL) 20. In that case Lord Clyde stated that the presumption was for equality and that it is for the court of first instance to determine whether a special circumstance justifies a division in proportions other than equal (p22).

[84] The matters on which the parties sought an unequal division were as follows.

Aberdeen Property

[85] The house at Aberdeen was owned by the defender prior to the marriage. Parties were agreed that it was not matrimonial property. As at the date of the marriage, there was a mortgage outstanding over the property of around £30,000. Further loans were secured over the property during the course of the marriage. It was agreed in the joint minute that the sum of £346,985 due by the defender to Intelligent Finance in respect of a loan secured over the Aberdeen property and referable to the period of the marriage, was a matrimonial liability.

Initial Renovation of Aberdeen Property

[86] The pursuer sought an adjustment under section 9(1) (b) in respect of the sum of £50,000 borrowed against her non-matrimonial property at Kew and applied to the

renovation of the defender's non-matrimonial property at Aberdeen. She argued that this resulted in a loss of capital which was an economic disadvantage she suffered in the interest of the defender.

[87] The Aberdeen property had been purchased by the defender in 1997. The parties married on 20 May 2000. A building warrant for the renovation was granted on 26 May 2000, and a completion certificate was granted on 25 January 2001.

[88] The pursuer's evidence was that she and the defender had planned the renovation of it together while they were engaged with the intention that it would be the family home. The pursuer's position was that in order to fund the renovation work a total of £61,000 was borrowed, £50,000 of which came from a further advance over the mortgage with Abbey National over her pre-martial home at Kew. Her position was that this was a tax efficient way to borrow money as the Kew property was rented out. Her evidence was that the remainder of the cost was met through a loan of £11,000 which the defender took out with his employers Shell under the Shell Executive Loan Plan ("SELAP").

[89] The defender's position was that the renovation was not financed in that way. His evidence was that it was paid outright by him and more or less completed prior to marriage. He paid for it from his off-shore bonuses. The cost of the kitchen upgrade was barely a few thousand.

[90] It is understandable that due to the passage of time, there was little in the way of documentation against which the differing accounts of the pursuer and defender could be tested. No invoices from builders were produced. Some indication of what the costs might have been can be gleaned from the architect's letter which referred to an interim architect's fee which appears to have been based on a total building cost of £34,350. The pursuer sought to extrapolate from that a final building cost of £41,732. She said that in addition to

that there was a cost of a new bathroom of £8,500 and wall to wall cupboards in two rooms of £2,500 giving a total bill cost of £52,732. Her position was that the Shell Executive Loan Plan Agreement loan was taken out in July 2000 in connection with the renovation.

[91] We do not have any invoices nor were any bank statements available showing payment to the architect or builders. What we do have, however, is the pursuer's loan application to Abbey National signed by her and dated 19 July 2000. In that application it is stated that the money is to be used for "extension on other property".

[92] The defender, on the other hand gave evidence that the pursuer had planned the loan from Abbey National so that she could use it against him when they separated, as she had been planning ways to take his money even before they were married. I find his position not to be credible. As indicated above, I do not accept the defender's overarching position that the pursuer acted throughout the marriage to utilise the defender's assets and capital to her advantage. Further, it is clear from a letter from the architect dated 7 June 2000 that the works had not been put out to tender by that date, so they clearly could not have been completed before the marriage on 20 May 2000.

[93] The position of the pursuer, on the other hand is supported by her loan application for further borrowing to be secured over her Kew property which refers to the use of the money for renovation for a property other than Kew. It is also supported by the architect's letter which shows that the costs of the renovation were likely to have been around the order of the amount borrowed. It is also supported by the timing of the SELAP loan. I do not accept the defender's evidence that the renovation was undertaken prior to the marriage: the building warrant and completion certificate show that this was not the case.

[94] I find that the application of the £50,000 borrowed by the pursuer against Kew and applied to the renovation resulted in a loss in capital which was an economic disadvantage

which she suffered in the interests of the defender. However, as the additional borrowing of £50,000 was paid off during the course of the marriage it was in effect converted to matrimonial monies and so her loss is limited to one half of the sum borrowed i.e. £25,000.

SELAP Loan

[95] On 7 July 2000, the defender took out a loan of £11,000 from the Shell Executive Loan Plan Agreement. The loan was outstanding as at the relevant date.

[96] The pursuer submitted that the loan was taken out for the works to the Aberdeen Property and therefore consistent to her approach to other loans should be left out of account in the overall division between the parties.

[97] The defender's position was that it should be included as a matrimonial liability.

[98] I accept the pursuer's evidence that the SELAP loan was taken out in relation to the renovation of the Aberdeen property, which is supported by the timing of the loan. As it is loan taken out by the defender for the purposes of his non-matrimonial property I shall leave it out of account.

[99] The defender also claimed £1,100, being half of the SELAP interest paid after separation. He did so on the basis that the loan was taken out for joint purposes. However, as I have found that the purpose of the loan was not for joint purposes, I reject this claim for interest.

Kitchen renovation of Aberdeen Property

[100] Further works were done on the Aberdeen house when a new kitchen was installed in around 2004-2005. The pursuer submitted that this was work to the defender's non-matrimonial property but funded from matrimonial sources. As a result of the

expenditure matrimonial funds on this work which was to the benefit of the defender as owner of the property, the pursuer had been economically disadvantaged to the extent of 50 per cent of the cost. Her evidence was that the cost of the kitchen was £12,293.57.

[101] The defender's evidence was that they spent barely a few thousand on the kitchen as he did most of the work himself. He disagreed that any expenditure on the property should be repaid when they were both living in it and using it and it was just general wear and tear. A lot of work was required to bring the property up to a reasonable standard of décor after they left. There was nothing done by the parties during the marriage which would have added any real additional value to the property.

[102] At the time of the kitchen renovation the parties were living in the Aberdeen Property. The pursuer continued to do so until the relevant date and thereafter until she moved to a rented property. She had the benefit of the renovated kitchen for that period of time. The renovation was paid for from matrimonial funds and was used for matrimonial purposes. In these circumstances she has not suffered a disadvantage in respect of the kitchen of which account should be taken under section 9(1)(b)

Interest on mortgage secured over Aberdeen Property

[103] After the relevant date the defender continued to pay the interest on the Intelligent Finance mortgage secured over the Aberdeen Property and used to finance the Italian Property. He continued to do so until he sold the Aberdeen Property in 2013.

