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Case No: FD12D01549

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2014

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

JAMIE ANNE COOPER-HOHN	**Applicant**
- and -	
CHRISTOPHER ANTHONY HOHN	**Respondent**

- -

- -

Martin Pointer QC, Stephen Brandon QC, Geoffrey Kingscote and Oliver Marre (instructed by **Mishcon de Reya**) for the **Petitioner Wife**
Lewis Marks QC, Elizabeth Clarke and Emma Chamberlain (instructed by **Withers LLP**) for the **Respondent Husband**

Hearing dates: 1st to the 11th July 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

This judgment is being handed down in public on 12 December 2014. It consists of 310 paragraphs and has been signed and dated by the judge.

This judgment has been edited by the removal or modification of a number of identifying details and some other facts concerning the parties' confidential affairs, including personal, financial and commercially sensitive material.

Mrs Justice Roberts:

This is necessarily a lengthy judgment. It is arranged in the following sections:-

A. Introduction

1. Over the course of ten days between 1st and 11th July 2014, I have been dealing with the final hearing of a wife's claim for financial remedy orders. During the course of that hearing, I delivered an extempore judgment in relation to a discrete issue which arose in relation to the ability of the press to report the proceedings. It is reported as *Cooper-Hohn v Hohn* at [2014] EWHC 2314 (Fam). This is my judgment in respect of the main application. The issues canvassed in the hearing were complex, involving both disputed issues of facts and law. I heard submissions from leading counsel instructed on both sides to deal with aspects of publicity and tax, as well as the financial teams who were assembled to represent the parties. Mr Martin Pointer QC with Mr Geoffrey Kingscote and Mr Stephen Brandon QC with Mr Oliver Marre appeared for the wife. Mr Lewis Marks QC and Miss Elizabeth Clarke represented the husband with Mrs Emma Chamberlain. To both those teams I owe thanks for the meticulous and detailed preparation of their respective cases and the quality of the advocacy, all of which was of enormous assistance to me in reaching my decision on the issues with which I shall need to deal in this judgment.

2. Given the complexities of the case, the written material before the court was helpfully contained within three core bundles. Both sides produced detailed written skeleton arguments in opening and closing. I had two full bundles of authorities before me in relation to the matrimonial and tax issues and a very helpful organogram showing how the husband's business structure operated as between the various entities (both onshore and offshore) through which the wealth in this case has been created. The only witnesses from whom I heard oral evidence were the husband and the wife.

3. The assets which are available for division between these parties in this case are worth between US$1.35 billion and US$1.6 billion. There are various aspects relating to computation with which I shall deal in due course. However, those figures do not represent the full extent of the assets which have been generated by the husband's commercial activities during the subsistence of this 17 year marriage. In addition to the wealth which the parties hold personally, a further sum of US$4.5 billion has been channelled into a charitable Foundation which, through donations made to grantees in both the UK and the US (where there is a separate charitable Foundation), has achieved international recognition as one of the leading world charities in the fields (amongst others) of child poverty, HIV/AIDS and climate change. It is known as The Children's Investment Fund Foundation (or CIFF UK and CIFF US). In this judgment, I propose to refer to these two limbs of the charity as respectively 'the UK Foundation' or 'the US Foundation'.

The respective cases of the parties

4. It is common ground between the parties that all of this wealth (c. US$6 billion) has been accumulated during the course of their 17 year marriage. In terms of their personal wealth, the husband contends that much represents post-separation accrual, having been accumulated or 'earned' during the ensuing years of separation since 2012 at a time when the wife's contributions *qua* spouse had ceased. That, he says, is one reason why there should be a departure from equality in terms of the share of the wealth she should receive at the end of the marriage. He also contends that his creation of wealth on this scale falls to be considered as a special and unmatched contribution which is further justification for a reduction in the wife's entitlement.

5. His case is that the wife should receive no more than one-third of the assets as they stood in April 2012 when the marriage effectively came to an end and one half of one third of the post-separation accrual which has been achieved since then. In round terms, this would see her leaving the marriage with assets of c.US$350 million (c. £200 million on prevailing exchange rates at the date of trial), or some 25% of the currently available

assets. The wife seeks what she contends to be her entitlement to a full and equal share in what has been built up to date. She brings her claims from the foot of substantial and valuable contributions which she claims match those made by the husband, even if they are different in kind and quality to his wealth creating function. To seek to discount her 50% entitlement would, she claims, amount to clear discrimination in terms of the evaluation of those contributions.

6. That each of these parties has devoted most of their adult lives to the pursuit of philanthropic causes is not in dispute. Whilst I shall need to say more at a later stage about the roles which each adopted in furthering their charitable work, it needs to be said at the outset that these are remarkable people who have undoubtedly already made a significant difference in terms of their combined objective to leave the world a better place. That much is a given in this case. What I have to decide is how their personal fortune is to be divided between them as they begin the process of leading future lives independent from one another save for their continuing roles as parents to four much loved children.

B. Headline issues

7. Essentially, the headline issues which I shall have to determine are these:-

i. What is the extent of the assets available for distribution as between the husband and the wife (the computation issue)?

ii. To what extent do those assets fall to be considered as part of the marital acquest or, alternatively, to what extent have they been generated (or added to) in the period between separation and the date of trial (the marital acquest or post-separation accrual issue)?

iii. What percentage of the overall available wealth should each party receive at the end of the marriage? In particular, is a departure from equality justified on the facts by either or both of (i) post-separation accrual and/or (ii) special contribution on the part of the husband (the distribution issue)?

iv. In either event, should there be a *Wells* sharing of any or each of the various categories of assets, to include any goodwill value which I find to exist in the TCI entities over and above the value of the assets they currently hold?

C. Background

The parties and the early years of their married life

8. This case has already attracted a significant amount of publicity in the media generally, not least as a result of (i) its journey to the Court of Appeal on a discrete issue in June this year, and (ii) the well-publicised substantive final hearing before me in July when, amongst other issues, I had to decide the extent to which there should be restrictions on reporting. Neither party seeks anonymity; each accepts that the scale of their wealth and the issues which arise for determination carry the inevitable consequences of widespread media interest. Thus, whilst the identity of the parties and their individual roles in connection with the charitable Foundation is information which is widely known, I have directed that none of their personal financial information may be disclosed or reported publicly. I have explained my reasons for this restriction in my earlier judgment.

9. However, as will be obvious, I cannot in this judgment embark upon the detailed forensic exercise which will be required in terms of the financial analysis of the evidence without reference to, and examination of, several aspects of that private information. To that extent, as I advertised at the conclusion of the hearing, consideration will undoubtedly need to be given to the extent to which redaction of parts of this judgment may be required. That will need to be the subject of further thought in due course once my decision and the reasons for it have been released to the parties and their respective legal teams. However, for present purposes and save where indicated by reference to abbreviation, I have not sought to anonymise any of the individuals or entities about whom or which I heard. Whilst I shall identify the parties in what follows, I propose to refer to them in this judgment as “husband” and “wife”. I intend no disrespect to either in adopting this convenience.

10. The husband is Sir Christopher Hohn. He will be 48 at the end of October this year. Shortly before the hearing, in June 2014, he was appointed to the Order of St Michael and St George, KCMG, for services to UK philanthropy and international development. He has accumulated great wealth over the course of his working life as a fund manager, and his career in finance is something to which I shall return.

11. Although family life for the last few years has been lived in England (where both parties maintain homes), the husband was born to Jamaican parents. He is a national of both the United Kingdom and Jamaica and retains his Jamaican domicile. He has described in his written evidence the rich ethnic ancestry which he enjoys and of which he is justly proud.

12. In the early 1960s, he moved with his family to England where his father found employment as a motor mechanic, an occupation which he pursued until his retirement. The husband's parents are now in their 70s and spend much of their well-earned retirement in Jamaica and elsewhere out of the United Kingdom.

13. The husband's early years as the middle of three siblings were unremarkable in terms of the success which was to come. He was educated within the state system and took A levels in maths and sciences. He was thereafter to graduate from Southampton University with a first class degree in business and accounting. Employment followed swiftly and he spent two years working as a financial analyst for Coopers & Lybrand before deciding to embark upon further study at Harvard Business School in the United States. As he explained in his written evidence, he never felt as though he belonged or 'fitted in' to a conventional career path in the City. After two years at Harvard, he graduated in the top 5% of his class.

14. It was at Harvard that he met the wife who was also studying for a Masters degree.

15. The wife is Jamie Cooper-Hohn. She is 49 years old and is an American national. Although she has lived in the United Kingdom since 1998, she retains her American domicile. She grew up in Chicago before moving to Connecticut to continue her education in the mid-1970s. She has a sister and her parents, each in their 70s, live in Connecticut in reasonable proximity to the home which the husband and wife own in that state.

16. Her early life appears to have been spent in the midst of a stable and nurturing family, albeit one which did not enjoy the privileges of wealth. She, too, attended state school and went on to study at Smith College, Massachusetts where she graduated with a Bachelor of Arts degree in 1987. She had a number of jobs thereafter, working for CBS News in New York where she was employed as a state election co-ordinator and assistant producer before moving in 1988 to become programme manager for the Centre for Policy Alternatives in Washington DC. In 1994, she completed a Masters degree in Public Administration at John F Kennedy School of Government, part of Harvard University. Here she met the husband.

17. I heard some evidence about this couple's early impressions of one another. It has a bearing on the case and the issues which I have to decide because it provides some insight into their aspirations even in those early years. The wife told me that when they first met, and before their relationship began, they had a conversation during which the husband had told her that he intended to make a great deal of money in his future career.

She told him that, if that was his sole objective in life, they had little in common and she was not interested in starting a personal relationship with him. It appears that it took the husband some time to persuade her that there was a future for them together, but she was eventually convinced by what he told her of his own philanthropical leanings. These had developed, as he told me, during his early twenties. He had originally considered a career as a doctor. During a visit to the Philippines, long before he met the wife, he had seen the abject poverty in which many of the children in that country were living their lives, often existing in 'garbage dumps'. It affected him deeply and he resolved to do whatever he could to alleviate that suffering if ever he should find himself in a position to do so. He told me that he had persuaded the wife that, if he succeeded in creating sufficient wealth in the future, it was his intention to apply it towards philanthropical causes. As he put it to me, *'a dream, an aspiration without resources is just that'*.

18. During the early years of their relationship, I am satisfied that the sort of wealth which would have enabled this couple to turn aspiration into reality was simply not available to them. Each had periods when they were unemployed. During this early period they were, as I find, very much a young couple enjoying all that the relationship brought in terms of love, mutual support and company.

19. On 8 October 1995, the parties married in Washington DC. The wife had by then resumed work at the Centre for Policy Alternatives where she had been promoted to Associate Director. She was earning approximately US$100,000 per annum.

20. As to the husband's career post-Harvard, he obtained employment in Boston with a consulting firm before returning to London in 1994 where he worked for Apax Partners. After about a year, he returned to the United States. Having married, and after a brief period of unemployment, he found a job in New York. From January 1996, he was managing a hedge fund owned by Perry Capital. His starting salary was US$70,000 per annum. The parties rented an apartment in lower Manhattan and the wife took a position on the executive team of a charitable foundation working on inner city education programmes.

21. Some two years later, in 1998, the husband's abilities had clearly been noticed and recognised by his employers. He was asked to move to London to open a European office for Perry Capital. The couple moved from New York in the autumn of 1998 and shortly thereafter, their first child, a daughter, was born in London in January 1999. They were then living in rented accommodation in an attractive part of North London.

22. The husband's performance in the new London office continued to impress his employers who invited him to set up a new fund of which he was to be the sole investment manager. Together with the pre-existing fund which he continued to manage, he had by now some US$2 billion of assets under management. It was during this period that he developed and began to hone his 'activist' investment strategies. Whilst he had a couple of analysts working for him, he was responsible in those early days for finding new business ideas and making all the investment decisions.

23. The wife continued to pursue her interest in charitable causes working as a co-director of the Shine Trust, a London based grant-making trust which supported children living in poverty in England. She also took on a role as a consultant for the National Employment Panel.

24. The wife gave birth to triplets in June 2001. Their eldest child was just 2 years old when the family expanded from three to six with the addition of two new daughters and a son. Whilst she had some help from nannies who became 'the extra pairs of hands', it is difficult to conceive of a greater contribution to their domestic life during that period than the one which the wife was making. Whilst the husband was no doubt a loving and devoted father to all four children, I have little doubt that the heavy demands of his own working days resulted in the wife having to shoulder the majority of the responsibility for their domestic and home life. Whilst they were financially very comfortable by this stage as a result of the husband's increasing remuneration from Perry Capital, I am entirely persuaded that this wife was a 'hands on' mother to each of their four children in the fullest sense of the word. Whilst their children are now 15 and 13 years old respectively, it has to be remembered that for three years during this period, she was looking after four children under the age of 5 years.

The Children's Investment Fund ('TCI Fund') *and the related Charitable Foundations*

25. By the beginning of 2002, the husband's accumulated wealth as a result of his work for Perry Capital over some seven years was such that these parties could have retired without either needing to work again. On the husband's evidence, he had by then accumulated wealth of about US$100 million. The wife told me that she did not know the full extent of their personal wealth at that time and it was not a matter of concern to her. They were still then in their thirties and parents to a very young family. That independent wealth enabled this couple to take stock of life and decide where their future would take them.

26. The husband's evidence, which I accept, was that he then saw two options open to him. The first was retirement; the second was to raise money for charitable purposes through an independent fund. Neither of the parties appeared to have had any interest in increasing the extent of their personal wealth. As the husband told me, his life has never been motivated by money. Whilst that remark has to be seen in the context of the security of the wealth which he had by then created for his family (the scale of which is not available to most), I accept that the fundamental driver behind this husband's continuing success has never been the accretion of vast personal wealth. Whilst it is clear that this couple lived a life which was free from financial constraint in beautiful homes of their choosing, I am entirely persuaded that neither has pursued a materialistic lifestyle involving discretionary spending at a level which would certainly have been available to them. On the contrary, they are quintessentially an intensely private couple and family life has always been lived modestly and away from the public gaze.

27. At this particular crossroads in their lives, the husband decided, in consultation with the wife, to take the latter of the two options; he decided to leave employment in order to set up and manage his own independent investment fund. It was called The Children's Investment Fund. I shall need to say more about the complex structure which now underpins the various TCI entities in due course.

28. The position in relation to the two charitable Foundations is much more straightforward.

29. Whilst the husband was working at Perry Capital, he decided to start a Foundation which was originally called 'the C H Foundation'. This is what has since evolved into the main UK Foundation and its US counterpart. The C H Foundation was incorporated on 8 February 2002. It was registered as a charity the following month. In January 2004, its name was changed to The Children's Investment Fund Foundation (UK). The three original members were the husband, the wife and one of their friends and business associates, Marko Lehtimaki. (Including the husband and wife, there are now on the board seven trustees comprised of 'serious industry heavy weights' from the world of commerce and finance.) Part of the original investment in the US Foundation appears to have flowed from a significant donation which had been made by Perry Capital in 2002. That donation was made at a time when the husband was still formally under a contract of employment, albeit that his sole contractual entitlement at that time was the payment of a salary. The wealth he had by then created had been built up from years of receiving very substantial discretionary and performance-based bonuses. Whilst I do not know the precise detail of the route by which that money was diverted to the Foundation as opposed to the husband, it is probable, as he himself accepted, that there was a good

chance or likelihood (as he put it) that, absent such diversion, the monies would have been paid to him despite the absence of any strict contractual entitlement. It appears from the husband's evidence that the owner of Perry Capital was enthusiastic about the idea of benefitting the US Foundation and was happy to channel funds in this way

30. In April 2002, the counterpart US entity was incorporated and registered as a charity in the United States. The Settlor was Sarah Mudho, the New York attorney instructed by the husband. The wife was named as one of the original three trustees (there are now four). Its name was officially changed to 'The Children's Investment Fund Foundation' on 28 May 2003 ('the US Foundation'). The husband does not appear to have been a trustee either at this point in time or subsequently. The wife maintains (and the husband appears to accept) that this was a deliberate decision taken in the interests of tax efficiency to avoid any adverse fiscal implications for the UK Foundation. There is an issue between the parties as to whether, in subsequent years, the wife (who is Chairman of the board of trustees) has been actively opposed to the husband's appointment as a trustee of the US Foundation, but these are matters to which I shall return later.

31. For several years after its formation, the US Foundation was funded solely from management and performance fees generated by the TCI Fund. When it became clear to the parties that the amounts of money flowing in were becoming so great that they were affecting the ability of the US Foundation to make grants at the required rate of 5% per annum, the decision was taken to focus future funding on the UK Foundation. The US Foundation is now what the wife describes as the 'little sister' to the UK Foundation. It is the UK entity which reviews all proposals for grants and selects which grants to make.

32. The UK Foundation is now worth some US$4.5 billion. The US Foundation holds assets worth some US$140 million.

The TCI Fund (or the Master Fund)

33. In 2003, the husband left Perry Capital in order to set up The Children's Investment Fund. TCI was formally launched at the beginning of January 2004 with investments of $500 million then under management. The new venture which TCI represented was what the husband describes as a 'clean break' from Perry Capital. It was not in any sense a lateral move with a core supporting team. He took no employees with him and independently employed a single analyst at the outset.

34. It is important to distinguish between the TCI Fund (or Master Fund as it is sometimes referred to in the papers) and the charitable Foundations. Whilst their names are similar, they are entirely separate entities. The TCI Fund investments and the TCI Group of

corporate entities are matrimonial assets. The charitable Foundations are entirely non-matrimonial. Whilst the funds held by each have been generated in the main by donations made over past years from the TCI Fund, neither of the parties has any beneficial interest whatsoever in those funds. The assets of both the US and UK Foundations are exclusively charitable and entirely external to the resources over which I can exercise any statutory jurisdiction under the Matrimonial Causes Act 1973. That said, one of the key features of this new investment fund was its direct link to the UK Foundation and the philanthropic causes it was to support. The investors who were invited to join TCI were identified because of their willingness to invest on the basis of a clear contractual agreement that the Foundation would receive a percentage of the performance and management fees generated by TCI (the private investment fund). In this way, the success of the fund was directly linked to the sums which would flow into the Foundation. The investors were persuaded to agree to significantly longer lock-up terms than were then 'industry standard' on the basis that an element of the returns they would see from the husband's management of those funds would go directly to philanthropic causes.

35. There are three issues separating the parties in relation to the TCI Fund and the Foundation:-

    i. In terms of its (apparently) unique underlying concept, who was responsible for introducing the concept of the contractual nexus between the performance of the TCI fund and the fees which would be paid to the Foundation?

    ii. How did the parties anticipate the 'division of labour' in terms of their individual contributions towards the TCI Fund and the Foundation?

    iii. What contributions has each subsequently made?

36. These are matters to which I shall return at a later stage of this judgment when I consider the issue of the parties' respective contributions. At this stage, it is relevant simply to note that there is no dispute between the parties but that, until May 2012, the Foundation continued to receive funding from TCI either in the form of direct charitable donations or (from September 2007 until May 2012) in the form of a percentage of management fees paid through a trading subsidiary of the Foundation. In May 2012, some two months after the wife issued her Petition seeking dissolution of the marriage, external lawyers and advisers were appointed and it was agreed by the Foundation's Finance Committee and the board of trustees that the Foundation's future

interest in that revenue share would be terminated in consideration of a 'one off' payment of US$20 million.

37. For the first five years of the Fund's existence, and until the financial crash in 2008, it is the husband's evidence that 98% of the fees which would otherwise have been paid to him through TCI (as its sole shareholder) were allocated as donations to the Foundation. In 2008, at a time when he was drawing c. US$3 million from TCI, a further US$500 million was allocated to the Foundation. Aside from the funding which it has received from TCI over the ten years to 2012, there has never been any external funding injected into either Foundation. The phenomenal growth over the years in the underlying investment capital is the result of the successful performance of TCI and the funds under management. In April 2009, management of the Foundation's investments was transferred to a separate corporate management entity ('Talos') which has since that date administered the charitable portfolio. Talos is an Irish company which has a UK sister entity. Following the global financial crisis in 2008, the Talos entities were created as subsidiaries to the Foundation and they now hold the charitable investment portfolio which is designed to give the Foundation a regular return in the form of an income stream.

38. As stated above, the UK Foundation currently holds assets worth between US$4.5 and US$4.6 billion. The US Foundation holds assets worth a further US$140 million. There is currently a contractual nexus between the two entities. In practice, the US Foundation has been making appointments in favour of the UK Foundation for a number of years and that has always been viewed as a proper application of its funds for charitable purposes. The annual target for grants awarded is 5% of the assets held, or c. US$230 million per annum.

39. It is important to restate at this point that both parties accept that this court has no jurisdiction whatsoever in terms of dividing the funds belonging to the two Foundations. Those have been alienated from the reach of their personal wealth and are now properly constituted as charitable funds governed by an independent board of trustees and regulated by UK and US charity law respectively.

40. In contrast, the value of the husband's personal asset base insofar as it is comprised by his shares in TCI fluctuates in three ways:-

    i. as a result of growth in his personal investment in the TCI group entities;

    ii. as a result of his share of the management fees charged (a) to external investors in TCI (represented by a flat percentage of the funds under investment from time to time, usually 1.5%) and (b) to Talos (which owns the Foundation's assets)[1]; and

iii. as a result of his share of the incentive/performance fees (based upon the underlying performance of the fund from time to time) received by the Manager of TCI (between 15.5% and 16.5% of the increase in value of investments once a fixed 'hurdle' rate is achieved).

41. It is the husband's evidence, which I accept, that the vast majority of this couple's current wealth (some 90% or more) emanated from the funds which he had accumulated by the time he left Perry Capital in 2003. The US$100 million odd which he put into the TCI fund (his personal investment vehicle) has, over the ensuing years, increased about nine-fold. Because the husband has invested in a specific class of 'management' shares, he is not required to pay fees on the funds which represent the parties' personal investment in the TCI Fund. The original investment has compounded at the rate of 24% over fifteen years as opposed to an 'external investor' rate of return of 19%. As the husband explained it during the course of his oral evidence, *'If you double people's money where £1 becomes £2, the investor might receive £1.60* [after allowing for payment of fees]*, versus Jamie and I would receive £2' [sic]*.

42. Put simply, his personal assets within the TCI Fund track its value. He told me, and I accept, that his primary motivation has been to 'grow' or increase his capital. For example, in the last year alone (2013), his assets rose by 57%, a sum far in excess of any fee income he might or might not have expected to receive.

43. It is not simply the husband who has seen this level of return. Riding on the back of his investment decisions, over a ten year period, a typical external investor will have received a return of six times its original investment whereas the husband's (and thus, the wife's) return has been equivalent to nine times the original investment. By way of further comparison, the husband's evidence (which was not challenged) was that a similar investment in a MSCI Global Equities fund would have returned to an investor (before fees) a 100% return (ie. a doubling of the original investment) over a 10 year period. The husband achieved a return equivalent to nine times the original investment.

[1] There was some ambiguity in relation to the evidence which I heard in relation to the management fees paid by Talos, but I do not regard it to be a material ambiguity. The oral evidence which I heard was to the effect that Talos is charged performance fees but (apparently) not management fees, although the husband's written evidence was to the effect that Talos was charged a *de minimis* management fee. In the context of considering his personal resources, I take the view that this can be disregarded since the husband's oral evidence was that this minimal fee went to others and not to him. Paragraph 109 of my judgment should be read in this context.

44. The current value of the funds under management in TCI does not represent the high point of value. At its peak in 2008, there were some US$19 billion of funds under management. When the global markets crashed in 2008, many investors withdrew their funds. The Fund lost massively and the husband was thereafter obliged to embark upon the course of recovering for his investors all the losses they had sustained. He told me that he felt a sense of moral obligation to those investors who stayed with him. That he was able to achieve this through sheer 'effort and sweat and blood'[2], as I accept he did, is testament to the fundamental principles which have driven his business success.

Activist investing

45. It appears to be common ground that the exceptional level of returns has been achieved in this case largely as a result of the husband's strategy of activist investment.

46. I had before me a significant amount of evidence, both written and oral, in relation to the husband's *modus operandi*.

47. Although TCI is called a 'hedge fund', as the husband was to explain, it does not operate on the basis of hedging its investments. It is described as such because of the fee structure which involves investors paying both a management fee and an additional incentive fee if certain hurdle rates are met. These charges vary depending on the share class into which the investor elects to tie its funds.

48. Because the husband's rates of return are achieved in part as a result of his decision to invest in high risk / high return opportunities, he needed a platform of financial stability from which to operate. When he launched TCI, he was the first hedge fund manager in Europe to persuade investors to lock in their funds for up to five years without the ability to withdraw their investments before the end of that period. Initially, it appears that some two-thirds of the value of the Fund was made up of the five year share class, with the remainder locked in for three years.

49. After the global financial crisis in 2008, the husband found it much more difficult to persuade investors to lock up their funds for such extended periods. He therefore created new share classes to entice back the funding. The result is that the Fund now has far greater liquidity than in its first five years of operation with almost 50% of the underlying investments in a share class which permits investors to exercise quarterly redemption rights. That he was able to bring the funds back in is clear from the results

[2] [Transcript [5] page 504]

achieved in subsequent years. Each agreement with the Fund's individual investors contains a 'key man' clause whereby, in the event that the husband should cease his involvement in the management of the Fund, each and every investor is entitled to withdraw its funds after four months with the potential thereafter for the Fund to be liquidated and wound up.

50. The husband describes his investment strategy as the direct result of his 'personal, intellectual and emotional make up'. He likens his abilities to those of an expert chess player who is able to recognise patterns. This ability, he says, when combined with 'an appetite for financial risk, determination in business and a contrarian approach' are the keys to his success. He describes his ability to pick stocks as not being driven by formulae or data but as coming from within his head: *'It is subjective, not mechanical; an art rather than a science'*.

51. In describing his functions as an 'activist investor', the husband gave me a number of examples of what his business decisions involve. Whilst this was a skill which he began to hone during his years with Perry Capital, it is now at the core of his specialist investment strategy which is practised, he tells me, by only about 1% of the world's investors. I quote from the transcript of his oral evidence in chief *(Transcript [5] pages 493 to 495]:-*

> 'What does it mean? It means that you make change within a company. You identify dramatic change within a company, and that can be both public and private, and the most extreme and public examples of activist investments that I made were ABN Amro Bank listed in the Netherlands, where I bought 1% of the shares and put a motion on the Annual General Meeting for the bank to put itself up for sale and be sold. The management said, "You should go to hell". I said, "Well, it is my legal right. You have been underperforming." 70% of the shareholders voted for my motion and the Bank was sold for US$100 billion, virtually all cash, in a hostile break-up by three financial institutions, and the [TCI] Fund made US$1 billion on that investment.
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> Another example was Deutsche Börse where I bought a very large stake in order to stop what I thought was a value destructive acquisition of the London Stock Exchange. I formally put motions to the Annual General Meeting to remove the CEO. The Chairman was Chairman of Deutsche Bank. Under that pressure, the CEO was sacked, the Chairman sacked himself, and the shares went up five times.
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> Most recently during 2013, there are two examples where we are investing in a lot of privatisations recently, where dramatic change is occurring and we are driving it. Horizon was a big investment for the fund; there is the Australian Railroad where we have actively lobbied the board. We were the largest shareholder, where the company has bought back US$1 billion of stock, about 8% of that company, driving and doubling the stock price.

