Neutral Citation Number: [**2021] EWFC 128**

IN THE CENTRAL FAMILY COURT

Case No: ZC18D00273

First Avenue House, 42-49
High Holborn London
WC1V 6NP

Date: 8 November 2021

Before:

HER HONOUR JUDGE GIBBONS

Between:

VW — **Applicant**

-and-

VWS — **Respondent**

-and-

EWS, PWS, JWS and K
in their capacity as Trustees of the RWS Settlement dated 17 December 1998
Second Respondents

- -

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Timothy Becker (instructed by **VMD Solicitors**) for the **Applicant**

Alexander Thorpe QC, Marina Faggionato and Giles Richardson (instructed by **Abigail Blick and Co**) for the **First Respondent**

Andrew Mold QC and Millicent Benson (instructed by **Payne Hicks Beach LLP**) for the **Second Respondents**

Hearing dates: 13-22 September 2021
Approved Judgment

This judgment was handed down remotely at 10.00am on 10 December 2021 by circulation to the parties or their representatives by e-mail.

Her Honour Judge Gibbons:

1. VW applies for financial relief following the breakdown of her marriage to VWS. On 7 July 2019, she amended her Form A to include an application for the variation of the RWS Settlement ('the Settlement') and accordingly, on 23 October 2020, the Trustees were joined as parties by order dated 2 October 2020.

2. For convenience, I shall refer to the parties as the Wife (W), the Husband (H) and the Trustees respectively. I intend no discourtesy by use of this shorthand.

3. On 17 September 2021, the parties' daughter, L, applied (on her own behalf and on behalf of her siblings) to join the proceedings, having previously lodged a defective application on 3 September (which had not been referred administratively to a judge). Her application notice identified three claims: (i) compensation in relation to the sale of properties in the ownership of the children of the family; (ii) the repayment of gift monies and income distributions from the Settlement; and (iii) a more vague reference to concern that the children of the family would '*never receive our inheritance as beneficiaries of the [RWS Settlement]*'. On 21 September 2021, L withdrew the application. It was unlikely to have been successful, had it been pursued, given the lateness with which the application was made (notwithstanding the orders made by His Honour Judge O'Dwyer at the FDR) and the likely costs implications of the adjournment to which such joinder would inevitably have led.

4. All parties have been represented by counsel, W by Mr Becker, H by Mr Thorpe QC, Ms Faggionato and Mr Richardson and the Trustees by Mr Mold QC and Ms Benson. Mr Becker and his instructing solicitors have come to the case very late in the day, these solicitors being the eighth firm instructed by W.

5. W's originating Form A was issued as long ago as 5 December 2018. Almost three years later, £1,947,314 of the asset 'pot' which would otherwise have been available for distribution between the parties following this long marriage, has gone. This is entirely due to legal fees. The Trustees' costs, not included above, are £605,402 of which £253,931 remains outstanding. Only a few months ago King LJ described the litigation with which the Court of Appeal was then seized as '*an exercise in self destruction*'. I cannot think of a more apt description for this case.

Background

6. The parties were married in May 1992 and separated some 25 years later in the summer of 2017. This was thus a long marriage. W's Petition was lodged on 21 November 2018 and Decree Nisi was pronounced on 23 May 2019. The Decree has not yet been made absolute, but this is not of itself controversial and merely awaits the outcome of these proceedings. I have given W permission to apply for Decree Absolute (more than 12 months having elapsed), although it is agreed that no application will be made until the financial remedy order consequent upon this judgment has been sealed.

7. W is aged 60. She was born in Khartoum and brought up in the UK. She is in good health and remains living in the former family home in London.

8. H is aged 63. He was born in Zimbabwe and was also brought up in the UK. He, too, is in good health. In 2017, H moved to live in Israel. He presently lives in a property owned by his sister in a city in Israel. He proposes to remain in Israel and wishes to purchase a home there.

9. Neither party works, W having looked after the home and the family during the marriage and H having retired in late 2012, at the wish, he would say, of his father. Until his retirement, H worked (in various roles) for the ABC group, established by his father, RWS, many years ago. In June 1999, RWS's shareholding was settled into the Settlement.

10. H's income of c. £117,000 per annum derives from the rental of a jointly owned property in Washington, USA. W's income derives from the balance of a Green Card Investment which is fast dwindling. In addition to the expenses on the former family home, W receives an income of £5,000 per month.

