Neutral Citation Number: [2018] EWCA Civ 1050

Case No: B6/2017/0418

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**(FAMILY DIVISION)**
**Sir Peter Singer**
**ZC14D01200**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2018

**Before:**

**LORD JUSTICE LEWISON**
**LADY JUSTICE KING**
and
**LORD JUSTICE HOLROYDE**

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**Between:**

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| **Camilla Eva Carin Versteegh** | **Appellant** |
| **- and -** | |
| **Gerard Mikael Versteegh** | **Respondent** |

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**Mr Timothy Bishop QC, Mr Terence Mowschenson QC and Mr Richard Sear** (instructed by **Payne Hicks Beach Solicitors**) for the **Appellant**
**Mr Lewis Marks QC and Ms Elizabeth Clarke** (instructed by **Withers LLP**) for the **Respondent**

Hearing dates: 7 – 8 February 2018

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# Approved Judgment

## Lady Justice King:

*Introduction*

1. This is an appeal from the order of Sir Peter Singer dated 30 January 2017 by the wife Camilla Versteegh ("the wife") in relation to her application for financial remedies against her husband Gerard Versteegh ("the husband").

2. The order now challenged gave the wife approximately half the non-business assets (£51.4m) together with a 23.41% interest in a business called H Holdings, which business had been created by and was run by the husband under a trust structure. The costs to date (excluding the costs of the appeal) are in excess of £4m.

3. The judge gave three judgments: a substantive judgment (J1) and two supplementary judgments (J2 and J3), these latter two were in part clarification, but were predominantly concerned with the nature and form of the wife's proposed shareholding in H Holdings, together with such safeguards and protections as were capable of being put in place in order to protect her interest in the company.

4. Mr Bishop QC on behalf of the wife seeks a rehearing of all the issues in the case in the light of what he describes as the "profound deficiencies and errors which permeate the evaluations and exercise of discretion in the judgments". Mr Marks QC on behalf of the husband urges the court to dismiss the appeal in its entirety.

5. Whilst the court must address the extensive arguments it has heard about, *inter alia*, the impact of a pre-marital agreement, non-matrimonial assets and the sharing principle, the main focus of the hearing has been upon (i) the judge's finding that he was unable to determine the value or future liquidity of H Holdings, the major business asset and (ii) his decision to make a so called *Wells* order whereby, rather than receiving a lump sum representing her interest in H Holdings, the wife received her interest *in specie* in the form of ordinary shares.

*Background*

6. The husband and wife are both in their 50s. Both are Swedish and were born, brought up and educated in that country. The parties married in August 1993 and have three adult children. The wedding took place in Sweden. On 27 August 1993, the day before the wedding, the wife signed a Pre-Marital Agreement ("PMA") by which the parties committed to a separation of property regime.

7. The wife comes from a comfortable, middle-class background and, after completing her education, worked in Sweden for about 5 years. By the time of her marriage, she had bought a flat and owned a holiday property jointly with her sister.

8. The husband, in contrast, comes from a Swedish family who have, as the judge described it "enjoyed significant affluence for a number of generations". Prior to the marriage the husband had inherited tranches of shares in family companies.

9. In about 1983 the husband moved to London where he bought a flat. The husband proved himself to be an astute business man and acquired a number of property and business interests, the focus of which is "slow burn" property development.

10. Immediately after the marriage, the wife moved from Sweden to live in London with her new husband; there they lived with their children, the wife as home maker and the husband as breadwinner until their separation in June 2014.

*The business structure in brief*

11. Mr Bishop put before the court an organogram which demonstrates complex interlocking entities. These show a variety of land and real property related activities conducted through in excess of 30 entities spread across the world. Daunting though Mr Bishop's organogram appears at first blush, in the event, only a relatively basic understanding of the husband's business operations is necessary in order to identify and thereafter address the issues between the parties.

12. The businesses are in large part held within a trust structure, the H Settlement, in relation to which the trustees, a trust company in Jersey called Minerva, have discretionary powers. The husband is a life tenant of the settlement. At the top of the structure sits a company called D Holdings in which the H Settlement has a 96.38% interest. The remaining 3.62% is held in a settlement in which the wife is the beneficiary (the W Settlement), the husband having settled the shares into that trust during the course of the marriage.

13. D Holdings in turn owns a 93.74% interest in H Holdings. (The remaining 6.26% is owned by AMW and his wife, work associates of the husband, and is not relevant for the purposes of the dispute). H Holdings is the main holding company containing around 90% of all the group's wealth.

14. The nature of the business is that of long term land development projects which can take many years (if ever) to come to fruition. The company has high levels of borrowing, security for which comes substantially from commercial properties held within the structure. In addition, the husband has, over time, provided the company with loans of £45m which are repayable to him, tax free. These loans will, it is accepted, substantially fund the cash part of the wife's settlement.

15. It can be seen therefore that it is the H Settlement that owns the assets the subject of this dispute. The husband is however the life tenant and the driving force behind H Holdings. There has been, and is, no suggestion that the trustees will not agree to the release/transfer of such assets as are required to satisfy any order of the court. The fact that the assets are within a trust structure is therefore of only marginal relevance on the facts of the case.

16. The court heard extensive expert evidence at trial in relation to projects within H Holdings: The first category related to two sites:

    i) KF: a former industrial site of some 56 acres being developed in conjunction with a local authority, the site having been acquired as long ago as 2003.

    ii) CB: a beach development in Cornwall intended to be holiday homes. The site was acquired in 2002. As of trial, the development was on hold as a result of the change in stamp duty in relation to holiday homes.

17. The second significant area of dispute was in relation to the land promotion side of the business. Through this arm of the business, H Holdings works with landowners to promote planning applications and facilitate sales to developers. These investments involve significant up-front expenditure and are usually 'under water' until planning permission is obtained. It can take 15 -20 years before there is a profit. The valuation exercise focused specifically upon two of these land promotion businesses: ACo and CL Co.

*The Parties' Positions at trial*

18. In the early stages of the litigation the husband's stated position was that the PMA referred to above should conclusively govern the outcome of the proceedings. This would have meant that the wife would have retained assets of about £27 million held in her name against her needs, (generously assessed) at something over £22 million. The wife, in response to this early salvo by the husband, filed written statements which the judge held to be a "compound of deliberate untruths" in respect of the circumstances leading up to the signing of the PMA and her understanding of its implications. The judge found that she then 'embroidered' these untruths when she was challenged in cross examination [178].

19. By the time of the trial, the husband had moved away from his early position and now made a proposal which he felt to be fair in all the circumstances. As his offer required him to transfer money and shares to the wife to which he alone was entitled under the terms of the PMA, there was now a 'sharing' element to his proposed settlement.

20. The husband proposed that the wife should receive £38m from liquid resources. In addition she was to receive a 23.41% shareholding in H Holdings. The settlement would be made up from the majority of the net proceeds of sale of the former matrimonial home (currently held in joint names) a holiday home and a lump sum payment by the husband to the wife.

21. The husband's case was that this represented a fair outcome when taking into account the PMA, his contribution to non-matrimonial property and the need not to jeopardise his business.

22. The wife's position at trial was substantially based on the evidence of her expert Mr Bezant of FTI Consulting. She asserted that the matrimonial assets amounted in total to £278m (later adjusted to £273.5m). The wife proposed that the assets should be divided as to 42.5% to her and 57.5% to the husband. By her movement away from an equal division, the wife recognised the introduction to the marriage by the husband of non-matrimonial property. The effect of the wife's proposal would have been that she would receive £116m and the husband £157m. The wife proposed that payment should be by way of transfer of various readily transferrable assets and a balancing payment of £67m payable in 4 lump sums to be paid by the husband to her between 2016 and 2019.

23. In making an order substantially along the lines sought by the husband the judge decided:

    i) That the wife had a full appreciation of the implications of the PMA when she signed it,

ii) That the variables it was necessary to apply in order to value the 4 major developments within H Holdings were so fickle that it was impossible to value them or any of them. Similarly, in relation to future liquidity, the evidence of the experts did not, he held, provide him with a "probability-based assessment of the amount of, or rate at which, funds might be made available to the wife from the business structure" [81],

iii) That a fair outcome could be achieved by an equal division of the non-business assets and the transfer by the trustees to the wife of 23.4% of the shares in H Holdings.

24. The judge regarded a division along the lines proposed by the wife as "wholly disproportionate" [194] saying:

> "….it would leave the wife… with the entire proceeds of the London home (estimated at some £26.5m) plus the £67.2m lumps sum, out of which £93.7m once rehoused mortgage free she might retain £80m or thereabouts in free capital. In addition she would have the not so immediately or realisable shares £23.5m worth…of BM shares. Nor would such a distribution of component elements be fairly balanced: the wife on her side would be liquid as to 95% (that is to say treating the BM shares as too viscous to regard as liquid for this comparison). The husband by comparison would have £5m of equity tied into his two homes, a mortgage debt of twice that amount, and his interest in two Settlements from which about 35% (on the wife's valuation basis) would have to be extracted to pay her lump sum, less any tax liabilities which might arise in freeing up those funds for her."

25. The judge concluded that 'fairness and justice' between the parties would be met by provision for the wife, as follows:

a) Net proceeds of the London property: £40.2m (£28m + mortgage reduction via loan repayment of £12.2m)

b) Holiday properties: £1.6m

c) 35% share of the remaining outstanding loans to the husband : £12m.

26. Such a settlement would give the wife, after payment of some outstanding liabilities, the sum of £51.4m against needs of £22m. The husband for his part would have £49m outside of H Holdings, of which £23m would be in shares within an entity known as BM. The effect of this part of the judge's order (subject to the liquidity of the BM shares) was, to all intents and purposes, an equal division of those assets held outside H Holdings.

27. In accordance with the husband's offer, the judge proposed to give the wife in addition 23.41% of the shares in H Holdings (representing 25% of the shares in H Holdings owned by the H Settlement). The wife was to transfer back the shares currently held by her in D Holdings through the W Settlement.

*The Grounds of Appeal*

28. The lengthy grounds of appeal filed on behalf of the wife can be divided up into four categories of complaint which issues were the focus of the hearing before us:

    i) The judge's treatment of the Swedish Pre-Marital Agreement ("PMA")

    ii) The judge's treatment of the non-matrimonial property

    iii) The judge's decision that he could not properly place a value on a number of the projects within H Holdings or its liquidity going forward and the alleged impact that decision had on the sharing principle

    iv) The judge's decision to make a so called *Wells* order in relation to part of the wife's settlement whereby, rather than receiving payment for her interest in H Holdings, ordinary shares in the business were to be transferred to her.