> There is Japan Tobacco, a large investment for the [TCI] Fund, 16% of the Fund. We publicly lobbied the Japanese Government to privatise the company to pay for earthquake reconstruction. We were successful. The Government sold about US$8 billion of stock. The company bought back billions of dollars of stock and fired the CEO and, under the pressure of hostile Annual General Meeting proposals which we have repeated every single year, including this year, the stock price rocketed and doubled because it transformed itself from an underperforming company in the process to a performing company.
>
> There is Airbus. The other part of what we do is concentrated investing. We pick a handful of investment ideas. This is the other aspect of it. It is incredibly concentrated investing. Most funds would invest 1% in 100 ideas and say we are very diversified. We take the opposite approach. Our core investments might be seven to ten ideas. So, at the start of 2013, post-separation, I identified Airbus, one of the world's largest makers of commercial airlines, as an activist investment idea. Because it was being privatised and I thought we could push change harder, we made a public proposal (which was front page of the Financial Times in 2013) for the company to sell off a division which was accepted as a sale by the board publicly. They accepted our advice and they accepted our recommendations to buy back shares, and huge change occurred in the company. But I put 18% of the [TCI] Fund in it – 18%. The shares went up over 90% in 2013.
>
> The same goes across all our investments. One way or another, virtually all our investments are actively managed. We work hard to create change in the company; it is not passive. We take a handful of debts for things where we drive dramatic change in the company, and that is what produces these dramatic returns which are far in excess of what normal people can receive by investing in the stock market. That is how we justified what are very high fees."

52. Another recent example of his activist strategy is the Fund's investment in Royal Mail shares. As soon as the shares came onto the market, the Fund began to buy. After an acquisition of over US$600 million in a few days (some 6% of the company), the share price increased. When TCI sold, it did so at £6 per share, a profit of £1.30 per share on 6% of the entire stock.

53. I heard about a piece written in the Financial Times on 23 October 2013 under the heading, *'TCI adds to Osborne's woes by checking into Hotel RM'* in which the financial journalist wrote, *'Floating a company is like opening your house as a hotel. People you might not invite to dinner check in. They hang round complaining about the service and the management's taste in furnishings.'*

54. I have little doubt that this husband is an extremely aggressive player in his field. There is no doubt that his commercial aggression drives the original ideas which he then translates into his active investment strategies. Given that this has been his skill set from his early days at Perry Capital (albeit a skill which was subsequently to be honed over future years within TCI), it seems to me that there may well be truth in the wife's evidence that both the link to the charity and its philanthropical causes and her role

within the Foundation were attractive to investors in terms of tempering his somewhat aggressive reputation.

55. Given the success of the TCI Fund over the last few years, it is not surprising that the husband has a lengthy 'wait list' of investors who are anxious to align their financial fortunes to his particular investment success. He told me that, as at July 2014, there was a wait list of US$700 million worth of investment funds. The decision as to when to take in 'new' money and whose money to take is, as he explained it, part and parcel of the decision-making process which is left to him, and him alone. He told me,

> 'We have a policy for several years now that we only take … it is explicit; we put it in all our marketing materials and verbally … approximately subscriptions equal to redemptions, because if you grow too large you cannot compound, and without compounding, there is no point to what I do. So there is a finite capacity that is taken up by management shares. In effect, it precludes fee-paying clients from entering in, because it uses up finite capacity.' *[Transcript [5] page 499]*

56. As he put it during the course of re-examination by Mr Marks, his decisions about taking in new money are based on whether the TCI Fund can continue to perform in terms of the underlying capital investments. As more investments are taken in, the returns diminish.

> 'There is a finite liquidity in every security, so when the Fund became US$20 billion, it was impossible to manage and the returns became too large ….. If you keep compounding, you need to take a decision on whether you return capital to investors ….. It is a judgment call whether you can put the money to work based on the amount of ideas and whether they are in large capitalisation liquid securities or small capitalisation illiquid securities. I would say that at any time you get in the range of US$5 to US$10 billion of assets, it starts to become problematic which is why we put a policy for the last few years of no subscriptions greater than redemptions overall. So there might be small variations month by month within a particular year, but we capped …. the new capital we would take with a formal rule and we are now actively discussing return of capital to people, return of profits. But there is a subjective thing. We look at the quality of the investor and we may say, 'we like this pension fund or we do not like that fund or funds. Is it a good investor or a bad investor?' *[Transcript [7] page 718-720]*

The overarching structure of the TCI Group entities

57. The TCI Group comprises a significant structure of separate corporate entities registered both in this jurisdiction and offshore. Over 80% of the TCI Fund is held by third party investors. The husband personally owns about 16%, either directly or through other entities, although he owns 100% of the shares in the Group. The husband's investment

in the TCI Fund is worth in excess of US$1.2 billion in round terms. This is held either in his own name as a personal investment, through UK companies or through various Jersey entities. A UK company, TCI Fund Management Ltd, is also the corporate partner in the UK LLP (The Children's Investment Fund Management (UK) LLP), which has a total of 17 partners including the husband and the trading subsidiary of the UK Foundation. It is this entity which (through Talos) manages the US$4.5 billion of assets for the Foundation, alongside the investments of the husband and the other partners.

58. There is an affiliated group of two fund management companies registered in the Cayman Islands and the UK which essentially 'piggy back' upon TCI's facilities in running their middle and back room offices. TCI holds shares in both entities which, in turn, provide it with a share of the profits in return for that administrative support.

59. Investors in the TCI Fund choose whether to invest in an onshore or offshore feeder depending upon their individual fiscal and other requirements. Within the Fund there is a significant number of US investors. The structure has been set up to enable global investors to elect the most tax efficient route for the investment of their particular funds. As referred to earlier in this judgment, the Fund has a number of different share classes and partnership interests which determine both the fee structure and the lock in period. The Master Fund, which is based in the Cayman Islands, is not controlled by the husband or any entity controlled by him. Rather, it is under the independent control of its three directors (of whom the husband is one). The board operates as an independent board, notwithstanding the significant stake which the husband has in the Fund. In theory, at least, it could dispense with the services of the UK LLP which acts as the Investment Manager, albeit that this is as unlikely a scenario as one could imagine in present circumstances, given the returns which the husband is producing for the investors. It is also relevant, in my view, that the husband is required contractually to retain significant amounts of his own capital within the Fund so as to ensure his alignment with and commitment to the other investors.

60. Within the material which formed part of the parties' presentations in opening was a detailed, and very useful, organogram setting out the corporate structure of the Group, the inter-relationship of the various entities, and the manner in which fees are channelled through the structure in accordance with various management and service agreements. For the purposes of an understanding of the facts and issues in this case, I need not say anymore at this stage about the complex internal structures which underpin the broad corporate edifice which I have set out above. The relevance of an understanding of the

broad structure lies primarily in two of the issues which I am going to have to decide in reaching my conclusions as to computation. First, is there any inherent goodwill value in the group of TCI management entities over and above the underlying assets in which the wife should be entitled to share? Secondly, what are the tax implications (or potential implications) of winding up the Group structure? These I shall come on to at a later stage of my judgment when I deal with computation.

61. At this stage, and having set out in some detail the husband's business career and his investment strategy within TCI, I turn now to consider an equally central aspect of the case : the wife's role within the UK and US Foundations and the extent to which the husband was active as a participant in either or both.

The Foundations (UK and US)

62. It is the wife's case that the plan to link the success of the TCI Fund to the charitable Foundation was an idea which, although originally hers, was one upon which they both settled at the time TCI was set up. At that point, she met with about ten potential investors to 'pitch' the twin concepts of the underlying philanthropic motivation behind the Fund and the fact that she was to be integral to running the Foundation in a professional manner. She describes herself as 'the public face' of the Foundation and told me about the work she had undertaken to develop and nurture the relationships which are necessary for the Foundation to stand as an effective facilitator for change and, as I accept, as one of the most successful charitable foundations in its field. Whilst she accepts that it was a joint project, she claims to have played a greater operational role than the husband whose energies she describes as being absorbed by his essential role in TCI generating the funds which have flowed into the Foundation over the years.

63. Until very recently, she was both President and CEO of the UK Foundation. She describes it as her 'passion' (a description which I accept as wholly accurate), and one to which she has devoted the majority of her working life. The approach which she and the husband have adopted in relation to the operation of the Foundations has been substantially different from the conventional approach to development funding. As the wife describes that approach in her written evidence,

> 'We see our funding as an investment rather than a gift. Therefore we monitor the effectiveness and success of our investments very carefully. Secondly we take a business approach, which means that we accept that nothing quite works out in reality as it did in the business plan.'

64. On a practical level, the offices of the UK Foundation and the TCI Group are housed in the same building in central London. In the early days, the wife worked from home

around the needs of the children, making appearances in the office only to attend meetings. Once the children were of school age, she was in the office every day of the working week. Her days were often extended to fit in with the children's routine and managing her role as their mother. She told me that she would often be taking calls from India at 4am or 5am as well as working until midnight after the children were in bed. Throughout the years of her involvement with both Foundations, she has worked on an unpaid basis.

65. Her role for the Foundation would often involve overseas travel for up to seven or eight weeks a year, principally to Africa and India. Under the direction of the husband and wife, the UK Foundation has focused its activity around a number of strategic priorities for children in poverty. These include perinatal mortality, under-nutrition, de-worming, early learning and prevention of mother to child transmission of HIV/AIDS. The other limb of the Foundation's focus, some five years into the life of the Fund, has been climate change and energy transformation. In 2013, a new project concerning adolescent reproductive health was launched.

66. The scale of these projects and the successes of the Foundation's interventions is obvious from the synopsis set out in the latest set of Foundation accounts to which I was taken. The wife told me that she led the process of the ground-breaking work which was done in the field of neonatal mortality and established new partnerships with Ethiopia and Ghana. In the former, she worked closely with the relevant government health minister agreeing programmes to benefit the country's health infrastructure in ways which would reach the greatest number of women in the shortest time, including the importance of the qualifications of health care workers 'on the ground'. Having established the initial programme at ministerial level, the wife nominated an individual as the Foundation's representative to continue the work alongside the government's representative.

67. Another important area for this wife in terms of child development was nutrition. She is clearly *au fait* with the minutiae of the underlying narrative and statistics of the projects she oversees, as I was able to observe when she was giving her evidence. The UK Foundation has been involved in a joint overseas project with the UK Government which involved a sizeable initiative with the Brazilian and UK Governments. The Foundation has committed some US$700 million into this area over the next seven years. With external donations from other charitable entities, a total of some US$4.5 billion of new commitments is being channelled into this area of development.

68. In Kenya and Nigeria, the wife has been involved in projects involving de-worming. Up to one billion people in the poorest parts of the world live with ongoing infection caused by water-borne and ground-transmitted parasites. The Foundation is now halfway into the second year of a five year national school-based de-worming programme for Kenya, undertaken in conjunction with the national government, to treat and prevent re-infection in over 5 million school-aged Kenyan children. As the wife told me, that initiative has led to a 25% increase in school attendance. She attended a conference at Davos and was asked to work closely with the Kenyan Prime Minister with whom she sat on a panel which committed to a national programme. Through the Foundation, she has worked with the Gates Foundation and others and it has now committed US$50 million to a systematic de-worming programme. To implement this strategy, she has had to work at government level and has built relationships with the Kenyan government which have resulted in a new programme of neonatal nutrition in that country.

69. A particular passion of this wife was (and is) the prevention of mother to child transmission of AIDS. This is what she told me during the course of her oral evidence *[Transcript [1] page 101-102]*:-

> 'I begged organisations to support a change in protocol for years and, finally, the new executive director of the Elizabeth Glaser Paediatric AIDS Foundation, who I had a relationship with, agreed that we would take a country, there are seven countries where AIDS is a leading killer of kids, so we agreed that we would take one of those countries where they have their strongest team. We were shocked when they said Zimbabwe, it was an incredibly difficult political time. It was at the height of the Mugabe issues but that is where they felt they had their best team. They had about 80% coverage, I believe, of this protocol that we did not believe was terribly effective.
>
> We agreed that we would bring it nationally because the country has the issue nationally and that we would change protocol and we did that all in conversation with the government. Chris, actually, he was very concerned about my safety and actually went before I did to meet the government. I was very, very involved in developing the strategy. We had done similar programmes on a smaller scale or with paediatric anti retro-virals before that. Again, it was very effective. There was 37% transmission from a pregnant woman who was infected to a child when we started the programme. A year later it was 19% and we are now below 10% and the government has fully embraced the programme and has taken over most of the funding of it.'

70. I heard a great deal more evidence about the wife's involvement in other projects funded by the Foundation, including climate change and urbanisation, a field which the husband has particularly espoused in his own support of the Foundation. I give these particular examples as solid evidence, which I accept, of both the degree of commitment and the level at which the wife was working for the Foundation. Whilst she does not

claim to have had any involvement in the generation of wealth which made these various projects both feasible and capable of delivery, she was, as I find, wholly committed to the principles and ideals of the Foundation. That commitment translated into many hours of (unpaid) work both in terms of overseeing strategy and building relationships with stakeholders and partners in the various projects which were undertaken by the Foundation.

71. It is perhaps not entirely surprising against the backdrop of that scale of activity that a point was reached when the wife's dual roles within the UK Foundation as CEO and Chair became overwhelming in terms of both the scope of the roles themselves and her commitment to the family. As the husband was to tell me during his oral evidence, the Foundation was not achieving its full potential and the board of trustees (which included both the husband and the wife) was becoming increasingly frustrated by the limited amount of money which was going out compared to the vast scale of its underlying resources. By 2012, the Foundation had grown out of all recognition from its relatively modest beginnings and both parties agreed that neither had ever contemplated the exponential growth in its potential financial reach and influence. (The wife described it to me as 'a fairy tale' compared with their earlier ambitions for the Foundation.)

72. Put simply, the job was becoming too big for the wife. The objectives of the Foundation required the implementation of hugely complex projects. There was consensus that it needed to move from what the husband described as a 'founders-managed situation to one where there was professional experienced management who had 30 years' experience in Africa and India'.

73. To this end, an organisation called Bridgespan was approached. Bridgespan is a non-profit management consultant which specialises in providing advice to charities and other philanthropic institutions. It is a widely respected body which is closely affiliated to the well-known management consultants, Bain & Co. The point at which Bridgespan was consulted in 2012 coincided with the period during which the parties' marriage was breaking down. By the time Bridgespan presented its report to the Board of Trustees in April 2012, the situation between the husband and wife in their respective roles of co-trustees appears to have become untenable. A meeting was scheduled for 5 April 2012 to discuss the results of the diagnostic phase of Bridgespan's work. By that stage, the wife had issued her Petition seeking dissolution of the marriage, although it had not then been formally served on the husband.

74. In his written evidence, the husband was critical of the wife's poor management performance as CEO of the UK Foundation. He gives this as the reason for

Bridgespan's recommendation that she should be replaced as CEO and Chair. As he was cross-examined by Mr Pointer about this aspect of his evidence, he was prepared to adopt a softer position. He told me,

> 'It is very typical that an organisation starts small with founders actively involved [and] graduates to being something where professional management takes over the management. So it is not unusual. It is not that I want to criticise Jamie or the board wanted to criticise Jamie and hence the diplomatic language used here ….. everybody wanted to be respectful for the contribution Jamie had made and say thank you, you know. Things have gotten started *[sic]*, we plan to spend 5% of the assets [which] the Foundation has generated, but 95% of the assets remain to be spent. We want, as all trustees have, we have a duty of care to act in the best interests of the Foundation. That means have the Foundation run as professionally and effectively as can be the case.
>
> I know you want me to state something in a certain way, but I would like to express it as the way Bridgespan has expressed it; it was time for the management to evolve and move from founders to experienced professional people who have extensive 30 years' experience in complex projects like this in Africa and India.' *[Transcript [5] page 544]*

75. In response to a direct question from me, the husband agreed that the reference in his written evidence to 'poor management' was not intended as a criticism of the way in which the wife was doing her job; it was simply that, in order to achieve the results which the board of trustees wished to achieve (including the husband and the wife), there needed to be some radical change of management structure.

76. This change was achieved in September 2013 when the wife was replaced as CEO by Michael Anderson. He had previously worked as Director General for Policy and Global Issues at the Department for International Development as well as being the Prime Minister's special envoy for United Nations development. Since his appointment, there has been a fundamental internal re-structuring within the UK Foundation. This has allowed the wife to concentrate on an ambassadorial role in her capacity as non-executive Chair, a role she has continued to discharge by maintaining the profile of the charity at world economic forums such as Davos, and by visiting non-profit sector organisations in developing countries. Lord Malloch-Brown now acts as interim Chair of the Foundation.

77. As to the wife's future role with the UK Foundation, this is currently in the hands of the independent Board of Trustees. I am told that there is likely to be some resolution of the issue in November 2014. There have clearly been tensions generated in no small part as a result of these ongoing divorce and financial proceedings. I am aware from the evidence which was put before me that there have been discussions about the possibility of diverting funds from the UK Foundation into the US Foundation (or another

charitable entity) which might be designated as a separate charity which the wife might represent. I am similarly aware that such a 'split' is not supported by the husband because of the potential conflict which he sees with the best interests of the UK Foundation. As things stand, she retains effective and sole control over the US Foundation and its underlying assets of US$140 million, although she acts in concert with the US Board of Trustees. The husband is not (and appears never to have been) a trustee of this 'sister' Foundation, despite his requests to become one. It is his case that the wife has been deliberately obfuscating and blocking his appointment to the US Board. In this context, he has had to enlist the support of the other US Trustees who do not appear to have raised any material objection to his appointment. The wife's case is that the husband was never interested in a formal appointment to the Board because of tax sensitivities (not for himself but for the UK Foundation). I need say nothing further about these matters. As I have already said, neither party is suggesting that the assets held for the benefit of the two Foundations are 'matrimonial' resources which fall for division in these proceedings, despite their provenance.

78. What, then, of the husband's contributions to and role within the UK Foundation? Far from a strict delineation of their respective roles as 'wealth creator' and 'Foundation front woman', the husband's case is that he has been intimately involved from the outset with the work of the Foundation. He told me that he worked full-time for the Foundation in three different roles. First, in the context of his overall contribution, he has been the benefactor of US$1.6 billion of funding which has been transposed into US$4.6 billion of assets through his investment work. Secondly, he sits as one of three board members in which capacity he selects and oversees the work of the trustees. In this context, I have already referred to the financial 'heavy weights' who now act as trustees. He is one of those trustees and, in that capacity, has a central role (with the wife) in reviewing and evaluating all the investment grant proposals received by the Foundation. His evidence on this aspect was as follows:-

> 'Our biggest area [in grant making] is climate change and I sit on the Climate Change Advisory Board which meets regularly to review in detail. I am often the champion or specific designated person for review of those proposals. It was my concept and proposal to found the European Climate Foundation which has been our largest grantee in our climate change work, and I am an active advocate of climate change work. You can see, for example, a recent issue of Institutional Investor where the main story is on climate change and the author attributed the article on it to me.
>
> I travelled extensively in the past on Foundation work. Most recently I spent a week in India researching in the red light districts of India a grant to an Indian anti-trafficking organisation whose board I sit on, and I was actively involved in

> working…in creating input and changes in laws on Indian anti-trafficking legislation personally and successfully.
>
> I gave a personal grant of US$1 million and asked the Foundation to make a grant of US$9 million to that organisation, and carried out extensive legal due diligence on the organisation internally and that grant was approved. So I am very active on the trafficking side. I have been visiting their projects in Zimbabwe for a week, Kenya in the past, Malawi and India. So I have travelled the most of any board member in reviewing projects.
>
> I am an active advocate for the Foundation. I was asked by David Cameron to speak at a No. 10 summit on malnutrition. In addition, it was my conversation with Mark Lowcock, who is the 'number two' at DFID, to propose that we work together on solving malnutrition. That was the genesis of the large commitment that the Foundation made to malnutrition and, together with Jamie, I announced that grant at a large conference which raised $4 billion, speaking on the stage with Bill Gates, whom I meet regularly each year to discuss the work of the Foundation and collaboration. Most recently I travelled to California where I met with him and we discussed a number of grants, including the grant that we have committed to for HPV vaccines in partnership with the Gates Foundation.' *[Transcript [5] pages 483-484]*

79. He was also, as I accept, an active 'hands on' father to their four children, albeit that the primary domestic responsibility for the children's day to day lives fell on the wife's shoulders. He was emphatic in his denial that there had ever been a deal or arrangement between them that he would manage the money while the wife worked in the Foundation.

80. He told me, and I accept, that he travelled extensively in connection with his role as the manager of the Foundation's underlying wealth. The investments were (and are) global and the husband's style of management strategy (which I have described earlier) required him to cross the length and breadth of the globe in order to keep track of them. Regular and extensive travel between Europe, the United States and Australia was a feature of his working life.

81. In terms of his more recent travel for the Foundation in his capacity as trustee, he told me that his travel was variable. He would frequently make long distance trips to India or Africa for a week and also travelled within the UK and the United States. He told me about one particular trip to the United States to review the operation of a food factory which was the subject of a grant application in connection with a project in Zimbabwe. When he was cross-examined by Mr Pointer about the extent of his involvement with the Foundation, he said this:-

> 'You know, I do not think I travelled as a trustee as much as Jamie would, but you know I would certainly in terms of time, my commitment in time to the Foundation I would say was greater in aggregate than Jamie's time commitment to the Foundation, because you have to factor in the two components of the

> work. Managing the money, without which there was no Foundation, and creating the wealth, and then I would say secondarily, because without the money there is no Foundation, secondarily time as a Trustee.' *[Transcript [5] pages 535 to 536]*

82. Like the wife, the husband is completely on top of both the operation and finances of the UK Foundation. When he was asked about the split of funding between climate change projects and its work alleviating child poverty, he was able to explain immediately that, of the US$25 million a year in grant commitments made by the Foundation, some 75% has been diverted towards work with children and the balance to climate change and related projects. He was also able to tell me about the specific 'segments' which are funded under the umbrella of the Foundation's work with children, such as nutrition, HIV/AIDS and the like. To this extent, I accept that he was, and is, fully invested in the operation of the Foundation in all senses of the word. That he had a specific, and separate role, as the wealth creator via the TCI Fund does not, in my view, detract from his personal investment in the Foundation. Inevitably, there has been a degree of elision between those two roles. It is an inescapable fact that the husband's (and, thus, the wife's) personal wealth has grown and compounded as a result of his direct and indirect investment in the TCI Fund. But I accept that his (and her) primary motivation has never been the creation of further personal wealth of the magnitude which this couple might have enjoyed had fees not been diverted to the Foundation. If this was the case, I would now be dealing with a division of personal wealth of some US$6 billion.

83. I will return to an evaluation of their respective contributions to this marriage in terms of section 25 of the Matrimonial Causes Act 1973 when I come to deal with the central issue of 'special contribution' and the law as it applies to a potential departure from equality of division as between these parties.

84. For present purposes, I propose now to return to the remaining aspects of computation with which I have yet to deal.

D. COMPUTATION

The course of the litigation to date in terms of the husband's disclosure

85. At this point, I should say something about the manner in which disclosure has proceeded in this case against the background of the litigation chronology.

86. The wife issued her Petition seeking dissolution of the marriage on 26 March 2012. She and the children moved out of the former matrimonial home the following month into rented accommodation where they continue to reside. She told me during the course of

her evidence that throughout the next few months, this couple continued to explore the possibility of repairing their marriage. I was told about four or five counselling sessions in which they engaged. Whilst their physical separation appears to have been a condition imposed by the wife on these continuing attempts to explore the possibility of reconciliation, she told me that there were no restrictions placed upon the husband's ability to see the children. Their two homes were more or less within walking distance and he was free to come and go as he pleased.

87. Whilst there is no consensus on the precise date when these attempts at reconciliation were finally abandoned, it is clear that by November or December of 2012 the parties' respective solicitors had become involved in a dialogue which was to lead to this litigation.

88. On 10 December 2012, the husband provided voluntary financial disclosure in the form of a Net Asset Register. That showed assets, as of 30 November 2012 and in round terms, of US$889 million or US$665,175,198 net of liabilities (including potential tax and existing commitments).

89. At the end of January 2013, the wife's solicitors raised a lengthy questionnaire to which the husband responded on 21 February 2013. He provided five additional bundles of financial disclosure with his replies. The wife's formal application for financial remedy orders was issued on 14 March 2013, less than three weeks before Decree nisi was pronounced on 3 April 2013. At that point, the matter was transferred to the High Court to be dealt with by a Judge of the Division.

90. An updated version of the husband's Net Asset Register was produced on 30 April 2013. By that stage, the assets had risen to a gross value of US$1.092 billion. That disclosure provoked a further questionnaire from the wife's legal team to which the husband replied on 17 June 2013 with three more bundles of documents.

91. Neither party has in the course of these proceedings produced disclosure by means of a Form E, a decision having been taken at an early stage by both legal teams that the highly complex nature of the husband's financial infrastructure was best exposed by a bespoke voluntary process which was agreed upon by both sides. This was a process undertaken outside the structure envisaged by the Family Procedure Rules 2010, and it appears to have been a process which was undertaken without the approval or imprimatur of the court. Nevertheless, it was a consensual process undertaken with the wife's agreement which provided not only the confidentiality on which the husband laid such significant stress, but also early clarity in terms of an understanding of the structure

and potential value of the assets which were, or would be, available for division between these parties.

92. On 11 June 2013, the matter came before Mrs Justice Eleanor King (as she then was). She made a raft of directions in relation to the future progress of the litigation, including provision for expert valuation of the various properties owned by the parties. As well as listing the matter for a Financial Dispute Resolution hearing, the matter was set down for a final hearing on the basis that each party would, six weeks in advance of that date, file and serve comprehensive narrative statements dealing with all relevant matters set out in section 25 of the Matrimonial Causes Act 1973.