11. There are three adult children of the family: L, M and N. L has some health issues. M was working but lost his employment during the Covid-19 pandemic. N attends university. All three live with W at the former family home. Sadly, the children are estranged from H, having very much aligned themselves with their mother when the marriage broke down and since.

12. I read and heard the evidence of W, H and Mr P. WS (**PWS)** who is H's younger brother and one of the Trustees. My preliminary observations as to the parties as witnesses is as follows: As to W, I am afraid I was unable to accept all of her evidence as truthful or accurate. I gained the clear impression that she had limited knowledge of the family's financial circumstances and it is this which, in part, explains her present perception that H has assets and resources that he has failed to disclose. To give but one example, W was adamant that H had received £1.75m in about 2007, either from the Trust or another undisclosed source. H's team were able swiftly to establish that this was in fact the advance of funds from the mortgage secured against the former family home. W's emotional attachment to this property was palpable and I fear that her approach to these proceedings has been coloured by her burning desire to retain it, despite her case that it suffers from severe damp, a redundant electrical system, obsolete plumbing and a kitchen in disrepair with broken appliances. As to H, his evidence was often very vague and unsatisfactory. He struggled with recall. There were aspects of his historical financial dealings which were opaque at best and which I well understand will have made W suspicious of his disclosure. On the whole, however, I found him to be doing his best to assist the court. PWS (a solicitor) was an impressive witness, whose evidence reflected the Trustees' general approach of seeking to assist the court. He provided much (but not all) of the detail that H was unable to provide.

13. Given that W's case is based on the likely availability of resources which do not belong to either H or W, I remind myself at the outset that I must be astute to look at the realities of the Settlement. PWS gave reasoned and, in my judgement, entirely fair and honest evidence as to both factual issues and the approach of the Trustees.

14. I heard a great deal of evidence about W's alleged 'asset grab' following separation and in respect of *Imerman* documents. I do not consider that these issues assist in determining the outcome of the proceedings.

The Assets

15. The assets schedule, insofar as it goes, is uncontentious.

16. Whilst the value of the Settlement assets has been in issue for much of these proceedings, W having pursued (at great cost) an unsuccessful Part 25 application for the valuation of the underlying company assets which lie within the Trust, no challenge is now made as to the value of the Settlement in accordance with the latest accounts.

17. In simple terms, the dispute as to the treatment of resources centres around:

    (i) whether the Settlement, which does not appear on the schedule, is a nuptial settlement which, on W's case, is capable of variation and ought to be varied under section 24 (1) (c) of the Matrimonial Causes Act 1973 or is otherwise a resource available to H on a *Thomas v Thomas*[1] basis; and

    (ii) whether H's minority shareholdings in three companies, X Ltd, Y Ltd and Z Ltd are matrimonial in character and therefore susceptible to a 'sharing' claim by W, or, if not, whether they should be invaded on a 'needs' basis. Plainly, liquidity would, in such circumstances, also be relevant.

18. The former family home (held in joint names) is valued at £4.95m. H argues that there is potential to maximise the value of the property by selling its Mezzanine floor separately. The property is subject to a mortgage of £1,748,209, with four years of its term remaining. After selling costs the equity is £3,053,291.

19. The property in Washington DC, USA (in joint names) is valued, net of selling costs, taxation and repairs, at £2,905,075. This property is rented to an Embassy. It appears likely that H will acquire vacant possession in Spring 2022 and there will then be no impediment to sale. There is a suggestion that a tax liability arose when the property was transferred from H's sole name to the parties' joint names but there is no evidence of this.

20. I ignore the sum of £61,343 held in the HSBC account (Y No 2) and the balance of the Green Card investment which will be required to meet interim living expenses.

21. W has modest cash assets of £8,754. H has £2,462. These are likely to fluctuate, and I therefore ignore them.

22. H is owed £23,000 by a friend. Having heard H's evidence, that he made this loan at a time when the friend was in real difficulty, I find it unlikely that it will be repaid, and I therefore exclude it.

23. The parties own chattels valued at £684,390, comprising jewellery and coins with a value of £285,150 (W sought to challenge this valuation, but no *Daniels v Walker*

[1] [1995] 2 FLR 668

application having been made, I accept the single joint expert valuation of Coram Jones), watches and clocks valued at £81,150, pens at £128,650 and other chattels at £189,440.