[104] The defender claimed half of the interest paid after the relevant date under section 9(1)(b).

[105] There was a factual dispute between the parties as to the amount of interest paid after the relevant date. The defender submitted to the court a schedule of matrimonial

property which stated the amount as being £38,572.22 and as being based on mortgage statements. The pursuer submitted that the amount was £15,209.84. As the mortgage statements vouch the figure given by the pursuer and not that given by the defender, I find that the amount of interest paid by the defender on the mortgage between the relevant date and the sale of the Aberdeen Property was £15,209.84. Accordingly half of the interest would have been £7,605.

[106] Section 9(1)(b) provides that fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person. The defender did not sell the Aberdeen Property until June 2013, some 4 years after the relevant date. Nor did he rent the Aberdeen Property during that period. Had the defender sold the Aberdeen Property as soon as practicable after the relevant date then the interest incurred after the relevant date would have been negligible. Had he rented the property out the total of the rental payments could reasonably be expected to have been more than the interest. The property had been rented out for £400 a month in 2007, and most of the monthly interest payments were less than that. The figure of £7,605 is not significant in the context of the parties' financial dealings. In any event, the pursuer too has made interest payments after the relevant date in respect of borrowings used for the Italian Property and secured over her non-matrimonial Kew Property so in the interests of fairness these would also have to be taken into account and set off, thus reducing the £7,605 figure further. In these circumstances, in my opinion it would be fair for the £7,605 not to be taken into account.

Kew

[107] The house at Kew is not matrimonial property. The pursuer owned the house before her marriage to the defender.

[108] The parties were in dispute as to funds expended on renovation works on the Kew House. The works were undertaken in 2008-9. The pursuer's position was that around £97,000 was spent – this comprised £70,000 from a mortgage from Birmingham Midshires and £27,000 from the joint Bank of Scotland account.

[109] The defender's position was that the cost of the renovation was £131,468, comprising £130,058.22 before the relevant date and a further £1,409.90 thereafter. The defender's position was that this had all come from joint funds, and so he contributed half of the construction costs, ie £65,734.

[110] I accept the evidence of the defender as to the cost of these works. The defender had been personally involved in managing the renovation project, and produced detailed vouching of the costs.

[111] On the other hand, I accept the evidence of the pursuer on how these works were funded. Her evidence that they were funded as to £70,000 from further borrowing from the Birmingham Midshires is vouched by a mortgage statement from Birmingham Midshires showing an additional loan being made on 3 July 2008 and the statements from the parties' joint HSBC bank account showing the £70,000 being paid in to that account.

[112] The pursuer accepted that about £70,000 was spent from the Birmingham Midshires mortgage on renovating the Kew property and that accordingly £70,000 of the balance of the loan at the relevant date should be left out of account. I shall give effect to this by reducing the loan from £146,499 to £76,499.

[113] As the total construction cost was approximately £132,000, then once the £70,000 loan is deducted that leaves the remainder of the construction cost as £62,000. As that £62,000 came from joint matrimonial property and was spent on a property owned solely by the pursuer, half of that figure (ie £31,000) represents an economic disadvantage which the defender suffered in the interests of the pursuer.

Rents of non matrimonial property

[114] The pursuer submitted that both parties rented out their non-matrimonial property for periods during the marriage. They both benefitted from the income generated. There was no economic advantage or disadvantage as a result.

[115] The defender sought a one half share of the rental income of the pursuer's non-matrimonial property during the marriage. He estimated the rental income of the Kew Property as £2,000 a month for 8 years, and sought one half of this being £96,000. He estimated the rental income of the Goswell Road Property as £2,000 a month for 17 years, and sought one sixth of this being £68,000. He also sought one half of the rental income of the Milan flat during the marriage, but did not quantify this. However, the Aberdeen Property had been rented out while they were abroad between 2001 and 2004, and part of the property was let out from their return to 2007.

[116] I will make no adjustment under section 9(1)(b) for the rents for the Goswell Road property because these relate to the dispute as to the nature of the property investment (see paragraph [38] above). I will make no adjustment for rents from the Milan flat. Any advantage derived by the pursuer was not from the contribution of the defender but from the gifting of the flat by the pursuer's mother.

[117] That leaves the Kew Property rents. So what we are left with is that rents have been generated by both the pursuer's property in Kew and the defender's property at Aberdeen. I am required by section 9(1)(b) to take fair account of any economic advantage derived by either person from contributions from the other, and of any economic disadvantage suffered in the interests of the other person. During the marriage rents have been generated from properties owned by each of the parties. Taking a broad brush view, I find that there is no overall advantage or disadvantage to either party and that it is fair that no adjustment is made in respect of the rents from either.

Gifts from the pursuer's uncle

2001 gift

[118] The parties were in dispute as to whether the pursuer had received a gift of €50,000 from her uncle in April 2001.

[119] The evidence the pursuer and the uncle gave was that there was no such gift.

[120] The defender's position was that there had been such gift. The only evidence he produced to support his position was a file-note of a meeting between parties solicitors on 17 June 2011. That file note was taken by the pursuer's solicitors. The meeting was for the purpose of the litigation and numerous aspects of the parties' financial affairs were discussed. The note states:

> "My father opened an account in Switzerland in 2001, as her father lives there. The account was named 'Red Geese' for simplicity, as my client had started a company named 'Red Geese Consulting'. The account was started with around 50,000 €, which was a gift from her uncle."

[121] I find that there was no such gift. The only evidence for its existence is the file note, which is not a record of the gift but merely a record of a discussion between the parties' solicitors during the course of this litigation. The note is clearly mistaken. Bank statements

for the Swiss bank account were lodged and these showed that the account was not opened with such a payment. I accept the evidence of the uncle.

2007 gift

[122] The parties were in dispute about whether a gift of €50,000 from the pursuer's uncle in 2007 was a gift to both of the parties or to the pursuer only.