93. On 31 December 2013, the husband again updated the original version of his Net Asset Register. This showed the gross assets to be US$1.359 billion (or £821,042,463 on then prevailing *fx* rates). This schedule, together with additional updating financial information, was exchanged on 14 February 2014, some three weeks in advance of the Financial Dispute Resolution hearing which had been listed before Moylan J on 11 March 2014.

94. That appearance in court by the parties and their respective legal teams did not result in settlement, and no order was made at the conclusion of that hearing. However, it emerged during its course that at some stage the wife had engaged the services of an expert to advise on the value of the TCI management entities. (No allowance for anything other than the underlying value of the investment assets had been made in any of the earlier presentations of the husband's financial net worth.) Although the report was disclosed on a without prejudice basis, its contents have never been laid before the court. What has emerged, however, is its likely conclusion that the potential value of the goodwill in the TCI Group entities might be substantial and possibly in the bracket of £513 million to £872 million. Whilst acknowledging that the court might wish to apply a significant discount in terms of the husband's status as a 'key man' within the structure, the wife's expert was apparently suggesting the application of significantly less than a 100% discount, and more likely less than one half of that.

95. On 28 March 2014, the wife launched a formal application whereby she sought permission to file expert evidence at trial from Ernst & Young in relation to the valuation of the husband's interest in the TCI Group entities, both in terms of the net asset value (or underlying investments held) and in terms of their value as a going concern (with goodwill). On 8 April 2014 at the Pre-Trial Review, Coleridge J refused that application. I have been provided with a transcript of the short judgment which he delivered on that occasion. At paragraphs 7 and 8, he said this:-

> '[7] I have listened carefully to the arguments advanced by both sides and I am not persuaded that this application should now be granted. I, having read the submissions of the parties and many of the documents, am completely persuaded that this exercise would be so theoretical as to do nothing more than generate an argument which would not assist the court at all. At the end of the day, the court in a case of this kind wants to be able to proceed so far as possible on ground which is, if not solid, then at least supportive of some weight. It seems to me the more I have thought about this proposed valuation exercise, the more I have become convinced that it is shot through with so much theoretical speculation that the court would find itself quite unable to ascribe any sort of reliable value to it.
>
> [8] At the end of the day, the key factor in any valuation would be the extent to which the husband Mr Hohn's own contribution to the business was relevant. On the one hand, it will be said on his behalf, (because, judging by the documents that have been produced thus far, this is the position that has been taken) that any discount should be in effect 100%. In other words, without him, there is nothing. And I am as confident as I can be at this stage that this is the most likely result. The fact that there are others in the organisation in which he works who assist him by the production of raw material, the production of analyses, does not in any way meet the point that in a business which is wholly dependent upon the investment eye of the individual concerned, it is quite impossible for the court to carry out a valuation exercise of the organisation in those circumstances.'

96. The wife appealed to the Court of Appeal which handed down judgment on 18 June 2014. Refusing permission to appeal both on the merits (for reasons expounded by Coleridge J) and on the basis that her application fell outside the requirements of FPR 2010 Part 25 and was made too late in the day, Ryder LJ said this:-

> '[35] On the material put before this court, I have to say I tend to agree [with the reasons given by Coleridge J as set out in para 34, above] but, in any event, I cannot regard that judgment as being wrong.
>
> [36] It is speculative to suggest that a purchaser could be found to pay for an income stream that can and would walk out of the door together with the vendor of that income stream. The evidence filed in the case included disclosure of the offering memoranda in respect of the underlying funds. The key man provisions were patent and their purpose is self-evident.
>
> [37] I would go further. Some assets cannot sensibly be ascribed a capital value. It is a fallacy that every asset must be valued in every case or even in every sharing case. Of course, the court will need to draw a balance sheet or asset schedule, but that does not lead to the conclusion that every asset must be valued in order for the court's statutory duty to be complied with. The valuations sought in this case would likely be theoretical. It would not be a valuation of assets available for distribution between the parties.
>
> [38] That is not to say that it will not be open to the wife to argue at trial about the division of existing capital assets which might reflect the fact that the husband could augment his share in the future from his substantial earning capacity within the management entities. There could be a <u>Wells</u> sharing of any profit in respect of the husband's subsequent earning capacity. Those are matters for the final hearing judge.'

The main frame asset schedule

97. The final version of the husband's Net Asset Register, and the one from which we worked for the purposes of the final hearing, shows the assets as they stood on 30 April 2014. This is the document at **[A/D4]** of the trial bundles. In terms of layout and presentation, it is an agreed document. Certain aspects of the figures, however, are not agreed. When the case was opened, the husband's presentation put the available assets for division at US$1.436 billion or US$1.353 billion once allowance was made for potential tax liabilities (equivalent to £802 million on *fx* rates prevailing as at 30 April 2014). By their final computations on behalf of the wife, Mr Pointer and Mr Kingscote invite me to work from a final figure of US$1,611,843,217. That figure emanates from the US$1.436 billion which appears on the agreed mainframe schedule but includes allowances and/or deductions in respect of the following:-

i. profit of just over £7 million allocated to the husband for the year to 28 February 2014 in respect of which it is said he has provided no account;

ii. profit yet to be allocated for the same period which was (or is) potentially available to the husband in the sum of just under £21.25 million net;

iii. the value (some £8 million) of an investment in Indian real estate (IREO) which the husband contends represents post-separation accrual;

iv. the value of contingent incentive fees which have not yet crystallized (which, on the wife's presentation, amount to US$113.6 million).

98. There is a further (and fifth) issue to be determined in respect of the extent to which I should factor in, or assume a value for, the husband's interest in the TCI Group entities to which I have referred earlier.

99. I shall need to deal in due course with the rival contentions in relation to the law as it applies to post-separation accrual and the date upon which the assets fall to be valued. For present purposes, I propose to say something more about computation generally, including an outline of non-contentious aspects. I shall then deal with the five points of contention listed above before moving on to tax.

Agreed aspects of computation

Properties / Real Estate

100. The parties own three properties in London, Jamaica and Connecticut (United States). For convenience, their (unmortgaged) values have been converted into US dollars. The London property (which was purchased in September 2011 and has been, and remains, the subject of a complete re-build) was valued at US$17,716,650 as at May 2013. The husband has spent in the region of £9 to £10 million on work which has already been undertaken at the property[3]. During the course of evidence, it was suggested to him that he has actually lost money on the development, in part as a result of the insolvency of the first firm of builders which worked on the property. Whether or not that is the case, the parties have agreed the value of this property for the purposes of the computation exercise. It is agreed that the husband will have the London property.

101. The husband has a substantial home in Jamaica where he remains domiciled. Significant sums of money have been spent on work to this home. A value of US$6.5 million is the agreed figure on completion of those works. This property, too, will be retained by the husband at the conclusion of these proceedings.

102. The third property is the American home which the parties maintain in Connecticut. That property was worth US$2.7 million in August 2013 and it will be transferred to the wife as part of her overall award in these proceedings.

103. Thus, the real estate in the case is worth just under US$27 million and the parties are agreed upon how it is to be divided at the conclusion of this case.

Liquid cash reserves and loans receivable

104. The husband has cash deposits held in various different bank accounts in the total sum of US$524,270. In addition, he has lent money to a friend and a family member and expects repayment of neither loan. Insofar as the smaller sum is concerned (some £36,400 for educational fees), I accept it is an immaterial figure in the context of this particular case. As to the loan of £4 million to a close family member, I heard some evidence about this transaction and accept that the figure can properly be ignored for the

[3] In para 47 of his closing submissions, Mr Pointer QC submitted that the husband had spent over £12m on the London property. He does not seek to argue for any formal add back in relation to either this sum or the expenditure on the Jamaican property notwithstanding potential losses of what he contends amount to in excess of US$24m. In the context of the assets in this case, I regard that as a wholly appropriate concession.

purposes of the computation exercise. Whilst a significant sum, it was paid out prior to the break down of the marriage. The wife does not seek to challenge the 'write down' to nil and, in the context of the wealth available to this family, I take the view that the husband should be entitled to benefit close family members in this way if that is what he chooses to do.

Pensions

105.The husband maintains three pension plans which together have a value of just over US$93.4 million. The bulk of the value (some US$93 million) is maintained in an offshore plan in respect of which there will be tax implications should he choose to remit funds onshore whilst he is resident in the United Kingdom. The tax 'risk' is agreed to be c. £29 million. I shall deal with the likelihood of this tax materialising as a hard liability when I consider the wider implications for this couple of the tax consequences of their separation and divorce.

Investments in the TCI Fund

106.I have already referred earlier in this judgment to the structure of the TCI Fund, the various management entities which support its operation and the manner in which management and performance fees are fed back through structure. It is an agreed fact in this case that, because his personal assets are held within the Fund, they essentially track the value of the Fund (and they are currently compounding at 24% per annum). As part of the financial disclosure which the husband provided in March 2014, I was taken to a schedule which demonstrates clearly the changes in the underlying value of the TCI Master Fund from 28 February 2007 to 28 February 2014 **[C/F:94-95]**. From a low point of just under Euros 9.5 million[4], the Fund reached a highpoint of US$19.75 billion in May 2008 before falling to US$9.5 billion over the last few months of that year as a result of the global collapse in world markets. It continued on a downward trend hitting a low point of US$4.3 billion in May 2012. Over the next two years there was steady incremental growth to a position of US$8.112 billion as of 28 February 2014.

107.The husband's personal assets in the Fund are agreed to be worth US$1,177,274,972 and are held directly in his own name, or through other entities he controls directly or indirectly, or through the Children's Investment Fund LP (in round terms, a total of slightly less than US$1.2 billion).

[4] For the first year of its operation, the TCI Fund was funded in Euros. From January 2008, the functional currency changed from Euros to US dollars.

108.That much is agreed. There is an issue as to whether he will be required to meet a tax liability in the event that the UK companies within the TCI management structure are wound up. Again, I propose to deal with this when I come to consider wider issues of tax.

109.There are essentially two 'pools' of money under the effective management of this husband. First there is the TCI Fund which consists of the husband's personal assets and those of his external and institutional investors whom he selects to join the Fund. These investors pay both management fees and contingent incentive fees. Secondly, there is the US$4.5 billion of assets held by Talos Capital on behalf of the UK and US Foundations. At this point, it must be recalled that neither the UK nor the US Foundation has any assets <u>directly</u> invested in the TCI Fund. This has been the case for the last three years. As referred to earlier in this judgment, in April 2009, all of the assets which were previously invested by the Foundation in the TCI Funds were moved into a separate entity (Talos) and managed by an Irish company, Talos Capital Limited. The husband is not a director of that company. There is nevertheless a management agreement in place between TCI (UK) LLP (the investment manager) (owned 100% by the husband) and Talos Capital under the terms of which the entirety of the US$4.5 billion held within the UK Foundation is placed under the active management of the husband. It is a 90 day notice agreement and the husband charges no management fees to Talos, although an incentive fee of between 7% and 10% is payable if the investments pass a hurdle rate of 3% to 6%. He receives no further or additional remuneration from the Foundation notwithstanding the value of the funds under his active management.

110.Thus, the assets under the management of the investment manager now consist of his own capital and that of private and institutional investors, including Talos Capital.

The value in the TCI Group entities

111.Under this heading there are seven potential corporate entities which make up the group management entities. To these, the husband attributes a value of $111,551,314, being the value of the underlying assets they hold without any allowance for goodwill on a sale. In their closing submissions, Mr Pointer and Mr Kingscote accept that it is not open to the court to ascribe a particular figure to the value of the business. That consequence flows inevitably from the court's refusal to give the wife permission to adduce expert evidence on the subject. Notwithstanding that concession, it remains part of the wife's case that she should share in any eventual gain on realisation of these entities. The wife invites me to proceed on the basis of a *Wells* sharing of any proceeds which may be realised in the event of a future disposal by the husband. By her open proposals dated

11 June 2014, she seeks a 50% share of any excess over and above US$200 million in the event that I were to decide that the management companies have a value over and above that sum. In the event I were to conclude they were worth a figure which was more than US$111 million but less than US$200 million, that value should be aggregated with the other assets and divided so as to increase the lump sum to be paid to her by the husband to bring her up to a full 50% share of the matrimonial assets.

112. In seeking to persuade me that there is future value in these management entities over and above their underlying assets, Mr Pointer and Mr Kingscote point to six years of very substantial profits under the husband's stewardship of the funds. Mr Marks and Miss Clarke, on the other hand, rely upon the arguments which were accepted by Coleridge J at first instance and by Ryder LJ in the Court of Appeal. Fundamentally, they argue that any attempt to value goodwill is nothing more than an attempt to capitalise the husband's future income stream. On behalf of the wife, it is said that this misses the point, since <u>any</u> valuation of a trading company involves a computation of the current market value of a future income stream.

113. Taken in isolation, I accept that point. I also bear in mind that the observations of Ryder LJ which I have set out above in paragraph 96 were made in the context of an assumption that the business would be sold on the basis that the husband would no longer be involved. Mr Pointer seeks to persuade me that the whole purpose of factoring in the key man discount was to make provision for the husband's prospective departure.

114. The fact that the husband has no immediate plans to sell the management entities is not *per se* a factor which prohibits a consideration of potential value. Section 25 of the 1973 Act requires me to have regard to 'assets available in the foreseeable future'. That said, I need to look at where the evidence in this particular case takes me.

115. The husband's evidence in cross-examination was that, were he to leave the Fund, he was 100% certain that the substantial income stream generated by the TCI Fund would disappear because his investors would wish to redeem their investments, as they would be entitled to do under the terms of their contracts. That view was based upon *'every single one of my investors making it crystal clear that the day I am not there, they are not there…. It is a performance-driven business. It is a talent business. When the talent is not there, these funds get liquidated all the time.'* He told me about a similar exodus which had occurred when he left Perry Capital in 2003. He was then running a fund of US$1 billion. When he gave notice of his intention to leave, the parent fund attempted to replace him with another fund manager but, as he put it to me, the investors 'fled'. Each investor was given the

option to remain in the fund despite the fact that the 'key man' clause was triggered. According to the husband's evidence, 'every single investor' (apart from a *de minimis* number who did not return the form) opted to redeem and the entire fund was liquidated. Their unanimous voice was resoundingly heard. As he put it : *'we backed Chris rather than the fund'*.

116.Mr Pointer in his closing submissions sought to persuade me that the husband had overplayed his role in relation to the performance of the TCI Fund. He submitted that the husband's depiction of his team of analysts and partners as mere 'support staff' who only worked with the ideas he 'came up with' was misleading. He pointed to the fact that five or more of his previous partners over the years had left to become investment managers in their own right. He pointed to the very significant sums which the analysts had earned as bonus or incentive payments over the years. All these factors, said Mr Pointer, contribute to a clear impression that this 'team' adds significant potential value to the TCI business, with or without the husband at the helm.

117.Having listened carefully to the husband's evidence about the structure and operation of the TCI Group and, in particular, his aggressively focused control over virtually every aspect of the decision-making process, I am not persuaded that the team of analysts and partners, without the husband driving the process, would add much – if anything at all – to the value of the TCI entities from the perspective of a potential purchaser. Although at various points during the course of his evidence, the husband referred to 'we' and 'our' when he was describing his *modus operandi* and the manner in which decisions were taken, I am entirely satisfied that no decisions of substance are taken in that business without his 'say so' and express approval. It seems fairly obvious from the evidence which he gave that the husband has controlled the decision-making process from bottom to top. It is he who selects, hires and (in some cases) fires the individual members of the team of analysts and partners which support the commercial operation of the Fund. They have their roles to play, and I have no doubt that they are important roles. The husband told me, for example, about a dedicated team responsible for liaising and maintaining relations with the individual investors. In much the same way, I have no doubt that the analysts whom the husband employs are all extremely clever and able individuals who provide him with the best background due diligence available. He does not strike me as a man who suffers fools gladly. With TCI UK LLP (the investment manager entity) generating an annual turnover on its own of almost £100 million in the last year, it would be wildly naïve to believe that any one individual could maintain a 'hands on' role in relation to every aspect of its day to day operation. The husband has surrounded himself with a handful of key personnel and, further down the chain, backroom support staff all of whom have a role to play. He no doubt employs the best and they are handsomely rewarded for what they do. Nevertheless, without him at the centre of operations as the 'ideas man', making the investment decisions, driving aggressively forward the activist management strategy which has brought such significant rewards for the Fund and its investors, I accept that very few of his investors would be prepared to stay on board.

118. He was asked about the possibility of selling the TCI business to an investment bank on the basis that there was evidence of such sales having occurred on previous occasions. The husband told me that he had never consulted any investment bank about a potential sale of TCI and he was only aware of one significant and similar transaction when Goldman Sachs took a stake in Schumway Capital. The bank invested approximately US$100 million. Within a matter of months, the fund manager, Chris Schumway (who had been at business school with the husband), retired. The fund was liquidated and more or less the entire investment lost.

119. When it was put to him that Goldman Sachs had in fact taken a stake in a number of smaller hedge funds, the husband drew a distinction between those where investment decisions were tracked by computers ('black boxes' as he called them) and those where investment decisions were taken by an individual strategist who makes all investment decisions as an individual performer.

120. Rather than an election to retire, Mr Pointer suggested to the husband that he might wish to enter into a service contract with a fund management company for a term and then sell the business, or a share in the business, to a bank. To that suggestion, the husband's response was this:-

> 'I have absolutely zero interest in working for somebody [else]. I do not need the money. I do not want to be constrained. The purpose of the fund is actually to compound my capital. You know, if I wanted to sell my capitalised stream of future income, first, there is no buyer, but I would have done it by now if there had been. I have no interest to work for anybody. Why would I want to work for anybody? I am a billionaire, Mr Pointer … why do I want to work for anybody? I do not really care about money. I gave away nearly all that I made to charity.' *[Transcript [6] page 639]*
>
> And later,
>
> 'Investors do not have to leave. In perfect example, they did not have to leave the Perry European fund, but they did, completely. They all followed me when I started up again … because it was me they backed. They did not back the parent or some third party. To answer your question, I have never had any interest to work for somebody else. I do not want to sell my future earning stream. There is no value in the business other than what I take. There is *[sic]*

> no profits. There is only my partnership allocations. I have no interest. You assume that I work for money, Mr Pointer.' *[Transcript [6] pages 642-643]*

121. I had a very good opportunity to assess this husband in the witness box over a significant period of time. There is no doubt in my mind that he is virtually 'unemployable'. I accept his evidence that he has no present or future intention to work for someone else. In circumstances where he has a proven track record of giving away the vast majority of his wealth, I am satisfied that he is unlikely to be drawn by the lure of significant financial remuneration into giving up the total independence which he now enjoys as a fund manager. The scenarios posed by Mr Pointer as possible 'exit' routes, whilst entirely acceptable as hypotheses, are, in my view, entirely unrealistic when looked at in the context of the individual with whom I am concerned. It was suggested in closing submissions that he is unlikely to pass up the opportunity in future to make significant financial returns on the 'sale' or other disposal of the TCI entities were the opportunity to arise. I take a contrary view. This man may be a wealth creator *par excellence* but I do not get the impression that he is motivated solely by money for its own sake. Of course, that is in one sense an easy position to take in circumstances where his personal fortune, on any view, runs to over US$1 billion. Just as I referred during the course of the hearing to the Foundation being the wife's *raison d'etre*, I take the view that the TCI Fund and the structure within which it operates are very much his, to the extent that since their inception it is accepted that, once set up, the wife has played no part in the wealth creation function they have performed. To this end, I find it difficult, if not impossible, to conceive of circumstances in which this husband would surrender the autonomy he presently enjoys in order to make money for someone else, whatever financial inducements might be put on the table. For the reasons expressed above, I am equally persuaded that it is unlikely that investors would wish to stay in a fund in which the husband no longer exercised that autonomy of control over investment decisions.

122. In the event that TCI as a structure open to external investors is collapsed at some point in the future, I am persuaded that it is highly probable that the vast bulk of the husband's personal assets will thereafter be managed 'in house' from a family office from which he will continue, I suspect, to do much the same as he does now, albeit with more limited resources to deploy.

123. For these reasons, I do not propose to attribute to the TCI management entities any present or future value over and above that which can properly be attributed to their underlying assets. Thus, in this aspect of the dispute as to computation, I propose to adopt the presentation put before me by Mr Marks and Miss Clarke. In other words, I shall take the value of the TCI entities as being US$111.5 million.

124. Before leaving TCI, I make this point. The fact that I have declined to accede to any *Wells* sharing of the hypothetical future value of the Group does not mean that the income which it generates for the husband is irrelevant in terms of the consideration of the fairness of any award which I make in this case. I am satisfied that, for so long as the structure exists and for so long as the Fund continues to perform in the way it has done, this husband will continue to receive a very substantial personal income as a result of his ownership of the structure, directly or indirectly. Whether or not he chooses to give that income, or part of it, away is entirely a matter for him. The fact that he has such an earning capacity is nevertheless one of the circumstances which I shall need to consider in due course.

Other investments - IREO

125. The husband maintains personal investments in three property owning entities. There is no issue about these save in respect of his investment in IREO, an investment in Indian real estate private equity. Whilst a figure of just under US$26.5 million is uncontroversial, he has, since separation, invested a further US$11.8 million (which includes an allowance for tax). This additional investment, says Mr Marks, represents post-separation accrual and should be excluded from the overall computation process in terms of the assets in which the wife is entitled to share.

126. Mr Pointer and Mr Kingscote contend that, since funds were paid to TCI Management Ltd for investment in this real estate, those funds (less the tax) should be aggregated to form part of the overall assets. For these purposes, they allow a figure of £8 million (or US$13.6 million). To the extent that this investment falls for consideration as one which falls outside the sharing principle, I shall return to record my specific finding once I have dealt with the wider issue of post-separation accrual.

127. Into this category also fall (i) the unallocated profits which the wife contends are likely to be allocated to the husband, and (ii) the incentive fees which have been notionally earned but are yet to crystallise.

128. Before dealing with these items in turn, it may be helpful to make some general remarks about the structure and component elements of the TCI profit / income figures. There are currently fifty-four employees within the Group, between seventeen and nineteen of whom have an entitlement to profit share[5] although none are equity partners in the sense

[5] The husband referred to both 17 and 19 partners during the course of his written and oral evidence. These are partners (including some of the analysts employed by him) who participate in the profits of TCI

of owning shares in the Group (all of which are held by the husband). Their contracts entitle them to a minimum percentage share of the Group's profits on either a one or three year rolling basis, subject to various conditions. Over the history of the TCI Master Fund, a varying percentage of the profit pool has gone to the analysts and the remainder has been retained by the husband, much of which has been diverted into the Foundation.

129.In each accounting year, the Group (principally TCI UK LLP, as the investment manager) receives both management fees and crystallised incentive fees. The management fees are relatively straightforward. Depending upon the share class in which an investor places its funds, a standard (or set) percentage fee is charged, usually between 1% and 1.5%. In addition, each investor becomes liable to pay an incentive fee which is performance based and depends upon the achievement of an identified hurdle rate of growth in the underlying investment over a specified period of time. From a schedule which the husband has disclosed, it is apparent that the shares are divided into eight classes (A – H) which require from investors a commitment period of between one, two, three and five years. There is also a quarterly class share (D) which enables investors to withdraw their funds quarterly. The various classes attract an incentive fee of between 13.5% and 16.5%. These incentive fees crystallise and become immediately payable at the end of an investor's lock in period. That period will depend upon the class of share to which the original investment subscription is made. When the lock in period ends, the investor redeems his investment at which point, if the hurdle has been achieved, the incentive fee crystallises and becomes immediately payable. In the event that the hurdle is not reached, no fee or a reduced fee is payable. In the case of the quarterly share class, the incentive fee calculation period is the end of a three year cycle following issue. The hurdle rate varies according to the class of share but is typically LIBOR plus 2% or 300bps.

130.Incentive fees which remain contingent are not provided for in the formal company accounts or for tax purposes. However, in terms of running accounting records for management purposes, and in order to provide information to both its investors and its partners on an ongoing basis, the accountants responsible for the preparation of the TCI Group accounts adopt the practice of making a hypothetical allowance in the balance sheets for the contingent incentive fees which may become payable at a future date. These are calculated by reference, in the main, to actual performance as compared to the

(UK) LLP, the 'investment manager' entity. I accept that numbers of partners may well change from time to time and nothing turns on this point.

specified hurdle return and are based upon the current net asset value of the TCI Fund. The hypothesis is based upon an assumption that hurdle rates will be met but, unless and until they are, the sums allocated are no more than accounting figures. There is no 'crystallisation' or contractual entitlement to receive those sums allowed for, or any other. Neither the husband nor his partners in the Fund have any call on the funds until the point of crystallisation. In this sense, they do not represent 'real' money or 'earned cash'. The reason why the numbers exist at all is to enable investors to know what the value of their fund units may be at any given point in time if they were to withdraw them net of fees payable.

131. We see an example of this in part of the husband's most recently updated disclosure in the months leading up to the final hearing.

Unallocated profit

132. On 23 April 2014, the husband's solicitors wrote to the wife's solicitors with information extracted from the draft unconsolidated management accounts for all TCI entities as at their year end, 28 February 2014. In that letter they confirmed that the profit available to the husband to keep or allocate to other members at his discretion was £64,748,865, less amounts due from members (£25,022,394[6]), a sum of just under £40 million gross. A draft balance sheet accompanied that letter. The analysts/partners employed by the husband have a contractual entitlement to a percentage of the profits. From time to time, in addition to that fixed entitlement, the husband has paid out from his own share of the incentive fees further sums to individual analysts, either to incentivise or to retain them as part of his working team. These additional 'bonus' or 'incentive' payments are made entirely at the husband's discretion in terms of both their size and destination. I heard some evidence about quite significant sums being paid out to individual analysts over the course of the years. These payments fall within the overarching discretionary management strategies which the husband controls as part of his operation of the TCI Group as a whole. He selects the individuals with whom he wishes to work; he agrees their remuneration structures; he 'lets go' the individuals who do not perform; and he decides who benefits financially at the Group's year end over and above their contractual financial entitlement.

[6] This sum of £25,022,394 represents sums or drawings actually paid out to members during the accounting year on account of their eventual entitlement to profit. It is represented in the accounts as a 'claw back' or 'monies due' figure purely as an accounting device in the event that sufficient profits were not made in the relevant year to cover such interim drawings.

133.Following questions from the wife's team, the husband's solicitors wrote again on 30 April 2014. That letter contained further information about how the year end profit had been calculated. Of some £97 million (representing the turnover for TCI UK LLP, the investment manager), the crystallised incentive fees (converted to sterling) amounted to just under £39 million and the management fees a further £53.8 million. Those sums, together with a de minimis sum representing some recharged expenses, made up the annual turnover of the UK LLP[7]. Of the crystallised incentive fees (c.£39 million), part was earmarked for the analysts. From the balance available to the husband for distribution as he saw fit, 47% is deductible in respect of tax and national insurance.