24. W owns a Porsche motor car and H an Aston Martin, both of which are valued at £30,000.

25. H's shareholdings have been valued by Jon Dodge on a net asset basis and have a combined value of £2,594,000. H's 10% shareholding in X Ltd is valued at £321,000 (allowing for a minority discount which I find to be appropriate), his 20% shareholding in Y Ltd at £2,021,000 and his 10% shareholding in Z Ltd at £252,000 (again allowing for a minority discount which I find to be appropriate). In respect of X Ltd and Z Ltd, the WS family own 50% of the shares and the balance are held by non-family associates. The shares in Y Ltd are held solely by the WS family.

26. H has two very modest pensions with a combined value of £13,857. Given their *de minimis* value, I propose to ignore them.

Allegations of undisclosed assets/disputed beneficial interests/L's joinder application

27. W is convinced that H has assets which he has failed to disclose within the proceedings. There can be no doubt that the parties enjoyed a lavish standard of living for much of their marriage. Indeed, the picture which emerges clearly from the evidence, and particularly that of PWS, is that their spending was extravagant and unwise, even in the context of their wealth. I heard evidence, for example, of H and W having spent £273,898 in one New York jewellery shop in a day (August 2007) and £390,000 being spent on a Bar Mitzvah. I note the value of the various jewellery and pen collections that the parties have accumulated over the years. I accept that PWS was shocked when he learned, during the proceedings, of the extent of H and W's spending. It is agreed that from 2009, RWS and PWS effectively managed and controlled the family's expenditure due to concerns as to H and W's financial mismanagement. RWS set up an HSBC account, designated the Y No 2 account, of which PWS and RWS were signatories (notably not H or W). H's income, distributions and loans (when made) were paid into the account, the day to day running of which was managed by an accountant. The mortgage, bills and insurances on the family home and school fees were settled directly from this account and two monthly payments of £3,000 and £2,000 were made to the joint account and to W's account respectively. In 2012, when H's employment with ABC came to an end, so too did the healthy distributions which he had been receiving for his work in ABCM. The parties' spending does not appear to have slowed down to reflect this change. H first asked his father for a loan (of which more later) in c. July 2014, by which stage the 'severance' payment of £879,215 which had been made to H in March 2013 had already been spent. On 13 October 2014, H entered into a Loan Agreement with J Ltd which recorded a loan facility of £240,000, to be applied in part to redeem the sum of £100,000 borrowed between 31 July and 3 October 2014, but with a rather curious 'bolt on' agreement that on sale of the family home, £5m of the proceeds of sale would be invested on behalf of H and held in trust. This did not in fact happen. That all of this was considered necessary by RWS (and PWS) speaks volumes.

28. I have commented on the opacity of H's evidence and W's lack of hard knowledge of his finances. In 2006, RWS gifted £3m to each of H and his brothers (offshore). In or about 2007, H purchased a property in Israel for $2.7m. H could not even remember whether the property was held in his name or through a company structure (D Ltd). The property was sold in 2010. It is not clear what happened to the net proceeds of sale, and this has never been fully explored. The likelihood is that the parties have simply spent the proceeds. In the same year, H purchased a property in Mexico. Again, his recollection of the detail is '*hazy*', but he believes that this too was held by D Ltd on his behalf. This property was sold in 2012 for $5.1m and some of the proceeds, $3.02m, were invested in the Washington property. Again, it is not clear what happened to the surplus, but H says that the parties '*went through the profit… in no time*'. Certainly, as I have already indicated, the parties did not hesitate to spend freely and excessively during the marriage. Some of the funds are likely to have been spent to fund L's education abroad and on rental accommodation there for her and H, with journeys made by cruise ship to and from there. In 2013, £350,000 was invested into a Green Card Scheme.

29. An issue has been raised by W and L as to the beneficial ownership of the properties in Israel and Mexico. In her witness statement in support of her application notice (by which she sought to be joined, with her siblings, to the proceedings), L set out that she and her brothers sought, *inter alia,* compensation for the net proceeds of sale of both properties (c.$9m). She and W rely on a document said to have been provided by H to W, setting out a record of his finances should anything happen to him. The document, which appears in the bundle, includes the following 'Israel flat is in a trust for the childred (sic) and therefore in there (sic) ownership. You have the right to reinvest the money into another property'. H denied that he had written the relevant parts of the document and asserted that it had been forged. He went on to accept, however, that discussions had indeed taken place with his father at the relevant time about the possibility of the Israel property being purchased on trust for the children, that a Deed to that end had been created by lawyers in Switzerland but that it not been executed in Israel because it would not have been legally recognised there. Subsequently I was provided with an unsigned and undated document entitled 'A Notice about a Trust' which in fact suggested that the property was held by C I S.A. (a subsidiary of D Ltd) on trust for H. The evidence surrounding this was all very unsatisfactory.