*The Pre-Marital Agreement*

29. The husband and wife met for tea at the Dorchester on the eve of their engagement in May 1993. They talked about the signing of a PMA. The husband's evidence was that it was discussed in detail and it was understood between them that they would enter into a formal and binding PMA which would "encompass and keep inviolate", not only his prenuptial assets, but anything he acquired thereafter during the marriage.

30. As noted above, the wife in due course signed the Pre-Marital Agreement ("PMA") on 27 August 1993 in Sweden, the day before the wedding.

31. The wife's case was that whilst she had been willing to sign the PMA, she anticipated that the proposed agreement would cover only non-marital assets derived from the husband's family. The wife said that she did not have legal advice before signing the PMA and had not even read the agreement before the wedding. The wife said that it was only when she was asked to take the document to show to her solicitors 21 years later, after the breakdown of the marriage, that she read it for the first time. On reading it she was "shocked" upon appreciating its implications for her in divorce.

32. A former friend of the wife, Mrs L, gave evidence about conversations she had had with the wife about her (the wife's) understanding of the PMA. Mrs L is also married to a Swedish man. The two couples lived in England and were friends particularly between about 1997 – 2005. (The wife is godmother to one of Mrs L's children). The two women saw each other regularly and, Mrs L said, had discussed PMAs on several occasions. Mrs L had herself declined to sign a PMA. The wife had explained to Mrs L that all of her friends who had "married money" had had to sign one, and that the spouses of each of the husband's siblings had signed them when they had got married.

33. Mrs L's evidence was that the wife had told her in terms that under the PMA she would get nothing on divorce and that she was therefore seeking some form of financial security from her husband. At some stage the wife told Mrs L that the house (earlier matrimonial homes having been in the husband's sole name) was now in joint names and that she had secured a share of the business that he ran (a reference to the W Settlement). Mrs L said that in 2005 the wife told her that, having negotiated such provision with her husband, she was now content.

34. The wife hotly denied Mrs L's account of matters. In response to Mrs L's statement she filed what the judge described as a "malicious counter-statement denying as fiction what Mrs L asserted [which] can fairly be described as a vitriolic attempt at character assassination."[182]

35. The wife's case, which was rejected by the judge in its entirety, was that Mrs L was a clever, calculating woman "determined, competitive, resolute, ruthless who has no hesitation to use every means in her power to climb the social ladder". The wife said that Mrs L was giving evidence as "she has seen an opportunity to attack me, please her husband and get a little bit of social advantage by helping [the husband] and she has taken it" (statement 14 April 2016).

36. The judge's finding in this respect was that:

    a) [182]…"I am not remotely persuaded that Mrs L was, as was put to her, giving invented evidence to further her social aspirations and to pander favour with the husband, nor because he had bribed her or because she hoped that he might do so, if only with invitations to desirable social events. Her evidence was clear, and to my eyes and ears compelling.

    b) [183]… So I find as a fact that throughout the marriage the wife has known and understood the impact of the PMA.

37. Mr Bishop submits that this does not amount to a clear finding that the wife understood, at the time that she signed the PMA, that the husband's future acquired wealth would be excluded under the terms of the agreement because, Mr Bishop said, the judge referred to her state of knowledge "throughout the marriage" rather than "from the date of signing the agreement". Whilst the judge could undoubtedly have drafted his findings in this regard with more precision, I do not accept Mr Bishop's submission. The evidence of Mrs L could not have been clearer: not only had the wife understood the implications of the PMA when she signed it, but she had been sufficiently conscious of them that she had, over the course of the marriage, done what she could to ameliorate the effect of the PMA. Further, given that the PMA was signed the day before the marriage, it is hard to know what could have happened to change the wife's state of knowledge overnight.

38. The agreement signed by the wife when translated from Swedish provides:

> "The property owned by either of us is to remain the private property of the party in question. This applies to all and any property whether acquired or inherited by us, bequeathed to us under a will or given to us as a gift whether prior to the marriage or subsequently. It also applies to any property acquired to replace such property or any income derived from it."

39. Swedish law is the proper law of the contract.

40. Since *Radmacher v Granatino (Radmacher)* [2011] 1 AC 534 PMAs are no longer regarded as contrary to public policy in this country. Lord Philips said:

> "52. If parties who have made such an agreement, whether antenuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement."

Looking at the structure of the judgment of Lord Philips in *Radmacher* he identified three heads for consideration:

a) Factors detracting from the weight to be accorded to the agreement [68 – 73]

b) Factors enhancing the weight to be accorded to the agreement: the foreign element [74]

c) Fairness [75].

In considering those factors "detracting from the weight to be accorded to the agreement" Lord Philips said, as far as is relevant to the present case:

> i) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications;
>
> ii) Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end;
>
> iii) [70] It is, of course, important that each party should intend that the agreement should be effective;
>
> iv) As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so."

41. At [71] Lord Philips says that the first question will be whether any of the 'standard' vitiating factors of duress, fraud or misrepresentation is present. He goes on to explore this further taking into account the party's emotional state and maturity amongst other matters.

42. Lord Philips moved on to consider factors "enhancing the weight to be accorded to an agreement": the foreign element saying at [74]:

> "When dealing with agreements concluded in the past, and the agreement in this case was concluded in 1998, foreign elements such as those in this case may bear on the important question of whether or not the parties intended their agreement to be effective. In the case of agreements made in recent times and, a fortiori, any agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in relation to that question."

43. Finally [75] Lord Philips turned to the heading of *Fairness* identifying the difficulty which arises where the agreement makes provisions that conflict "with what the court would otherwise consider to be the requirements of fairness". He said:

> "The effect of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance.

It was in this context that Lord Philips 'advanced' his now well-known proposition that:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".

44. *Radmacher* represented a "sea change" in the UK court's approach to pre-marital agreements whereby, not only are PMAs no longer contrary to public policy, but where a party has a full appreciation of its implications, the court should now give effect to such an agreement, unless it would be unfair to do so.

45. In order for a court to conduct such an evaluation it will inevitably be required to make a number (and perhaps many) findings of fact. In this case the judge not only made findings of fact against the wife, but regarded her evidence in this regard as such a "compound of untruths" that it merited the rare sanction of the making of an order for costs against her.

46. There is (rightly) no appeal against the judge's findings of fact in relation to the PMA. Mr Bishop has no choice but to make his submissions against the backdrop of these damning findings. Nevertheless he has been tenacious in his submission that the judge should have ignored the PMA entirely and rather approached the case as if it

were a pure sharing case in which fairness required the wife to receive an equal division of the assets, less only her proposed 15% reduction to acknowledge the non-matrimonial property held by the husband.

*Legal Advice*

47. Mr Bishop's main focus was upon the fact that the wife had received no legal advice prior to signing the PMA. How could it, he submitted, be said that she had a "full appreciation of its implications" absent such advice? To make good his submission, Mr Bishop relied upon the observations of Mostyn J in *B v S (Financial Remedy: Marital Property* [2012] FLR 502.

48. In *B v S,* the parties had married in Catalonia where there is a default separation of property matrimonial regime. The couple subsequently, in addition, entered a formal separation of property regime in a different country at a time the husband was placing a valuable property into the sole name of the wife.

49. The parties moved to England and were subsequently divorced. The court considered what, if any, weight to place upon the default matrimonial regime under which they were married and/or on the second country agreement. In his judgment Mostyn J referred to a recent decision of Moor J in *Z v Z (No 2) Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam). *Z v Z* related to a French couple who had signed an agreement in France which was considered to be 'the norm' and which subjected them to separation of goods upon divorce. The wife in *Z v Z* conceded that at the time she had entered into the agreement, she "had a full appreciation of its implications". Moor J did not accept her evidence that the PMA should not however be enforced because the husband had, she asserted, told her that he would not rely upon the agreement in the event that they separated.

50. At [18] of his judgment Mostyn J set out Moor J's conclusion that :

> "I therefore reject all the arguments raised to say that it would not be fair for me to uphold the agreement insofar as it excludes sharing. It might have been very different if the agreement had also purported to exclude maintenance claims in the widest sense…."

51. In considering *Z v Z,* Mostyn J rightly said that Moor J's judgment is of 'persuasive force'. He went on to say however that his (Moor J's) decision to implement the agreement to its full extent was "perhaps unsurprising as it would appear that the wife in *Z v Z* had conceded that she had signed the agreement with a full appreciation of its implications."

52. Mostyn J went on to say that:

> "[19]…. Mr Le Grice has argued, with some force, that the persuasive influence of this decision must be affected by a concession which appears to have been wrongly made…"

53. Mostyn J therefore expressed his own view as to the effectiveness of a foreign PMA in divorce proceedings in England independent of and different from, those expressed

by Moor J in *Z v Z.* Mostyn J concluded that the wife in *B v S* had not entered the agreement "with a full appreciation of its implications" and so he would place no weight on either the default matrimonial regime or the later agreement. Mostyn J said:

> "[20] In my judgment the requirement of *"a full appreciation of its implications"* does not carry with it a requirement to have received specific advice as to the operation of English law on the agreement in question. Otherwise every agreement made at a time when England and Wales was not on the horizon would be discarded. But in order to have influence here it must mean more than having a mere understanding that the agreement would just govern in the country in which it was made the distribution of property in the event of death, bankruptcy or divorce. It must surely mean that the parties intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution. I have respectfully suggested in *Kremen v Agrest No. 11* that usually the parties will need to have received legal advice to this effect, and will usually need to have made mutual disclosure."

It follows that the concession made by the wife in *Z v Z* was wrongly made only if one agrees with Mostyn J that she should have had legal advice before it could properly be said she had a full appreciation of the implications of her PMA.

54. Mr Bishop unsurprisingly relied on *B v S* in support of his argument that the PMA should carry no weight as the wife had received no legal advice in respect of the English discretionary regime of divorce at the time she signed the PMA. He submitted that without such advice she could not truly be said to have had a "full appreciation of the implications". Mr Bishop's case was therefore that, although the wife was well aware when she signed the agreement that she was going to be living in England, she was unaware that England has a discretionary approach to financial provision upon divorce. It follows, he said that she could not be said to have had a full appreciation of the implications of what she was signing.

55. Mr Marks QC submitted that the approach of Moor J in *Z v Z* was to be preferred to that of Mostyn J in *B v S.* He says that the findings of fact made by the judge in respect of the wife's understanding of the agreement itself, and the fact that the agreement was signed on the basis that the wife would immediately move to live in England, cannot be ignored. Mr Marks says that it cannot properly be argued that the wife (contrary to the finding of the judge) did not have a full appreciation of the implications of the PMA which were clearly intended to apply to their marriage regardless of where they lived from time to time.