134. The husband subsequently produced for me during the course of the hearing a revised allocation schedule showing how the profits for the 2013/2014 year had been applied and how much remained unallocated. That schedule showed a provisional allocation to him from all TCI Group entities excluding one of the UK entities (which provided a nil return) of £25 million (which he told me was in fact rounded up from £24.7 million). In terms of unallocated profits for the 2013/2014 year, his revised schedule confirmed the figure of £40 million gross, which figure is now reflected in the latest set of (2014) accounts which were produced during the course of the hearing. In relation to this sum, the husband's evidence was that he was entitled to take this money but that he might decide to allocate from it payments to third parties (such as his team of analysts) in order to retain or incentivise them over and above their contractual entitlement to the minimum percentage of the profits. He did not tell me about any decisions which he had made in relation to distributing funds out of the £40 million gross and he accepted that I could treat this fund (£21.25 million net) as money which was notionally earmarked for him. I take on board his point that this profit (or income in his hands) was generated during the second year after which the parties separated (ie. in the year March 2013 to February 2014), and I shall come back to this point in deciding how to deal with it insofar as the sharing of post-separation accrual is concerned. However, this unallocated profit represents an asset which I consider should be included (less tax and the share allocated to the analysts) at a figure of £21,247,360 (US$35,850,672) in the global balance sheet of assets available for division between these parties.

Profit for year end 28 February 2014 – has the husband failed to account for a sum of c. £7 million?

[7] I have not sought to overcomplicate this judgment by a breakdown of the year end figures in respect of the other TCI Group entities over and above the UK LLP since they are either property owning entities (eg. OREO) or entities which receive allocations for (eg) administrative support and back office functions. The principal vehicle of revenue generation insofar as the husband is concerned is the UK LLP.

135.The other aspect of computation which can conveniently be dealt with here is the suggestion that a sum of c. US$12 million (£7.136 million) was paid out to the husband in May or June 2014 which is not represented in his most recent presentation of the Net Asset Register. This flows from the representation set out in the husband's solicitor's letter of 30 April 2014 to the effect that a sum of approximately £18 million had been paid out to the husband as part of a global figure available for distribution to members of the LLP in a total sum of £25 million. (It will be recalled that this sum represents, in effect, 'drawings on account'.) In the most recent set of accounts for the year ended 28 February 2014, these global sums have not been allocated to any specific individual and that allocation will only take place by the end of January 2015. Of the £18 million paid out to the husband on account of his 2013/2014 entitlement, his solicitors confirmed in their letter of 30 April 2014 that the £18 million paid out to the husband was captured in full by the most recent net asset statement. That much is confirmed as an 'advance' to the husband in the most recent accounts **[C/F:421]**. On behalf of the wife, Mr Pointer and Mr Kingscote submit that, because the letter was written on 30 April 2014, I can infer that the difference of £7.1365 million was paid out to the husband in May or June 2014. Since it does not feature in the mainframe asset schedule as cash, it needs to be added back.

136.I find myself unable to accept that submission. The letter of 30 April 2014 is clear : the cash payments out to members of the LLP (including the husband) will only be allocated at the end of January 2015 **[C/F:173]**. All drawings actually received by the husband on account of his eventual allocation (some £18 million) are reflected in the mainframe asset schedule. His expenditure for the year ended 28 February 2014 has been calculated in round terms by his 'in house' financial team (signed off by his CFO as part of his presentation to this court) as £19 million broken down as to £9 million spent on the house renovation, £8 million paid in tax and £2 million paid to the wife on account of her legal costs **[C/F:402]**. The husband told me during the course of his oral evidence that all sums which he had received from TCI had been ploughed into the costs of the housing renovations, the maintenance of his own and the family's general living expenses (including the wife's not insubstantial rent) and legal costs. At the present time, in addition to the wife's rent of £418,000 per annum, he is paying interim support of £60,000 per month (or £720,000 per annum). For these reasons I decline to draw the inference that the husband has under-disclosed his assets by a figure in excess of £7 million and I propose to make no allowance for it on the final balance sheet.

Contingent incentive fees : should a value be included?

137.The figures in relation to the contingent incentive fees which have not yet crystallised are not in issue as between the parties in conceptual form. They have been disclosed in the written evidence and forensically examined during the course of the oral evidence. Over a four year period from 28 February next year (2015) to 28 February 2018, there may be a further gross sum of just under US$290 million receivable by TCI from this source. If the analysts' share of the 'take' is increased on a discretionary basis above their minimum percentage, that sum will reduce pro tanto. If compounded hurdles are not met, some – or all of it – may never materialise.

138.Mr Pointer and Mr Kingscote invite me to take a view as to whether or not this falls to be considered as what they describe as 'a comparatively modest figure' in the context of this case, such that it can fairly be aggregated with the other assets as a fixed sum certain. They point to the inherent improbability of these fees being lost through underperformance given the husband's track record over the last 15 years (which he himself accepts is 24% compounded on the basis of annual gross gain).

139.It seems to me that the following points need to be borne in mind:-

i. Whilst the figure of US$290 million represents accrued contingent fees as at 1 April 2014, to adopt the approach advocated on behalf of the wife requires me to make an assumption that these fees will, in fact, be paid out on the same day. It ignores the fact that payments will fall in according to a cycle which is dependent upon the length of each investor lock in period and the fact that there remains a hurdle which TCI needs to outperform. That hurdle is linked to LIBOR plus a margin. Whilst the highest hurdle rate is currently 5%, that rate is predicated on the basis of historically low interest rates following the global collapse in 2008. With emerging improvements in economic markets, that hurdle rate may well rise, linked as most of them are to LIBOR. Under the terms of their investment contracts, the hurdle compounds for investors either on an annual basis or on a month by month basis. In the event that a particular share class is below its high water mark, the hurdle continues to compound, thus raising the bar further before eventual crystallisation. If the Fund performance is lower than the compounding hurdle rate, the amount of contingent incentive fees will be reduced or never collected.

ii. The figures provided assume there will be no early withdrawal of funds by investors because they are 'locked in' and cannot withdraw their funds or because they choose not to. There is the opportunity to 'roll over' into an alternative class of share in some cases. The rolling programme of crystallisation will occur principally over the course of the next three years if performance does not dip below the compounding hurdle rate. This was set out in the husband's solicitors' letter dated 30 April 2014 as follows:-

to year end February 2015	$77,404,093
to y/e February 2016	$86,200,606
to y/e February 2017	$125,704,701
to y/e February 2018	$372,883

iii. The accrual of these fees has occurred almost exclusively since the parties' separation. Figures have been provided from the accounts. They are as follows :

Accrued incentive fees as of date shown	
31 March 2012	$5,475,380
30 November 2012	$9,050,890
31 March 2013	$46,154,088
31 March 2014	$289,682,284

140. In the context of the performance of the Fund, the husband told me during the course of his oral evidence how this pattern had emerged. He said,

> 'After the financial crash [in 2008], the fund went down by 40%. The way incentive fees are calculated is that you do not receive them until you have made back all the losses to the so-called high watermark. After 2008, we spent until the beginning of 2013 making back all the losses for investors before we received any material incentive fee – maybe one investor here or there, but nothing material. Then and only then, so a year after separation, I think at February 2013 – sorry, January 2013 – there was only after tax about $1 million of crystallised incentive fees. Long after separation, only $1 million of incentive fees had been crystallised because of that high watermark issue.
>
> Finally, at the beginning of 2013, we suddenly began to accrue or have contingent fees created. Then 2013 was a good performing year for the Fund; it went up by 47% but the vast majority of those incentive fees still remained contingent on continued performance. In order to retain investors, we offered them this long crystallisation period plus hurdles. Without making the hurdles, we do not make the incentive fees. It is not as good as many other hedge funds that you may be thinking about, Mr Pointer, where they get their money every

> year, come what may, and there is no contingent, no crystallisation, and no hurdles. We have those factors in our contracts.' *[Transcript [6] pages 601-602]*

141. Looking at the table of crystallisation referred to in the husband's solicitors' letter of 30 April 2014 (paragraph 139 (ii) above), it is clear that about one quarter of the fees which might be received (some US$25 million net in the husband's hands) will fall in during 2015 and 2016 (respectively three and four years after the date of the wife's divorce petition). The major block of contingent fees is likely to crystallise in 2017. That would represent c. US$45 million net in the husband's hands and would come to him (if it does) some five years after the effective demise of the marriage. According to the husband's evidence, as at that date (ie. the end of the marriage), he was still in the process of clawing back all the losses made after the financial crash in 2008. The recovery which began in 2013 was a financial regeneration, on his case, achieved during a period which post-dates their decision to end the marriage. Of course, that – in itself - is not an answer to the wife's case to an entitlement to share in these assets because a continuum of trading in volatile market conditions is part and parcel of what this husband has done from the outset.

142. In an attempt to separate out those investors who were 'in' and those who were 'out' of the fund at the point of separation, I heard much during the husband's cross-examination about the composition of the various classes of investor. The husband produced for me various tables as his evidence unfolded over the days he was in the witness box. It appears to be agreed that only 1.3% of the Fund's investors are contracted to a five year 'lock in'. That represents a very small percentage of the US$290 million which may, or may not, crystallise in 2018. If the 'rump' of the five year lock in funds can be expected to be withdrawn by investors in 2018 (at which point they will pay whatever crystallised funds are due), it follows that there must be some of this class of investor contributing to the payments hypothetically due in the years 2015 to 2017. However, these investors represent only 1.3% of the total fund value.

143. The largest number of the underlying investors in the Fund are in Class D (45.1%) which is the quarterly class share. These investors can withdraw funds at will without penalty on a quarterly basis. All the rest, apart from Class H (3 year lock in and 18.7% of the Fund) and the management shares (ie. the husband, whose holding is 15.8%) represent significantly less than 10% of the global investment in the TCI Fund. Class D, the majority, represents predominantly 'old' investors who have 'rolled over' from their previous 'lock ups' into quarterly money after the financial crisis because of their unwillingness to commit to a position of comparative illiquidity in new 'lock ups'.

144. On behalf of the wife, Mr Pointer and Mr Kingscote contend that nothing in the schedules which the husband produced will assist me to determine the question of 'who was out and who was in at the date of separation?'. They point to the fact that the husband said during the course of his evidence that the information which would answer this question was available and had been analysed and that it would be produced. It was not, at least not in the form in which it had been requested as at two specific dates in March and December 2012. They say that, absent the provision of proper analysis from the husband as to the structure of the investors who are liable for the contingent incentive fees, the totality of the sums due should be regarded as part of the assets generated up to the date of trial and available for distribution. Thus, they invite me to include in an adjusted asset schedule a 'hard' figure of just over US$113.6 million.

145. In contrast, on behalf of the husband, Mr Marks and Miss Clarke submit that, in terms, it does not matter when the investors came in or how long the husband has been managing their underlying investments within the Fund. What matters is when the work was done to generate the profit which gives rise to the potential entitlement to the contingent incentive fees. That line can be clearly drawn because the evidence establishes unequivocally that the Fund only went into profit in the latter part of 2013. They say that it would be quite impossible on the state of the evidence before me to draw a 'bright line' in order to determine how much of the, as yet, uncrystallised fees fall pre-separation and post-separation. On the basis of the evidence I do have, I can safely assume that these fees were predominantly generated after the breakdown of the marriage and consequently the asset schedule needs no further adjustment to reflect what is an uncertain, future and contingent receipt.

146. What Mr Marks and Miss Clarke accept I can properly do in the exercise of the wide discretion which I have in considering these matters under section 25 of the 1973 Act is to bear the contingent fees in mind when looking at a fair distribution of the assets and the overall percentage of the funds which are 'already in the pot'. As Mr Marks put it,

> 'The fact that there is this machine, as I think Coleridge J referred to it, which the husband is able to use to generate money, most of that machine resides between his ears, but he nevertheless has the benefit of the machine going forward.' *[Transcript [8] page 961]*

E. The law in relation to post-separation accrual

147. Before setting out my conclusions in relation to the treatment of the contingent incentive fees in the context of computation, this will be a convenient point at which to consider the law in relation to post-separation accrual and the treatment of assets which might be said to fall outside the ambit of the marital acquest.

148.Before doing so, two important points need to be made. First, it is important in this context to distinguish clearly between (i) the contingent incentive fees which fall to be considered as income or earnings elements of the underlying financial matrix; and (ii) the underlying growth in the value of the TCI Fund since separation. They are different elements of the accretion of wealth in this case, albeit that both result from contributions made by this husband both pre- and post- the separation which led to the demise of the marriage.

Date of separation

149.Subject to what I shall say below about post-separation accrual and the entitlement of a party to share in assets created after the breakdown of the marriage, I need no persuading that the law requires me to consider the value of the assets as they stand as at the date of trial. That much is clear from numerous authorities including *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FLR 192*, Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790*, S v S (Ancillary Relief After Lengthy Separation)* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186. The relevance of the date of separation and/or the effective demise of the marriage lies in the interruption of the spousal contributions which each of the parties has been making up to that point in time. I shall need in due course to consider in greater detail the issue of contribution insofar as it relates to the welfare of the family for the purposes of section 25(2)(f) of the 1973 Act. The particular resonance of the date of separation in this case is its impact upon the wife's entitlement to an equal share in an asset pool which has seen exponential growth in value since that date.

150.Mr Marks sought to raise an issue of public policy in this context. He says that the problem with computing assets at the date of trial is that it provides an incentive to a claimant to delay settlement if he or she believes that assets will increase. I have to say that I am not persuaded by that argument as a principle, but in any event the law is clear. Furthermore, there is no evidence in this case that the wife delayed the litigation or that she was unwilling to engage in settlement discussions following the unsuccessful conclusion of the FDR hearing. Whilst I have not been made privy to the content of such discussions for obvious reasons, I am aware that they have taken place.

151.As to the facts, the wife first sought legal advice in the summer of 2011 from a US attorney called Mr Dontzin. Her Petition seeking dissolution of the marriage was served on the husband by her English solicitors on 6 April 2012. The date of separation in the agreed chronology is put at 'March 2012'. The point of physical separation occurred in late April or early May of that year when the wife and children moved out of the former matrimonial home into nearby rented accommodation. On behalf of the wife, Mr Pointer and Mr Kingscote submit that the service of the Petition did not signal the end of this marriage. As I have said, from that point until a date in November or December 2012, the parties were exploring the possibility of saving the marriage in the context of marriage counselling. I heard about some four or five sessions, at the conclusion of which both parties appear to have accepted that divorce had become inevitable. As I pointed out during the course of argument, it is often difficult to define the precise point at which a marriage has irretrievably broken down. In many cases, if not the majority, parties will engage in some form of formal or informal counselling in an attempt to salvage a relationship, particularly where there are children involved in the family breakdown. They may often reconcile for a period of time before reaching a final conclusion that neither wishes to continue to share a life with the other. I have no doubt that each of these parties was genuine in his and her attempts to explore the possibility of a reconciliation. In terms of considering the wife's entitlement to a fair share of the matrimonial assets, I do not propose to draw any clear line under the asset base as it stood on 6 April 2012. That is not what the law obliges me to do and it is not in any event what Mr Marks, on behalf of the husband, contends I should do. He and Miss Clarke do not seek to quarantine the post-separation growth, nor the husband's post-separation income (other than unallocated profit and the second stage IREO investment, both of which fall very far into the separation). His case is that assets accrued or earned since the date of separation have to be considered in a different way in terms of any entitlement which the wife may have to a share because the nature and extent of their respective contributions during that period of time is different from what it was during the marriage. In other words, the husband does not seek to argue that the wife has no share in these post-separation assets; rather that she has a lesser share than that which she can expect to receive from the marital assets.

152. Mr Pointer reminds me that each of the parties has continued to discharge their respective roles throughout the period since March 2012 or December 2012 to the present time. The husband has continued to engage in his wealth creating activities at TCI. The wife has continued her active involvement in the Foundation and her role as mother to their four children. Until the implementation of the recommendations of the Board following the Bridgespan report, she performed her role as Chair and CEO of the Foundation until September 2013. Her replacement as CEO does not mean a reduced workload, a fact which I accept. Thus, says Mr Pointer, quite apart from the fact that she has not been paid out her share of the assets for her to deploy separately, there has been no actual cessation of the work during the marriage it was their respective roles to

perform. He says that the only thing which has in fact changed is that there is no longer any spousal support between the two.

153. That is as maybe, but the absence of *spousal* support is a significant factor to be taken into account, as the authorities demonstrate. Since the decision of the House of Lords in *Miller and McFarlane*, the courts have expressly acknowledged the important distinction which needs to be drawn between matrimonial and non-matrimonial property. In this case, where the wealth available to these parties is vastly in excess of any conceivable anchor to needs, wealth accrued after the effective end of the marriage (at a time when spousal contribution from the wife had ended) will necessarily fall to be considered differently in the context of an entitlement to share, whether equally or in some other fair proportion. In relation to some assets, that entitlement may be nil. In relation to others, it may be 50% or something between 50% and nil.

154. Each case is necessarily fact specific. In relation to one of the two conjoined appeals in *Miller and McFarlane*, the House of Lords had to consider the treatment of post-separation accrual in the context of a relatively short five year childless marriage. Lord Mance, at paragraph [174] on page 1230 said this:-

> 'Sixthly, if account is taken of the increase in the value of the parties' assets during the marriage (the matrimonial acquest), a question may arise about the date up to which one should measure it. Should this be up to the date when the parties ceased effectively to live as married partners (here April 2003), as Mr Mostyn QC considered in his judicial capacity in *GW v RW* at para [34]? Or should it be up to a later date such as the date of trial, or even, in a case where an appellate court thinks it right to re-exercise its discretion, up to the date of the appellate decision? Reference was made by Mr Mostyn QC to my remarks in *Cowan v Cowan* [2002] Fam 97, [2001] 2 FLR 192 paras [130] – [135]. The matters to which the court must have regard under section 25 include several which exist or appear likely as at the date the court has regard to them (cf s 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look back at the past (eg s 25(2)(c), (f) and (g)). To the extent that the focus is on the matrimonial acquest, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance. The present may be viewed as a case (paralleling the then unreported decision of Coleridge J in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 to which I referred in *Cowan v Cowan*) where the increase in value of the New Star shares between separation in April 2003 and trial in October 2004 or judgment in April 2005 was contributed to by the husband's further investment of time and effort, independently on its face of any contribution by the wife. Further, Mrs Miller had here no right to, and could not have been given, any part of Mr Miller's New Star shareholding in relation to which Mr Miller carried the risk. Mrs Miller has at all times been living in the house, which has now been formally transferred to her. Her only further claim is to a sum of money, assessed by the judge at £2.7 million (which Mr Miller paid in two instalments in May and June 2005). Mr Miller cannot easily be said in this case to have been holding on to any asset which should have been Mrs Miller's, or to owe anything other than money. Assuming that the focus is on assets acquired during the

> marriage, rather than on the husband's overall means, it seems to me, therefore, natural in this case to look at the period until separation.'

155. I accept that there is no question but that there is post-separation accrual in this case, whether the starting date is taken to be April 2012 or December 2012. Because of the manner in which disclosure has progressed in this case, I have before me a very clear snapshot of the extent of the wealth held by the husband in the months immediately prior to the wife's divorce petition and at various points up to and including April 2014. That insight is collected from the various incarnations of the Net Asset Register which have been produced by the husband as part of his voluntary disclosure. (Helpfully, the framework of the assets has not changed in the interim.)

156. In this context, it is instructive to revisit the figures. As at 31 December 2011 (some months after the wife first sought legal advice in relation to the marital difficulties but just over three months before the service of her divorce petition), the total assets stood at just under US$700 million (the equivalent of c. £446 million on the prevailing *fx* rates as at March 2012) **[C/F:100]**. As at 30 November 2012, a date by which Mr Pointer would accept the separation had become permanent, the assets had increased to US$889 million without any allowance for tax. By 30 April 2014 (the date of the mainframe asset schedule from which we were working during the final hearing), the gross assets had increased to US$1.436 billion (US$1.354 billion net of tax on the husband's case or US$1.4 billion net if the unallocated profits and IREO investment is included). That represents an increase over 17 months of some 62%. On Mr Pointer's and Mr Kingscote's final computation schedule, the global available assets are now in excess of US$1.6 billion.

157. Whilst I do not have precise figures for March 2012 (save for the sterling equivalent on that date of the US$700 million / December 2011 figure), Mr Marks and Miss Clarke produced as part of their written presentation a graph which demonstrates the almost linear increase in the total assets from 31 December 2011 to 30 April 2014. Assuming straight line growth from 31 December 2011 **[C/F:100]** to 30 November 2012 **[A/D:1]**, the figure in March 2012 would have been about US$690 million, although Mr Marks tells me that their informal assessment is that the figure could be closer to US$750 million. That, of course, is not a sufficient evidential platform for proceeding from that base line figure. It seems to me that the fairer approach to measuring the extent of the post-separation accrual, in the absence of a specific snapshot for March 2012, is to look either to the equivalent value of the December 2011 figure applying the exchange rates as at the end of March 2012 (US$700 million), or to take the 30 November 2012 figure

of US$889 million. In both cases, there is no specific allowance for tax on realisation. Whichever figure is adopted, the subsequent increase is exponential.

158.On the basis of the husband's case that a figure of between US$700 million and US$750 million is the fair quantification of the marital assets (being the wealth generated prior to the breakdown of the marriage), the increase has been of the order of US$600 million to US$650 million, or 93%, or, as Mr Marks put it, 'just short of double'. On that basis, he invites me to consider the scale of the post-separation accrual here as being equivalent to three times the total wealth which was available to Mr and Mrs Charman. That extraordinary level of wealth creation in the aftermath of marriage breakdown should not be treated, as Mr Marks and Miss Clarke submit, as part of the marital acquest.

159.In contrast, Mr Pointer and Mr Kingscote contend that it is only in cases where there has been an extended period of separation that the court will utilize some earlier figure for the assessment of an award. They cite three reasons why this is so:-

i. it is more often than not the case that the relevant business remains under the sole control of one of the parties;

ii. that party is continuing to trade with those assets; and

iii. the claimant is unable to realise her undivided share and reinvest it in another venture or asset and so attract what might be similar or equivalent growth elsewhere.

160. This is often referred to as the *Cowan* principle of 'trading with a party's undivided share of the assets'. It emanates from a passage in the judgment delivered by Thorpe LJ. At paragraph [70], of *Cowan v Cowan*, his Lordship said this:-

> 'All the above considerations are capable of inclusion in a review of the respective needs, responsibilities and/or contributions of the parties. They cover three of Mr Pointer's four submissions summarised in [21] above. The third, namely that much of the husband's fortune was generated in the 6 years post-separation, receives no reflection because in my opinion it is inherently fallacious. The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in *[X company]*. The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit. If this factor has any relevance it is within the evaluation of the husband's exceptional contribution.'

161.Of that contribution made by Mr Cowan, Thorpe LJ had earlier said this at page 216:-

> ‘**[67]** Third, in my opinion fairness certainly permits and in some cases requires recognition of the product of the genius with which only one of the parties may be endowed. Indeed Miss Baron conceded the proposition, whilst contending that this husband was not in the category, since she submitted that he was no more than a hard-working businessman. That submission does not seem to me to do justice to the husband’s achievements, which clearly for their scale depended upon his innovative visions as well as upon his ability to develop those visions. It is a factor that in the present case deserves some recognition. I do not regard it as discrimination by the back door. Whilst no doubt the husband’s capacity to devote himself to the expansion of the companies depended in part upon the stability and security of the home and family life which the wife created and sustained, his creativity was not so dependant to the same or perhaps to any degree.’

162. I shall return to the separate issue of special contribution shortly. For present purposes, and in the context of an evaluation of post-separation accrual in this case, I take on board the fact that the period during which Mr Cowan was continuing to trade with Mrs Cowan’s undivided share in the business was 6 years. Here, the period is significantly shorter and no more than a maximum of 2 years even on Mr Marks’ case.

163. The majority of the increase in the underlying value of the assets is represented by growth in the value of the TCI Fund (just under US$550 million). The balance of some US$48 million (the IREO investment and the unallocated profits) represents surplus income or profits generated from the receipt of management and crystallised incentive fees.

164. On behalf of the wife, Mr Pointer contends that the increase in value represented by the growth of the Fund is caught squarely by the *Cowan* principle. The husband was, in effect, trading with the wife’s undivided share of the assets and she is entitled to share in the results of his investment activities. To Mr Marks’ riposte that the husband had no choice in the absence of agreement as to the size of her settlement award, Mr Pointer argues that there was nothing to prevent him from making a substantial voluntary payment at the outset. He points to the husband’s unwillingness to relinquish control over the money, as borne out by his earlier refusal to pay to the wife a sum of £5 million on account of her claims. I heard evidence from the husband on this point. He was keen to point out that substantial funds had been made available to the wife in respect of her legal costs (some US$2 million) as soon as she had requested them. Furthermore, after some initial debate about the extent of her annual budget, there was early consensus between their respective legal teams as to the interim financial provision which should be put in place. It seems to me that a more substantial point is the tax issue. Had the husband liquidated a significant part of the TCI Fund in order to make an accelerated payment to the wife, because of their non-domiciled status it would have given rise to a significant tax liability in the event she remitted all or part of those funds for which he

would have been responsible. In that event, it may well be that the wife would have elected to stay in the Fund not only to avoid an overall reduction in the asset pool in which she was to share but also to take advantage of the very significant returns which the husband was generating. Because his personal wealth was increasing on the back of his management shares (which attracted no fees), the wife was potentially sharing in a level of return on their 'joint' investment in the Fund which was not even open to the other Fund investors, regardless of their share class.

165.Mr Pointer argues that there is no reason to believe that, had the wife received her share in 2012, she would not have achieved as good a return as the husband has done. He points to the fact that, because of the circles in which this couple moved, she has many contacts in the investment fund world. Whilst there was no hard evidence before me to substantiate this argument, I am sceptical about placing much reliance on it. I accept that the husband is one of only a handful of investors in the world who can demonstrate the track record of performance which is borne out by the undisputed figures in this case. Whatever connections the wife might have been able to exploit, I am not persuaded that there was any guarantee she would have matched the returns which have been achieved by remaining in the TCI Fund. In no small part, these returns have been achieved, as I find, by the activist investment strategies deployed by the husband in relation to the underlying Fund assets.

166.I accept that, given the scale of the assets under management, there would have been some passive growth in the Fund regardless of any decisions taken by the husband. I heard evidence from him (which was not challenged) about comparative returns available to an investor in MSCI World Global Equities[8]. Such an investor might have expected to double his money over a ten year period had he invested on 1 January 2004. By comparison, investors in the TCI Fund saw a return, net of fees, of 19% over a similar period resulting in an almost five times greater profit[9].