30. It is necessary to comment briefly on L's application. When she wrote to the court in the early hours of the morning on 21 September 2021 stating that she wished to withdraw her application, it was clear that she had misunderstood the position as to the court's approach to the Israel and Mexico properties. I informed her that contrary to her understanding, I did not propose to make findings in respect of her asserted claims unless and until she was joined as a party to the proceedings and had filed pleadings. L confirmed that she still wished to withdraw and that she would take proceedings elsewhere. It is tolerably clear that if she does issue separate proceedings these will be against her father alone. Mr Thorpe and Ms Faggionato invite me to determine that any future judgment entered against H in favour of the children of the

family in respect of the proceeds of sale of these properties should essentially be satisfied by both H and W in equal measure. It seems to me that can be achieved by way of an indemnity. It cannot be right that L be permitted to bring proceedings against her father alone in relation to assets which form part of a whole matrimonial 'pot' and in circumstances where she has had every opportunity since December 2018. Beyond that, I do not propose to comment further in respect of L's complaints against the Trustees or H.

31. Evidence emerged during the course of the hearing as to a company called K Management Ltd, a Cypriot company owned by H and PWS in equal shares. H was cross examined about a payment dated 29 January 2016 (reference dividend) that was paid into the parties' Chase bank account and he was unable to explain what is was (no questions having previously been raised by way of questionnaire). PWS explained that to the best of his knowledge this had come from K Management which had been incorporated in about 2007 to deal with the management of offshore properties in a venture in which ABC had a 10% stake together with other overseas investors. PWS explained that the company will shortly be wound up and will produce only a nominal sum. Whilst H should have declared this asset in his Form E, I accept PWS's evidence that it will not produce any capital other than a nominal sum to H.

32. It will be apparent that on the evidence available to me, I do not draw the inferences sought by W that H has further undisclosed assets as she believes.

Liabilities

33. In terms of liabilities, the parties owe HSBC £3,490, there are outstanding management charges in respect of the family home in the sum of £55,975 and the children of the family are owed £751,117[2]. The original sum owed to the children was £1,050,000 which had been a gift to the children in equal shares from RWS. This is reduced by the £120,670 already recovered by L and £133,213 paid by way of Inheritance Tax (because RWS sadly died before the seven-year period for an *inter vivos* gift had elapsed). In addition, W owes £68,000 to L and £2,500 to Ballards. H owes £27,000 to his mother which I exclude on the basis that it is a soft debt. He will have a CGT liability of £60,000 on the sale of the family home.

34. W's outstanding costs (including her litigation loan) are £653,583 and H's (including his litigation loan) are £906,123. Both parties' litigation loans will continue to accrue interest at 12% per annum until they are discharged. The Trustees' total costs are £605,402. Of that total, £97,774 have already been the subject of assessment (leading to costs orders against W of £78,009). The outstanding fees yet to be determined are £507,628.

35. Interlocutory costs orders (summarily assessed) have been made against W, not be enforced until the conclusion of the proceedings, such that W owes £66,003 to H and £78,009 to the Trustees. These do not fall to be deducted from the pool of assets, but I

[2] W accepts that she received £45,000 by way of gift from S's funds between 22.03.18 and 03.07.18 – Reply 10 C107

will have regard to them when considering net effect.

36. The gross matrimonial assets thus total **£6,702,756**. In addition, H has his shareholdings valued at **£2,594,000** and he remains within the pool of discretionary beneficiaries of the Settlement.

37. This gross total is reduced by virtue of the parties' liabilities **(£2,500,788)** to **£4,201,968**, plus H's shareholdings. These totals do not take account of the Trustees' costs, or the costs orders already made against W.

Open Proposals Wife

38. W's position has significantly evolved over the course of the proceedings. Until the final hearing, the headline points of W's open proposals were as set out in her written offer of 19 January 2021:

    (i) The transfer to her of the family home free of mortgage [3];

    (ii) The transfer of the Washington property to H;[4]

    (iii) An equal division of chattels (W to recover items of female jewellery and watches, works of art and the objects at the family home with a value of £342,195.