56. Mr Marks rightly points out that when the PMA was signed by the wife in 1993, it was some 8 years before the House of Lords heard *White v White [2001] 1 AC 596.* Had the wife been given the advice Mostyn J had in mind, Mr Marks reminds the court, she would have been told that England had what then amounted to a 'separation of property' regime and that, upon divorce, she would get a settlement which provided for her needs and no more. In those circumstances Mr Marks says, there was not, in any event, any material lack of information or advice per *Radmacher* [69].

57. In my judgment Mr Bishop has a number of difficulties with his submission that as the wife had not had the benefit of legal advice, the judge should have excluded any consideration of the PMA.

58. Lord Philips said legal advice is 'desirable' (but not essential) and that if it is clear to the court that the party understands the implications of the agreement and intended that the agreement should govern the financial consequences in the event of divorce, that is sufficient [69] to give effect to the agreement.

59. The desirability of legal advice forms part of the miscellany of factors which a judge considers before concluding that a party did (or did not) have a full appreciation of the implications of the PMA. Doubtless in some cases its presence or absence will be critical. In the present case, the judge was fully aware that the wife had not received legal advice but, having seen her give evidence, made the clear finding that the wife knew "full well" the effect of the agreement. The judge said that he was able to "reach a firm and clear conclusion" and to "find as a fact that throughout the marriage the wife has known and understood the impact of the PMA" [183:J1]. On the judge's findings there can be no doubt but that the wife clearly felt herself to be bound by the PMA in England and acted to ameliorate its effect.

60. The parties are Swedish and the wife lived her entire life in Sweden prior to the marriage. PMAs are both commonplace and binding in Sweden. The brief document signed by the wife was in absolutely standard form, written in Swedish and which the wife agreed she understood. The agreement was to be subject to Swedish law. Under this standard agreement the parties elected a regime of separate assets with no delineation as between inherited and other kinds of wealth, all of this in contemplation of their married life being in England not Sweden.

61. The judge had the benefit of the opinions of three Swedish commentators on family law who confirmed that such formal requirements for a PMA as existed in Sweden at the time were complied with. Further, neither the absence of, nor lack of opportunity to take, independent legal advice (nor the proximity of the signing to the ceremony) would of themselves offend a Swedish court. [184]

62. Lord Philips acknowledged that foreign elements may bear on the question as to whether the parties intended the agreement to be effective [74]. The Supreme Court did not say that the fact that the PMA was signed in another country elevated the obtaining of legal advice from desirable to essential.

63. On Mr Bishop's case, the relative informality (and absence of legal advice) which is prevalent in many European countries where PMAs are routine, would render them of no effect in the context of English divorce proceedings absent independent legal advice having been given to the wife at the time of the making of the PMA in order for the court to be satisfied (as Mostyn J put it) that " the parties intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in a jurisdiction that operates a system of discretionary equitable distribution".

64. The PMA was, in effect, a part of their marriage, metaphorically taken with them where ever they went, reflecting an autonomous decision made by them as to how they wished to govern their affairs. People move from country to country for many

reasons and sometimes find themselves moving abroad never having expected even to leave their home town. It cannot be right that a couple have to take legal advice of the type envisaged by Mostyn J "just in case" in ten years' time they move to live in the UK or, that they have to in some way "refresh" their PMA by the wife receiving legal advice prior to relocating.

65. In my judgment, when an English court is presented with a PMA such as the present one; signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to *Radmacher* to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system. As Lord Philips said in *Radmacher*:

> "[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."

66. I am reinforced in that view by the fact that *Radmacher* in recognising PMAs carries within it a safety net through its expectation of both fairness [73] and that needs will be provided for.

67. Lady Hale said:

> "177……Some of the precedents I have seen are of comparatively wealthy couples making a prediction of comparatively generous sums which ought to provide for the "reasonable requirements" of the recipient spouse in a way which might well have attracted the "millionaire's defence" in the days before *White v White*. In effect, therefore, they are contracting out of sharing but not out of compensation and support.
>
> 178. Provided that the provision made is adequate, why should they not be able to do so? On the one hand, the sharing principle reflects the egalitarian and non-discriminatory view of marriage, expressly adopted in Scottish law (in section 9(1)(a) of the Family Law (Scotland) Act 1985) and adopted in English law at least since *White v White.* On the other hand, respecting their individual autonomy reflects a different kind of equality. In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the

> modification of the sharing principle than of the needs and compensation principles."

68. At the end of the day England and Wales is indeed a discretionary jurisdiction, and that in itself provides the wife with her protective safety net. As Lord Philips said:

> "[7] There can be no question of this court altering the principle that it is the court… that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation."

And Lady Hale:

> "163……the court always has to exercise its own discretion, if there is to be a starting point for the exercise of that discretion it has to be the statutory duty under section 25 of the 1973 Act. This applies to all applications for orders for financial provision, property adjustment and pension provision ancillary to divorce, judicial separation and nullity decrees. "

69. Mr Bishop seeks to suggest that the judge in using the words "full well understood" rather than "having a full appreciation of the implications", in some way failed to apply the *Radmacher* test. I do not agree, it is in my view a distinction without a difference; not only is it obvious from the context that two phrases were used interchangeably, but the evidence was overwhelming particularly given that the judge accepted that, during the marriage, the wife took steps to ameliorate the effect of the PMA by acting on the advice of her former friend Mrs L so as to ensure that certain assets were put into her own or the parties' joint names.

70. Whilst I accept that Mr Marks' task would have been more straightforward had the judge at some stage in his judgment pulled together his devastating findings as to the wife's credibility in one (or two) succinct paragraph(s), nevertheless his findings cannot be finessed away and in my judgment are unequivocal. I rhetorically ask how can the wife sustain this aspect of the case when considered against the findings that her case had been "utterly demolished by the evidence of Mrs L" [179:J1], whose evidence was "compelling".

71. The wife's case at trial was set out by the judge in this way:

> "[170]…… For her part the wife… has throughout clung to the claim that the PMA should carry no weight whatsoever and should be disregarded entirely, and that she should receive her share in wholly liquidated form whatever the damage that might unleash. The issue which I have therefore to decide is whether the PMA should indeed be wholly ignored as a factor in this case, or whether it should only have some limited but less literal impact on the amalgam of factors upon which my discretion bears."

72. The husband had relied upon the PMA as part of his overall submission that his proposals were fair in all the circumstances. Important too was his submission that a

significant part of the purpose of the PMA had been to protect his business in the event of divorce. The husband's case was that the judge should give effect to the intention behind the PMA, to the extent that the court should not make any order which would place the business structure in jeopardy. In my judgment the judge was entitled, when considering all the circumstances of the case and, in particular, the fairness of the proposals put forward by the husband, to take into account the effect of any order on his long standing business.

73. The judge found the PMA to be effective, that the money the wife had in her own name more than met her needs and that therefore the enhanced provision offered by the husband substantially exceeded her needs. Had the judge not been conscious of his statutory duty, he could, on one view, have declined to hear the wife's case for further provision once he had made his findings as to her appreciation of the implications of the PMA. He did not do so, instead he heard the case in all its lengthy and complex detail before concluding that the proposals of the husband were 'fair'.

74. The judge concluded that:

> "[185] ….I need in relation to the outcome of the case to consider only the inferences *(perhaps a misprint for influences)* as to the structural effect which Mr Marks asks me to accept: that this is not a case for determination, if it were possible, by reference to evaluated proportions, nor one where my order should threaten seriously to damage or to bring down the business structure."

75. Whilst the wording is not wholly clear, what is clear is that the judge's findings in respect of the PMA had some influence upon his ultimate decision as to the structure of the order, whereby the wife has been given a minority interest in the H Holdings and that he has taken into account potential damage to the husband's business.

*Sharing*

76. The wife's case was that, regardless of the court's findings against her and regardless as to whether she should, or should not, have received legal advice, the effect of the husband's open position had been that there was now an element of 'sharing' within the husband's offer. Once that had happened Mr Bishop argues, the case should thereafter have been decided on conventional sharing principles which would have justified the wife in receiving £67m in cash, over and above the orders she sought in relation to the non-business assets.

77. Mr Bishop submits that once a husband chooses to make an offer in excess of that to which a wife would be entitled under the strict terms of a PMA, then that PMA (and its agreed intention) must be ignored and the case become a pure 'sharing' case entitling the wife to a full half share of the assets (subject only to any allowance for non-matrimonial assets). With respect to Mr Bishop, I cannot accept the logic of that argument.

78. Such an approach runs against the fundamental tenet of *Radmacher*. 'Fairness' does not, in my judgment, require a court to ignore the precept upon which the parties have governed their affairs for over 20 years, anchored as they were to a PMA, simply because the husband, for whatever reason, chose not to hold the wife to that agreement in its entirety.

79. It is clear from the judge's judgment that he did not believe it to be 'fair' to hold the wife to the strict terms of her agreement in circumstances where the husband had proposed additional provision. Neither, in the event, did he decide it was fair wholly to endorse the husband's offer which amounted to £38.1m plus the interest in H Holdings. The judge enhanced the offer [208] by ordering the wife to receive the whole of the net proceeds of sale of the former matrimonial home (rather than 80%), and increasing the amount she should receive from the business loans outstanding to the husband. The judge's order therefore meant that the wife would receive £51.4m (or approximately half the non-business assets) plus her interest in H Holdings.

80. The judge did not spell out in his judgment that he was endorsing the structure of the open offer, or explain the basis upon which he was increasing the figures which had been put forward by the husband. It would have been more helpful had he done so and made it clear that (by way of his own independent analysis) he was carrying out what amounted to an extensive cross-check of the husband's proposals at the conclusion of which, whilst increasing the amounts the wife was to receive from the house and the outstanding loans, otherwise endorsed the husband's approach. That that was what he was doing is, in my judgment, clear from his comment that "this cannot be seen as a conventional sharing case" [195] and

> "[210]…such an outcome will fairly reflect the significance of the non-marital and therefore unmatched contributions made available to and employed by the husband both before and during the marriage, the considerations arising from the PMA to which I regard it as appropriate to give effect, and the overall exercise of the section 25 discretion."

81. That this was his approach was confirmed in the judge's second judgment of 14 December 2016 when he refers to the essence of his decision as being between [208 & 210] of his J1 judgment in which :

> "I say what she is to receive and that that is what fairness and justice between the spouses require."

82. In my judgment, the case was a 'sharing case' in that the provision made went beyond that which would provide for the needs of the wife. That that was the case does not, in my view, catapult a court to the conclusion that the only fair distribution of the assets is now an equal division of the assets, subject only to an appropriate adjustment to reflect the pre-marital assets of the husband. In my judgment, an effective PMA is another example of a case where, upon a proper consideration of all the circumstances of the case (per s.25(1) MCA 1973), a court can conclude that (notwithstanding that the husband does not seek to enforce the PMA in full, and that there is now a sharing element to the case, needs having been exceeded) the assets should be divided unequally. This to use the words of Lady Hale in *Radmacher* represents a "modification of the sharing principle"[178].