167.Mr Marks and Miss Clarke produced as part of their final submissions a table and a graph in order to demonstrate the returns which the wife might have achieved in alternative investment vehicles. In addition to the MSCI Global Equity Index, I was provided with figures for both the FTSE and the Dow indices over similar periods of

[8] These are widely tracked global equity benchmarks used as integral tools in the investment processes of institutional investors around the world.

[9] This rate of profit is based upon the premise that if 100% profit over 10 years is 'double' the original investment, and 19% compounded over 10 years produces a return of 4.69% over the original investment, then 469% profit 'returning' 569% of the investment represents something approaching an almost five times greater profit.

time. The FTSE produced an average return of 4.14% and the Dow an average return of 4.42%. In contrast a fee paying TCI investor saw an average return of 18.9%, whereas holders of management shares achieved an average return of just over 24%. As Mr Marks puts it, '[The husband's] point about compounding is that 24% (TCI) for 10 years is 15x more profitable than 4.14% (FTSE) for 10 years, and almost twice as profitable as 18.9% (TCI investors) for 10 years'.

168.When these figures are transposed into the table demonstrating investment return over a ten year period from March 2004 to March 2014, it is possible to see that, for TCI investors (within and without the management share class which pays no fees), the clear majority of the present value in the fund has been generated by active growth over and above the typical investment return achievable from any of the FTSE, Dow or MSCI indices. Whilst I accept that the table in itself is no more than a forensic tool designed to give some graphic depth and colour to the figures on which Mr Marks relies, it is nevertheless useful as a context in which to set the point he seeks to make.

The business of investment in the TCI entities as a continuum

169.Mr Pointer ably meets this point by reminding me that, without an accurate breakdown as to which of the current investors were in the Fund in 2012, it is impossible to analyse out the different constituents of the success which TCI has enjoyed so as to show (i) what proportion of the fees that have been earned may be regarded as a product of a pre-existing business; and (ii) what proportion are properly to be considered as a result of the husband's extra-marital endeavour.

170.As Mr Marks himself accepts, there has been a massive amount of 'churn' within the Fund as a result of the money being actively worked but, overwhelmingly, as he submits, the money is being generated through new ventures. Whilst the overall structure of the TCI entities represents a continuum, it is not the structures in themselves which are generating the wealth. Wealth creation on the scale achieved by the husband comes about by his ability to identify a new investment opportunity and make it work, either by driving internal change to increase value or by creating change in the commercial environment in which the company works.

171.I bear well in mind that the skills and financial insight which this husband brings to all his investment decisions were precisely the same skills he was exercising to a greater or lesser degree in Perry Capital. They are doubtless skills which he has been honing ever since. Mr Marks accepts that there is some 'tailback' into the marriage but his case is that there is now a new element, and a significant new element, which is the extent to which he deploys his skills in activist investing. As he put it, 'an activist investor cannot stand still. [He has] to be constantly looking for the next challenge'.

172.I accept that every case turns on its own facts. However, in *Rossi*, a case decided in the immediate aftermath of *Miller and McFarlane,* Nicholas Mostyn QC (as he then was, sitting as a deputy Judge of the Division) identified the issue of post-separation accrual as one which was then in a state of development. At page 794, he said,

> '**[9]** In this case there has been a very substantial passage of time between the separation of the parties and the hearing of H's claim for ancillary relief. Quite apart from the independent question of whether delay per se is a relevant factor in the exercise of the statutory discretion there is the critical question of whether money or property that has been acquired after separation forms part of the matrimonial property (or marital acquest).
>
> **[10]** In all cases now a primary function of the court is to identify the matrimonial and non-matrimonial property. In relation to property owned before the marriage, or acquired during the marriage by inheritance or gift, there is little difficulty in characterising such property as non-matrimonial (provided it is not the former matrimonial home). The non-matrimonial property represents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party : see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576; *Miller* (paras [21]-[25], [148]).
>
> **[11]** But what of money or property acquired by one party after the separation? This gives rise to a number of conceptual problems which I have to say have not been altogether resolved by the opinions in *Miller*.'

173. Having conducted a thorough review of the law, including the passage from Thorpe LJ's judgment in *Cowan* quoted earlier in paragraph 161, the judge proceeded to draw together the various threads from which he deduced the following principles:-

> '**24.1** The statute requires all the assets to be valued at the date of trial.
>
> **24.2** For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will 'forcefully' apply the value of assets brought into the marriage by gift or inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property.
>
> **24.3** Assets acquired or created by one party after (or during a period of separation) may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property which arises after separation will not qualify as non-matrimonial property.

24.4 If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here, I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after separation.

24.5 By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division: (a) if the marriage is short; and (b) part of the matrimonial property is 'non-business partnership, non-family assets' (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).

24.6 The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and, if so, in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely the non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs requires this.

24.7 In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means.'

174. In relation to the observations made by the judge in para 24.3, Mr Marks submits that assets acquired, created or enhanced in <u>this</u> case post-separation arise by virtue of the husband's personal industry, although he accepts that, up to a point, that position (particularly as it applies to the increase in value in the fund units) has been achieved through his use of an asset which was created during the marriage. He contends that different considerations apply in relation to items or assets acquired through use or application of post-separation earnings or profits.

175. The passage from *Rossi* which I have set out above was cited with approval by Singer J some three months later in *S v S* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120.

176.The following year, Charles J had to grapple with the issue of when and where to set dates and draw lines in the context of assets accrued or earned post-separation. The assets in that case were substantial bonus payments received by the husband both after separation and after divorce. In *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548, he said this:-

> '**[54]** In the application of the statutory test under the MCA which looks to past events and to the future it is inevitable that the court will have regard to current values at the time it makes its award. This does not mean that such a value would identify the value of the matrimonial property to which the yardstick of equality applies with force. Further, as in *Miller*, that yardstick may not be a fair one to apply whichever date is taken for the identification and valuation of the matrimonial property.
>
> **[55]** If those assets include one that can change in value the reasons for any increase or decrease in value over a relevant period would be a factor to be taken into account. For example, the value of a property, or the shares in a public or private company, could go up or down for a great variety of reasons and it seems to me to run counter to the objective of the MCA, its terms and the guidance of the House of Lords to seek to set tests, or formulae, as to how these changes should be taken into account in a given case (see for example Baroness of Richmond at para [158] of her speech in *Miller and McFarlane*).'

177.In *H v H*, Charles J was dealing with a husband's very substantial earning power and the properties and investments acquired as part of his income. The key question in that case was the rationale for an award in respect of the husband's future earnings through a share in post-separation bonus receipts. However, what his Lordship had to say in relation to setting time lines is relevant to the case with which I am dealing. He said this at page 578:-

> '**[116]** In my view, the concept of the matrimonial property to which the yardstick of equality applies readily and with force is based on the concept of an equal and voluntary partnership providing mutual emotional, economic and general support and matching contributions to it of different kinds. A point, or line, for defining the matrimonial property is therefore a date when that mutual support ends see, for example, para [174] of the speech of Lord Mance where he says:
>
> > 'To the extent that the focus is on the matrimonial acquest, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance … it seems to me therefore natural in this case to look at the period until separation.'
>
> **[117]** This mutual support could have diminished, or ended, before the parties split up but the guidance given as to the effect of conduct by the House of Lords means that in this case the first possible point, or line, to identify the matrimonial property is early January 2005 (the husband having announced dissatisfaction with the marriage on 24 December 2004 and having left the matrimonial home on 9 January 2005). ….. Correctly no earlier date was argued for.'

178. In relation to subsequent, but unsuccessful, attempts at reconciliation, Charles J said this:-

> '**[120]** In my judgment it cannot be said that the unsuccessful attempts to reconcile, or the discussions about reconciliation, that took place continued the mutual co-operation, support and goal that had existed during the happy years of the marriage beyond the date when the husband left the matrimonial home. Indeed in my judgment a conclusion that they did would fly in the face of the reactions of these parties to and after that event, and indeed of normal human nature.
>
> **[121]** Thus, in my view, the sad reality was that in January 2005 the underlying foundation of the marital partnership was brought to an end and was not re-established.
>
> **[122]** The marriage however continued as did the husband's financial support for the wife and the children, and the wife's role as primary caretaker of the children. But this will continue after the decree absolute and the award of ancillary relief. Therefore it does not seem to me to provide, of itself, a guide to a later date being taken for the definition of the end of the marital partnership as the producer of the matrimonial property and thus for defining the matrimonial property.'

179. His Lordship was also to part company with the judge's observations in *Rossi* in relation to the 'grace period' of one year post-separation as qualifying a bonus for matrimonial treatment with the possibility that it might nevertheless attract an application of the yardstick of equality. Charles J took the view that, aside from being arbitrary in its application (as the judge in that case had himself acknowledged), it failed to reflect the reality of the relationship between the parties which was essentially no longer 'matrimonial' in character or essence.

180. Mr Marks relies upon those passages in support of his submission that the same reasoning applies in this case to the IREO investment, the unallocated profits, the crystallised incentive fees and the contingent incentive fees. In relation to each, he argues that the matrimonial character of those assets weakens over time with the result that they do not fall to be shared, and certainly not on an equal basis.

181. Some three and a half years later, Wilson LJ (as he then was) scrutinised several of these passages in *Rossi, S v S* and *H v H* when he came to deal with an appeal from another decision of Charles J, *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723. Having endorsed the propositions advanced by the judge in *Rossi* as 'helpful' and 'accurate', Wilson LJ added this (page 1738, para [46]) in relation to his consideration of passive growth post-separation:-

> '*Passive* growth is to be contrasted with growth as a result of contributions of one sort or another made during the marriage, ie of *activity*, irrespective of

> whether such is achieved with the assistance of a spring-board already in position……'.

182.It seems to me that an analogous approach is just as apt in relation to passive growth as contrasted with contributions (ie activity undertaken by one of the spouses but not the other) made after the marriage has effectively come to an end.

183.Thus what I have to decide is whether and to what extent the new work and new investments created by the husband in the period after the parties separated falls to be considered in the character of matrimonial property in which the wife should be entitled to a share or whether some or all of it falls at a point too distant from the essential character of the matrimonial partnership to qualify.

Continuum versus new ventures

184.The husband's evidence in relation to the underlying composition of the investment turnover during the last two or three years was that more than 100% of the entire TCI portfolio had been 'churned' (or reinvested) into new investments. I have already given several examples of these in my extraction of the husband's evidence at paragraph 51. Thus, regardless of any lack of forensic clarity over precisely where lines can be drawn in relation to the different investor pools or share classes at any one point in time, the evidence demonstrates, as I find, that the present composition of the TCI portfolio is very substantially different in terms of its makeup from its composition as at 2012. Does that make any difference? On the one hand, it might be said that 'investment churn' is part and parcel of what an activist investor aims to achieve. Having listened carefully to all that the husband told me about his business model, it seems to me that very little of the TCI investment business could be labelled 'static' or 'long term'. His particular talent (some might call it financial genius) lies in his ability to identify particular ideas or commercial opportunities, to take significant and often very high risk positions within a limited number of entities, to 'work' them (often from the 'inside out') and to 'exit' on behalf of his investors at the optimum moment for maximum return. It is precisely the opposite stratagem to conservative, long term investment. His investment eye, coupled with his appetite for massive risk and sheer intuitive 'nous' as to how to push through a change-for-profit agenda, has given rise to very significant levels of investment return and created, in its wake, the lengthy 'wait list' of investors all eager to jump upon his very lucrative coat tails. In answer to the question I posed above, the relevance of the high turnover of different investments in the Fund matters, in my view, because it shows the extent to which the Fund is constantly being 'worked'. It represents active and ongoing contributions by the husband to the continuing generation of wealth at a time when the marital partnership has long since ceased to exist.

185.I accept that, in making these contributions, the husband is using as his commercial vehicle the TCI Fund which might be said to be a creature of the marriage. However, in this case, the Fund and the wealth invested within it is only one component part of the wealth generating vehicle. Its engine and driving force is the husband's investment eye coupled with his ability to drive change and so achieve levels of profit which are demonstrably in excess of any conventional rates of investment return. Whilst it was not part of the wife's case that the husband's earning capacity should be treated as an asset in itself and brought into account for the purposes of the sharing principle (other than in respect of arguments as to his ability to recapitalise his position in fairly short order whatever the extent of her award in these proceedings), it seems to me that to take account of assets created in the Fund long after the point of separation risks an invasion of that territory. Following the decision of the Court of Appeal in *Jones v Jones* (supra), it is territory into which I cannot venture (see paras [21], [226]-[29] and [66]).

186.Having weighed all these arguments carefully in the light of the evidence and the submissions made, I have reached the clear conclusion that a fair outcome in this case has to reflect some departure from equality of division in order to reflect the contributions made by the husband in the two or more years since their separation. In other words, whilst I propose to look at the totality of the value of assets available to these parties as at the date of trial, I do not consider that it would be fair to treat the wealth creation after the breakdown of the marriage as simply part and parcel of the marital acquest in which the wife should be entitled to an equal share.

187.For these purposes, I propose to take March 2012 as both the date of separation and the date when the parties ceased to operate as a partnership *qua* spouses. Without doubt, their respective roles as parents to their four children continued uninterrupted as did the routine of their daily working lives within TCI and the Foundation. However, to the extent that the husband went on outside the marital partnership to claw back the very significant losses made after 2008 and thereafter, predominantly from 2013 onwards, to generate wealth on an exceptional scale, in my judgment fairness requires me to take account of that contribution as one which created wealth which falls outside of the marital acquest. I do not regard the parties' subsequent attempts to explore the prospects of repairing the marriage as part of the continuum of its course. The separation in March 2012 was not a temporary separation but a permanent one. In the eight months between March and November 2012, I heard about nothing which might persuade me that the marriage was continuing to operate in its essential character as a partnership between spouses.

188.In my considered view after weighing all these matters carefully in the balance, I have reached the conclusion that the following specific classes of assets fall outside the ambit of the marital acquest and into that category of assets which, for the most part, represent the income or earnings element of post-separation accrual in this case:-

i. the IREO (second stage) investment of some £8 million;

ii. the unallocated profit of some £40 million gross (£21.25 million net) earned in the period 1 March 2013 to 28 February 2014;

iii. the vast majority of the contingent incentive fees of US$113.6 million[10] which, if crystallised, will become payable over the course of the next four years (2015 – 2018). Whilst it is simply not possible for me to put a precise figure on the split of pre- and post-marital assets in this category, I bear in mind that only 1.3% of the Fund is held by the 'old' 5 year class of investors. I know not what percentage of the D (quarterly) shares represent 'old' 'rolled over' money but I bear in mind there is likely to be some. However, I take the view that such 'roll over' as there might have been is neutralised to a significant extent by the work which the husband subsequently did to invest the money into new investment opportunities where the funds increased significantly under his particular style of activist management.

189.In terms of post-separation accrual, the more difficult question in this case is the extent to which the underlying value of the units representing the husband's shares in the TCI Fund can be segregated into component elements representing marital acquest and post-separation accrual. The manner in which Mr Marks and Miss Clarke have approached their analysis in terms of the overall increase in the asset base since separation is a reflection of the increase in the totality of the funds available for distribution (ie including properties, pensions and liquid investment/cash held outside TCI). I do not criticise them at all for that approach. But it does not assist me in terms of an analysis of the husband's interest in the Fund itself.

190.In strict numerical terms, it is possible to collect from the various versions of the Net Asset Register at **[A/D:1-4]** that there is very little fluctuation in the underlying value of the TCI Group entities (US$103.6 million as at 30 November 2012; US$101 million as at

[10] This figure being the US$289,682,284 referred to in Withers' letter dated 30 April 2014, less the percentage payable to the analysts less tax and NI of 47% payable on the husband's contingent share.

30 April 2013; US$109 million as at 31 December 2013 and US$111.5 million as at 30 April 2014). Those figures represent the net asset value of the individual entities making up the Group without any goodwill, which I have found to be the proper basis for valuing these entities. They have nothing to do with the value of the TCI Master Fund itself which was being actively managed by the husband through the TCI Group entities.

191. As to the value of the husband's holding of shares in the Fund itself, those same Net Asset Registers show the following:-

30 November 2012 *(year of separation)*	US$664.6 million
30 April 2013	US$872.7 million
31 December 2013	US$1.107 million
30 April 2014 *(assume date of hearing)*	US$1.1773 million

192. Thus, the increase from the earliest point in the year of separation for which I have figures to the date of hearing is in the order of US$512.7 million. It is both unrealistic and overly simplistic to take that figure as being the 'bright line' between what falls into the marital acquest on one side of the line and what falls into post-separation accrual on the other. The scale of the increase is self-evident. The more difficult issue is how far the 'tail piece' of the marriage should be reflected in the final reckoning.

193. I am reinforced in this view by the observations made by Moylan J in *SK v WL (Ancillary Relief: Post-Separation Accrual)* [2011] 1 FLR 1471. In that case the judge was dividing a matrimonial estate, including business assets, worth about £16.25 million. The wife sought an equal division of the assets, notwithstanding the significant post-separation accrual represented by the sale of a business some three and a half years into the separation at the end of a 19 year marriage. The husband contended that she should receive no more than about 28% of the total wealth, justifying this substantial departure primarily by reference to post-separation accrual but also on the basis that, whilst the company he had sold had been in existence prior to the breakdown of the marriage, it was wholly external to the marriage and its eventual sale price had been achieved due to his endeavours alone. In awarding the wife some 40% of the total assets (including some *Wells* sharing of deferred assets), Moylan J observed that there was no statutory or other requirement to separate out the two 'classes' of assets into matrimonial and non-matrimonial before proceeding to determine a financial award. As counsel for the husband in that case (Mr Nicholas Mostyn QC) submitted, the degree of specificity required in any case is a matter which lies in the discretion of the judge.

194.In this case, I have figures which I am able to extract from the various incarnations of the Net Asset Register which are not challenged by the wife in terms of their accuracy at each relevant point in the relevant time line, apart from the actual date of separation in March/April 2012. In *SK v WL*, the position was somewhat different in that the judge was being asked to conduct the segregation exercise in the context of business valuations produced by accountants instructed on either side which were based upon a series of artificial and hypothetical assumptions so as to create the sharp line in the figures as at the date of separation. That approach was criticised by Moylan J as of doubtful utility in guiding him to a fair award. His lordship reached his own conclusion of what that award should be by settling on a figure of just over 40%. That was, in his view, a departure which was a fair reflection of the degree of weight to be attached to the husband's post-separation endeavours (to which he found the wife had given insufficient weight) and all the other s25 factors, including the length of the marriage and the fact that the husband had, since separation, been trading with the wife's notional share of the family wealth.

195.In this case, and in relation to the argument that the husband was throughout 'trading with the wife's undivided share of the assets', I have reached a clear conclusion. I accept that the wife was on risk in relation to further losses in the Fund. The fact that I am not drawing any valuation line other than as at the date of the hearing means that her entitlement to benefit from the subsequent uplift and share in the Fund's recovery (reflected in the husband's personal holding of units) will be reflected in the share she will receive from those funds which represent both marital acquest and post-separation accrual. Whilst I shall come on to the precise figures once I have considered the issue of overall computation and special contribution, it is not my intention that this wife should receive no share of the assets which fall outside the marital acquest in this case. She will receive a share and that share will form part and parcel of the overall award which I will make on the basis of fairness to both parties. There is no question of her entitlement to any element of post-separation accrual being triggered by a 'needs' argument but I take the view that, notwithstanding the exponential increase in the growth of the Fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award she will receive at the conclusion of these proceedings. It goes to the heart of what I consider to be fair in the overall context of the case.

196.In terms of the facts, however, I am not persuaded that, had the husband been minded to settle a large sum on her at the outset, this wife would necessarily have elected to leave the Fund. We are dealing in hypotheses to an extent because (a) he did not, and (b) I know not whether in these circumstances she would have been entitled to leave 'her' funds invested under his management. However, she knew far better than most the extraordinary success which the husband had achieved over the life of the Fund and there was no evidence put before me that she would have been likely to replicate his investment returns on her separated funds elsewhere and to the same extent. Indeed, the evidence which I do have suggests the contrary. The fact that she moved in circles where she had social connections with other wealthy investors and money-makers does not to my mind lead to such a conclusion. Further, for so long as she remained within the TCI Fund, she had the unique opportunity to earn returns without paying any management fees at all. That opportunity represented a very significant saving (running into tens of millions of dollars) which she would not have achieved as an external investor in another fund. Significantly, it also meant that for so long as she remained invested with her undivided 'share', the husband was effectively making significant returns for her for no consideration at all at a time when, on any view, their marital partnership with its mutual obligations had long since come to an end.

197. I am also sceptical as to whether she would have wished to risk the tax consequences and, by implication, an overall reduction in the assets ultimately available for division even if she had received a payment on account. Theoretically, she could have left the funds offshore and thereby avoided a tax charge but I have no doubt that, in the event of a significant payment on account, the husband's financial support of the wife in her home in London would have been very significantly reduced from its current level, and properly so. It is difficult to see how, in these circumstances, she would have been able to avoid bringing funds onshore.

F. Tax

198. Perhaps not surprisingly given the complexities of this case, there are several issues relating to tax which require a resolution. On these, I had the benefit of hearing submissions from specialist tax counsel. Mr Stephen Brandon QC and Mr Oliver Marre were instructed on behalf of the wife and Mrs Emma Chamberlain on behalf of the husband. Helpfully, discussions between tax counsel were ongoing as the hearing progressed in an attempt to narrow the issues. I shall come to where matters stood when I heard from them on the 7th and 8th day of the final hearing.

199. Before dealing with the substance of these issues, it is important to bear in mind that they fall into two separate and distinct categories. The first concerns what are essentially hypothetical tax charges in respect of which the husband is seeking specific indemnities from the wife. The second relates to (as yet) unascertained and unquantified risks for which he seeks a general indemnity. The wife has agreed to give a specific indemnity for

those tax charges which are perceived to present an actual risk, notwithstanding that her evaluation of that risk (and those who advise her) is small. The sums involved are significant and she accepts that, if she is to receive a percentage of the available assets, it is only fair that she should bear an equivalent percentage of any actual tax which might have to be borne by the husband. She offers no such indemnity in respect of the majority of the potential tax charges which the husband has identified because (i) these are not perceived as solid risks, or, as Mr Brandon put it, they vary from 'the highly unlikely to the fanciful'; and (ii) they relate to future events within the husband's control and should not in any event be taken into account in the assessment of what is now available.

200.In carrying out the evaluation process, I bear in mind that these purported charges all relate to years during which the husband has filed full tax returns. He has, quite properly, paid all taxes and national insurance due on his partnership profits. His overseas wealth (ie. his interest in the TCI Master Fund) is retained and invested abroad. His accountants, PriceWaterhouseCoopers (PWC), are widely acknowledged to be amongst world leaders in their field.

201.It is accepted by both parties and their respective teams of advisers that I am not being asked to deal with tax risks arising as a result of the extraction of funds to meet any award I make at the conclusion of this case.

202. In relation to these contingent or potential liabilities and to the extent that the wife has agreed to provide the husband with an indemnity, the parties have agreed a mechanism which involves setting up an escrow account into which a percentage of the wife's award will be paid. She accepts that, if and insofar as there is some tax to be paid, she should share that risk with the husband to the extent of her entitlement. Thus, on the basis that she succeeds in securing 50% of the available assets, she bears 50% of the tax. However, matters are not quite that simple because, as it transpired, there is no agreement on the ambit of the risk in which she will be sharing.

203.The general point is also made on behalf of the husband that the funds which will be left in his hands are 'clogged' to the extent that he will have virtually no 'clean' capital because any remittance by him (for which no tax allowance has been made) will trigger a further liability to tax. In contrast, the funds which the wife will be receiving post-Decree absolute will be entirely clean. This, says Mr Marks, is a further consideration to be weighed in the scale when assessing the fairness of any percentage division.

204. I shall come on to the quantum of the potential liabilities shortly. The issue arises in this way. The figures which appear on the mainframe Net Asset Register and which make up the cumulative total of US$1.436 billion are (on the husband's case) the assets available to the parties without allowance for further tax liability.

205. In terms of mechanics, and in order to give both parties the security of knowing that funds will be made available in the event of a future tax demand, it is agreed that a proportion of the wife's award will be held in escrow up to a limit of 40%. The wife's agreement to provide the husband with an indemnity backed by the escrow to secure her share of the potential tax is limited to the period from 6 April 2012 to 5 April 2014. In respect of the general indemnity which the husband seeks over and above those specific risks, the wife's position is that the evidence put before the court does not justify any further security from her; in other words, those risks are negligible if, indeed, they exist at all. She will not give any indemnity which involves her exposure to a personal liability in excess of the monies held in the escrow account. I am therefore going to need to form a view in relation to two issues relating to tax points:-

i. are the figures involved significant in the context of this case? and

ii. is there any material risk of future liability crystallising?

206. It is accepted that all future liabilities arising out of assets which may be acquired by the husband from this point onwards or arising from decisions he may take in relation to his personal or financial circumstances will not fall within the ambit of either the escrow or the indemnity. Nevertheless, it is his position that she should share in <u>any</u> risk, however remote, in respect of the existing assets.

207. There are two other aspects in relation to the tax position which are reflected on the mainframe Net Asset Register. The first is the prospective charge to tax which will arise in the event that any of the pension proceeds are remitted onshore. That liability has been assessed in the sum of c. £29 million. The second is the tax which will be incurred in the event that the husband collapses the TCI Group structure and realises the fund investments held by the various entities that he controls, including the UK companies.

Tax treatment of the pension and potential future tax on the winding up of TCI

208. In relation to these two specific matters, the wife's position is this. In relation to the pension, she contends that no allowance for tax should be made. The pension scheme which holds the bulk of the value, some US$93 million, is not an approved scheme and therefore falls to be taxed under the employer financed retirement benefits rules

(EFRBS). Since the husband is employed in the UK, any income flowing from the pension is prima facie taxable under ITEPA 2003[11], s 394. However, the EFRBS code provides relief for the husband provided that he maintains his foreign domicile. This is because the fund is held by Jersey trustees and is thus classed as a 'foreign pension'. In these circumstances, and as a non-UK domiciled taxpayer, the husband will be taxed on a remittance basis : s 573 ITEPA 2003. Thus, if the income is paid to him over a ten year period after the age of 50 whilst he is resident in the United Kingdom, the receipt will be tax free unless he chooses to remit the funds onshore.