    (iv) The Porsche motor car;

    (v) A further lump sum payment of £3.85m, from which W would repay one half of the debt owed to the children (£375,559);

    (vi) Otherwise, a capital and income clean break;

    (vii) No order for costs.

39. This proposal would have provided W with c. **£8,592,161**. After payment of her outstanding costs and other liabilities, W would have received (on the figures as at final hearing) **£7,866,333**. After payment of the two adverse costs orders, W would have recovered **£7,722,321**. This is significantly more than the net matrimonial 'pot' (almost double in fact).

40. In contrast, H would have a **deficit** of **£3,598,363** of the net matrimonial assets[5] and his non-matrimonial (and illiquid) shareholdings of **£2,594,000**.

41. The basis upon which W advanced this as a principled and justifiable proposal has also evolved throughout the proceedings, of which I shall say more later. I have already referred to the fact that W's present solicitors are the eighth firm that she has instructed during the lifetime of the proceedings. Aside W's case that the Settlement

[3] £4,950,000 less costs of sale and charges of £55,975, so £4,745,525
[4] £2,905,075
[5] After payment of the mortgage, CGT and the additional lump sum and assuming his costs were reduced to £840,120 by receipt of the costs order of £66,003.

is a nuptial settlement capable of variation, W's case was also run on what I consider a wholly unsustainable argument that she was somehow entitled to a share of the Settlement assets, none of which are vested in H, because of H's now historical role within the Settlement's underlying company asset(s). On day two, (on instruction) Mr Becker made the realistic and appropriate concession that this argument could not be advanced, although it was still argued that the Settlement is a nuptial settlement.

42. In broad terms, by her present proposal, formulated only during the course of the final hearing itself, W now seeks the following:

(i) Transfer of the family home into her sole name subject to the mortgage and the outstanding charges;[6]

(ii) An order for sale of the Washington property with payment of the entire net proceeds of sale to her[7];

(iii) H to bear the whole responsibility for the debt to the children[8];

(iv) Half of the collections and chattels[9];

(v) The Porsche motor car;

(vi) Otherwise, a capital and income clean break;

(vi) No order as to costs.

43. After payment of her outstanding costs and other liabilities, the net award to W on this proposal would be **£5,548,757**. After payment of the two adverse costs orders, W would recover **£5,404,746.**

44. In contrast, H would still not recover the benefit of any of the matrimonial assets – indeed he would have a deficit in terms of matrimonial assets of (**£1,280,787**). He would retain his non-matrimonial and illiquid shareholdings and remain a discretionary beneficiary under the Settlement. In fact, aside H's illiquid shareholding, H would recover only half the chattels and a motor car (total £372,195) which would not even cover the liability of £751,117 to the children. The only way in which H could pay his debts and meet his needs would be either (i) by liquidating his shareholdings (and, even then, he would be left only with **£1,313,213** compared to W's **£5,404,746** and/or (ii) from the Settlement.

45. By paragraph 25 of her Particulars of Claim, W asserted that the Settlement was a post nuptial settlement within the meaning of s24 (1) (c) MCA 1973, but she failed to plead what variation she claimed should be granted by the court. In her Reply, she set out the variation which she sought '*to bring forward the end of the Trust Period to the date of the financial remedy hearing*'. Such relief was abandoned at trial. With respect to Mr Becker, when pressed he was unable, for understandable reasons, to

[6] On updated valuation £4,950,000 - £1,789,209 - £55,975 - £148,500
[7] £2,905,075
[8] (£796,117)
[9] £342,195

formulate the precise variation of the Settlement sought by W. By the end of his submissions, Mr Becker made the (unusual) submission that there should be no variation in favour of W but in favour of H instead. It is not difficult to see why his primary submission was that the court should approach the case on a *Thomas v Thomas* basis.

Husband

46. H's case has, since the outset, been that each of the parties' claims could be met through a fair division of the matrimonial assets without recourse to non-matrimonial resources. His open proposal was made on 1 October 2020:

(i) The immediate sale of the family home with the proceeds of sale (up to a gross sale price of £4.95m – the revised valuation) to be divided as to 90% to W (£2,747,962) and 10% to H (£305,329). Any net surplus generated by a sale in excess of £4.95m to be divided equally with the sale price to be maximised by selling the Mezzanine floor of the flat separately;

(ii) H to pay into the Y no 2 account £6,000 per month to cover the mortgage and other utilities until sale or for 12 months;

(iii) H to pay to W a lump sum of £60,000 representing maintenance of £5,000 per month for 12 months;

(iv) Transfer of the Washington property to H at a time to be elected by H for taxation reasons;

(iv) Upon sale of the Washington property, H to pay to W a deferred lump sum of £600,000. This aspect of H's offer is now withdrawn because of the costs he has incurred since the offer was made.