83. It follows that I dismiss the grounds of appeal found in Grounds 1 -7 of the Grounds of Appeal which focus on the judge's approach to the PMA, sharing and the judge's desire to protect, so far as was appropriate, the husband's business structure.

*Non-Matrimonial Assets*

84. Consideration as to the treatment of the non-matrimonial assets falls logically to be considered next for the purposes of the appeal. It should be noted however, that this issue fell to be considered later in the judge's judgment and so, when he turned to consider the treatment of non-matrimonial assets, he had already concluded that he was unable to settle upon a reliable valuation in relation to H Holdings, or as to its future liquidity.

85. It was common ground that some degree of credit should be given to the husband in recognition of the fact that he brought assets into the marriage. Mr Bishop's case was that the correct allowance was 15%. The judge set out the arithmetical basis put forward by Mr Bishop in support of that figure. Mr Bishop submitted that the non-matrimonial assets, properly updated, came to £22m (or 8% of the wife's calculation of the total assets of £273.5m). The wife proposed however, for the purposes of her open offer, nearly to double that percentage allowance to 15%. This gave the husband, on her calculation, the first £41m and resulted, overall, in a 42.5% / 57.5% split in favour of the husband.

86. The judge described Mr Bishop's conclusion as to the figures as 'impressionistic' as opposed to 'scientific'. This was, no doubt, in part because the wife doubled the interest to which, on her mathematical calculation, the husband would have been "entitled". The judge then set out Mr Marks' competing submissions, but ultimately found himself in the same dilemma as he had in relation to the valuation of H Holding (dealt with below) namely:

> "[147] I appreciate that this is now something of a refrain, but I am perplexed how I am to decide the historic basis upon which to found conclusions about the legal effect of events, and therefore to define the status of many of the assets in question and the extent to which I should disregard their attributed value."

87. The judge described the two differing schools of thought which have developed as to the treatment of non-matrimonial assets.

88. The 'arithmetical approach' was applied in *Jones v Jones* [2011] EWCA Civ 41; [2011] 1 FLR 1723. Per *Jones,* the assets are first divided into matrimonial and non-matrimonial assets. That having been done, the non-matrimonial assets are deducted from the total and the matrimonial assets which remain are shared equally between the parties.

89. The 'impressionistic approach' on the other hand, is where the court considers the nature and quality of the non-matrimonial assets and then, in the exercise of its discretion, gives the wife such reduced percentage of the total assets as in the judge's view, makes a fair allowance for the introduction into the marriage of the non-matrimonial assets in question.

90. Wilson LJ (as he then was) in giving judgment in *Jones* was by no means blind to the limitations inherent in his choice of the arithmetical route saying:

> "[35]…Criticism can easily be levelled at both approaches. In different ways they are both highly arbitrary. Application of the sharing principle is inherently arbitrary; such is, I suggest, a fact which we should accept and by which we should cease to be disconcerted. "

91. In the years that have followed since *Jones*, it may have seemed that divergent judicial opinion evolved. Mostyn J has preferred the 'arithmetical' approach: for example see amongst others: *JL v SL (No 2)* [2014] EWHC 360 (Fam), [2015] 2 FLR where he said in relation to the 'impressionistic' approach:

> "[24]…The problem with the first technique is that it is quintessentially intuitive….The technique may reflect the individual judge's instinct and intuition but it risks being described as a lawless science."

92. Moylan J (as he then was) preferred the "impressionistic" or, put more accurately, the discretionary, route *SK v WL* [2010] EWHC 3768 (Fam) at [64 & 65].

93. In *Goddard-Watts v Goddard-Watts* [2016] EWHC 3000 (Fam) Moylan J took issue with the use of the word 'arbitrary' in relation to the judicial decision making process saying:

> "…. Wilson LJ said in *Jones*…. "Application of the sharing principle is inherently arbitrary". Whilst I am not entirely happy with the concept that that sum I award to reflect these factors is arbitrary, I take it that Wilson LJ meant discretionary rather than susceptible to the application of a precise formula."

94. In my judgment it is however the observation of Lord Nicholls in *Miller and McFarlane* [2006] UKHL 24;[2006] 1FLR 1186 which continues to carry the day:

> "[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day. Similarly the 'equal sharing' principle might suggest that each of the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate. The case of Mr and Mrs Miller illustrates this only too well.

> [27] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.

95. I agree with Moylan LJ (as he now is) in the analysis he undertook of the two approaches in *Hart v Hart* [2017] EWCA 1306. His discussion on the topic is worthy of reading in its totality [83- 97], but for the purposes of this judgment it is necessary only to set out only the following passages:

> "[86] In my view, the guidance given by Lord Nicholls in *Miller* remains valid today and, indeed, bears increased weight in the light of the courts' experience since that case was decided. It can, as he said, be artificial to attempt to draw a "sharp dividing line". Valuations are a matter of opinion on which experts can differ significantly. Investigation can be "extremely expensive and of doubtful utility". The costs involved can quickly become disproportionate. Proportionality is critical both because it underpins the overriding objective and because, to quote Lord Nicholls again: "Fairness has a broad horizon".
>
> [87] In addition, with due respect to Mostyn J's extensive experience in this field, I am not sure there are different schools. In my view, the differences which he identifies are examples of the same principle being applied, but applied in a different manner depending on the circumstances of the case. One application may be more specific than the other but this will typically reflect the "degree of particularity or generality appropriate in the case": *Miller* (paragraph 27). The outcome will be the same, namely, when justified, an unequal division of the parties' property."

And later

> "[96] If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in *Jones*, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply

> apply a broad assessment of the division which would affect "overall fairness". This accords with what Lord Nicholls said in *Miller* and, in my view, with the decision in *Jones*."

96. Mr Bishop rightly does not seek to say that the judge was wrong to adopt the impressionistic/discretionary approach, rather his complaint is that the judge failed properly to exercise his discretion in this respect and should have adopted the division proposed by him on behalf of the wife in relation to the totality of the assets. Such a division should, he submitted, have been calculated by reference to a computation of all the assets to include a conservative figure in relation to valuation of the development land.

97. Mr Bishop complains that on reading the judgment as a whole, "the impact of the non-matrimonial property is inscrutable". Whilst the judge did not set out his conclusions as to the weight to be given to non-matrimonial property by reference to a percentage or the specific exclusion of certain assets, he did make clear his conclusion as to the place of the non-matrimonial assets in his discretionary exercise saying :

> "[186] And indeed I do regard as relevant circumstances of this case the fact that the business structure had received its seed-corn very largely if not entirely from the husband's family resources and was nurtured and developed by his own endeavours in the period preceding the marriage; and that the business has subsequently benefited from external receipts over the last decade as already described. This in my view is why the wife has been right to concede that this significant element of non-matrimonial input should be reflected in my estimation of what should be awarded to the wife."

98. Mr Bishop says that the judge fell into error by failing to identify the weight to be given to the non-matrimonial property and "thus the appropriate departure from equality". Mr Bishop submits that that would have been the proper approach and referred the court to observations made by Holman J in *Robertson v Robertson* [2016] EWHC 1672 to that effect. The difficulty in that submission is that the judge was unable to value H Holdings. He was never going to be able to say, as Mr Bishop says he should have, that having reached a conclusion as to the total value of all the assets, a certain identified percentage of them should be treated as non-matrimonial.

99. In the majority of cases, the court will be able to value the assets, both matrimonial and non-matrimonial, and therefore, if appropriate, make orders by reference to a percentage of the total assets. That is not going to be the case in those less common cases such as the present one, where the court has been unable to place a value on certain of the assets.

100. As Moylan LJ said in *Hart:*

> "The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just.

> He will do so with such generality or particularity as he considers appropriate in the circumstances of the case."

101. In the present case, the judge was entitled, and really had no option, but to give weight to the non-matrimonial assets in a more general way as part of the totality of his discretionary exercise. This involved consideration of not only the non-matrimonial assets, but the PMA and all the circumstances of the case before he ordered that the wife should receive 50% of the non-business assets and 23.5% of the business assets.

102. The order made by the judge therefore largely endorsed the proposal of the husband. The judge said that :

> "[210] a)…. Such an outcome will fairly reflect the significance of the non-marital and therefore unmatched contributions made available to and employed by the husband both before and during the marriage, the considerations arising from the PMA to which I regard it as appropriate to give effect, and the overall exercise of the section 25 discretion.
>
> b) I wish to make it clear that strong as have been my comments on the wife's dishonourable attempts to claim ignorance about the wording and effect of the PMA I have not allowed that factor to affect my estimation of the provision which she should receive."

103. I should make it clear that on my reading of this last paragraph, the judge was not saying that in reaching his conclusion he was ignoring the evidence (as he found it to be) that the wife was fully well aware of the wording and effect of the PMA at the time of the marriage. What he was saying was that, notwithstanding his trenchant and highly critical findings of the wife, he was not allowing those findings to 'affect' his "estimation of the provision she would receive".

104. Put another way, the judge was not treating her conduct, no matter how reprehensible he had found it to be, as 'conduct' such that it would be 'inequitable to disregard it' per section 25 (2) (g) and to be so 'obvious and gross' as to require him substantially to reduce the provision made for the wife.

105. This view, if it needs endorsing, is sustained by:

i) The judge's reiteration in J2 that "those findings do not in fact impact upon the amount which, globally, I think it is appropriate she should have" [J2:[6] and

ii) The judge's treatment of the wife's behaviour as litigation misconduct which would, as is the usual course, be reflected in an order for costs. In his third judgment (J3), the judge took the view that the wife's 'flagrant and persistent conduct' was in the same category as serious concealment of assets and should be penalised in costs. Not to have marked her behaviour with costs consequences would, the judge held, have been "unjust and unprincipled". The

> judge therefore made an issue-based costs order against the wife to mark the court's "profound disapproval of her behaviour".

106. The judge therefore exercised his supervisory discretion by making an order largely in terms as proposed by the husband who, notwithstanding the terms of the PMA, was prepared to make proposals which 'extends beyond meeting needs into some not insubstantial degree of sharing'[191].

*The valuation of the assets*

107. Turning then to the judge's decision that he could not put a valuation on H Holdings. Certain of the assets posed relatively few problems in valuation. The difficulty facing the judge was in valuing certain developments projects which are held within H Holdings.