209.The wife also points to the fact that he has throughout been a highly sophisticated individual in terms of tax planning and is unlikely to take steps which create a tax penalty where such can be avoided perfectly legitimately. Further, she says that he is sufficiently wealthy not to need to bring funds onshore and thus it would be wrong to deduct tax which will never be paid by him. For the purposes of this judgment, and having recorded the wife's case, I wish to make it clear that the husband's unchallenged evidence to this court was that he has never undertaken, or participated in, any tax avoidance schemes. In terms of his personal tax arrangements, he has done no more than retain his foreign domicile which has enabled him, quite legitimately, to pay tax on a remittance basis whilst retaining much of his wealth offshore.

210.Mr Brandon raises one further point of qualification. If the husband were to defer taking his pension until he is resident in Jamaica, he might then be subject to tax deduction at source, as a non-UK resident, although in this instance there may well be provision under a Jamaican tax treaty for double taxation relief. His alternative may be to take up residence in another country with such a tax treaty. If, however, he takes his pension from the scheme before he leaves the UK, he can leave the money abroad without incurring any tax penalty. On this basis, argue Mr Brandon and Mr Pointer, there is no valid reason for deducting any tax in respect of his rights under the pension scheme.

211.In relation to the potential tax flowing from any future winding up of the TCI Group entities, Mr Pointer in closing submitted that there was agreement between tax counsel that the tax could be properly avoided if the husband deferred any winding up until he is no longer resident in the United Kingdom. That is not quite the position. If the asset is eventually realised, it appears to be accepted that tax will be payable. The issue for the

[11] Income Tax (Earnings and Pensions) Act 2003

wife is that this is a future contingent tax risk which the husband can take appropriate steps to avoid. She should not be responsible for those future tax risks when, perhaps many years from now, he will be in a position to make decisions regarding tax mitigation.

212. In terms of my treatment of these tax liabilities, s 25(2) of the 1973 Act requires me to have regard both to the property and financial resources and to the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future. Mr Pointer invites me to assess the likelihood of such tax liabilities arising on the balance of probabilities and in the light of all the evidence. In this context, he relies upon the well-known decision of the House of Lords in *Re B (Care Proceedings : Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141. That case concerned the standard of proof in finding the facts necessary to establish the threshold in care proceedings under section 31(2) of the Children Act 1989. In the context of financial remedy proceedings, he also points me to the decision of Bodey J in *K v L (Ancillary Relief: Inherited Wealth)* [2010] EWHC 1234 (Fam), [2010] 2 FLR 1467. In that case, the judge had to determine how to treat latent capital gains tax (CGT) arising on the disposal of shares held by the wife offshore. Those shares were worth slightly less than £60 million as at the date of trial. It was accepted by the wife in that case that she could readily meet her outgoings out of dividends (which were regularly remitted to this jurisdiction and taxed here) without touching the capital. Her evidence was that she intended to leave the shares in specie to her children. Mr Pointer appeared for the claimant husband in that case and argued that, in the light of this evidence from the wife, no deduction should be made for tax. The wife's counsel argued that CGT should be deducted as is entirely conventional in these cases. The wife should be entitled to access her resources as and in such manner as she might choose. In the event of a future remittance, CGT would inevitably become payable and thus fairness dictated a comparison of like with like after deduction of CGT.

213. Bodey J considered the passage of Lord Nicholls of Birkenhead's judgment in *White v White* where, at [2001] 1 AC 596, page 612, he said:

> 'Counsel submitted that the use of net values in this situation should be discontinued. I do not agree. As with so much else in this field, there can be no hard and fast rule, either way. When making a comparison it is important to compare like with like, so far as this may be possible in the particular case.'

214. The solution settled upon by the judge in *K v L* was this. Given the wife's clear evidence about her wishes and intentions regarding the shares, coupled with the modest way in which she had lived her entire life, he found that the likelihood of her ever having to pay out significant amounts of CGT was extremely modest. Nevertheless, he accepted that

in the fullness of time she might wish to bring some of her wealth onshore, thus attracting CGT. Having held that there was no way of approaching the issue in an informed way, his lordship took a broad brush approach and deducted latent CGT on what he accepted was an arbitrary £10 million worth of her shareholding. He justified that decision in the following way at page 1482, para 60 :

> 'Accordingly, if this issue *[of potential CGT]* were an important one (which I do not think it is) I would not be inclined to deduct CGT on the entirety of the wife's holding. Equally, however, in the fullness of time and as things turn out, she may wish to bring some of her fortune into this jurisdiction, as she has done on some occasions in the past, thus attracting CGT on the proportion remitted. There is no way of anticipating this in any informed way. So taking a broad brush, I would deduct latent CGT on an arbitrary £10m worth of her shareholding, but would not deduct it from the balance of the share holding. I consider that this discretionary although speculative approach is open to me, as there is 'no hard and fast rule' and because I think it is the best way to produce a fair and realistic determination on the issue, given the unusual facts of this particular case. The gross kitty, therefore, reduces in size accordingly.'

215.The Court of Appeal left that decision undisturbed when the case subsequently made its journey to that court on appeal[12].

216.In *K v L*, it was accepted that, in the main, this wealth had been segregated entirely from the family's general domestic economy. It was also an agreed fact that the family had spent very little during the course of their marriage given the extent of the resources which were available to the wife. The husband was awarded a lump sum of £5.3 million. Whilst it was not a special contribution case, the wife had brought to the marriage her pre-existing and inherited wealth. The judge found that both parties had given of their best in the non-financial sense to the welfare of the family. At para 55, Bodey J said this:

> 'In circumstances such as those pertaining here, suggested guidance as to maximum and minimum likely outcomes does little to assist. Each case simply has to be looked at on its own particular facts and fairness achieved by the exercise of judicial discretion based on those facts, informed by the s 25 exercise and by the authoritative guidance referred to at para [42] to [47] above *[relating to various quotations from the judgments of the House of Lords in Miller]*. It is for this reason that the schedule of 'Cases involving extra-matrimonial property' referred to at para [49] above *[being cases cited by Mr Pointer QC who had acted for the husband in that case]* if only of limited informative value and not in the end compelling as regards determination of the actual outcome.'

217.That passage is important because it reflected the judge's approach to the case. He was not dealing with the computation of top and bottom line figures or the selection of some

[12] The Court of Appeal did not deal specifically with the tax point on appeal since they upheld the trial judge's view that the appellant husband's award should be restricted to a sum sufficient to cover his future needs, generously assessed.

particular percentage around or discounted from the yardstick of equality. In that event, his decision as to the deduction or not of the CGT in the context of the available assets in that case might well have been expressed in more specific terms. As it was, he settled on his figure of £5.3 million as one which fairly met the husband's reasonable requirements fully and generously assessed : see para 56 on page 1481. The exercise on which I am embarking in this case is very different. All of the wealth has been built up over the course of a long marriage. Each of the parties relies upon significant contributions to the accretion of that wealth and, in the husband's case, on a special and unmatched contribution. In these circumstances, I take the view that, if and insofar as the wife receives anything less than a full 50% share (and I shall have to calculate what that 50% share might otherwise be), she is entitled to know why there has been a departure from a position of equality. That said, I respectfully agree entirely with Bodey J that each case simply has to be looked at on its own particular facts and fairness achieved by the exercise of judicial discretion based on those facts, informed by the s 25 exercise with all the guidance which the higher courts have provided.

218. There are, thus, two categories which I shall need to consider in relation to the tax exposure in this case. First, there is tax that is said to be payable or latent in a particular asset. Secondly, there are speculative liabilities which have not yet arisen and, on the wife's case, may never emerge. In respect of the former, I shall need to consider the probability of the liability arising from the foot of the evidence before me. It is Mr Pointer's case on behalf of the wife that it is only the pension which falls into this category and that any tax which might be payable is entirely avoidable because the husband has complete control over timing and thus the liability. All other taxes, he submits, fall into the second category of speculative taxes, including the winding up of the TCI Group.

219. In relation to these, the wife accepts and acknowledges that, where the exposure is significant, she should share the liability proportionately even if the risk is small. This position informs her willingness to give the indemnity backed by the escrow for certain risks arising. In respect of the speculative liabilities, she contends through Mr Pointer that whether or not there should be an indemnity is dependent to an extent upon the inter-relationship of the level of her award, the duration of the indemnity, the extent of the risk and the level of exposure should the risk crystallise into a hard liability. He and Mr Kingscote provided me with an example in their closing written submissions (para 81) :

> '… if there is a risk of a tax liability of $100m (so that W's share would be $50m), and it will be determined within, say, 12 months then it would probably

> be reasonable to require an indemnity. If there were a minor risk of a tax bill of $2m which will not be determined for 5 years then it would be unreasonable and inconsistent with the court's objectives [to achieve a clean break at the earliest opportunity pursuant to s25A] to require an indemnity.'

220.In terms of my jurisdiction to require the wife to provide the husband with an indemnity, and in the event of her unwillingness to do so, we are in the territory of contingent lump sums. The statute will not permit me to achieve that outcome by any other means. In terms of the escrow, Mr Pointer contends that my jurisdiction is limited to requiring the wife by means of an injunction to retain a proportion of the award which she receives so that it is preserved intact until the determination of any future liability which the husband may incur.

Wife's proposals to 'cap' the indemnity she offers

221.By the time we came to closing submissions, the wife's position broadly was that she agreed to provide an indemnity backed by an escrow fund to secure her aliquot share of the tax payable in the event of certain tax risks materialising for the tax periods from 6 April 2012 to 5 April 2015. In the event that there were to be an enquiry during that period, then the time frame would be extended until the conclusion of any such enquiry. This concession was given on the basis that the normal enquiry date for all periods prior to 6 April 2012 has now expired.

222. The request for a general indemnity is not agreed and not on offer. On behalf of the wife it is submitted that the degree of risk identified by her tax counsel, Mr Brandon QC, is negligible and the level of exposure small. The duration of the indemnity sought by the husband (to 2021) is too long and prolongs unreasonably the financial nexus between this couple to a date some 9 years after the effective demise of the marriage. Notwithstanding that submission, Mr Pointer and Mr Kingscote accept that, if the wife were to be awarded a full 50% share of the available assets (which is her case), they might be in difficulty in resisting a general indemnity, notwithstanding the statutory imperative in s 25A(1) of the 1973 Act.

223.In relation to the indemnity which she offers, her case is that it should be 'capped' at 40% of her award. This would be the maximum amount to be held back within the escrow. Over and above that sum, she would have no liability to contribute to any future tax liability out of her personal assets. That proposed 'cap' only comes into play if the tax liability turns out to be at the upper end of the range in relation to the risks which have been identified. Thus, even on a 'doomsday' scenario in relation to tax, she would be secure in the knowledge of receiving 60% of whatever award I make.

224.In relation to the indemnity cap, tax counsel have provided me with a formula for computing at what level of tax the 'cap' comes into play. I quote from Mrs Chamberlain's written submissions at Appendix 2:-

> 'The formula for computing at what level of tax payable the 'cap' comes into play is not complicated, it is
>
> $$A \times r$$
>
> Where A is the total asset base and r is the percentage of W's award which is held in escrow or withheld to be the second lump sum. H has proposed that r should be 40% (but says that there should be no cap) whereas W has not proposed a figure for r, but does say that it should also serve as a cap.
>
> If the cap came into play the consequence is that H bears more than his proportionate element of the tax.
>
> While this is not 'likely' it is 'possible' and if it eventuated it would convert a 'fair' outcome into an 'unfair' outcome. Clearly the greater the amount by which the tax exceeded the proposed cap, the greater would be the distortion of the ordained outcome.' **[3/36 of H's Tax bundle]**

The husband's position in relation to tax

225.The husband's general position on the tax issues is this. Mrs Chamberlain referred in her submissions to 'the complexity of the taxation of offshore funds in particular and … the structure through which [the husband] has accumulated his wealth and the labyrinthine remittance code which was introduced in 2008'. All these factors, she submits, have resulted in uncertainty. The quantum of the hypothetical liabilities, on his case, could extend back to the tax year 2008/2009. For this reason, he seeks an indemnity from the wife which will cover all and any taxes which may turn out to be due for earlier years (ie. an unlimited and unquantified general tax indemnity).

226.In terms of the specific reach of the indemnity sought, when the case was opened to me, he was seeking from the wife protection which extends beyond the amount of the funds which will be held in escrow. In other words, she would be required to make up from her personal wealth any shortfall between the maximum assessed liability of any and all tax risks and the value of the escrow account. Her exposure, on his case, should not be limited to tax arising between 6 April 2012 and 5 April 2015 but should cover all tax years from 6 April 2008. He was seeking to extend the protection of the escrow account until April 2021 which is a year after the last date by which any relevant enquiry must have been commenced. It was, indeed, a blanket densely woven.

227.By the time of closing submissions, Mr Marks made it clear that the husband's position had moved in this respect. Given that the purpose of the escrow account was both to provide security for the husband and to save the wife having to 'gross up' any funds which she might otherwise be required to contribute to the discharge of any future liability, the husband would agree to releasing funds in that account by January 2017 rather than April 2021. The down side from the wife's point of view is that thereafter she would have to accept the risk of 'grossing up' if she required the husband to release the funds from the escrow account in January 2017 or on completion of the enquiry if later. In other words, he was still seeking a general indemnity in relation to all and any tax risks and, insofar as the wife was required to use personal funds to meet her share of the husband's tax bill and she had not chosen to allow the escrow fund to be retained until April 2021, she should bear any additional tax liability arising on the husband as a result of grossing up that might thereby arise. If, however, the original escrow had been fully deployed in paying tax then any grossing up issue arising out of the wife paying an additional share of the husband's tax should be borne pro rata to the award.

G.My findings in relation to the known tax risks

Treatment of the pension funds

228.In terms of the specific tax issue which arises in relation to the US$93.5 million held in the offshore pension funds, the husband proposes what he calls an 'obvious' solution which is to share the fund by means of a pension sharing order. That suggestion was raised quite late in the day and I was taken by Mrs Chamberlain to a letter written by the Jersey Trustees of the main pension fund (Appendix 4) **[5/47] tax** bundle. That letter did not set out in express terms the trustees' agreement to implement an English pension sharing order; it merely stated that the trustees would seek independent legal advice. It continued,

> 'However if a pension sharing order was made the current position of the trustee is that there would be no withholding tax on payment to a sub-fund for Mr Hohn's ex-wife but that she would then be subject to the same restrictions as above. As any tax liability arising would strictly be Mr Hohn's liability, presumably appropriate provision would be needed to ensure that the new sub-fund would bear its share of any tax arising at a later date depending on the choices made by Mr Hohn's ex-wife.'

229.On behalf of the wife, Mr Pointer neither embraced nor rejected the principle of pension sharing. The wife had simply not had the opportunity to take specific advice which, as a US citizen taxable on her worldwide income, she required.

230.Of the three funds held by the husband, almost the entire value is held within a Jersey Pension Plan (some $93,053,098 of the $93,420,995 which is available). Mrs Chamberlain's estimate of the tax payable is between $42 million and $49 million.

231. From the age of 50, the husband will be entitled to draw an annual pension which the trustees have said they will pay over a minimum period of 10 years. As set out above, provided that he continues to pay tax on a remittance basis in each year in which the pension is paid, he will pay no tax provided that he does not remit any pension income to the UK. In other words, for so long as he is a UK resident and a remittance basis user, he will be able to keep those funds offshore and pay no tax on them.

232. In essence, the point being pursued by Mrs Chamberlain on behalf of the husband is that if he retires and takes the pension and he is still in the UK, he will find it difficult to justify using the remittance basis in which case his pension will be taxed in the normal way.

233. I am conscious that the wife has not yet had the opportunity to take advice in relation to the consequences of a pension sharing order but it seems to me that this is the fairest way to deal with the division of this asset. I am encouraged by the stance which the Jersey pension trustees have taken and what I propose to do in relation to the pension is to invite the trustees to carve out of the Jersey Plan a pension credit in the wife's favour equal in value to the proportion of the award which I propose to make in relation to her overall share of the assets at the end of this judgment. This will obviate any need to make a specific (but notional) reduction in respect of tax on the pension.

234. I propose to adopt the route which was taken by Moylan J in *P v P (Post-Separation Accruals and Earning Capacity)* [2007] EWHC 2877 (Fam), [2008] 2 FLR 1135. In that case, the judge was dealing with trusts established in Jersey and elsewhere. The Jersey trustees were not a party to the proceedings and had indicated that they would be seeking the approval of the Royal Court of Jersey for their decision not to participate in the English matrimonial proceedings other than for the purposes of providing information. Moylan J had raised with counsel the point that any order which he made in respect of the trusts or their assets would, at least in the first instance, have to be implemented through the home jurisdiction of the relevant trust. Quoting from the Royal Court's (unreported) decision of *Representation of Mourant and Co Trustees Limited In the matter of the B Trust* [2006] JRC 185 (unreported) 8 December 2006) (per Sir Philip Bailhache, the Bailiff of Jersey), he said :

> 'It would, in our view, avoid sterile arguments, and expense to the parties, if the English courts were, in cases involving a Jersey Trust, having calculated their award on the basis of the totality of the assets available to the parties, to exercise judicial restraint and to refrain from invoking their jurisdiction under the Matrimonial Causes Act to vary the trust. Instead they could request this Court to be auxiliary to them … we can see no reason why the trustee or one or more of the parties before the English court as the case might be, should not be

> directed to make the appropriate application to this court for assistance in the implementation of the English court's order. It appears to us that this would be a more seemly and appropriate approach to matters where the courts of two civilised and friendly countries have concurrent interests. It would furthermore be more likely to avoid the risk of the delivery of inconsistent judgments.'

235. Both parties agree that this is an approach I can take in relation to the pension. It will then be for each of the husband and the wife to make his or her own decisions as to how they will deal with their own individual pension pots or sub-funds, assuming that the trustees will implement the division which I propose. The issue of tax therefore falls away in terms of a pre-division deduction of some £29 million odd. I take the view that this is the fair way to deal with the pension because (i) it reflects a fair division of the non-liquid resources in circumstances where the balance of the wife's award will be made up more or less entirely of 'clean' cash (save for the Connecticut property); and (ii) it acknowledges the principle of personal financial autonomy which each of the parties will have going forward to choose the manner in which they live their lives and regulate their finances. Whilst Mr Marks would no doubt add to those reasons a submission in relation to the 'clog' on the husband's remaining assets, and whilst acknowledging that as a feature to be borne in mind, it must be counter-balanced by the fact that the TCI entities will continue to drive the income engine in this case. I accept that a significant part of the husband's wealth is offshore and he has only limited 'clean' capital in this jurisdiction but he has the ability, which the wife does not, to re-establish a capital base in relatively short order, a factor that I shall be returning to later in this judgment.

236. If and insofar as there is a problem with achieving a pension sharing order in the terms I propose, and if and insofar as the parties agree that a lump sum in lieu has to be paid by the husband to the wife as an accretion to the sum which will be payable to her as her share of the 'pot', I can foresee arguments as to whether that sum should be paid net or gross of tax. My provisional view is that the husband is likely to arrange his affairs in such a way as to minimise, if not extinguish altogether, any tax consequences of drawing his pension. But there remains the argument as to whether or not there should be some discount in the cash sum paid in lieu to the wife to take account of the fact that £1 (or US$1) of pension value is not the same as £1 (or US$1) of cash. In the hope and expectation that pension sharing will not prove to be an issue, I am not going to say any more about a fall-back position. If I have to make a further adjudication on this discrete point, so be it. I shall do so as and when each of the parties has had an opportunity to make further submissions. As I say, I hope and expect that we shall not reach that point.

Potential tax on the winding up of TCI Group entities (£19.9m or $33.7m)

237.I have already recorded the wife's position in relation to this tax. She contends that this represents a future liability and one in which she should not be expected to share.

238.On behalf of the husband, Mrs Chamberlain has set out in her written submissions the basis on which such tax arises, or may in future arise. The tax has been assessed at just under US$33.7 million (or £19.9 million).

239.What the tax actually represents is the tax which is likely to be payable on the ultimate extraction of value from TCI Fund Management (UK) Ltd (referenced 'K' on the corporate organogram). To put the position as simply as I can, the value in the UK company which is a partner in and board member of the Investment Manager (TCI FM (UK) LLP) is represented by its Fund holding in a Jersey partnership. Since it is a UK company, the likely 'exit' route on a liquidation or winding up would be extraction of value by way of payment of a dividend. Because this is UK sourced income, UK tax would be payable. Because the dividend rate is 30.56% and the company is based within the UK, the remittance basis would have no application for the husband in terms of his tax position in this event. Further, the husband has has accumulated no clean capital which he can bring onshore and spend in the UK without incurring tax because the vast bulk of his overseas wealth has been generated whilst resident in the UK. To the extent that he remits funds to spend in this jurisdiction (including any funds he may need to bring onshore to discharge tax liabilities), those remittances are taxable.

240.On behalf of the wife, Mr Brandon's primary position is that such tax as may arise is a future event, possibly many years, if not decades, off. It does not represent a present tax liability and thus no deduction should be made in terms of net asset values. To say that the TCI Group is presently worth US$111.5 million less US$33 odd million is, says Mr Brandon, a misconceived valuation. He also argues that, as and when a decision may be taken at some point down the line to wind up the TCI Group (if, indeed, this decision was ever to be taken by the husband), provided he was non-UK resident, he could avoid tax altogether. Mrs Chamberlain agrees with that proposition. However, whilst this is probably more the territory of Mr Marks, she says that if one is looking at net values now in terms of division, the tax which would be payable if the Group was wound up now is something which I should take into account. She makes the point that the court does not normally follow the route of saying, in effect, 'you can save tax on the disposal of a company by emigrating and therefore the tax that is inherent in the UK structure should not be taken into account'. That is as maybe, but here it seems to me that we are back in the territory identified in *White* and considered again by Bodey J in *K v L*. I have to look at the underlying reality of the situation. I have Mr Brandon's point about the conceptual difference between a present commercial valuation of a company, or a group of companies, and a future liability which may occur at some point down the line if the asset remains in the husband's hands until he decides to collapse the structure or otherwise withdraw value. But, here, I suspect that the approach conventionally taken by the Family Court may be slightly different from a 'black letter' approach to valuation in commercial cases. In striving to achieve a fair result as between these parties, I have to anticipate insofar as I can the underlying realities of the situation both as it is now and as it is likely to be. That is why s 25(2)(a) and (b) of the 1973 statute refers to both 'present' and 'future' resources and obligations. The present resources will usually be capable of more or less precise forensic analysis. Future obligations and needs are confined to those which are foreseeable. That inevitably requires a consideration of what is likely to happen at some point in the future. That there will probably come a time when the husband will wish to extract value from the TCI Group seems to me highly likely. The issue which then arises is whether or not he can structure his arrangements in such a way as to mitigate any potential tax consequences.

241. In terms of timing, I bear in mind that, in the event of a shortfall in terms of any general tax indemnity from the wife, and if the 'doomsday scenario' in relation to tax were to surface, the husband will in all probability need to extract cash from the TCI Group in order to meet a substantial tax bill. However, this is part and parcel of my assessment of the risk of the hypothetical taxes arising as crystallised liabilities.

242. In part because of the view that I take about the tax risks (see below), and because I think it more likely than not that the husband will be unlikely to collapse the TCI structure until he is in a position to mitigate any tax consequences, I have decided that the fair way to deal with this issue is to make an allowance on the Net Asset Register for approximately 50% of the tax as a deduction against net asset value. I propose to substitute for the figure of £19,966,088 a figure of £10 million. I accept that, on one view, it may seem arbitrary simply to make an allowance for one half of a potential liability but it reflects my view of the likely risk of (a) the tax being incurred, and (b) the allowance I should properly make for the risk (albeit unlikely) that other tax risks may crystallise which are not covered by the indemnity/escrow offered by the wife in respect of which the husband may need to liquidate funds within the TCI Group. In this event, he will not have available to him the tax free route which is presently open in terms of liquidating funds to meet the matrimonial award in these proceedings.

H. Consideration of the individual tax risks (known and hypothetical) in respect of which the husband seeks a general indemnity

The hypothetical tax risks

243.I turn, now, to the position in relation to the hypothetical tax risks and to the submissions made to me by tax counsel in relation to the substance of the tax position. I should say at this point that I am grateful to them for the enormous thought and industry which has so obviously gone into the lengthy written submissions which they produced. Those submissions were accompanied on each side by a substantial bundle of tax authorities to which reference was made at various points. I cannot hope in this already lengthy judgment to do full justice to the breadth and range of their submissions but I have carefully considered all that I heard and all that I read in reaching my conclusions about these matters.

244.At Appendix 1 of Mrs Chamberlain's written submissions, she produced a table which sets out certain itemised tax risks. That template was helpfully taken up by Mr Brandon who elaborated the document to include extra columns to show comments and the hierarchy of risk in respect of each category from the wife's position. He made it clear to me, on behalf of the wife, that the quantum of the potential liabilities relate to figures produced by the husband's advisers. He does not take issue with the underlying methodology of their calculation but the wife's team has not had access to all the material which would enable them to perform their own calculations by way of specific cross-check.

245.Together, the written tax skeletons run to 52 pages. As I made clear during the course of argument, it is not my intention to make specific findings in relation to each category of risk over and above a general assessment of the likelihood of future exposure. Far less can I seek to quantify the potential tax exposure were the risks to crystallise into a liability. Happily, neither side asks me to do that and I take the view that it would be an impossible exercise to perform in any event[13]. What I must do, however, is form a view as to the overall picture so as to inform my conclusions in relation to the ultimate award, in all its component elements, which I make in favour of the wife, and my decisions in relation to how to achieve an appropriate escrow/indemnity position.

[13] In para 5 of her written submissions on behalf of the husband, Mrs Chamberlain says this : 'The Court is not being asked to weigh the risk or to act as a Tax Tribunal but to accept that if there is any tax risk then it must be taken into account when W's award is made.'

246.Mrs Chamberlain points out that if, after the normal enquiry window of one year has closed, HMRC takes the view that the return for a relevant year is insufficient, it can make a 'discovery assessment' at any time up to four years after the end of the tax year in question. In this event, there does not need to have been any careless or deliberate behaviour on the taxpayer's part. That time limit is extended to six years if the taxpayer or his agent has been careless.

247.Thus far, there have been no assessments raised by HMRC in respect of the husband's returns for previous years. Mrs Chamberlain told me during the course of the hearing that in fact negotiations have now been opened with the Revenue as a result of recent contact initiated by the husband's advisers as a result of the wife's remittance of some $200,000 of funds paid to her by the husband on account of her legal costs. This remittance will necessitate the filing of an amendment to his last year's tax return. As a result, his file has been transferred to the high net worth unit.