[123] The defender's position was that the gift of €50,000 from the pursuer's uncle was a joint gift to both the pursuer and the defender. He remembered writing to the pursuer's uncle to thank him for it. He claimed that the pursuer had made up a fictitious story about the loan from her father as a means of getting back the gift from the uncle.

[124] The pursuer's position was that it was given to her alone and that she applied it to the Italian Property.

[125] The uncle gave affidavit evidence that the gift was intended to benefit the pursuer only and was not intended as a joint gift to the pursuer and defender. He explained that the context was an ante-mortem distribution of the estate amongst various members of his family. He produced vouching showing that the gift was made in 2007 and that at the pursuer's request it was paid into her father's Swiss bank account.

[126] I accept the evidence of the uncle that the gift was to the pursuer only. His position was supported by the email trail regarding payment to the pursuer and making no reference to the defender. Accordingly I shall make a deduction to reflect the pursuer's sharing of the gift to her from the uncle.

Dissipation

[127] As indicated above (paragraph [6]), the defender's general position was that from even before the parties became engaged the pursuer had been taking action to utilise his assets for her advantage. He made particular claims in respect of Brunei and the USA, and the build cost of the Italian property.

Brunei and USA

[128] The defender makes a claim under section 10 that the pursuer appropriated and dissipated $211,041 during their time in the United States of America and €230,000 during their time in Brunei. He calculated these figures on the basis that the pursuer had substantial earnings in Dubai and the United States and that the parties should have been able to make significant savings when they were living there. However, there was no independent evidence of her having earnings of the amount which he claimed, and the independent evidence of her tax returns and bank accounts supported her evidence that she earned much less (see paragraph [165] and [166]). I do not find it proved that the pursuer appropriated these sums.

[129] The defender gave evidence that the pursuer took suitcase loads of money to Switzerland. There is no basis in other evidence for this. The Swiss bank account statements have been analysed by expert accountants for both the pursuer and the defender and neither found any unexplained cash deposits. I accept the pursuer's position, supported by the reports from Mr Miller and Mr McGregor referred to below, that the funds from Brunei were mainly used for the purchase of the Italian Property and the remaining balance was in the Credit Suisse accounts at the date of separation.

[130] Accordingly I find that there was no dissipation in respect of the parties' earnings in Dubai and the USA.

Italian Property

[131] The pursuer also seeks to be compensated under section 10(6)(c) for a discrepancy between the funds sent abroad and the expenditure for the construction of the Italian house.

[132] The financing of the construction of the Italian house was a complex matter, as the parties used various sources of funds. The sources included monies from joint bank accounts, monies from non-matrimonial assets and loans from family members. In tracing the funds through the various bank accounts, the court has had the invaluable assistance of expert accounting evidence on both sides. The pursuer's expert was Brian William Miller, a chartered accountant since 2007 and Director of Forensic Accounting at Henderson Loggie Chartered Accountants. The defender's expert was Robin McGregor, a qualified solicitor and chartered accountant at Christie Griffith. Both accountants produced initial reports, and then further reports having considered each others. They then met. As a result of this, they were in agreement apart from in relation to three matters. They are both to be commended for their painstaking and detailed work in analysing numerous entries in a very large number of bank statements relating to the entire period of the parties' marriage, and for the constructive way in which they each engaged with each other's work in advance of the proof in order to narrow the issues.

[133] The experts examined the payment trail of funds sent abroad up to the relevant date and compared it against the amount spent on the Italian Property.

[134] The defender's expert Mr McGregor found a discrepancy of €163,159. Counsel for the defender submitted that there was dissipation of this sum within the meaning of section 10 as interpreted in *EP or G* v *GG* [2016] CSOH 32 2016 Fam L R 30.

[135] On the other hand, the pursuer's expert Mr Miller reconciled almost all the payments and was left with an unexplained amount of €3,746. That sum is *de minimis* in the context of the financial dealings of the parties, and so for all intents and purposes Mr Miller's conclusion can be taken to have been that that there was no significant discrepancy between the amounts remitted abroad and the amount spent on the Italian Property, and therefore no dissipation.

[136] There were 3 components to the discrepancy of €163,159 found by Mr McGregor.

<u>€50,000 gift from pursuer's uncle</u>

[137] The first component was in respect of €50,000 and related to the gift from the pursuer's uncle in 2001. Both experts recognised that this component was a matter of fact to be determined by the court. If the court accepted the defender's position that there was such gift then there was a discrepancy of €50,000. If the court accepted the pursuer's position that there was no such gift then there was no discrepancy. I have found in paragraph [121] that there was no such a gift. Accordingly €50,000 of the €163,159 falls away.

<u>£75,000 loan from pursuer's brother</u>

[138] The second component is in respect of €63,560 which relates to the loans from the defender's brother discussed in paragraph [57] ff. Again both experts recognised that this component too was a matter of fact. The pursuer's position was that there was such a loan of £75,000 (including interest) and that that the repayment in 2004 was achieved in part by

the pursuer's father making a payment to the defender's brother's conveyancing solicitor. That gave rise to what was in effect a short term loan by the father to the pursuer of the amount which he had paid the solicitor. The father was repaid with part of the proceeds of an additional borrowing of £45,000 on the existing mortgage with Northern Rock on 31 October 2005. The pursuer's expert's view was that this resulted in a double count in the defender's calculation of the discrepancy as the funds were not applied to the Italian Property but instead were used to repay a loan to the pursuer's father. The defender's expert agreed that if the pursuer's position were factually correct then there would be a double count. However, his opinion was based on his instructions that the defender's position is that there was no loan repayment to the defender's brother, in which case the sum was properly included and there was no double counting. I have found in paragraph [65] that there was such a loan and it was repaid in part by the pursuer's father. Accordingly a further €63,560 of the €163,159 discrepancy falls away.

Build costs of the Italian Property

[139] The third component is €37,175 in respect of the costs of the Italian Property up to the relevant date. The pursuer's position is that they amounted to €1,183,351 and the defender's that they amounted to €1,146,176, the difference being €37,175. Again this is a matter of fact: if the pursuer's position is correct there is no discrepancy.