108. In large measure the focus of this long and phenomenally expensive forensic process has been on the parties' attempts to value two development sites and two land promotion companies. A total of 4 experts gave evidence and in excess of £2 million was spent by the parties in their endeavours to put before the judge evidence which, on the balance of probabilities, would enable him to fix upon a value for the purposes of computing the total assets available for distribution.

109. On the basis of the experts' reports, as originally filed, the range of valuations would appear to be unbridgeable, for example in respect of KF, a development site owned by H Holdings; the valuations ranged from between £12.4m and £35.0m, and in respect of ACo, a land promotion business; between £10.3m and £45.7m.

110. Having heard evidence over a number of days and extensive and elaborate submissions, the judge concluded:

> "[29] It would be possible to elaborate to a huge degree upon the interconnection and the interdependence of this amalgam of entities and businesses. But in view of the overall view I have formed about the unreliability of assessing an overall computation of value from major parts of the group such elaboration for the purposes of this judgment would not bring me closer to what I hope will be a fair decision. For the degree of refinement (and legitimate disagreement) about the future progress and viability of the group components and their capacity to create and release liquidity in the short and medium term are extremely subjective and variable as they depend upon individual assessment (including expert assessment from a number of perspectives) and methodology. Having considered a good deal of evidence on the question I conclude that this is an enterprise in relation to which it would be simplistic to assume that any particular part of the past is in any dependable sense a guide to the future."

111. When the judge moved on to attempt to assess future liquidity, he reached a similar conclusion saying:

> "[81] I am therefore reluctantly but firmly driven to the conclusion that the evidence taken as a whole does not provide me with a probability-based assessment of the amount of or rate at which funds might be made available to the wife from the business structure."

112. Mr Bishop's submission (as set out in Ground 8 of his grounds of appeal) is as follows:

> "i) …Both experts stated that a valuation could be made. The concerns the Judge identified, at the very most, should have led him to adopting conservative conclusions but not to refuse to reach any conclusions as to value. Further the professed valuation difficulties were largely of the Judge's own making due to the delay in preparing his judgment. The Judge should have ascertained the value of the Respondent's two umbrella companies, and by not doing so failed to ascertain the value of the family's assets. This was wrong."

113. The wife's case is that the judge failed to "do his job" in "ducking" making a finding as to the value of the H Holdings or its future liquidity. Mr Bishop says that this "failure" contaminated the judgment. The failure to value the company and thereafter to make findings as to liquidity, wrongly, says Mr Bishop, led the judge to conclude that the only solution was the making of a so called *Wells* order whereby the wife was to take a shareholding in H Holdings as a minor, but significant, part of her entitlement in the proceedings.

114. The judge summed up the respective positions as follows:

> "[30] Nothing can disguise the width of the gulf between the proposal with which the wife comes out of her corner, that she should exit this litigation with a clear and, she would hope, enforceable order for a quantified lump sum (…) and the husband's diagonally opposed position that in some measure she should receive a significant proportion of her award in specie, in the shape of shares within the business structure of which he will remain largely, if not effectively, in control. "

115. The judge in no way overstated the case when he referred to the valuation as:

> "41….a Herculean exercise of monumental proportions with which experts have struggled, applying numerous levels and layers of sophistication to arrive at figures which are more or less cogent."

116. There were a number of facets to the valuation of the development projects which had to be addressed before the judge could attempt to attribute a present day value to the entirety of the parties' assets. A valuation of H Holdings necessitated an estimate of the future performance of H Holdings, notwithstanding the challenge that this

presented to the valuers (and therefore the judge) by virtue of the 'slow burn' nature of the two major development projects within the business structure.

117. The task of the experts was, as the judge identified, to evaluate " the four corners of the computational exercise" which were [41]:

i) "to assign present day value, or range of values fairly attributable to the entirety of the parties' assets, including the business structure

ii) To ascertain how and how much access to liquidity can be achieved

iii) As an integral part and parcel of that future process to estimate (or perhaps the word is to speculate) as to the future performance of the business structure in an economic environment dominated by the uncertainty of the Brexit referendum decision which emerged just a few weeks before the final hearing commenced, and

iv) To canvass the taxation consequences of various extraction scenarios"

118. The focus of the dispute was in relation to the four assets within H Holding referred to at [100] above, with the valuation pendulum swinging between a low of £38.2m on the part of the Single Joint Expert, Mr Nicholls, on the one hand and the wife's expert, Mr Bezant, who gave a range of: £149.6m (high) to £121.6m (low) on the other.

119. Adjustments subsequently made and set out in the judge's judgment include a 13% Brexit discount. This led to Mr Bezant putting forward a final valuation range of £103.7m - £90.22m. This as the judge described it represented "either a reduction along the way of 40% or an initial overshoot of 67%". [51]

120. I should make it clear that the judge was in no way critical of Mr Bezant who became the lodestar in respect of the valuations. On the contrary, the judge said that he did not doubt Mr Bezant's neutrality and that he was doing his best to assist the court on the basis of the evidence and information available [54]. Indeed, the judge specifically said in relation to the striking difference between Mr Bezant's total for his high range of £150m and his "finally considered" low range of £90m that this:

> "[52]Would be of little or no consequence for the fair outcome at which I strive to arrive if I could be persuaded that the final figure for these particular assets is within a reasonable margin of tolerance."

121. The issue for the judge was whether there was a sufficiently sound basis from which he could reach a probable valuation for computation purposes.

122. There is no doubt that the judge had contemplated doing precisely that which Mr Bishop said he should have done, namely opting for a conservative figure. In deciding whether he could settle on such a figure, the judge considered the discounted cash flow analysis performed by Mr Bezant in respect of the 4 key development projects.

123. Having heard all the evidence, the judge regarded the valuation exercise as having failed to provide the court with even a 'broad or very broad' guide to the value of the

assets in question. The judge looked at the effect on the valuations resulting from, even relatively modest, adjustments to the variables, [60] & [61], the impact of which would inevitably be more dramatic in relation to those projects which were likely to take years, if not decades, to come to fruition.

124. The judge identified a further difficulty faced by the experts, namely that the forward projections, which had been historically provided by the business management (and which had been based in part on anticipated realisation dates) had proved to be 'wildly inaccurate'. It was upon the most recent of those that Mr Bezant had necessarily relied.

125. The judge gave an example in relation to ACo saying:

> "[55]….. if the sale of relevant assets were to be pushed back from the year when the discounted cash flow analysis supposes they will take place, then the effect on the valuation is dramatic. If the sales within ACo were to take place one year later then for £45.7M one would need to substitute £33.8M; if two years later, £23.8M. The nature of the business is such that deferrals for such periods would not be in any way surprising, as was indeed demonstrated in relation to two particular assets within ACo which I will call the Farms."

126. In relation to the two land promotion sites within ACo, the judge recorded that after planning permission had been obtained, successive cash flow projections had shown the proceeds from the sites had been anticipated to come in during the course of 2014, then 2015 and then 2016. By the time the experts were preparing their valuations, it had become clear that 2016 was no longer achievable. Mr Bezant therefore introduced the projected sale proceeds into his liquidity analysis as coming in in 2017. This example the judge said:

> "[58]….shed light on the ease and extent to which targets with such a significant impact on the computation of value can slide, for what may or may not prove to be good reason, but with significant impact on values ascribed."

127. Liquidity was a matter of considerable importance given the wife's case that £67m could be extracted from the company over 5 years. The judge pointed out that:

> "… [65] ….historically there has been a huge disparity between the management's cash flow forecasts (and I again recognise that all such must necessarily be predictive) and the actual outcome calculated when the chickens have come (or rather in the last two years have not come) home to roost."

128. The judge then gave this stark example; the management cash flow forecast for 2014 was £36m and for 2015 was £39m. The actual amount achieved respectively was £2.0m and £6.4m that is to say 5.6% and 16.4% respectively of the cash flow predicted.

129. Given this situation, in my judgment it is unsurprising that when not only Mr Cottle (the husband's expert, about whom the judge was critical), but also Mr Bezant, each based their future predictions of liquidity on such management forecasts for the later part of 2016 and for 2017 & 2018, the judge concluded that this was not "the stuff on which probability can be founded".

130. The judge directly addressed Mr Bishop's submission that he should reach a 'conservative finding' and that the husband could arrange his business structure so as to enable payments to be made to the wife at the rate of £15m pa for 3 years with a final payment of £24m in the fourth year saying:

> "[71] To arrive at his conclusion, however, he relies on the expectation (perhaps better described as a hope) that transactions will be concluded and expenses borne in accordance with Mr Bezant's adjustments based on the same management forecasts which led Mr Cottle to predict ( in practice unimaginable) -£15m shortfall."

131. The judge went on to observe that, even on Mr Bezant's more optimistic analysis, in the period to the end of 2018 only £38.6m of cash would be generated, far short of the £67m sought by the wife. Further he pointed out that in order to achieve even that £38.6m of liquidity, it would necessarily require the decimation of the investment property portfolio which provided security to the banks for the businesses' substantial borrowings.

132. Mr Bishop submits that by failing to value H Holdings, the judge had failed to carry out the first stage of a two stage process and reminds the court that in *Charman v Charman* [2007] EWCA Civ 503; [2007] 1 FLR 1246 the Court of Appeal described the inquiry as being in two stages, namely "computation and distribution". [67]. The passage to which he refers says :

> "[67] Even if, however, a court elects to adopt the sharing principle as its "starting point", it is important to put that phrase in context. For it cannot, strictly, be its starting point at all. As Coleridge J. himself stated in the passage cited in paragraph 59 above, the starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter..."

133. In *Wells v Wells* [2002] EWCA Civ 476; [2002] 2 FLR 97, the authority which has become central to this appeal, Thorpe LJ, having set out in detail the challenges the judge had had at first instance in settling upon a valuation of the business in question said:

> "[8] The judge's inability to place any value on the husband's shareholding was almost inevitable given its precarious state and the fact that in the preceding 3 years only 66,000 of its shares had been traded on the market."

134. It is undoubtedly far more satisfactory for all concerned if a court can, with sufficient confidence, settle on a valuation of a business to the necessary standard of proof, that is to say the balance of probabilities. Not to do so is unsatisfactory for the applicant (still often the wife) and is often equally frustrating for the respondent (husband) particularly if the result is, as in this case, the making of a *Wells* order.

135. Notwithstanding the disadvantages of the present situation, considerable unfairness can be caused to either, or both, parties if the approach is to be that in a sharing case, there is an absolute requirement on the court to settle on a valuation (come what may) and that, if the variables render such a valuation to be particularly friable, the court should simply adopt a conservative figure.