248.Various tax risks were enumerated in the course of proceedings including the point that tax can be charged not only on remittances made by non-domiciled foreign residents (i.e. the husband himself) but also on remittances made by 'relevant persons'. Both cash payments and the remittance of assets in specie are caught. For these purposes, a 'relevant person' in relation to the husband would include the wife (until Decree absolute), his children, any trust of which he is the beneficiary or of which the wife and their children are beneficiaries, and any close company in which any of the above participates. Both counsel agreed that the likelihood of any tax actually being due was low or in the wife's counsel's contention "negligible" but Mrs Chamberlain reiterated the complexity of the legislation for foreign domiciliaries.

I. Conclusions in relation to computation

249.In summary, and in the light of my conclusions set out above, the resources available to these parties can be broken down as follows:-

ADJUSTED NET ASSET REGISTER		
		US$
H's investments in TCI Fund		1,177,374,972
TCI Group entities		111,551,314
Unallocated profit to 28.02.14	*(£40m gross less tax @ 47%)*	35,850,672
Belu Water Ltd		170,700
IREO (Indian real estate)	1st stage investment	26,418,364
	2nd stage investment	11,801,000
Cash		524,271
Pensions		93,420,995
Properties		26,916,650
TOTAL GROSS ASSETS		USD 1,484,028,938
TOTAL ASSETS CONVERTED INTO STERLING AT *FX* RATE AS AT 30 APRIL 2014 (£)		
		879,528,796
Less allowance for tax on unwinding TCI entities		(10,000,000)
POTENTIAL TOTAL NET ASSETS		**£ 869,528,796**
POTENTIAL TOTAL NET ASSETS *converted into US$*		**USD *1,467,155,938**
**The sterling equivalent as at 05.10.2014 (1.5968) is £918,810,081*		

250.The combined total of just under US$1.5 billion (or £870 million) is necessarily crude to some extent since it includes a number of different types of assets, including the pension funds in respect of which I have made no allowance in respect of tax for reasons I have already explained. I have taken the exchange rate as at 30 April 2014 which was the basis for the calculations on the working mainframe schedule. Whilst some of the sterling figures which appeared on Mr Pointer's and Mr Kingscote's final corrected schedule (in abbreviated format) appear to have been calculated by reference to the prevailing *fx* rates at the end of the trial, it seems to me that to undertake a wholesale recalculation would only add confusion at this stage. For the most part we were working in US dollars throughout the final hearing and, importantly, for the purposes of the closing submissions which I heard in relation to the quantum of the wife's final award. In order to compare values as at 30 April 2014 and within a few days of the date when this judgment will be handed down, I have referenced the sterling equivalent (just under £919 million) at the foot of the adjusted schedule. It is axiomatic that exchange rates will fluctuate either up or down between now and the point at which the wife is able to extract the full value of her award. With figures as great as these, it is equally obvious that even small fluctuations in the underlying rates have the potential to create significant changes to the base line figures. That said, it seems to me that I need to keep in mind the earlier figures since these were the basis of the open offers which the parties made and these were the figures from the foot of which the parties made their closing submissions. Whilst the approach adopted by Mr Pointer and Mr Kingscote has the clear advantage of being simple in its presentation (ie. 50% of whatever I find the total assets to be), the route to their conclusion as to outcome adopted by Mr Marks and Miss Clarke followed a much more detailed and formulaic approach. I shall deal with the final figures in terms of the global US$ award when I set out my conclusions in relation to the wife's entitlement. For present purposes, I am working with a final figure of just under US$1.5 billion. It will be apparent from this figure that I have declined to include within the total a 'hard' figure representing an allowance for the uncrystallised contingent incentive fees. For the reasons set out in paragraphs 139 and 188(iii) of my judgment, I have concluded that it would be wrong to introduce those future and uncertain sums into a baseline total when they can more appropriately be factored into my overall approach to fairness and percentage division.

251. There is one final aspect to which I now need to turn before setting out my conclusions and that is the issue of special contribution.

J. Special contribution

252. Section 25(2)(f) of the 1973 Act requires me to take into account 'the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family'.

253. I have described earlier in this judgment the history of this marriage and the roles which each of the parties took on as it unfolded over the years. There is no doubt in my mind that each of these parties has made a full contribution in terms of their respective roles. The husband has generated what, on any view, must be regarded as an extraordinary amount of wealth during his working life. In all, a total of some US$6 billion has been

generated, much of which has by common consent been donated to the Foundation for deployment in philanthropic enterprise. Notwithstanding, the scale of the personal wealth available to this family is still considerable and significantly in excess of that available in any reported case to date. Some eight years have elapsed since Coleridge J recognised the principle of special contribution (conceded by the wife to the extent of a 5% departure from equality) as justifying an award of 36.5% to Mrs Charman. Ten months later, his award was upheld in the Court of Appeal. The assets in that case were just over £130 million, including some £68 million held in an offshore discretionary trust which the husband had created.

254.Because it is central to my determination in this case, I set out below the relevant passages from the judgment delivered in the Court of Appeal by the then President, Sir Mark Potter. At [2007] 1 FLR 1280, the President said this:-

> '*(iv) Special contribution*
>
> **[78]** Coleridge J postponed delivery of his judgment until after publication of the determination of the House of Lords of the appeal in *Miller*. He did so not least because of the wife's concession that the husband had made a special contribution which should lead to a departure, albeit modest, from equal division of the property was expressed to be conditional upon the 'survival' in *Miller* of the possibility of a special contribution for the purposes of the exercise required by s 25 of the Act.
>
> **[79]** It was inevitable, so it seems to us, that the notion of a special contribution should have 'survived' the decision in *Miller*. The statutory requirement in every case to consider the contributions which each party has made to the welfare of the family, as well as those which each is likely to make to it, would be inconsistent with a blanket rule that their past contributions to its welfare must be afforded equal weight. Nevertheless the difficulty attendant upon a comparison of their different contributions and the danger of its infection by discrimination against the home-maker led the House in *Miller* heavily to circumscribe the situations in which it would be appropriate to find that one party had made a special contribution, in the sense of a contribution by one unmatched by the other, which, for the purpose of the sharing principle, should lead to departure from equality. In this regard the House was unanimous. First it approved at paras [67], [68] and [146], the decision of this court in *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103, [2003] 1 FLR 139, in which Thorpe LJ had ventured at para [46], 'a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances'. Then it reached for the criterion by which the court determines whether a party's conduct is relevant to the inquiry and suggested that it should be applied to identification of the linked and in effect obverse feature, namely the special contribution. When, by s 3 of the Matrimonial and Family Proceedings Act 1984, Parliament had recast the reference to conduct in s 25 of the Matrimonial Causes Act 1973, it had provided in s 25(2)(g) that conduct should be taken into account if it was 'such that it would in the opinion of the court be inequitable to disregard it'. On one view that criterion is of fair width. In practice, however, its meaning has largely been interpreted in line with the narrow criterion for determination of the

relevance of conduct set by this court prior to 1984, in particular in *Wachtel v Wachtel* [1973] Fam 72, in which, at 90C, it approved the trial judge's suggestion that conduct was relevant only if it was 'obvious and gross': indeed see the current re-affirmation of this criterion by Baroness Hale of Richmond in *Miller* itself at para [145]. It is therefore in the light of the very limited ability of a party to establish a case of conduct under s 25(2)(g) that we must have regard to the statements in *Miller* both of Baroness Hale of Richmond, at para [146], that contributions should be approached in much the same way as conduct; and of Lord Mance, at para [164], as follows :

> '[S]ection 25(2)(g) recognises the difficulty and undesireability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions – conduct and contributions are in large measure opposite sides of a coin.'

In saying that he 'now' recognised the same difficulty, Lord Mance no doubt had in mind the wider room for special contributions which, as a member of this court, he had identified in *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FLR 192, at paras [160] and [161].

[80] The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial, and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue. In such cases can the amount of the wealth alone make the contribution special? Or must the focus always be upon the manner of its generation? In *Lambert* Thorpe LJ said, at para [52]:

> 'There may be cases where the product alone justifies a conclusion of special contribution but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish.'

In such cases, therefore, the court will no doubt have regard to the amount of the wealth; and in some cases, perhaps including the present, its amount will be so extraordinary as to make it easy for the party who generated it to claim an exceptional or individual quality which deserves special treatment. Often, however, he or she will need independently to establish such a quality, whether by genius in business or some other field. Sometimes, by contrast, it will immediately be obvious that substantial wealth generated during the marriage is a windfall – the proceeds, for example, of an unanticipated sale of land for development or of an embattled take-over of a party's ailing company – which is not the product of a special contribution.'

255.Later, at para [87] on page 1284, the President said this:

'**[87]** Mindful of the postscript to the judgment of Coleridge J …… we have wondered whether, in order to help courts to perceive the circumstances in which, subject to our remarks in para [80], above, the generation of substantial wealth during the marriage might qualify as a special contribution, we should identify a threshold of wealth below which a court would be unlikely to conclude that it was the product of a special contribution. It is obvious that any such guideline would have to be laden with qualification so as to avoid any impermissible gloss on the court's duty under s 25 to assess each case on its merits. Subject to that caveat, we invited counsel to make submissions upon the threshold. Both Mr Singleton and Mr Pointer were rightly tentative. Mr Singleton suggested a threshold no higher than £40m or £50m. Five years ago, in *Lambert*, Mr Pointer had suggested a threshold of £10m, in relation to which Thorpe LJ stated, at para [46], that it was 'futile and dangerous even to attempt to speculate on the boundaries of the exceptional'. Before us Mr Pointer suggested £30m or £50m.

[88] Like this court in *Lambert*, we find ourselves unable to identify any figure as a guideline threshold for a special contribution of this character. It would, we consider, be dangerous for us to do so. However laden with qualification, the guideline might discourage a court from discerning special contribution in the generation of wealth below the threshold in circumstances, however rare, in which it should properly do so. The greater concern, however, is the obverse risk that it might encourage a court to discern special contribution in the generation of wealth above the threshold in circumstances in which it should not properly do so. While the law recognises the concept of a special contribution in the generation of wealth, there is no doubt that, following the decision of this court in *Lambert*, approved and developed in *Miller*, it keeps the concept in very narrow bounds. We would not wish a party's claim to have made a special contribution to succeed by reference to something interpreted as effectively a presumption deriving from our identification of a threshold figure.

[89] There has been an interesting collateral discussion as to whether, if a party makes a special contribution by the generation of wealth, as a result of which the proportions of its division with the other party under the sharing principle will be unequal, the extent to which the proportions are unequal should depend upon the size of the wealth. The greater the wealth generated by one party, submits Mr Singleton, the lower should be the proportion awarded to the other. Mr Pointer disagrees. He submits that in any event the principle will yield to the maker of the special contribution more than half of the wealth; that the greater the wealth, the greater will be the amount thus yielded; and that fairness requires no further adjustment in favour of its generator. In principle we agree with Mr Singleton. If such a contribution is special, it follows that it is unmatched; and the greater the wealth, the greater is the extent to which it is unmatched and to which it calls for an unmatched, or unequal, division under the sharing principle.

[90] Although we decline to identify a threshold for the application of the principle of special contribution, we are nonetheless prepared to respond to the judge's postscript to the extent of offering guidance on the appropriate range of percentage adjustment to be made in cases in which the court is satisfied that the principle requires departure from equality; it is necessary however to bear in mind that fair despatch of some cases may require departure even from the range which we propose. As it happens, our views on this subject are by way of endorsement and development of what in this case Coleridge J has himself said. As we have recorded at the end of para [60](d), above, the judge suggested that any adjustment for special contribution of this character should be significant as opposed to token. We agree. We find it hard to conceive that, where such a special contribution is established, the percentages of division of matrimonial property should be nearer to equality then 55%-45%. Equally, in the course of Mr Singleton's application to him for permission to appeal, the judge, in

> referring to percentages in cases of special contribution, observed 'I think you need to be careful, after a long marriage, to give a wife half of what you give the husband'. Arbitrary though it is, our instinct is the same, namely that, even in an extreme case and in the absence of some further dramatic feature unrelated to it, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6%-33.3%.
>
> **[91]** We turn to Mr Singleton's contention that the method by which the judge allowed for the husband's special contribution was flawed. It will have become apparent in paras [76] and [77] that we reject the contention. In what one might now almost call the old-fashioned way, namely in accordance with *White*, the judge considered all the factors in s 25; reached a figure; and checked it against the yardstick of percentages. In the light of *Miller* he would, as it happens, have been entitled to move at an earlier stage to consider percentages. In any event this was a rare case of special contribution by the husband's generation of wealth; and the size of the wealth which he generated and contributed to the welfare of the family compelled quite a substantial departure from equality. The judge's endorsement of a departure to 63.5%-36.5% in part reflected his view that the award to the husband was of assets laden with greater risk. Mr Singleton's surmise is that the judge justified a discount against the wife of 3% in this respect; but the risk is not obviously demonstrated by the near seamless accretion of wealth by the husband as a result of his activities in the sphere of insurance throughout the marriage and we regard 3% as a maximum of what the judge must have had in mind. It is clear that the extent of the departure from equality very largely reflected the value placed by the judge upon the husband's special contribution. Such departure lies very near the middle of the range which we have suggested in para [90], above, and, in the light of the scale of his special contribution, appropriately so. Neither in its method nor in its result do we regard the judge's treatment of the husband's special contribution as vulnerable to appeal.'

256. During the course of his closing submissions, Mr Marks took up that last passage and suggested that what Coleridge J had actually done in reaching his conclusions in *Charman* was to start from a mid-point in the Court of Appeal's subsequent departure bracket (39%) and thereafter apply a further discount to reflect the fact that some of the assets which Mr Charman was retaining were laden with greater risk than those being diverted to Mrs Charman. Whether or not that was what he did (the discount of 3% was no more than Mr Singleton's surmise), I accept that there appears to have been an element of further discount to reflect an element of illiquidity. The final resting point of the judge's award reflected his overall view about fairness to both parties and no doubt reflected a number of different factors which he had weighed to reach his conclusion.

257. There are two stages to consider in respect of a case involving special contribution. First, has the party claiming to have made a special contribution unmatched by the other made out his or her case on the facts and within the law? Secondly, if the answer to that question is yes, what is the range of extent of the departure from a position of equality?

258. Dealing with the first question, there is no doubt that the accretion of significant wealth can constitute a special contribution for these purposes: see para [80] *per* Sir Mark Potter P in *Charman (No 4)* above. If, with the blessing of the Court of Appeal, Mr Charman fell into the category of 'special contributors' because the amount of wealth which he had generated was 'so extraordinary as to make it easy for the party who generated it to claim an exceptional or individual quality which deserves special treatment', can there be any argument some seven years later in relation to this husband when the sums involved can be expressed not in millions of pounds but in sums in excess of a billion dollars? The fact that, with the wife's agreement (and she would say at her suggestion), most of the US$6 billion earned has been diverted for charitable purposes does not, in my view, detract from the relevance of the enormity of the total fortune. Even the retained wealth of just under US$1.5 billion is more than six times greater than Mr Charman's own fortune.

259. In a recent first instance decision (which was not cited in argument), Moor J had to consider the issue of special contribution. In *SK v TK* [2013] EWHC 834 (Fam), the court was dealing with a long marriage which had produced two children. The wife was 52 and the husband 49. The husband had recently sold a company and was claiming to be entitled to an enhanced share of the assets as a result of his own special contribution. Moor J said this :

> '**[43]** It is clear to me that the husband is a very able business man. He has a number of important skills that have enabled him to create two very successful businesses in the field of cutting edge technology. He has excellent computer skills. He is a very good salesman. He is clearly good administratively. He is able to lead a team and motivate his staff. He has deserved all his success.
>
> **[44]** Nevertheless, I am quite satisfied that, applying the authorities, this does not amount to a "special contribution" such as to amount to a good reason for departure from equality. It would not be accurate to describe him as a "genius". Equally, whilst the extent of his business success is rare and something to be applauded, it cannot be said to be "exceptional". I did not in any way get the impression that it was something that it would be inequitable for me to disregard.
>
> **[45]** I realise that the quantum of the fortune amassed by a businessman is only one feature. I am certainly not intending to lay down a rule that it is impossible to make a "special contribution" if the assets are below £20 million. It is however a factor that the husband's business success has not been so great as to generate truly vast wealth. He has been very successful. Whilst he is to be applauded for that, it is quite impossible to say that his contribution in this regard gets close to justifying a greater share of the wealth than that of the wife who contributed herself in an equally valuable way to the best of her ability.'

260. I shall need to say something more about whether or not the husband in this case can be classed as a financial 'genius' but it is difficult to imagine how personal wealth in excess

of $1.5 billion (with a further $4.6 billion generated from the same source ploughed into the Foundation) would not be seen as 'truly vast wealth', even by today's standards.

261.In their written closing submissions, Mr Pointer and Mr Kingscote said this of the husband's contribution :

> '[60] There is no doubt but that H, for his part, achieved tremendous things in his generation of wealth. He is the one who has been principally responsible for their now holding assets worth in excess of $1.5b. He has also been the architect of the funds now held within CIFF, amounting to a further $4.5b. We do not suggest other than that that is a significant achievement.'

And of the wife's contribution, they said :

> '[63] It is difficult to exaggerate the work undertaken and therefore the contributions made by W. She was running their household throughout the marriage. She was the primary carer of their children. Because of their ages and because of their being triplets, for about 2½ years she had to care for 4 children under the age of 5. To this can be married her work at CIFF *[the Foundation]*. She was at the helm from its inception in 2003 up to now. Under her CIFF has grown from a modest family foundation to one of the largest and most influential organisations of its kind in the world. This could not have been achieved merely by the injection of money. W is the one who has performed the outreaching across the globe (which required international travel of c 8 weeks a year): she is primarily the one who has been the interface with governments in the beneficiary countries; she is the one who has managed the administration of the fund right up to September 2013. To categorise this endeavour as "ordinary" is not just a slight; it is a significant distortion of the way in which she has applied her energies in pursuit of their common goals.'

262.In this context, it is the wife's case that to suggest that the husband's role in the generation of wealth should attract the label 'special' is a step too far.

263.That submission goes to an examination of the nature or quality of the contribution which it is said the husband in this case has made. Before dealing with that question, I need to turn to Mr Pointer's first and fundamental submission which is that the entire concept of special contribution is wrong and discriminatory. He submits that its application will inevitably lead to the unfair treatment of wives because, as the authorities demonstrate, it will usually be the husbands who have procured the generation of substantial wealth. If and insofar as the court continues to permit derogation from the principle of equality by reference to disparate contributions, the policy objectives laid down by the House of Lords in *White* will not be carried into effect.

264.For my part, if and insofar as Mr Pointer seeks to say that the policy objectives of non-discrimination between husbands and wives in their respective roles as explained in *White* require equality of treatment notwithstanding the presence in the case of significant wealth generated by a husband, I would respectfully disagree. As their lordships made very clear, fairness requires the court to take into account all the circumstances of the case and the circumstances in which the statutory powers have to be exercised will vary very widely 'from the poverty stricken to the multi-millionaire' : *per* Lord Nicholls of Birkenhead at page 989C. 'If in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer': page 989F.

265. That said, the House of Lords was quite clear that there was no *presumption* of equal division. Having stated the principle that there should be no bias in favour of the money-earner and against the home-maker and child-carer, Lord Nicholls went on to say this at pages 989G to 990E:

> '…. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well-advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.
>
> This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers conferred by Parliament 30 years ago enable the courts to recognise and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness. Today there is a greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money-making qualifications and skills. In *Porter v Porter* [1969] 3 All ER 640, 643-644, Sachs LJ observed that discretionary powers enable the court to take into account 'the human outlook of the period in which they make their decisions'. In the exercise of these discretions 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought.
>
> Despite these changes, a presumption of equal division would go beyond the permissible bounds of interpretation of s 25. In this regard s 25 differs from the applicable law in Scotland. Section 10 of the Family Law (Scotland) Act 1985 provides that the net value of matrimonial property shall be taken to be shared fairly between the parties to a marriage when it is shared equally or in such other proportions as are justified by special circumstances. Unlike section 10 of the Family Law (Scotland) Act 1985, s 25 of the 1973 Act makes no mention of an

> equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible gloss on the statutory division. That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.'

266.That the principle of a departure from equality on the basis of a special contribution has survived the decision in *White* is clear from the later decisions in *Cowan, Lambert*, *Miller and McFarlane* and *Charman (No 4)*. In *Cowan*, the Court of Appeal reiterated the important point of principle that the rationale of the judgments in *White* was not equality but fairness. Whilst the reasons justifying a departure from equality would inevitably prove too many and too varied to permit of listing or classification, they did include acquisition of wealth through the exercise of some special individual skill and effort. At para [67] on page 216, Thorpe LJ said this :

> '**[67]** Third, in my opinion fairness certainly permits and in some cases requires recognition of the product of the genius with which only one of the parties may be endowed. Indeed Miss Baron conceded the proposition, whilst contending that this husband was not in the category, since she submitted that he was no more than a hard-working businessman. That submission does not seem to me to do justice to the husband's achievements, which clearly for their scale depended upon his innovative visions as well as on his ability to develop those visions. It is a factor in the present case which deserves some recognition. I do not regard it as discrimination by the back door. Whilst no doubt the husband's capacity to devote himself to the expansion of the companies depended in part upon the stability and security of the home and family life which the wife created and sustained, his creativity was not so dependent to the same or perhaps to any degree.'

Mr Cowan's particular 'vision' was the creation and development of plastic bin-liners and draw-string bags which enabled him to build up wealth of £11.5 million. As to what constituted 'special skill and effort', the Court of Appeal rejected the suggestion that it would only be in cases of a 'stellar contribution' that a departure was justified. There was one continuous spectrum extending from the entirely ordinary to the 'stellar'. As Lord Justice Mance explained at para [161],

> 'The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently. The first spouse's special skill and effort is special to him or her, and the individual's rights to the fruits of an inherent quality of this nature survives as a material consideration despite the partnership or pooling aspect of marriage. For my part, I think this consideration is a material one to which weight can and should be given in appropriate cases.'

267.In *Lambert*, some 18 months later, Thorpe LJ considered the issue of 'special contributions' at some length. It is clear that the intervening passage of time and the very full and reasoned argument which preceded the judgments in *Lambert* had led his lordship to a more conservative approach to the circumstances in which special contribution would provide a legitimate reason to enhance the share of the contributor. It was his lordship's view, referred in the President's judgment in *Charman (No 4)*, that care had to be exercised in allowing in the concept of special contribution on the basis of the scale of the fortune generated alone since, in this event, discrimination was almost bound to follow. Marking time on the concept, his lordship nevertheless gave a 'cautious acknowledgment that special contribution remains a legitimate possibility but only in exceptional circumstances'. Whilst he declined to even attempt to speculate upon what those circumstances might be, he suggested that it might more readily be found in the 'generating force behind the fortune rather than in the product itself' : para [46].

268. In *Miller and McFarlane*, I accept that the principle of special contribution did not arise and thus the remarks made by the House of Lords in that context were plainly obiter. It is also true that in *Charman*, special contribution was conceded as a justification for a departure from equality, albeit that Mrs Charman's concession was limited.

269. However, Mr Pointer and Mr Kingscote accept that the decisions in *Cowan* and *Lambert* are both squarely directed to the concept of special contribution and are binding on me in holding that special contribution is indeed available in an appropriate case. Thus, if there is to be any further development in the law on the basis of inherent discrimination *simpliciter*, absent an amendment to the statute itself by Parliament, that must be an argument for another day and I have little doubt that few advocates will argue that case before a different court as ably as Mr Pointer.

270. In support of the wife's contention that special contribution should not influence my award in this case, three separate grounds are advanced:-

i. the principle is now outmoded given the court's emphasis on a computational approach and the treatment of assets as matrimonial or non-matrimonial, the latter often excluded from the sharing principle other than in cases of need : see *Charman (No 4); N v F;* and *K v L.*

ii. the parties could have regulated their financial affairs by entering into a pre- or post-nuptial agreement which, following *Radmacher* , would in all likelihood be carried into effect.

iii. the special nature of this marriage and the parties' agreement as to how each would perform and their mutual objectives of deploying their resources to benefit the deprived in the world make the concept of contribution inapt.

271. I can dispose of the first and second of these grounds in fairly short order. As to the first, I accept that the modern approach to computation as demonstrated in many of the recent cases which have been litigated in this Division and beyond is moving towards an assessment of the nature and character of the assets and a consideration of their quality as within or outside the reach of the marital acquest. However, that approach does not seem to me to preclude or avoid the need to consider as of overarching importance the factors listed in s 25 of the 1973 Act. Contributions to the welfare of the family are one such factor and the law in relation to special contributions continues to apply, as Mr Pointer and Mr Kingscote accept.

272. As to the second, and so far as I am aware, neither of these parties has at any stage of their partnership (either before or after the celebration of their marriage) discussed, far less elected to enter into, a nuptial agreement regulating what was to happen to their assets in the event of a separation or divorce. In the circumstances, I do not consider the absence of such an agreement to have any bearing on the impact of the law as it applies to special contributions in this case.

273. It is really the third point which goes to the heart of the case which is being advanced on behalf of the wife. Given the extent of her involvement with the Foundation (which I have already described earlier in this judgment); her obvious devotion to and prioritisation of the family's needs – a family of four children which included triplets; her role as homemaker and co-ordinator of all the children's social and other needs; what more, asks Mr Pointer, could she have done? What more should she be expected to have done in order to qualify for equal treatment with the husband in terms of financial outcome? As he rightly reminds me, she was not simply a 'working' wife; she was a wife who was fully engaged in fulfilling her role in the joint objective which had underpinned the marriage from its very inception. Her role in the Foundation demanded of her the skills and qualities which would have been needed in any CEO at the top of an organisation. Until the time came when the 'job' grew too big for any one individual, she performed that role without remuneration and entirely for the benefit of the beneficiaries of its grants and programmes. I thought it slightly churlish on the husband's part to say, as he did, that he did not seek to control the amount of time which she spent at work and she more or less devised her own working programme around the needs of the home and the children. I am quite satisfied that there was not a spare moment of this wife's waking day when she was not actively engaged either in

discharging her role in the home or working for the Foundation. I heard, and accept, her evidence that her day would often start in the early hours to coincide with calls which needed to be made in different time zones. She was frequently still working in her study at home after midnight when the children no longer needed her attention.

274.I am alive to the fact, as are the wife's advisers, that I am required under the statute to have regards to the contributions which the wife made 'to the welfare of the family'. How do these words square with her work in the Foundation? It seems to me that, had she secured remunerative employment in an equivalent organisation, no one could possibly have contended that her contribution as a working mother fell outside the parameters of s 25(2)(f). Why then should the fact that she volunteered her services for philanthropic causes without remuneration take her contributions outside that sub-section? The CH Foundation started its life as a creature of this family. Both parties accept in their evidence that neither could possibly have foreseen the manner in which it would grow over the intervening years. The wife described it to me on more than one occasion in her oral evidence as 'a fairy tale'. Together they conceived of this objective at a time when their own personal needs for financial security were already met. Together they discharged their respective responsibilities towards it.