[140] In the initial stages of the project, until the parties opened a joint bank account in Italy, payments for the Italian property project were organised through the pursuer's father, who provided account of what had been spent. I found him to be a credible and reliable witness and I accept these accounts as accurate. Thereafter, payments were made through the joint Italian bank account and vouched by the bank statements. The pursuer provided a

detailed analysis of the costs incurred and what they were incurred for. I accept the evidence of the pursuer on the costs. She, either herself or through her father, was the person managing the project. She was able to specify the precise item of construction cost on which each payment had been spent. There was no evidence that any payment had been spent other than on the specified item.

[141] Accordingly I accept the pursuer's figure for the build cost of €1,183,351. The consequence of that is that a further €37,175 of the €163,159 euro discrepancy falls away.

Conclusion on discrepancy

[142] Once these three components fall away, the discrepancy is reduced to €8,678. Mr Miller was unable to precisely establish the composition of this remainder, but believed that it was immaterial in the context of the case and may have arisen because of differences in methodology between him and Mr McGregor. In terms of section 10 I have to consider whether departure from equal sharing is fair in circumstances. In my opinion a potential discrepancy of this relatively small amount does not justify a finding that there has been dissipation.

Italian Property maintenance and rental income after the relevant date

[143] The defender claimed one half of the rental income of the Italian property after the relevant date. He claimed that the property had been let. On an occasion when he had visited the property it had been occupied by a family on holiday. He quantified his claim on the basis of the property being let for 16 weeks a year for 8 years at a rent of £2,500 a week. That gave a total of £320,000, of which his one half claim was £160,000.

[144] The pursuer's evidence was that there had been some lettings of the property as a holiday destination. However, she stopped letting it out as the uncertainty caused by this litigation meant that she did not want to take bookings which might not be honoured. She produced bank statements from the Unicredit account ending 104 showing receipt of rents and the receipt and return of deposits.

[145] I prefer the evidence of the pursuer on this matter. The family on holiday was one of the lettings which was vouched by the bank statements. There is no basis in evidence for any lettings beyond those in the bank statements. The defender's quantification was speculative and was based not on evidence but on an unwarranted assumption that the property was let out for lengthy periods.

[146] The pursuer claimed that she had suffered an economic disadvantage in respect of maintenance costs of the Italian property from the relevant date. She claimed £22,900 in respect of an accounting for these costs. I accept the evidence of the pursuer on this matter. Her claim was vouched by the bank statements for the Unicredit account ending 104 from the relevant date and an analysis by her of these bank statements showing the payments made in to the bank account by each party and the maintenance costs. The defender accepted in evidence that he had made a payment into the account in respect of the Italian property after the relevant date. That was a payment of €10,000 in September 2009. No payment was made by him into the account thereafter. The accounts show that subsequently the pursuer has been regularly making payments into the account when the balance had been depleted by maintenance costs. It is self-evident that a house requires to be maintained and utility bills and other maintenance costs met. The defender is joint owner of the property and requires to meet his share of the maintenance.

Sale of defender's shares in the Shell Sharesave Scheme

[147] The defender claims in respect of shares owned by him in the Shell Sharesave Scheme and sold during the marriage and shortly after the relevant date. He claims the sum of £121,000, as being the approximate value of the shares less the amount that they were cashed in for. He makes his claim under section 10(6)(c) on the basis that there has been an alienation of property.

[148] The defender participated in a sharesave scheme with his employer Shell. His position was that he would never have cashed his shares in as they were valuable, secure and produced fantastic dividends. His position was that he had participated in three tranches. The first from 1992 to 1996 would by now be worth well over £250,000, but these must have been sold by the pursuer. The second was from 1997 to 2002. 5669 shares were sold in three tranches: 5214 on 26 May 2004 for £20,591; 343 on 20 July 2005 for £1,770 and 112 in March 2009. If they had been retained they would have been worth £85,998 at the relevant date and £121,600 at 17 October 2016, the date of his affidavit. The third tranche was from 2002 to 2006 and had been sold by the pursuer without his knowledge or approval. Further, there were 1202 US sharesave shares sold on 20 May 2004 for the dollar equivalent of £4,734 which would have been worth £18,234 at the relevant date and £25,782 at the date of his affidavit. There were 43 Eurosharesave shares sold for £1674 on 27 October 2003 which would have been worth £652 at the relevant date and £922.35 at the date of his affidavit.

[149] The pursuer's position in relation to the first tranche was that that there was no evidence of the defender having these shares. I accept the pursuer's position. There was no independent evidence from documents or other third party witnesses that the defender had these. There was no such evidence that they had been sold during the marriage, nor that the

proceeds had been received into any bank account. Indeed the only relevant documentary evidence pointed to the opposite conclusion: the interest in the Sharesave Scheme was not listed as an asset of the defender in the very detailed division of the assets of the defender and his former wife in their formal separation agreement entered into on 30 October 1996.

[150] The pursuer accepted that the shares in the other tranches had been sold. Her position was that they had been sold with the consent of the defender to finance the Italian Property.

[151] In support of his contention that the pursuer had sold the shares without his consent, the defender drew attention to a series of emails in January 2004 relating to the need for the defender to withdraw from one aspect of the Shell scheme, ie the Global Employee Share Purchase Plan, because of a re-organisation.

[152] On 8 January Sam Clark, the person within Shell dealing with this, emailed the pursuer saying *inter alia*:

> "Further to previous emails from Christine Duthie and Ken Edmends with regard to the recent Circular form the GESPP Plan owner about the need for Participants in non-Participating Countries to withdraw from the Plan. We do not have a record of you contacting us or we are still awaiting your decision/paperwork and bank details"

The email went on to ask the defender to choose between the options of a refund of contributions or sale of the shares, and asked him to send bank information. The defender replied by email on 16 January 2004 giving bank details and stating:

> "However, please confirm if I had made a decision as to what to do, i.e. a contribution refund OR to sell the shares. If this decision has not been executed please let me know straight away, without you acting on it, and I will get back to you by return as to my (new) decision. This is obviously in the light of what has happened to the Shell share price over the last week and thus wish to make the right financial decision"

Sam Clark emailed back the same day stating "Unfortunately the shares have already been sold. Amount is €1674.14 coming to you". Later that day the defender forwarded that reply to the pursuer with the message "FYI" meaning "For your information".