136. In *H v H* [ 2008] 2 FLR 2092 Moylan LJ highlighted the fact that the vulnerability of valuations had been specifically recognised by the House of Lords in *Miller v Miller; McFarlane v McFarlane:* [2006] UKHL 24, [2006] 1 FLR 1186. Moylan LJ said:

> "[5] The experts agree that the exercise they are engaged in is an art and not a science. As Lord Nicholls said in *Miller v Miller; McFarlane v McFarlane*[2006] 2 AC 618 [26]: "valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained."

137. Moylan LJ was referring to a business valuation, as was the Court of Appeal in *Wells.* Here the court is more specifically concerned with valuations relating to property developments. For the reasons given by Lewison LJ at [184] – [195], the same principle found in *Miller* and *H v* H applies as much to development land valuation as to conventional business valuations, perhaps even more so given the dramatic effect that even a small adjustment in a variable can make to a valuation and given the

inherent unpredictability, described by Lewison LJ, in relation to property development projects.

138. In the present case, notwithstanding that a total of £2m has been spent on experts, the court was in my judgment, justified in coming to the conclusion that it was unable to make even a "conservative estimate" as to the value of H Holdings. In my judgment, the judge cannot be criticised for concluding that he was unable to make findings as to the valuation of the development sites or as to future liquidity with the degree of reliability necessary in order to discharge the standard of proof. Further there can be no basis for suggesting, as was done by Mr Bishop in his grounds of appeal, that the failure by this highly experienced specialist judge to reach a valuation was "his own fault" due to the delay in his handing down his first judgment.

*Tax*

139. Each party had specialist lawyers and/or accountants to give advice and make submissions in respect of what the judge called "The tax quagmire" [100]. The judge having heard extensive submissions concluded that :

> "This is again a tangled thicket through which I struggle to reach a firm and informed outcome."

140. Mr Marks rightly observes that this is a 'makeweight' ground and was of only the most tangential relevance to the judge's decision. This was indeed reflected by the fact that it was scarcely touched upon in oral argument.

141. I agree with Mr Marks and would dismiss this ground of appeal.

*Wells Sharing*

142. The expression *Wells sharing* comes from the case of *Wells v Wells* [2002] EWCA Civ 476; [2002] 2 FLR 97. In that case the business which the husband had run for 17 years prior to, and thereafter, throughout, the marriage, had suffered a serious, genuine, downturn. Six alternative valuations were advanced by the experts ranging from a balance sheet asset valuation to a liquidation valuation. The Court of Appeal found the judge's inability to place any value on the husband's shareholding as "almost inevitable".

143. Thorpe LJ said that in relation to a clean break case:

> "[24]…. In that situation, however, sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk laden assets. After all the wife was already a shareholder in Soundtracs and a substantial increase in her shareholding would at least have enabled her to participate in future prosperity by dividend receipts or capital receipts on sale or a cessation of trade. An increase in her share of the illiquid and risk-laden asset would have allowed a reduction in the Duxbury fund, if not in the housing fund. If profitability were not recovered, then both parties would share the experience of a marked reduction in standards of living."

Thorpe LJ went on to consider whether the allocation of the assets made by the judge at first instance had been fair saying:

> " [20]…..But, as the judge recognised, any analysis of the division of assets between the parties in percentage terms was dependent upon the valuation of the company. Once the judge found it impossible to value, it became no more than an uncertain source of future income for the husband. Its retention of course conferred on the husband a chance, namely the chance that he might trade out of deep difficulty and achieve a level of sustained profitability sufficient to create demand for the shares and with it a realisable value. The extent of that chance was not quantified and was probably incapable of quantification."

144. The Court of Appeal allowed the appeal of the husband although, as was rightly emphasised by Mr Bishop, they did not substitute the judge's order by increasing the wife's interest in the struggling company, but rather by reducing the sum which she would receive from the net proceeds of sale of the former matrimonial home. This, Mr Bishop submits, shows that whilst *Wells* purports to recognise that a situation may arise where a business cannot be valued and therefore the right course is the transfer of an interest in the business to the wife, it is an option only rarely, if ever, adopted due to the wholly unsatisfactory outcome which is the result. The views expressed by the Court of Appeal in *Wells* he submits should be regarded as being in the context of a 'a one off case' in which, in any event, the court did not even adopt its own suggested alternative outcome.

145. Mr Marks does not seek to suggest that a *Wells* order is a desirable outcome from either party's point of view. He submits that *Wells* is clear authority for the proposition that, where a business is incapable of valuation, then an order providing for each party to share in the ownership of the risk-laden asset(s) allows, as Thorpe LJ had said, for each party to "participate in future prosperity by dividend receipts or capital receipts on sale or cessation of trade".

146. Mr Marks further draws the court's attention to the fact that in *Wells* itself, had the CGT implications not rendered such a course impractical, the court would have made an order increasing the wife's share in the business. Thorpe LJ said that it was only that (CGT) "fetter" that had persuaded the court to adopt the course it did, rather than increasing the wife's shareholding in the company [33].

147. In the present case the wife was, and remains, adamantly opposed to any sort of *Wells* sharing order. Mr Bishop, together with Mr Mowschenson QC (who made powerful submissions to the court on this aspect of the case) identified the following specific difficulties with the making of a *Wells* order:

i) That the proposed order is contrary to the clean break principle. Where, as here, funds can be found (albeit some way in the future) which would allow there to be a clean break between the parties, that course should be adopted.

ii) The difficulty for the wife in having any real protection of her interest. This difficulty remains notwithstanding a shareholders agreement negotiated at

great cost between the parties and settled by an arbitrator, and that the terms of that agreement allow her to have her own appointed non-executive director on the board of H Holdings.

iii) There is no foreseeable exit for the wife when she can anticipate the realisation of her interest in the company.

iv) The unusual level of hostility between the parties consequent upon the particular circumstances which led to the breakdown of this marriage after 21 years which feeds into (i) above.

148. Section 25A Matrimonial Causes Act 1973 provides:

> "(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24 or , 24A, 24B or 24E above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable."

The court is under a 'duty' to consider whether the financial obligations of each party towards the other can be terminated. The judge undoubtedly did that [198 – 199], having quoted the subsection he went on to say:

> "[199] It does not seem to me obviously and certainly not necessarily inconsistent with that requirement for an order to leave one spouse with shares in a company in which the other holds shares, nor indeed to preclude part of the spouse's award including such shares."

149. The judge went on:

> "[203] I therefore see no reason why such a continuing link is, in principle and in an appropriate case, so far from the gold standard outcome of a complete and effective economic and emotional clean break that it should never be employed. Moreover I believe that the facts and my findings in this case militate towards a solution along these lines if sufficient safeguards of the sort discussed can be achieved."

150. Even if the judge was wrong to conclude that the order that he made was not in itself inconsistent with a clean break, it matters not as he undoubtedly complied with the statutory requirement to consider whether it was "appropriate" to terminate the financial obligation between the parties as soon as he considered it to be "just and reasonable". In all the circumstances of the case the judge concluded that a clean break was only "appropriate" to the extent provided by the order that he made.

151. I fully accept that the making of a *Wells* order is something that should be approached with caution by the court and against the backdrop of a full consideration by the court

of its duty to consider whether it would be appropriate (per s25A MCA 1973), to make an order which would achieve a clean break between the parties. I do not accept however that *Wells* was a wholly singular case and should be regarded as such by the courts: see for example *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108 and *WM v HM* [2017] EWFC 25, [2017] 3 FCR 198.

152. In my opinion the judge, in making the order he did, had not made an error of law, either by being in breach of section 25A or in the making of a *Wells* order. The question remains whether, for the reasons submitted by Mr Mowschenson, the judge had nevertheless erred in the exercise of his discretion in making the order that he did.

153. The judge's approach evolved over time. In his first judgment, having decided in principle to make a *Wells* sharing order he said:

> "[197] But over and above that I will fix upon a proportion of the shares in H Holdings which should be transferred to the wife either in specie or by the creation of a different class or type as may best prove to be practicable in the light of the discussions between the parties and their advisers which will continue after this part of the determination, represented by this judgment, is concluded. And then if agreement is not reached I will need to decide between the options and consider what if any effect shortcomings which emerge during this process and cannot be safely guarded against need lead to any reconsideration of the orders relating to the lump sum element of the award.

154. He went on to say that :

> "[202]… the practicality of such an arrangement needs now to be given serious consideration on both sides to investigate what greater degree of security can be achieved both in terms of dividend or fixed interest income and end of date realisability"

155. The judge therefore referred to his conclusion that the wife should receive 23.4% of the shares in H Holdings as a "necessarily interim expression of my decision, to be augmented in due course in the areas I shall indicate" [204]. The judge speculated on the possibility of the shares having preferred rights to dividends [213] and emphasised the need to consider a framework to protect the wife's holding [214] but, having said so, specifically left all options open to allow the parties to negotiate terms.

156. The matter came back before the court on 14 December 2016. The judge confirmed his decision that, as to quantum, the percentage interest was intended to be only in H Holdings and not across the whole group. He went on to say :

> "[9]… I make it clear that if at the end of the day…. Adequate safeguards and an exit are not included within the structure of the shareholding proposed, then I have, as it were, reserved to myself the right to say that if that is the best you can do, if that is the best that can be managed—there may be technical reasons justifying it—then I do reserve the right to go back and

> think to what extent, if at all, the shortcomings in whatever structure is proposed should be reflected in some other way: in some award over and above what this interim judgment order contains…."

157. The matter came back in January 2017 for a final time when there were a further two days of argument in relation to the proposed shareholding by the wife in H Holdings.

158. Mr Mowschenson articulated the conventional disadvantages for a wife in this position in relation to the difficulties she faced in monitoring the company and in ensuring the payment of dividends (I say conventional, but those disadvantages are nonetheless serious for that). Critical however, Mr Mowschenson says, is the lack of an identified exit route for the wife. The judge said in this regard [J3]:

> "[20] I find myself driven to retreat from the aspiration I held that the wife should enjoy the confident expectation that she could, at some stage expect to receive value for the shares which are to form part of her award. That could only be achieved by imposing an obligation ( or seeking to do so) on the husband and the Trustees to issue preference shares. And, as I have described, that would require me to fix their value which I have already found I cannot and should not do.
>
> [21] I accept that one result of holding ordinary shares in H Holdings may be that the wife does not realise their value. There are pre-emption rights which, were she able to seek to sell her shares, would involve a significantly discounted price being in effect imposed upon her. The outright sale of the company as a whole seems inherently unlikely having regard to its interrelationship with other components of the structure, but were such an opportunity to occur and to be agreed then she could expect to receive payment for her parcel of shares at the same price as the other shareholders would receive for theirs.
>
> [22] I conclude that the ordinary share route should be followed, hoping that the protections for the wife can be strengthened in the course of the negotiations…."