275.However, in this context, and on the basis of the evidence which I heard, I do not think it is either fair or accurate to describe the husband's role within the Foundation as simply that of money-maker or finance generator. I accept entirely that this was a central and vitally important function. As he said, without the means to fund the good causes, they are no more than laudable aspirations. But, having listened carefully to him, I was left with the clear impression that he was much more involved in the work of the Foundation than the wife's presentation might appear to suggest. I have set out in paragraphs 78 to 82 of this judgment the account he gave me of the work he has done for the Foundation. As I said then, I am not able to accept that there was some clear line of demarcation between the respective contributions which the husband and the wife were making vis à vis their roles in the Foundation. The wife may have had a very much more 'hands on' role in terms of the day to day administration of the Foundation. She may have spent more time meeting and liaising with various dignitaries and government ministers than the husband, but I am satisfied that he was not excluded from this operational role within the Foundation. Like the wife, he has made a significant personal investment in the choice of causes which the Foundation supports. He was a regular attender at Board meetings and has quite clearly involved himself in the identification and selection of high profile candidates for appointment as trustees. I was struck by the contents of one of the emails to which I was taken. It was exhibited to the wife's narrative statement at **[A/C:22]**. It was written to the parties jointly by Lord Malloch-Brown, one of the trustees of the Foundation, on 13 January 2013. It concerned the selection of a replacement CEO following the Board's acceptance of the recommendations of the Bridgespan report. Having identified a short list of three potential candidates for the role, the email continued,

> 'The next step is for the two of you to meet them as quickly as possible. Each of them understands that indispensable to success in this role is a strong relationship of mutual trust with both of you so I anticipate that you will need to devote significant time to determining whether such a personal chemistry will or won't develop with each of the three.'

276. To put it simply, I was not left with the impression that TCI and the wealth generation was "his" exclusive role or domain, whilst the Foundation was "hers".

277. That does not in any sense diminish the wife's overall contribution. It was, as I have said, a full one. The question is whether or not the husband has made some further contribution, over and above that made by the wife, and unmatched by her in terms of their joint endeavours within the partnership which was their marriage. In terms of the way in which it was put by the Court of Appeal in *Cowan*, is there evidence that the husband was exercising some special skill and effort which is special only to him, and, if so, is it of such a quality or nature that his rights to the fruits of that inherent quality survive as a material consideration despite the partnership or pooling aspect of marriage?

278. I am conscious that in this case, as in so many, outcome is not simply a question of numbers or money. The court is asked to embark upon the exquisitely difficult task of assessing how different types of contributions should find expression in qualitative assessment. If special contribution in this case is to be reflected in a departure from equality of outcome in the husband's favour, is it not inevitable that the wife will feel that she has in some way been judged to be an inferior partner in the marriage partnership? Can it ever be a legitimate answer to such a case for a wife to highlight the more difficult aspects of married life with a 'stellar' or 'alpha' achiever? Can she point to the pressures placed on her role as wife and supporter occasioned by the quality traits often observed in individuals who achieve this level of success? Is it feasible for her to point to an increased burden in terms of family and domestic life whilst such a husband traverses the globe several times a month and works through special family anniversaries, birthdays or holidays?

279. All these factors simply bear out the often insurmountable difficulties of trying to quantify that which is often unquantifiable.

280. I am satisfied that each of these parents has played, and will play, a full part in their children's lives as parents. That does not diminish the importance of the wife's role as their day to day carer. Each was an equal partner in the marriage for so long as it endured. I am equally satisfied that the wife could not have done more in terms of her contribution to the home and to her work within the Foundation. I reject any suggestion that poor performance on her part was the catalyst for the recruitment of the new CEO during 2013. (To be fair to the husband, that was not where the oral evidence in the case took us.)

281. I am satisfied, too, that the husband's role in terms of his own involvement in work for the Foundation was a substantial one. I accept, of course, that he was balancing that work against the heavy responsibilities he carried for his external investors in TCI. Whilst it may not have matched the wife's role in terms of him being an almost daily presence in the Foundation's London offices or travelling abroad on frequent trips (as she was), he was nevertheless, as I have found, much more than the 'money-maker' in the equation.

282. I cannot, and do not, discriminate between their fundamental roles as wife, mother and homemaker on the one hand and wealth-generator on the other. But I then ask myself, as I am required to, was this husband's contribution 'exceptional' and deserving of some special treatment in this case? I am not prepared to embark in this judgment upon the definition or boundaries of what might constitute an exceptional contribution. But I ask myself these questions in the light of all the evidence I have heard and read :

i. Can it properly be said that he is the generating force behind the fortune rather than the product itself?

ii. Does the scale of the wealth depend upon his innovative vision as well as on his ability to develop those visions?

iii. Has he generated truly vast wealth such that his business success can properly be viewed as exceptional?

iv. Does he have a special skill and effort which is special to him and which survives as a material consideration despite the partnership or pooling aspect of the marriage?

v. Would it, in all the circumstances, be inequitable for me to disregard that contribution?

283. To each of these questions, my answer is 'yes'. Is it necessary for the purposes of 'special contribution' for me to find that the husband possessed the quality of 'genius'? Mr Pointer relied to an extent upon the fact that Mr Marks' case on his client's behalf relied simply on the extent of the wealth created to establish the special nature of the contribution he made. There are various definitions of the word 'genius' but all seem to suggest that, in order to qualify for this sobriquet, a person must have some exceptional natural capacity or intellectual or creative power or other natural ability which finds reflection in the exercise of an exceptional skill in a particular area of activity. Applying that definition to this husband, I take the view that he qualifies as a financial genius in his particular field of financial investment. If he does not, who could? In these circumstances, I find that, on any view, there has been a special contribution made by the husband in this case and that such contribution should and will be reflected in a departure from equality in terms of the overall award which I propose to make.

Discussion

284. The much more difficult question in the case is the extent of such a departure. I am extremely conscious of the need to ensure that this wife's contributions are properly reflected in the share of the assets she receives. I bear in the mind the limits of the *Charman* bracket and it would be invidious to embark upon a comparison of the different qualities and roles which this wife took on by way of a comparison with any undertaken by Mrs Cowan, Mrs Charman or Mrs Lambert. The fact of the matter remains that I have found that she could not have done more in terms of her role as wife, mother and homemaker. She applied herself to her work within the Foundation with assiduous enthusiasm, determination and commitment. By the time the marriage had come to an end, she was effectively CEO and Chair of one of the largest charitable foundations in the world. I think there is much in the submission made by Mr Pointer and Mr Kingscote that their joint endeavour flowing from the 'pact' or agreement which these parties made to devote their time and energies to philanthropic causes makes this union, of itself, a special partnership. From that partnership flowed obligations and responsibilities and each performed his and her part in discharging those responsibilities to the fullest extent possible. Just as the wife's effort was not rewarded by any financial benefit, so, too, the husband's work in managing the significant investment maintained by the Foundation in the TCI Fund was given freely and without any charge for management fees.

285. Nevertheless, I cannot ignore the extent of the very significant post-separation accrual in this case. That factor, taken together with what I have found to be a special contribution

on the husband's part during the marriage, leads inevitably to a departure from equality of outcome. I bear in mind the law which obliges me to reach a result which reflects not simply a nominal departure but a departure which recognises and properly reflects the full extent of the unmatched contribution which I have found he has made. The *Charman* guidelines provide a bracket within which I can properly commute between an award of 33.3% and 45% of the assets. The scale of the wealth in this case makes that a significant bracket in terms of outcome for both parties.

286.I bear well in mind the submission made by Mr Pointer that, throughout the period of separation, the wife continued to discharge her roles as mother and homemaker to the children, as well as her function at a senior level within the Foundation. So too, the husband's role as their father continued uninterrupted, as did <u>his</u> work within TCI and the Foundation. Does the full extent of the departure in this case then fall to be quantified on the basis of the absence of a spousal relationship between the parties coupled with the element of post-separation accrual? If that is the correct approach, how does one value each element of that equation? Do I adopt the precise and formulaic approach embraced by Mr Marks and Miss Clarke in their closing submissions and award the wife a certain percentage of the marital acquest as my baseline and only one half of that percentage of the separation accrual in addition? If that is the right approach, how then do I go on to reflect in my overall award a value or discount for the fact that for over two years in the post-separation period the wife and husband have not been providing the mutual love, comfort and support which was a feature of their married lives together?

287.It seems to me that, whilst having the attraction and rigour of intellectual logic, the approach which is illustrated on the 'case on a page' document which Mr Marks produced for the purposes of his final submissions may have the consequence of leading me into a 'straight jacket' approach which itself falls into the trap of attributing to the element of post-separation accrual the very 'bright line' figures which everyone accepts it is impossible for me to extract in this case.

288.I bear in mind also that, in my quest for a result which is fair to both parties, there are a number of other factors which need to be reflected in my ultimate award. These include the following.

289.First, I am very conscious of the fact that the wife's financial position will inevitably crystallise as a result of the award which I make at the end of this case. She may well achieve a substantial measure of investment return on her capital once she has had the benefit of specialist advice, but it is difficult to see that she will in future match the returns which are likely to be generated by the husband within his share of the TCI Fund for all the reasons I have explained earlier in my judgment.

290.Secondly, whilst he will continue to receive a very substantial income from his role as the effective investment manager, I find that it is more likely than not that the wife will not seek remunerative employment in the future. That is not to say that she would not be well qualified to seek a senior position. Rather it is a reflection of my view of her as someone who will continue to devote much of her life away from the children to charitable causes and philanthropic endeavour. She will certainly not have any financial imperative to seek paid employment.

291.In terms of the husband's future income stream, part of this will find reflection in the uncrystallised contingent incentive fees which will flow in over the next four years. I have not made an allowance for these in the adjusted Net Asset Register for reasons which I have explained (see paragraphs 137 to 139 and 188 (iii)). Whilst it is true that they reflect a significant amount of post-separation endeavour and new investments represented by the husband's unmatched contribution, they are nevertheless likely to fall in (in whatever sums eventually become payable) as a significant accretion to the substantial income he generates through receipt of his share of the management fees. In that sense they are, in my view, more properly categorised as a quasi-income receipt rather than a capital receipt. Because of the impossibility of drawing an accurate 'bright line' in determining what value should properly be attributed to the 'marital' element of this category of receipts, I have decided that the fairer way of dealing with this aspect of the case is to reflect the husband's far greater future income as one aspect of my determination in respect of the overall fairness of the percentage division which the wife will receive.

292.As Mr Pointer submitted so persuasively during the course of his closing submissions, the income which will be available to the husband over the course of the next two or three years is likely to be very significant. In my view, it can properly be described as being stratospheric in comparison with the sums this court is used to seeing, even at the upper end of the scale in 'big' money cases. From the husband's disclosure, Mr Pointer was able to extract his income figures for the last three years; there was no challenge from Mr Marks to the accuracy of his calculations. These are reflected in the table below.

HUSBAND'S GROSS INCOME (2011 – 2013) [C/F:140]	
2011	US$36.7m
2012	US$24.4m
2013	US$26.4m

Whilst it is true that, of these sums, significant amounts were diverted to the Foundation, it is also an established fact in the case that, with effect from April 2012, he ceased to make any further contributions.

293.This has a direct bearing on the ability of the husband to re-trench in capital terms. On the basis of the husband's evidence that he can make a 24% return for himself, Mr Pointer's maths demonstrate that, on the basis of his current offer to the wife, he will be back where he is now in capital terms within a 12 month period. If he were to retain less than US$1 billion for himself (the figure which represents the net effect of his current proposal), it might take him slightly longer. But the point remains a valid one, in my view. His potential to earn back (and thus restore) within a relatively short period any sums he has to pay to the wife at the conclusion of these proceedings is self-evident on the basis of his track record to date. In my view there is no likelihood of his 'ceasing operations' in the foreseeable future. In order to achieve a fair outcome at the end of this marriage, I therefore find that I can properly reflect in my award to the wife an element of the likely disparity in their wealth going forward, both as a result of the capital appreciation and income generation which will be achieved by the husband on his share of the assets but not by the wife on her share.

294.Thirdly, my view of the outcome in terms of the tax indemnity and escrow issues have played a part in my overall conclusions in relation to the extent of the departure from equality in this case. These conclusions I propose to set out in the final section of my judgment when I compute the award and the terms of the order I am proposing to make. They are based upon my assessment (where such assessment is possible on the known facts) of the degree of risk that each of the various categories of tax risk will materialise into a hard tax liability which the husband will have to meet. These I have already dealt with at paragraphs 249 to 251 of my judgment.

K. Quantum of the wife's award

295.As will be clear from my judgment, I have had very much in mind throughout my analysis the various sub-sections of section 25 of the Matrimonial Causes Act 1973. I do not intend to rehearse these individually for a second time. By way of summary, I say only the following.

296.I am obliged to give first consideration to the needs of the parties' four children, none of whom has yet reached the age of 18 years. I consider that their needs will be well met by each of their parents and I need say nothing further about them in this context.

297.I have dealt comprehensively with *'income, earning capacity, property and other financial resources'* (s 25(2)(a)) as well as *'needs, obligations and responsibilities'* (s 25(2)(b)). In each case I have considered the position both now and in the foreseeable future. I should say only this in terms of the wife's obligations. Her future within the UK Foundation will be the subject of a future determination by the board of trustees. During the course of the hearing, I asked Mr Pointer whether it was any part of his client's case that, in the event of her ceasing to be involved, she 'needed' provision as an element of her award to enable her to continue with her philanthropic work. There is already over US$140 million in the US Foundation of which she is a trustee with three others. Mr Pointer made it clear that he was not seeking to elevate this aspect of the wife's case to a separate head of 'need', although he asked me to bear well in mind that she clearly feels a moral obligation to those in respect of whom she has already made commitments. I take the view that the award she will receive will be sufficient to enable the wife to continue with her philanthropic causes if that is what she wishes to do. It is no part of my function to seek to influence the UK board of trustees one way or the other, and I do not do so. The Foundation's assets form no part of the resources which I am being asked to divide in these matrimonial proceedings. I merely record at this juncture that the evidence which was before this court suggests that the wife has been one of the Foundation's most valuable assets in the past ten or twelve years. Her complementary role to the husband's work in the Foundation and his generation of the substantial wealth which has funded its operations has been significant.

298.The *'standard of living enjoyed by the parties before the breakdown of the marriage'* (s 25(2)(c)), *'age of the parties and duration of the marriage'* (s 25(2)(d)), and *'the contributions which each … has made or is likely in the foreseeable future to make to the welfare of the family'* (s 25(2)(f)) have been well traversed already. Neither party has any physical or mental disability which I need to take into account. *'Conduct'* for the purposes of s 25(2)(g) only becomes relevant if I take the view that it would be inequitable to disregard it. To the extent that 'conduct', for these purposes, can be considered as one element of the contribution which each has made, I have already taken it into account in my analysis of the husband's 'special contribution'. It has no further relevance *per se* in this case.

299.I have thought long and hard about this case. For the reasons which I have given, this is a case where a significant departure from equality in the husband's favour is entirely justified by the compounding factors of post-separation accrual and special contribution. The husband's proposal is too low and does not properly acknowledge the extent of the contributions which the wife has made in her own right to this marriage. The conclusion which I have reached having taken everything into account is that the wife should receive an award of US$530 million from the available assets of just under US$1.5 billion. That sum represents approximately 36% of the global resources (36.12%). On the basis of current *fx* rates, it converts to a sterling sum of c. £330 million. From that sum, the wife will bear her share of any of the contingent tax risks which materialise and she must also make provision for the escrow which will be established in respect of the tax indemnity. In my judgment, an award at that level properly reflects her contributions and her entitlement to a fair share of both the marital acquest and the post-separation accrual in this case. It is a result which I consider, with the orders I shall make in relation to the tax indemnity and escrow, is fair to both parties. It reflects my considered view of the weight and relevance which I should attach to each and every aspect of the case, the totality of the evidence put before me, and the submissions (both oral and written) which were made by leading and junior counsel on both the tax and matrimonial issues.

300. I test my conclusion about the fairness of this award against the framework of the distribution schedule which Mr Marks and Miss Clarke produced for the purposes of their final submissions. We have used different computational bases. Nevertheless, my percentage figure as a share of the global assets is not very different from the 33% and 16.6% applied in relation to the computation of the husband's final position in relation to his primary case. It seems to me reasonable to proceed on the basis that I can properly assume that a sum of approximately US$700 million is a fair representation of the value of the marital acquest as at March 2012, being the date of separation. (It will be recalled that this figure emanates from an application of the March 2012 *fx* rates to the original Net Asset Register produced by the husband as at December the previous year.) It was only in 2013 that the TCI Fund went back into profit and it has achieved exponential growth of just under US$550 million since then. No one has attempted to quantify the extent of the value of the matrimonial 'tailpiece' which can properly be traced into that growth and I take the view that formulae or the application of random percentages do not assist me. To the extent that Mr Marks and Miss Clarke accept that there is inevitably a degree of arbitrariness in their approach of applying a 50% discount to the headline percentage award in terms of calculating the wife's entitlement to the post-separation accrual, I do not seek to criticise their approach. Nonetheless, in striving for the fair result, it seems to me that it does not provide the definitive answer when one considers the breadth of the discretion which section 25 of the 1973 Act bestows upon courts faced with the difficult task of achieving overall fairness in cases where needs do not predominate but a departure from a position of overall equality is justified by factors specific to the individual case.

301.In this context, I bear in mind (and respectfully agree with) what Moylan J said in *P v P* when he was dealing with the difficult issue of drawing lines in relation to post-separation accrual. At [2008] 2 FLR 1135, his Lordship said this:-

> '**[106]** These issues reflect the continuing debate about, in particular, the effect of the House of Lords' decision in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186 and of the subsequent decisions in the lower courts. At present we are engaged, in my view, in an incremental search for a consistent pattern in the application of the principles identified by the House of Lords. This is unlikely to happen quickly. It needs to be incremental because of the risk that broad statements about the application of these principles can overlook their effect in different factual situations not then before the court. Consequences can also become evident in the long as well as the short-term. It was, after all, many years before the adverse consequences of Mesher orders were fully appreciated, when Ormrod LJ referred to the chickens coming home to roost.
>
> **[107]** In this search, there is a well recognised tension between predictability and flexibility in approach and outcome. A too ready reliance on the former at the expense of the latter can easily result in unfairness (Lord Hope of Craighead's harshly frank appraisal of the effect of the law in Scotland, as capable of 'producing very real injustice', provides a clear demonstration of this point.) On the other hand, complete flexibility leads to a consequent lack of predictability (and exposes parties to the costs of litigation referred to by me at the outset of this judgment).'

302.Nevertheless, if the wife were to receive 36.12% of US$700 million and roughly 18% of the increase in the value of the assets since then, her award would be in the region of US$252.84 million plus c.US$138 million, a total of just under US$400 million. In my considered view, that sum does not do sufficient justice to the extent of her very considerable contributions to this marriage. It is for that reason that I have looked at the broader picture and determined her share (which must be less than 50% on the basis of my findings) on an overall appreciation of the value of her claims in the light of everything which I now know about this case.

303.Whilst I recognise that, in abandoning any attempt at a strict formulaic approach to calculating the wife's award, I might lay myself open to the criticism that I have adopted an arbitrary or *ad hoc* approach, my answer is a principled one when assessed by the cross-check of overall fairness; that cross-check is an essential part of my reasoning. In this context, see para [52] of the judgment of Wilson LJ and para [64] of the judgment of Arden LJ in *Jones v Jones* [2011] 1 FLR 1723 at pages 1739 and 1741.

304.Of the award of US$530 million, I propose to round up the value of the Connecticut property which she will retain to US$3 million. That is the figure which Mr Marks has taken for the purpose of his calculations and it seems to me to be appropriate to make an allowance for some uplift from the August 2013 valuation of US$2.7 million.

Together with the share of the pension which she will receive from the Jersey fund (US$33.74 million[14]), the cash adjustment to be paid by the husband will be in the round sum of US$493,250,000. It will paid in US dollars abroad in such manner as the parties shall agree on the basis that there is no application for Decree absolute prior to the release of those funds. The wife will undertake for these purposes that she will not remit the funds onshore until after Decree absolute.

305. In terms of my decision in relation to the tax indemnity and escrow issues, I have decided that:-

i. 40% of the total value of the cash element of the wife's award (US$197.3 million) (reflected as a separate lump sum order) shall be held in a designated, and agreed, escrow account. The parties have already taken steps to identify the identity of the account holder and the terms of the escrow[15]. In the absence of an appropriate undertaking from the husband (and I have no reason to doubt that one will be forthcoming), I shall make an order which prevents either of the parties from taking any steps to deal with that account before the date stipulated in sub-paragraph (iii) below.

ii. The beneficial interest in the escrow account will remain the husband's albeit any net income arising on the account shall be paid to the wife as and when the escrow is released to her.

iii. The funds held in escrow may be released to the wife on the earlier of:-

a. 6 April 2017 (unless a formal enquiry on the part of HMRC is by then already in train); and

b. The later of (i) a determination that the husband continues to be non-domiciled in this jurisdiction and (ii) 6 April 2015.

[14] I have taken the wife's pension share on the basis of 36.12% of the aggregate value of the three funds although I intend that this should be extracted as a single pension credit from the main Oceania International plan.

[15] In the event that the husband wishes the US$197.3 million to be held in the equivalent sterling sum (because it is a sterling risk that is being secured), I would hope that agreement can be reached between the parties and their advisers to this effect. Absent such agreement, I will deal with further submissions in due course in the context of the drafting of the order which will flow from my judgment.

The escrow account can be used to cover any of the identified tax risks. Should she elect for the funds, or part of them, to be left in escrow for a longer period in order to cover the period of her exposure under the indemnity which should, in my view, continue until 6 April 2019 (see sub-para vi), that will be entirely a matter for her.

iv. To the extent that her liability to meet 36.12% of any tax arising in respect of potential identified hypothetical liabilities exceeds the amount held in the escrow account, she will be wholly responsible for any such grossing-up unless the original escrow account has been fully deployed in meeting her share of the liability. In this event, the cost of grossing-up shall be borne by the husband and wife in the same proportion as my award (ie.36.12% by the wife and 63.88% by the husband).

v. In relation to the tax indemnity sought by the husband in relation to identified risks, I do not accept that this should be limited to the value of the funds held in escrow, as the wife contends. Given that all parties and their advisers accept (and I have found) that the risk of liability crystallising in respect of the identified risks is very low if not negligible, I do not regard any potential liability on the part of the wife to contribute to represent an unfair or unrealistic burden in terms of sharing what could conceivably, in due course, represent a diminution of the assets currently available to these parties as I have found them to be. Her liability (or potential liability) will be limited to 36.12% of the tax, interest and any penalties charged for the period 2008/2009 to 2014/2015. I have extended the period back to the tax year 2008/2009 because (a) it relates to a period when the marriage was subsisting and the parties operating as a partnership in all senses of the word, <u>and</u> (b) I take the view that the risk of HMRC being successful in any challenge is low. She shall only be liable to contribute pro rata to the husband's professional costs incurred in dealing with any tax liabilities if such instructions are made on the basis of joint instructions and she is kept fully informed of any and all negotiations which may be ongoing with the Revenue.

vi. In terms of the scope or reach of the indemnity, I do not accede to the husband's request that there should be a general tax indemnity which covers all and any risks outside those which have been identified and addressed by tax counsel in the schedule at Appendix 1. I consider that it is reasonable for the wife to share in any liability arising under those risks but not for the term sought on behalf of the husband. My objective is to achieve a clean break between these parties at the earliest date in accordance with the statutory objective set out in s 25A(1) of the 1973 Act. To this end, in my judgment, the indemnity should come to an end on 6 April 2019. I do not consider it is either fair or necessary to keep the wife 'locked in' to potential exposure for an extended period of uncertainty until 2021. I have well in mind Mr Marks' arguments (and those of Mrs Chamberlain) that her exposure should last for a period of *at least* four years (ie. to 6 April 2019). The husband's case that it should endure for a further two years to 2021 is based on the further window which the Revenue has to take account of any carelessness on the husband's part in submitting his returns. Nonetheless, it is in my view too long a period even on the basis of the facts of this particular case and the complexities of the husband's tax position.

Timing of payment of the award to the wife and other drafting issues

306. The drafting of the order which I make will necessarily take time and consideration. In terms of the timescale for payment of the lump sum to the wife, the parties had agreed that it should be paid within six months of the date of the order. Because the husband had already put in place various (tentative) steps to liquidate some of his units in the TCI Master Fund by the conclusion of the hearing, and in view of the fact that my judgment was reserved, it may be that there will be agreement between the parties that she should receive her entitlement sooner. At the conclusion of the case, Mr Pointer sought on behalf of the wife an advance payment of US$10 million which he said could and should be paid within 14 days. If this interim payment can be the subject of agreement, it will obviously need to be paid to the wife offshore where it must remain until after Decree nisi has been made absolute by order of the court. Such an interim payment is likely to have consequences in terms of the wife's current interim funding regime. If there is to be a lengthy delay of some months between the date of any interim payment and the receipt by her of the balance of the award, she may well be put in a position where she needs to bring funds onshore to meet her living expenses (including the rent on the home she is currently occupying with the children). In these circumstances it seems to me that the preferable course is to ensure that she receives the totality of her award as soon as it can be made available to her. I would hope that the parties and their advisers

will now be in a position to agree these matters. If they are not, I shall make such order as may be necessary in relation to timing and/or an interim payment on account but, for these purposes, I shall need brief written submissions as to time lines and the up to date position in relation to the husband's proposed liquidation of some of his units in the TCI Master Fund.

307.If and insofar as there may be a need for me to embark down the road of contingent lump sums, I will do so. But I would hope and expect that the wife, once she has received appropriate advice, will feel able to agree to whatever mechanisms need to be put in place to ensure the full implementation of my order.

308.The timing of the clean break as between the husband and the wife will need to be factored into a draft order. I am confident that this is something which will be agreed with the assistance of the parties' legal teams.

309.Financial support for the children appears to be agreed in the sum of £30,000 per child per annum together with all their educational costs until each finishes tertiary education. The full terms of the order in respect of child support will doubtless be agreed in its detail to include, if necessary, any provision for their medical insurance cover and/or related expenses. I did not hear specific submissions on this point and propose to leave the drafting in the very capable hands of the experienced teams on both sides of the case.

310.These will be the terms of my order. In the event that issues arising need to be resolved, I shall deal with them on paper or in the context of a further hearing, as may be appropriate.

Order accordingly