(v) Chattels to be divided such that W recover chattels to a value of £371,170 and H the balance of £313,220;

(vi) W to retain the Porsche and H to retain the Aston Martin;

(vii) Each party to be responsible for half of the debt owed to the children (taking account of sums already recovered by L and the IHT paid on their behalf;

(viii) The family home charges to be met equally;

(ix) Otherwise, a capital and income clean break;

(x) No order as to costs

47. As at the date of this offer, W's costs were £454,965. If I ignore the proposed payments into the Y No 2 account, by my calculation, as at 1 October 2020, H's

offer would have provided W with net assets of c. **£2,878,046**[10]. The offer was predicated on the basis that W would have a housing fund of c.£2m and a Duxbury fund of £1.688m. I have found it impossible to reconcile the figures in H's open offer, even taking account of the reduction in the value of the family home. However, it is clear that the offer would nonetheless have permitted a reasonable fund for housing and income.

48. W's costs have increased by £319,479 since the offer was made. H's have increased by a startling £722,020. The Trustees' total costs are £605,402.

49. Ignoring any costs orders (past or future), the net effect of H's revised proposals (on today's figures) would be as follows: W would recover **£2,079,757**. After payment of the existing costs orders (incurred since October 2020), she would recover **£1,935,745** and H would recover **£2,188,212** (including cots of £66,003) and his illiquid shareholdings of £2,594,000.

H's shareholding: X Ltd, Y Ltd and Z Ltd

50. These companies were incorporated in the 1970s by RWS, who, at the time, registered shares in each of his children's name. Apart from one modest dividend of £16,000 from X Ltd in the year ended 2018 (post separation), H has received no income, whether by way of salary or dividend, from any of these companies during the marriage. Accordingly, none of the companies has ever contributed to the family economy. Nor has H been involved in the management of the companies. That one dividend payment is insufficient to render H's shareholdings matrimonial in character and I agree with the submission that these are unequivocally non-matrimonial. Accordingly, they will not be susceptible to a 'sharing' claim and are only relevant to the extent that W's needs require them to be invaded. Even this, however, must be subject to liquidity.

51. Mr Dodge opines that, in the present pandemic market, absent re-financing, there is no liquidity in any of the companies[11]. Moreover, although there are presumably pre-emption rights, there is no evidence to support the proposition that there is a market for H's shares. Indeed, this was only briefly touched upon during W's cross-examination of H and PWS and it was accepted in closing submissions that this evidence was not before the court.

52. In summary, I am satisfied that H's shareholdings are non-matrimonial in character and, on the evidence available to me, that they do not represent a liquid resource for H.

The RWS Settlement

53. The Settlement was settled by H's father, **RWS**, on 17 December 1998. By then H

[10] £2,747,962 +£60,000 + £600,000 + £371,170 + £30,000 - £375,559 - £27,988 - 70,500 – £1,745 - £454,964

[11] Paras 2.8 – 2.10 report dated 9 April 2020

and W had been married for some six and a half years. Sadly, RWS died in April 2019.

54. The present Trustees are PWS, EWS, L and JWS, all close family members. RWS was a trustee until his death in April 2019. PWS was one of the original trustees, L has been a trustee since October 2014 and EWS and JWS have been trustees since October 2016. I accept PWS's evidence that H was not added as a trustee in 2016 because of his residence at the time in the USA and that whilst RWS subsequently considered adding H as a trustee, he decided against this due to concerns about H's past history of poor financial management. I accept PWS's evidence that H and W's lack of financial prudence was well known within the family.

55. The Settlement is discretionary in nature during the Trust Period (as defined in cl.1(b), being the period of 80 years or such earlier date as the Trustees may decide).

a. By cl.4, the Trustees have a power to appoint capital and income in favour of such one or more of the beneficiaries as the Trustees shall decide.

b. By cl.5, the Trustees have further powers to apply or accumulate income and apply capital.

c. None of the beneficial class of the trust has any fixed or vested beneficial interest in the trust property. Instead, each beneficiary has the right to have the Trustees consider, from time to time, whether or not to pay to them or apply for their benefit some part of the income or capital of the trust. I fear that W has not understood the discretionary character of the Settlement.

d. The Trustees must, in undertaking such periodic considerations, take into account only relevant considerations; they must reach rational decisions in good faith and act for proper purposes.

e. Cl. 6 provides for ultimate default trusts in favour of the Principal Beneficiaries (the settlor's children), and failing that, in trust for the Beneficiaries. The Beneficiaries are the children and remoter issue of RWS together with their spouses, widows and widowers.

f. Cl. 6 only has any operation in the event that at the end of the trust period (16 December 2078 unless accelerated during the lifetime of the Principal Beneficiaries) the trust fund has not already been exhausted by distributions generally or has not been appointed out to new trusts.