[153] The defender's position was that he would never had sold the shares as they were such a good investment and the pursuer must have sold them. He should have raised this with her at the time of the emails, but did not do so until after separation.

[154] The pursuer on the other hand submitted that there was no evidence that the pursuer was involved in the sale at all. The most likely interpretation of the emails was the share price had changed and the defender was trying to review his previous decision to sell. Another interpretation was that he had simply forgotten that he had previously instructed the sale.

[155] In my opinion the defender has not established that the pursuer sold these shares without his consent. No matter how good an investment the shares might have been, it would not have been possible for the defender to keep the shares as he was no longer eligible to participate in that particular scheme. The email correspondence with Sam Clark is inconclusive one way or the other as it can be interpreted in different ways. The defender has produced no documentary evidence as to by whom or when the sale was instructed. He made no complaint to the pursuer at the time about her selling the shares without his consent: the email to her is merely sent for her information.

[156] In my opinion, the sale of the second and third tranches must be seen in the context of the parties' joint Italian property project. The timing of the sales is consistent with the timing of the project. The proceeds of the sales were used to fund the Italian property project. The defender has acknowledged that he cashed in certain of his pre-marital investments in order to finance the Italian property: he gave oral evidence that this was the

case in relation to a Virgin Personal Equity Plan. The defender is joint owner of the Italian Property and will share in the proceeds when it is sold. In these circumstances I find that there has been no alienation of the shares. All that has happened is that they have been cashed in and applied to the purchase of matrimonial property, as part of a construction project being undertaken willingly by both parties to the marriage.

[157] As I have found that there was no alienation, it is not necessary for me to come to a finding on the dispute between the parties on quantification in relation to the shares sold in 2004 and 2005. However, as I heard evidence on this I set out what my view would have been had I found that alienation had occurred. The quantification set out by the defender in respect of the shares sold in 2004 and 2005 failed to take proper account the effect on share prices of the restructuring of Shell and Royal Dutch Petroleum in 2005. I accept the evidence of Dr Pollock that if the shares had been retained they would have had a value at the relevant date of £30,541. As they were sold for £27,096 the defender's loss as at the relevant date would have been £3,445.

Use of pre-marriage property

[158] Both parties accepted that there should be an adjustment under section 9(1)(b) for the application of their pre-marriage property for joint purposes, as there had been an economic disadvantage to one and an advantage to the other. However they disagreed on how much that adjustment should be.

[159] The pursuer sought an adjustment in respect of her pre-marriage property totalling £56,867. This comprised £14,499 in respect of Phoenix Life, £7919 in respect of Phoenix life compensation for a pre-marriage event, £7,109 for Lincoln National Investment, £8,500 for a

Virgin Maxi ISA, £7,167 for a Vanguard 500 Index Fund, £2,020 for Alliance and Leicester shares and £9,653 for Tate and Lyle shares.

[160] The defender sought an adjustment in relation to his pre-marriage property totalling £64,500. This was the value of the savings and investments belonging to him in terms of the formal separation agreement from his former wife in 1996. His position was that he had not realised these items prior to his re-marriage to the pursuer. The pursuer did not accept this figure. She argued that there was no proof that the assets listed in the separation agreement still belonged to the defender at the start of their marriage. She calculated the adjustment as amounting to £31,253. This comprised £13,945 in relation to a Virgin PEP, £7,558 in relation to a Legal and General policy and £9,750 being the balance of the Sharesave account. I accept the evidence of the defender as to the figure of £64,500. The separation agreement is compelling evidence that these assets belonged to the defender in 1996. Between 1996 and his marriage to the pursuer in 2000 the defender was in well-paid employment and would not have needed to sell off these assets and there was no evidence that he had done so.

[161] Section 9(1)(b) provides that fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person. These pre-matrimonial assets of both parties were, in the main, cashed in to fund the Italian property project. That was a joint project which both parties had embarked on and both wanted to undertake. That project, which they both agreed on. It required to be financed and they both put pre-marriage assets towards that financing. The completed project was matrimonial property and jointly owned by them. Further, any disadvantage or advantage was minor. The pursuer contributed £56,867 of pre-marriage assets and the defender £64,500. When these figures are set off against each other, the difference between them is not significant in the

context of the costs of the project or the parties' overall financial dealings. In my opinion, in these circumstances fairness will be achieved by making no adjustment in respect of either party.

Loss of salary and pension rights

[162] The defender's position was that he had changed his career path within his employer, Shell, in the interests of the pursuer and his family and had therefore suffered an economic disadvantage. He sought £223,092 in respect of loss of income resulting from the change and £844,600 in respect of loss of pension rights.

[163] In order to set the evidence on this matter in its context, I require to firstly set out the employment history of the parties during the marriage.

[164] When the parties first met, the pursuer was working with an international company in the USA. She had worked with them in the UK since 1989 and had moved to the United States on secondment in 1996. She was offered a permanent position in the United States, but took redundancy in order to return to the United Kingdom to be with the defender. At that time the defender worked for Shell in Aberdeen. After spending around a year in London, the pursuer moved to Aberdeen in February 2000, when she worked for a company related to the oil industry at a salary of £60,000, with no pension provision. At that time, the defender was working for Shell as a well engineer at job level group four.

[165] In January 2001, the defender was posted by Shell to Brunei for a four year role. The pursuer gave up her job and moved to Brunei with him. She found employment through a local manpower agency at a rate of £600 per day less an agency percentage. Her evidence was that she worked for a total of about 120 days during their stay in Brunei, and the agency

paid her wages in to the HSBC Brunei account in Brunei dollars. The defender's evidence is that she was paid in cash or cheques and her earnings were substantially more as she only paid a fraction of the cheques into the bank. I accept her evidence on her earnings in Brunei as it is vouched by bank statements. At that time the pursuer's salary was in the range of £65,000 per annum, paid in local currency tax free, together with free accommodation and travel allowance.