159. Later in J3 the judge added this:

> "[64]… I have also borne well in mind the unquantifiable but very significant contributions from external sources within his family which he has received and deployed both before and during the marriage and which to some significant extent played their part in the development of wealth within his business structure. When that consideration is combined with the necessary conclusion to be drawn from my findings in relation to the wife's understanding of the PMA, which encompassed acceptance on her part that she would not expect to participate in that wealth or its product, there seems to me to be substantial obstacles in her path in seeking to achieve via a

> preference share structure such a significant additional transfer of capital, however much deferred.
>
> [65] I have in the event by no means limited her to an award reflecting her needs alone, and I remain of the view that the overall provision made for her is fair in all the circumstances of the case notwithstanding the limitations which may remain in the safeguards and availability of an exit route from her ordinary shareholding in H Holdings…."

160. Under the terms determined as between the parties in the event that the *Wells* order stays in place, the projects in H Holdings will now become ring fenced in order to protect the position of the wife. No new projects can be put through H Holdings with the attendant risk that assets presently held in the structure would be used as security for them.

161. The disadvantages to the wife of the making of a *Wells* order should not be, and are not, understated by this court. Whilst the wife has no defined exit route, neither does the husband. If the husband is to obtain the benefit of the projects he has been working on and investing in, for upwards of 15 years, he has to bring them to fruition under the jealous eye of the wife's advisers and appointed director. Only by liquidating the wife's interest, can he liquidate his own. The projects within H Holdings have, as Mr Marks put it "a finite- if presently indeterminate- life time and the value of the wife's entitlement will eventually crystallise as each project comes to an end".

*Discussion*

162. At the January hearing the wife submitted that (in the event that the court was wedded to the making of a *Wells* order) the proper course was for her interest in H Holdings to be secured by the making of an order requiring preference shares to be allocated to her at a price to be fixed by the judge. The wife valued such preference shares at £35m and the husband at £18m. The judge said:

> "[15] It was recognised on both sides that both these values were extrapolations from bases I had rejected as unreliable in the first judgment. Mr Mowschenson suggested that I should just take a stab at it whereupon (he rather optimistically, I thought, opined) the parties might just accept my figure. This seemed to me although perhaps pragmatic nevertheless unprincipled, and I declined to take up the suggestion.""

163. The figure of £18m featured also in the appeal. Mr Marks said that payment of that sum had represented the husband's "backstop position" at the hearing in January 2017 and that whilst not his first choice, he would have accepted the making of such an order. Mr Bishop, for his part, whilst not accepting the valuation, expressed the view that his client would have been in a far better position than she found herself in now had the judge ordered the transfer to the wife of preference shares with a fixed exit date and value of £18m.

164. The court was left with a sense that the stakes were now so high that (to use the vernacular) it had become a question of which of the parties would 'blink first' and invite the appeal court to substitute an order which would allow the preference share route (at a fixed price of £18m) to be adopted as an alternative to the *Wells* order. Lewison LJ attempted to give the parties an opening towards the conclusion of the hearing which if taken up might have enabled a compromise along these lines to have been reached. For my part I have no doubt that that would have been by far the best outcome for both parties (and for their children who have been through so much more than is usually found in, even the most bitterly fought, divorce). In the event neither side 'blinked' and demonstrated what might have been regarded as weakness by the other side.

165. Unhappily in the end, both parties, somewhat wearily, submitted that if the appeal were allowed there would have to be a retrial. This would be at huge cost when, on one view, the distance between the parties to achieve finality seemed, for a moment, to be 'relatively' small at £17m (£35 - £18m).

166. That being so, I am driven to consider whether the judge erred in his discretion in ordering the transfer of the ordinary shares at all, and more especially, absent an exit route. If he did, the court must consider whether there must be a retrial or whether as matters now stand, it would remain 'unprincipled' as Singer J maintained it would be, to take a pragmatic approach and order the issue of preference shares to the wife at a cost identified by this court. In doing so I remind myself that the court must be satisfied that the judge erred in the exercise of his wide discretion in making the *Wells* order, and that it is not for me to substitute my own view of what would have been the best of a range of imperfect outcomes in the case.

167. It would have been easier for this court to unravel the judge's decision making process and for the wife to come to terms with the judge's overall decision, if the judge had pulled together, in one place in his judgment, his cumulative reasons for deciding to make an order broadly in line with the husband's proposals.

168. In my judgment the reasons why the judge made the orders can however be discerned from the judgment and I do not accept that, when taken as a whole, he gave inadequate reasons for making his order.

169. The submissions in relation to the *Wells* order have to be considered against the findings which this court has, in dismissing the other grounds of appeal, now endorsed, namely that:

    i) The judge was unable to value H Holdings.

    ii) The court could not with any certainty estimate future liquidity. Further the company could be made vulnerable if substantial sums were required to be extracted annually for a number of years to satisfy a further lump sum payment to the wife.

    iii) The wife had a full appreciation of the implications of the PMA and that included providing protection for the husband's business assets.

iv) There had been a substantial non-matrimonial contribution by the husband largely (although not wholly) reflected in the assets held within H Holdings.

v) The wife had a surplus liquid fund of £29.4m over and above her needs, she was therefore protected from all contingencies even in the event that she was unable to realise her interest in H Holdings for many years.

170. Pulling together the extensive arguments and grounds of appeal and considering them against the backdrop of the features in the case which led to the making of the *Wells* order, I have concluded that it cannot be said that the judge was wrong in the exercise of his discretion in making the *Wells* order.

171. Unattractive as a *Wells* order is as an outcome for both the wife and the husband, it is hard to know what else the judge could have done given the impossibility of valuing the shares or in estimating future liquidity.

172. It follows that I dismiss the appeal. Having said that, I would in conclusion respectfully adopt the following words from the concluding paragraphs of the judgment of Thorpe LJ in *Wells:*

> "[34]…I would also urge the parties to have regard to the opportunity that still presents itself for them to come to a better solution by negotiated or mediated means. We are conscious that the parties, who are not inhibited as we are, may do better."

**Lord Justice Holroyde:**

173. I have had the advantage of reading in draft the judgments of both King LJ and Lewison LJ. I agree with them both and agree that, for the reasons they give, this appeal must be dismissed.

174. With every respect to the very experienced judge, I feel bound to say that I have hesitated over one particular aspect of this appeal. The submissions of Mr Bishop QC and Mr Mowschenson QC came close to persuading me that the judge could and should have valued H Holdings, and therefore could and should have made an order which awarded the wife the intended 23.4% of the value of H Holdings, but did not impose Wells-sharing upon the parties and did not involve an award of ordinary shares which left the wife with no clear exit route. The disadvantages of Wells-sharing in the circumstances of this case - summarised at paragraph 144 of King LJ's judgment and at paragraph 194 of Lewison LJ's judgment – were cogently expressed by counsel in those submissions.

175. In the end, however, I am unable to say that the making of a Wells-sharing order was outside the permissible range of the judge's discretion. He heard and considered detailed expert evidence and was entitled to conclude that he was simply unable to make any reliable valuation of H Holdings. Having reached that conclusion, it cannot be said that he was wrong to exercise his discretion by making the order he did.

176. I share the view that it was unfortunate that the parties were unable to reach a compromise of the appeal based on an award of preference shares, and I respectfully agree with the words of King LJ in her concluding paragraph.

**Lord Justice Lewison:**

177. There are two topics on which I wish to add a little to Eleanor King LJ's comprehensive judgment: the consequences of a pre-marital agreement (a "PMA"); and valuation.

178. The key points in *Granatino v Radmacher* seem to me to be these:

i) Whether a PMA is contractually binding or not is irrelevant. The court should apply the same principles whether or not a binding contract has been made: [63]

ii) There is no need for black and white rules about the process leading up to the making of a PMA. What matters is whether each party has all the information material to his or her decision, and that each should intend that the agreement should govern the financial consequences of the marriage coming to an end: [69]

iii) Factors which would vitiate a contract will negate *any* effect that the PMA might otherwise have had: [71]. But factors falling short of those which would vitiate a contract may *reduce*, rather than eliminate, the weight to be given to the PMA: [72]

iv) If the terms of the PMA are unfair from the start this will reduce (not eliminate) the weight to be given to it: [73]

v) If the parties to the PMA are nationals of a state in which PMAs are common and binding, that will increase the weight to be given to the PMA: [74]

vi) In principle, if parties have made a PMA there is no reason why they should not be entitled to enforce it: [52]

vii) Thus, the court should give effect to a PMA that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement: [75]

viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family [77]; or if holding them to the agreement would leave one spouse in a "predicament of real need": [81]

ix) But in relation to the sharing principle the court is likely to make an order reflecting the terms of the PMA: [82], [177] – [178]

179. I reject Mr Bishop's submission that if a PMA is unfair in the circumstances (e.g. because it fails to cater for the reasonable requirements of children or for the wife's

needs) it must be discarded entirely, rather than tempered to take account of the unfairness. His submission is, in my judgment, inconsistent with the way in which the Supreme Court dealt with the application of the PMA to the sharing principle.

180. In considering whether information or advice is *material* to the decision to enter into a PMA, it is usually necessary to consider what difference it would have made if the information or advice had been provided or given: *Radmacher* at [69], approving the decision of the Court of Appeal in that case in which Wilson LJ said that the lack of information must have a causative element: [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [141].

181. In *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam); [2012] 2 FLR 502 the husband and wife married in Catalonia in September 1995, at which time they entered into a PMA. The default regime in Catalonia was separate property; and the PMA confirmed that the parties wished that regime to apply. From June 2004 they had lived in England, having previously lived in Wisconsin, Illinois and two other countries unidentified in the report. Mostyn J held at [20]

> "But in order to have influence here it must mean more than having a mere understanding that the agreement would just govern *in the country in which it was made* the distribution of property in the event of death, bankruptcy or divorce. It must surely mean that the parties intended the agreement to have effect wherever they might be divorced and *most particularly* were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution." (original emphasis)

182. In my judgment, with all respect, this sets the bar too high. In the case of a globe-trotting couple it would require the giving of advice about multiple possible matrimonial regimes all over the world. That seems to me to be both impractical and prohibitively expensive. Moreover, if the move from one country to another is not anticipated at the inception of the marriage, why should a couple seek such advice on the off-chance that one day they might move? It is also, in my judgment, inconsistent with the Supreme Court's discussion of "the foreign element" in *Radmacher*. In that case the French husband and the German wife saw a notary in Germany, although they married and lived in London. There was no suggestion that the husband ought to have had the opportunity to take advice about the law of England and Wales.