56. W's pleaded case, that '*as one of the four principal beneficiaries, [H's] share [of the trust fund] is 25%'* is misconceived. The defined term Principal Beneficiaries is only relevant to the vesting of the trust fund *if and in the event* that the Trustees took the step of bringing the Settlement to an end whilst H and his siblings were still alive.

57. There are currently 29 living Beneficiaries comprising RWS's children and their

spouses (provided they remain as such), grandchildren and great grandchildren. There are two babies due to be born who will also be Beneficiaries. Accordingly, there is a large class of Beneficiaries, and it is reasonable to anticipate that it will grow.

58. The only material asset held within the Settlement is ABC Holdings Ltd ('**ABCH**'), which is the 100% owner of ABC plc (**ABC)**. RWS's shareholding in ABC was settled into the Trust in June 1999. ABCH was established in October 2006 and has been within the trust structure since inception. Accordingly, it was RWS who was the source of the settled assets, and prior to settlement, they were his assets absolutely to do with as he wished.

59. ABC is, as the name suggests, a business which invests in commercial properties. From approximately 1994, ABC began to invest in large shopping centres and expanded its enterprise over the years to include large centres in Europe, Japan and the USA.

60. I pause here to note that it had been W's case that H had been primarily responsible for the Group's successes and hence its value. It was on this basis that she sought to assert a sharing claim against the Settlement's Assets. This limb of her argument has now sensibly been abandoned (although only after H and the Trustees had been put to the expense of refuting it) but this was an argument to which I would not have acceded in any event. It was clear from the evidence, indeed from W's own oral evidence, that H played a role, together with others, in the company's successes, but it is equally clear that he was fully remunerated and compensated for the role he undertook. Moreover, and much more importantly, I can see no principled basis upon which W could have asserted a sharing claim against assets held by a third party on trust where H (like the other Beneficiaries) has no entitlement to or vested interest in any of the Settlement's income or capital.

61. I accept that following the 2008 banking crisis, RWS made the decision to diversify ABC's portfolio, so as to include smaller investments (office space, smaller retail buildings and residential properties etc) without investment partners and across sectors.

62. The tangible fixed assets (investment properties) held by the underlying companies are set out within the Supplementary Report to the ABCH accounts. The latest Trust accounts show a figure of £21,323,128 for net current assets. The way in which this figure takes account of the value of ABCH is explained in note 5 to the accounts and also in the letter from the Trustees' accountants dated 13 April 2021. Primarily, adjustments have been made to account for the costs that would be necessarily incurred in order for the value of ABCH's investments to be realised and distributed to the Trust.

63. As I have already said, until the final hearing, W was challenging the value attributed to the Settlement's assets. The issue is no longer pursued, again only after the Trustees (and H) had been put to considerable expense.

64. The Settlor's intentions are clear from the various Letters of Wishes and other

communications which speak of the long-term preservation of the capital of the Trust but the equal provision of net income from it to his children (as to 50%) in the first place and as to his grandchildren (as to the balance).

65. RWS's letter of wishes dated 11 January 2011 makes clear:

a. His wish that the Trustees keep the capital in the Trust and whenever practical only distribute the net income; and
b. His wish that when a beneficiary dies, their share goes to their children or brothers or sisters, not to their husbands or wives.

66. RWS's email dated 6 December 2018 is to the same effect. In particular, he specified that the Trust was for the benefit of his direct descendants and that as far as was practical he wished the Trust to survive for as long as possible and for only income distributions to be made yearly from the profits.

67. RWS's 2019 letter reiterates that position, and indeed makes clear that he only envisaged spouses of his bloodline being given income distributions from the trust where their spouse had died but had requested such post-death provision to their widow or widower and was still married at the time they died.