[166] In August 2002, the defender took up a position with Shell in the United States of America. The pursuer gave up her contracting job in Brunei and moved to the USA with him. In the USA the pursuer set up a consulting company. Her evidence was that during their time in the USA the company made a tax loss of $9,242.09. I accept her evidence on her earnings during this period as it is vouched by her tax returns. In August 2004, the defender took up a new role working for Shell in Aberdeen, still as a well engineer. The parties returned to live in Aberdeen, and the pursuer started a career with Shell in November 2004.

[167] Towards the end of 2008, both parties were looking for new job opportunities within Shell. The pursuer applied for a role as Commercial Manager in Rome, Italy. She was offered the role but declined it as it was offered on local rather than expatriate terms. She remained in Aberdeen. The defender applied for and obtained a role as a "Game Changer" in the Netherlands, starting work there in February 2009. The parties separated on 4 April 2009. The pursuer remained in Aberdeen. In January 2010 she was promoted to Business Improvement Manager and remained in that role until she was made redundant in October 2014. The pursuer worked in the Netherlands in the Game Changer position until he left Shell in 2015.

[168] The defender's claim under this heading arose from the circumstances in which the defender took up the job as Game Changer in the Netherlands in 2009. The defender's

position was that if a couple both worked abroad for Shell, you could allocate one as the main carer and the other as the breadwinner. This allowed additional benefits to flow to the breadwinner as it led to enhanced ratings being applied to pension benefits and salary. However, the downside was that for the carer the speed of career progression and rate of pension benefit multipliers would be stunted. His evidence was that the carer role was changed to the defender to allow the pursuer to take on a job in Rome.

[169] In order to understand the decisions made by the parties at that stage, it is necessary to have to an understanding of the personnel procedures within Shell. Shell operated a human resources system whereby all jobs were graded. Jobs were graded in three categories. The lowest category was designated by numbers on a scale of 10 to 1, with 1 being the highest in the scale. Thus, for example, senior managers would be graded 1 or 2. The next classification was designated by letter, ranging from C to A, with A being the highest for a very senior role such as a Country Manager. The third grading was for the very highest levels and did not have a number or letter classification. In addition to the relevant grade for the job which the employee was doing at present, each employee was also graded in respect of their potential career prospects. The grading of their career potential was called "Current Estimated Potential" (CEP) and was revised every two years. Thus, for example, a senior manager with a job at grade 1 but who had the potential to progress to becoming a Country Manager would have a job grade of 1 but a CEP grade of A.

[170] It is also necessary to understand how Shell treats spouses. The defender's position was that Shell had a policy that in dual career families, one partner was designated as having the lead career and was given the career opportunities, and the other partner was designated as the following career. The defender was insistent that this was the case. The expert report from Mr Davies was instructed on the basis that this was Shell's policy. The

pursuer's position was that Shell had no such policy. Although various Shell documents were produced in evidence, none of them contained nor made any reference to anything which could be construed as such a policy. Indeed, it would be surprising, in the era of sex equality, that a company would have such a policy. Counsel for the defender submitted that although it was clear that Shell did not have a policy which forced an employee to adopt a subsidiary role when his or her partner was also employed by Shell, that was what happened in this particular case. The strength with which the defender insisted upon the existence of this policy in his oral evidence reflected badly on his credibility and reliability.

[171] Another important consideration in relation to remuneration of Shell employees is whether the particular employee has the job on "local" terms or "expatriate" terms. If the employee is on "local" terms he or she receives the relevant remuneration for that grade of job. However, if the employee is on expatriate terms, the employee receives an additional range of benefits which can, depending on family circumstances, include travel allowance, relocation, free accommodation, tax-free salary et cetera.

[172] Against that background, I turn to look at the circumstances in which the parties decided to seek new jobs within Shell in late 2008.

[173] At that time, the pursuer was working in a job in job group 2 and her CEP was set at letter category. In other words, she had the potential to progress to the letter grading of job. The pursuer's job in Aberdeen as a well manager was graded at job group 3. At some point his CEP was reduced from job group 2/1 to 3/4 but there was no independent evidence as to the reason for the downgrading.

[174] The pursuer's evidence was that she applied to a role as Commercial Manager in Rome, Italy. This was attractive as her father and stepmother lived in Rome and would have been able to help with childcare, and also that it was only an hour away from the Italian

Property which was under construction. However, she was only offered the job on local terms. On the other hand, the defender had been offered the job in the Netherlands on expatriate terms. The pursuer's position was that both parties agreed that this was financially untenable and that the defender would go to the Netherlands and she would remain in the UK. The defender's position was that the pursuer had already decided to separate and she deceived the defender into taking the Game Changer job.

[175] I do not accept the evidence of the defender that his move to the Game Changer role in the Netherlands was him adopting a subsidiary role. At the time when he left Aberdeen, the pursuer and defender were on a similar salary. The defender's salary was about £85,000, which was taxable. His package in Holland was a salary of around £85,000 per annum tax-free, £16,000 per annum travel allowance and free accommodation. Accordingly his overall remuneration was increased when he took the Game Changer role.

[176] Nor do I accept his evidence that he was unwilling to move out of well engineering and into being a Game Changer. The defender's position on this in the witness box was extremely unsatisfactory. He contradicted himself, saying at one point that he was quite happy to leave well engineering, and then shortly afterwards saying that he was reluctant to leave that discipline. In contemporaneous emails to his superiors he expressed enthusiasm for the move. In an email dated 10 October 2008 he stated:

> "I have noticed the following opportunity that I am very interested in which would be a good solution. [The Game Changer job in the Netherlands] which I believe might as well have been written for me…! I would expect that such business opportunities seldom come up and this would allow me to really shine as I could fully utilise and further develop my strengths and meet my development opportunities."

In an email in February 2009, after he had taken up his new role, he stated:

> "I am having an absolute ball here in my new role with a superb team – basically anything goes! The work is very varied and am certainly in demand by the rest of the

> team due to my background, previous experiences and contacts and certainty able to contribute already in many areas."

In the witness box he showed little understanding of the difference between the truth and a lie, maintaining that what he stated to his superiors was not a lie because he had to say that it was his perfect job in order to get it.