183. On the facts as found by the judge I consider that he was entitled to hold the parties to their PMA. The wife already had assets (as a result of gifts to her by the husband) the value of which comfortably exceeded her needs, and the children are all adults. In fact the judge awarded her more; largely, as I read his judgment, because the husband was willing to agree to her having a larger award. I do not see any error that the judge made in this respect.

184. The other topic on which I wish to say something is the question of valuation. The husband's business interests are held in private companies. He is not himself a shareholder in any of the companies. The corporate structure is such that at the top of the tree are the trustees of a settlement, which has been variously described as a discretionary trust for a class of beneficiaries including the husband and the children (but not the wife); and a trust of which the husband is the life tenant. On the face of it

these are inconsistent descriptions, but that may not matter. The trustees are professional trustees based in Jersey. Beneath the main holding company, which is registered in Gibraltar, is an array of subsidiaries incorporated in a number of different jurisdictions. Access to information about these companies varies from jurisdiction to jurisdiction.

185. The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) (both decisions of Charles J).

186. The difficulties of valuing the companies were compounded in our case by the fact that among the substantial assets considered were potential development sites. The expert valuer called on behalf of the wife valued those sites by the residual method. In essence this method of valuation estimates the value of the completed development and then deducts the time cost and money cost of achieving the completed development, with a further deduction for developer's profits. What is left (the residue) is the value of the site.

187. The valuation of development land is discussed in Valuation Information Paper No 12, issued by the Royal Institution of Chartered Surveyors. It proposes two methods: the comparison method and the residual method; and suggests that in practice both methods should be used. It goes on to say at para 1.6:

> "Valuation by comparison is essentially objective, in that it is based on an analysis of the price achieved for sites with broadly similar development characteristics. The residual method, in contrast, relies on an approach that is a combination of comparison and cost and it requires the valuer to make a number of assumptions – any of which can affect the outcome in varying degrees."

188. Para 5.2 repeats the point:

> "The residual method requires the input of a large amount of data, which is rarely absolute or precise, coupled with making a large number of assumptions. Small changes in any of the inputs can cumulatively lead to a large change in the land value. Some of these inputs can be assessed with reasonable objectivity, but others present great difficulty. For example, the profit margin, or return required, varies dependent upon

> whether the client is a developer, a contractor, an owner occupier, an investor or a lender, as well as with the passage of time and the risks associated with the development."

189. Section 6 of the Information Paper discusses a number of variables: the value of the completed development; the cost and time of obtaining planning permission (and associated agreements such as a section 106 agreement); site related costs such as remediation of contamination; ground improvement works; phasing of development and so on. In relation to construction costs, para 6.16 states:

> "The residual method is very sensitive to variations in the estimated costs and the accuracy with which costs can be assessed may vary greatly according to the specific site characteristics or the requirement, or plan, to retain specific structures, any unusual building specifications and the extent to which a new building has to reflect relevant sustainability policies."

190. In addition it points out that the choice of procurement route may also affect cost (and hence value). In discussing financing costs, the Paper states at para 6.23:

> "The approximate timings for the pre-construction, principal construction and post construction periods have to be determined. The valuer is recommended to liaise with the client, such professionals as might be appointed, or colleagues with relevant experience, to assess an appropriate, realistic time frame for each of the phases."

191. The Paper also discusses developer's profit. The pertinent points that it makes at paras 6.35 and 6.36 are:

> "6.35 The appropriate level of profit to be assumed in the appraisal cannot be specified in this Paper as market requirements vary from project to project and from time to time. Evidence may be deduced (with difficulty) by analysing transactions, but it is better obtained from the valuer's knowledge of the market or of developers' requirements.
>
> 6.36 In any event, the appropriate profit to be expected from a particular development may be influenced by a number of factors which might lead to the departure from the market 'norm'. High amongst these is the certainty of the information available to the valuer, and the general risk profile (for example, whether the interest rate is fixed, whether the scheme is pre-let or pre-sold) but the scale of development, the amount of financial exposure and the timescale are also relevant."

192. Finally, it is worth noting the following:

> "The residual value is not necessarily the same as the value of the land as it has to be considered in the context of the

> valuation as a whole. The following matters may have an impact on the residual value and need to be addressed before the final conclusion is reached:
>
> - Some elements of the calculations may be very sensitive to adjustments and, although these may be reflected in the cost calculations, such sensitivities may also be reflected in an adjustment to the residual value. A sensitivity analysis, for instance a 'Monte Carlo' simulation, may be undertaken and the results incorporated into the report;
>
> - If at all possible an attempt can be made to compare the result with such market evidence as may exist because the residual method sometimes produces theoretical results that are out of line with prices being achieved in the market. For example, in a large, phased scheme (such as a major residential development) cash-flow constraints may prevent the theoretical value being realised (that is, there may be a quantum discount that applies in the market). Similarly, in some circumstances, for instance where site remediation costs are very high, the residual appraisal may produce a negative figure. There is plentiful experience of sites finding buyers even though a residual valuation shows a nil, or negative, value."

193. Although the judge was not shown this Information Paper, he was alive to the uncertainties that it discusses. The judge decided that given all these uncertainties he was unable to reach a safe valuation. As he said, even small variations in the variables (of which there were many) produced great differences in the end product. Where the assumed variables could be tested against reality (as, for example, in the anticipated dates for the realisation of profits) they had proved to be wildly inaccurate.

194. The Lands Tribunal has also frequently rejected residual valuations as being unreliable. Where a residual valuation is prepared for the purposes of a real sale, the figure thrown up by the valuation is tested by exposure to the real market. However, that "reality check" is not available in a case where all that the decision maker has to go on is the opinion of one or more valuers. The deficiencies of a residual valuation were pointed out over half a century ago by Mr RC Walmsley FRICS in *Clinker & Ash Ltd v Southern Gas Board* (1967) 18 P & CR 372; and echoed more recently by Mr George Bartlett QC and Mr Paul Francis FRICS in *Snook v Somerset CC* [2005] 1 EGLR 147 at [30]:

> "The tribunal has made clear on a number of occasions that, in valuing land for the purposes of assessing compensation, a valuation based upon the residual method, or one that is derived from an assessment of the profitability of the land, is to be adopted only in the absence of some more reliable method. The reason for this … is that, in contrast to the situation in which the method is used by a vendor or a purchaser in prospect of an

> actual transaction, there is no external sanction facing the valuer who, for the purposes of an arbitration, produces what is a calculation of potential profit made *in vacuo*. The potentially wide range of plausible assumptions that could be made as to the inputs in such a valuation, and the wide variations in the final result that quite small differences in these assumptions might make, means that it is in general an unreliable valuation method."

195. There may be cases in which a judge is left with no alternative but to fix a value. In other cases, instead of fixing a value, a judge may order the asset to be sold, so that the market will fix its real value. In yet other cases, an asset may be divided in specie: this is known in the jargon as "*Wells* sharing": see *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97. Where the judge comes to the conclusion that he can make no more than a wild guess at the value of an asset, and it is common ground that the asset in question should not be sold, *Wells* sharing may be the only option left. As Mr Mostyn QC put it in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108 at [64]:

> "That this was the only viable route became plain during the evidence. Both W's accountant and H agreed that it was impossible to attribute anything other than a wild guess to the value of H's options. H would extend this uncertainty to the rest of his deferred assets. It therefore follows that a *Wells* sharing is the only way of achieving fairness. Indeed, it would seem to me that this should become standard fare where a case has a significant element of deferred or risk-laden assets. For why should one party receive most of the plums leaving the other with most of the duff?"

196. Mostyn J returned to the theme in *WM v HM* [2017] EWFC 25, [2017] 3 FCR 198, in which he said at [24]:

> "Generally a *Wells* sharing arrangement should be a matter of last resort, as it is antithetical to the clean break. It is strongly counterintuitive, in circumstances where one is dissolving the marital bond and severing as many financial ties as possible, that one should be thinking about inserting the wife as a shareholder into the husband's company. … However, *Wells* sharing is not so objectionable if it only applies to a minority element of the claimant's award."

197. In our case there were two other factors which might be said to justify a *Wells* sharing arrangement. First, there was the impact of the PMA which, if enforced in its full rigour in accordance with the wife's understanding, would have precluded the application of the sharing principle. Second, although the judge quantified the wife's "needs" at £22 million, she in fact came away with £51 million in "copper-bottomed" assets, thus giving her capital on excess of her needs of just under £30 million before taking the shareholding into account.

198. On the other hand, there is considerable force in the wife's argument that a minority shareholding in a company which is in practice run by the husband (even if he is not a shareholder) is a very unsatisfactory outcome. Not only do commercial relations persist (even if they may not, strictly, be legal obligations), but the very nature of the underlying business structure is such that there is no clear exit route. A minority shareholding is unlikely to be a saleable asset; and participation in the fruits of the development sites may not be achievable for decades. The possibility of presenting an unfair prejudice petition under the Gibraltarian equivalent of sections 994 and 996 of the Companies Act 2006 would embroil the parties in yet further expensive litigation; and, even if successful, would be likely to result in a buy out of the wife's share at a valuation which, on the judge's assessment of the evidence, is an impossible task. In his second judgment the judge emphasised the importance of "adequate safeguards and an exit" within the proposed shareholding structure. However, by the time of his third judgment he recognised that the result of an award to the wife of ordinary shares "may be that the wife does not realise their value". In other words, he departed from the view he expressed in his second judgment that there would need to be an exit route.

199. In the course of the husband's evidence he expressed the view that an award of preference shares would be a better option. Both parties came to court on the occasion of the judge's third judgment to argue for that outcome. In the case of the wife, it was argued that that was the only fair way of giving effect to the judge's first and second judgments. She argued that the nominal value of the preference shares should be £35 million. The husband argued for an award of ordinary shares, but as a fall-back position offered preference shares with a nominal value of £18 million. The figure of £18 million made no pretence at a valuation but, according to Mr Marks QC, was a figure that the husband "could live with". In the course of his submissions before us, Mr Bishop said that an award of preference shares at the figure put forward by the husband would have been a better outcome for the wife than the award the judge in fact made.

200. Although the grounds of appeal criticised the judge's "U-turn" between his second and his third judgments, and despite some hints from the bench, we were not specifically asked to vary the judge's order by varying the award of ordinary shares to an award of preference shares. Rather, the wife was asking for a complete retrial of the whole claim for ancillary relief or, in the alternative, for the award of a cash lump sum.

201. We would only be in a position to grant that relief if we were persuaded that the judge's decision fell outside the margin of his discretion. In circumstances where the wife would be receiving more than her entitlement under the PMA; and for the additional reasons given by Eleanor King LJ, I do not consider that it can be said that he was wrong. That is the only ground upon which we could allow the appeal. But for these reasons in addition to those given by Eleanor King LJ, I would also dismiss it.