[177] Further, I note that the alleged disadvantage to the defender arises at a very late stage in the parties' time together. The parties were together from their marriage in 2000 until the relevant date on 4 April 2009, a total of around nine years. It was the pursuer who followed a subsidiary career for much of the time until the defender took up his job in the Netherlands in February 2009. She followed the defender on his postings to Brunei and the United States, and in neither of these places was able to obtain employment of a comparable level to that which she obtained when they settled in Aberdeen in 2004. During their time in Aberdeen, neither was in a subsidiary role.

[178] Further, the defender has not established that his career has suffered in Shell because he took the Game Changer role. The defender's position was that as a result of the move to the Game Changer role, he lost the opportunity to be promoted. There was conflicting evidence led as to whether the defender had withdrawn from a course which was a requirement for promotion, but the defender ultimately accepted in evidence that he had completed the course. He successfully re-applied for the Game Changer job in 2010. His position that it was difficult to move back into well engineering from the Game Changer role is not supported by any independent evidence. In any event in 2015 he left Shell. He has not established that his departure was caused by him taking the Game Changer role.

[179] Accordingly, I find that the defender has not suffered an economic disadvantage for the benefit of his family.

[180] In view of this finding, it is not necessary for me to make a finding on the quantification of the defender's loss in respect of that economic disadvantage. However, as I did hear expert evidence on the matter, I shall deal with briefly with how I would have dealt with quantification had a disadvantage been established.

[181] The defender submitted that he had suffered a loss of income of £223,092. In support of this quantification he led evidence from Peter Davies. Mr Davies has a background in vocational rehabilitation. He is regularly instructed to provide reports in personal injury and matrimonial cases.

[182] The question which Mr Davies had been instructed to address in his report was "Has [the defender's] career been damaged by [the pursuer] taking over his position in Shell as breadwinner?" Mr Davies concluded that it had and quantified the loss. In his opinion his projected net earnings to the date of the report in January 2017 had his career not been damaged were £661, 720. In his opinion he would have earned £223,092 more with Shell than he actually did. Mr Davies report was based in almost its entirety on information provided by the defender. It proceeded on the basis that Shell had a policy for married couples whereby one has the lead career and the other's career will be subsidiary to that of the first: my finding as set out above is that there was no such policy. It proceeded on the basis that had the defender not taken the Game Changer job he would have been promoted in February 2009. There was no independent evidence from Shell either before the court or supplied to Mr Davies which established that Shell would have promoted him at that time. All that can be said is that he had attended a course which was a prerequisite of promotion.

[183] There were a number of difficulties with the approach that Mr Davies took to quantification of the loss. The first was that he approached the quantification of loss in the same way as would be done in an award for personal injuries. This is inappropriate for the

reasons set out by Lady Smith in *Coyle* v *Coyle* 2004 FAMLR 2 at paragraph [49]. The second is that he made various assumptions which had no basis in evidence. For example, he assumed that the defender would be promoted in 2009 and again in 2010. He himself volunteered in the witness box that he was not an expert on Shell's internal salary structure, and yet he made assumptions about their salary structure by extrapolating from one year's information in 2016, and assumptions about where the defender's salary would sit within the pay grade. He volunteered in cross-examination that he was speculating. No deduction was made for any earnings after he left Shell as he (and indeed the court) had no information as to what earnings he had then. In these circumstances I would not have been satisfied that the defender had proved the quantification of his loss of salary.

[184] The defender claimed loss of pension rights in the sum of £844,600. In support of his quantification he led expert evidence from Dr Pollock. Dr Pollock was asked to consider the additional value of pension rights that would have been accrued by the defender had he not restricted the level of his career to support his wife during the marriage. Dr Pollock calculated two periods of pension loss. The first was for the period from the date of marriage to the relevant date and amounted to £237,300. The second was from the relevant date until retirement at 60 and amounted to £607,300. These calculations were based on the factual scenario and figures in Mr Davies report. As I have not accepted the factual scenario or figures in Mr Davies' report, it follows that I would not have been satisfied that the defender had proved his quantification of pension loss.

Section 9(1)(c) capital contribution for children's school fees etc

[185] I was informed that the pursuer and the defender were litigating in Aberdeen Sheriff Court about aliment for the children.

[186] In the present case, the pursuer sought a capital sum of £105,000. That was calculated on the basis of it being half the amount to be spent on the children until each of them reaches 16. The school fees for both children amount to £53,000 per annum. Her evidence was that additional holiday childcare, clothing entertainment and other expenses amount to a further £7,000 per annum. That gave a total of £60,000 per annum until the son was 16, and £30,000 per annum when the son was over 16 and the daughter was under £16,000. That gave a total of £210,000. The pursuer's position was that she was using capital to fund this and was receiving no assistance from the defender so it was reasonable that part of the matrimonial capital be set aside for application to the defender's £105,000 share of these costs.

[187] This court granted residence to the pursuer from 2014, initially on an interim basis. Prior to 2014, the children had been living with the pursuer in the Aberdeen area. They attended local schools in the area which catered for the son's dyslexia and behavioural problems. In 2014 the pursuer and the children moved to Chester as the pursuer had obtained employment in Wales. The children went to local schools. In 2015 the pursuer left that employment and set up her own consultancy business. She obtained consultancy work in Switzerland and commuted from Chester to Switzerland, returning on Thursday nights to spend the weekends with the children. The children attended local schools and were looked after by a nanny. The pursuer was of the view that the local schools did not adequately cater for the son's special needs. The pursuer wished the children to attend a boarding school in Wales which caters for special needs. The daughter wished to attend the same school as her brother. The children were offered a place at the boarding school in July 2016. The defender did not agree to them going to the boarding school and did not agree to pay a share of the school fees. By that time, the defender had stopped working for Shell in

September 2015 and had no income. The pursuer wished the children to go to the boarding school and they are now at the school, with the fees being paid by the pursuer. It appears that both children are happy at the boarding school.

[188] The principle set out in section 9(1)(c) of the 1985 Act is that the economic burden of caring for the children should be divided fairly between the parties. In the current case, the children were educated in the state system while parties lived together and indeed for 7 years from the date of separation. The children moved to boarding school in accordance with the wishes of the pursuer and against the wishes of the defender. Immediately prior to the move to boarding school the pursuer was commuting weekly to Switzerland and the children were being looked after at home by a nanny during her absence. There was no independent evidence that the son's special needs could not have been met in the state sector. In these circumstances in my opinion it would not be fair for the defender to be required to meet boarding school fees through the ordering of a capital sum. The other elements of the capital sum sought relate to the children's normal day to day living expenses which can properly be dealt with in the normal way through the Child Support Agency or (if relevant) in the sheriff court action, and do not justify a capital award.

Summary on matrimonial property

In the light of the above, I summarise the parties' positions as follows:

		JOINT	**PURSUER**	**DEFENDER**
Shell Pension			125,565	295,439
HSBC account	34,411			
Bank of Scotland joint account	9,385			
Total of HSBC and Bof S joint accounts	43,796	43,796	13,148	30,647
UniCredit ending 104		19,686	9,843	9,843
UniCredit ending 232		21,379	16,986	4,393

Credit Suisse ending 42-2			1,516	
Credit Suisse ending 780			3,085	
Intesa Sanpaolo			12,016	
TD Ameritrade		14,169	7,085	7,085
Halifax ending 545			9,699	
Credit Suisse ending 1-45		35,418	35,418	
ABN AMRO ending 084				6,709
IF savings account				29,950
Halifax Shell Sharesave ending 946			9,750	9,750
Shell Share Options			2,000	
Baronsmead VCT			14,446	
Rents for Goswell Road			1,218	
99 Shell US shares				3,980
108 Shell UK shares				1,652
Barclays Endowment				3,776
Loan due to defender's brother and sister-in-law		(10,000)	(5,000)	(5,000)
Barclaycard				(4,188)
IF mortgage over Aberdeen house				(346,985)
Loan from pursuer's father			(45,557)	0
Pursuer's sharing of gift from uncle			(45,557)	
Mortgage over Kew house			(76,499)	0
			89,162	47,051

[189] Adding the figures from the table for the pursuer and defender gives a total of £136,213. Half of that is £68,106. From that there falls to be deducted the defender's property of £47,051 and repayment of the half share of the loan from the defender's brother of £5,000. That leaves a balance of £16,055 due by the pursuer to the defender.

[190] The following further adjustments then require to be made:

		PURSUER	**DEFENDER**
Pursuer's contribution to Aberdeen Property		25,000	
Defender's contribution to Kew Property			31,000
Pursuer's contribution to maintenance costs of Italian property after the relevant date		22,900	
		47,900	31,000

[191] When the totals in the above table are balanced off against each other, there is an imbalance of £16,900 in favour of the pursuer.

[192] When the £16,900 in favour of the pursuer is deducted from the previous total of £16,055 due by the pursuer, the balance is £845 in favour of the pursuer.

[193] The balance of £845 is *de minimis*. Accordingly, I find that no payment of a capital sum is due to or from either party.

Fairness of proposed financial provision

[194] I have considered whether the above result would be a fair one in the light of the circumstances and the parties' current financial position. In my opinion it would.

[195] The complexity of the parties' financial affairs is the result of their joint decision to undertake the Italian Property project. Had they not done so, their financial affairs would have been relatively straightforward. They would have had various investments which they made pre-marriage, their houses at Aberdeen and Kew respectively, and their matrimonial property. Their joint decision to undertake the Italian project required to be financed. They did not have sufficient free cash for this. Therefore they had to use their various investments, assets and properties, either by cashing them in or by increasing the borrowing secured on them. They also had to borrow money from family members on both sides of the family. Very substantial funds were realised through such means, and applied to the Italian project. This process was managed by the pursuer. Due to the complexity of this financing, and the large sums of money involved, it is understandable that the defender found it difficult to understand where the money had gone, how little of the parties' previous assets remained and how much the borrowing secured over their UK assets had increased. The Italian property has required to be maintained since the relevant date. The

Italian property is now to be sold with each party being entitled to a one half share. In my opinion this gives a fair result. The parties agreed to undertake the Italian project and they will share in the proceeds of it.

[196] I also require to consider whether the proposed financial provision is reasonable having regard to the parties resources or whether the award should be reduced on the basis of the paying parties' resources.

[197] Both parties have limited resources.

[198] The pursuer is in employment. Since the relevant date she has bought and sold various heritable properties and financed this by mortgages over these properties and over her Kew property. In addition to the Kew and Milan properties, and her interest (if any) in the Goswell Road property she has two mortgaged properties in Chester, one of which she lives in and the other is let out. She has calculated her total net worth (not including the Italian Property or the Milan property and on the assumption she had a one third share of the Goswell Road property) as at 24 May 2017 as being a negative figure of £45,535.

[199] The defender is not in employment. The net proceeds he received from sale of the Aberdeen Property (after repayment of the mortgage secured over it for the purposes of the Italian property project and other expenses) amounted to around £25,000. He has no heritable property other than the Italian property and his interest (if any) in the Goswell Road property. He lives with his father in a house owned by his father.

[200] As no capital award is to be made in favour of either party, the financial provision is to be met in its entirety from the proceeds of the sale of the Italian property.

The pursuer valued the Italian property at €850,000 and the defender valued it at €1.55m (£1,350,000). The true value of the property will be determined by the sale price.

[201] In my opinion the financial provision will be a fair one in all the circumstances of the case.

Order

[202] Accordingly, I shall:

(1) uphold the pursuer's first plea in law and grant decree of divorce;

(2) uphold the pursuer's fourth plea in law and repel the defender's fifth plea in law and grant an order for sale of the Italian property and contents (other than the desk owned by the pursuer) and make directions as to the proceeds of sale;

(3) repel the pursuer's fifth plea in law, uphold the pursuer's seventh plea in law and the defender's fourth, sixth and seventh pleas in law and find neither party liable to pay a capital sum to the other;

(4) make incidental orders to facilitate the closing down of certain bank accounts;

(5) reserve all questions of expenses (including certification of experts) in the meantime.