History of Distributions and Loans from the Trust

68. The Trustees have provided a comprehensive schedule of distributions and loans made by the Trust during its Lifetime. W had referred in her section 25 statement to the apparent wealth of the other principal Beneficiaries, the inference perhaps being invited that they had received significant distributions from the Trust. She had also stated that '*the vast bulk of the parties' domestic economy has been financed from payments made by the settlement*'. However, W conceded in her oral evidence that the schedule of distributions was accurate and that she could not assert that further distributions or loans, not appearing in the schedule, had been made. I therefore find the following:

a. No distributions were made from the Trust before August 2007. This was some fifteen years after the marriage.

b. On the demerger of ABC and F (Holdings) Limited (**'F Ltd'**) (which held the management company, ABCM in which H and PWS worked), a sub-trust was established by Deed of Appointment dated 1 August 2007, by which the Trustees appointed life interests in F Ltd's shares to H and PWS. H and PWS were directors of both F Ltd and ABCM. None of their other siblings worked for the management company and RWS decided that H and PWS should benefit from the profits. Between 2007 and 2012, both H and PWS received income distributions from this sub-trust. During that five-year period, H received £2,584,700. In addition, he also received remuneration (including, I think, commission and/or bonus) referable to his employment. For the sake of completeness, ABCM would source the investments and thereafter manage the

property and the investment. This would typically consist of (i) property management (rent and service charge collection), (ii) asset management (lettings and development), (iii) strategic management (development strategy and exit strategy and 'client' oversight for a fee based on rent collected, service charge and a profit share.

c. On 22 December 2012, H resigned as a director of ABCM (and ABC) and ceased to have any role save through his continuing life interest in the shareholding in F Ltd. Because his work for A B C M had ceased, so too did the income distributions from the sub-trust. On 15 March 2013, H resigned as a director of F Ltd. The F Ltd shares were distributed out (equally) to H and PWS (on 13 March 2013), so the sub-trust ceased to exist. On 17 March 2014, H's shares in F Ltd were bought back by the company for approximately £100,000. Later, in about 2016, RWS decided to bring ABCM back within the Trust and PWS's shares were also bought back.

d. Thus, H's distributions from the sub-trust were made for a particular purpose and were not typical of distributions from the Settlement in general. These distributions ended when their purpose ended. This is an important distinction.

e. In addition to the distributions from the sub-trust, H has received three capital distributions totalling £1,011,593: (i) £5,000 in March 2013; (ii) following his retirement from ABC and ABCM, the Trustees (in accordance with RWS's wishes) made a distribution of £879,215 (net of tax) in March 2013 '*to see him right*'; and (iii) the Trustees distributed £127,358 on 26 October 2017 following an issue over whether H was entitled to a commission relating to the purchase of the a commercial property (D). This, too, was made in accordance with the wishes of RWS and was directly referable to H's work within ABCM. This latter capital distribution was not in fact paid out by the Trust but applied instead in part satisfaction of loans owed by H to the Trust (of which more below).

f. The family as a whole benefited from the above distributions.

69. It is of note (and I find) that no other capital distributions have been made from the Trust to any other beneficiary.

70. Loans (mostly attracting interest), on the other hand, have been made by the Trustees to various beneficiaries (within all branches of the WS family) for varying purposes (primarily from a subsidiary K Limited UK (**K Ltd**)) as the schedule demonstrates. In the 5-year period between 31 July 2014 and 5 September 2019 the Settlement made loans to H totalling £1,243,837. Of that £220,000 was advanced for H's legal fees (between December 2018 and September 2019) on the proviso that the loan would be repaid, as they have been, via a distribution from P Ltd (a shareholding disclosed in Form E). I note that all of these loans were made before the Covid pandemic began in Spring 2020.

71. By far the lions' share of the loans made to H were paid into the YG No 2 account

with HSBC and are annotated 'family expenses.'

72. I do accept W's evidence that until November 2017, she was unaware that the funds received by H from the Trust from 31 July 2014 onwards (apart from income distributions to which I shall return) had been loans and not distributions. Nonetheless, I am satisfied that the funds received were mostly paid into the Y No 2 account and expended for the benefit of the family as a whole. Whilst W disputes the need for these loans, no 'add-back' argument has been pleaded or argued, nor it seems to me, could it have been.

73. There has been a significant issue within the proceedings as to whether the children have been wrongly deprived of gifts from their grandfather (£350,000 each) and the income distributions from the Settlement between 2016 and 2018. On 14 January 2021, District Judge Duddridge determined that W should not be permitted to pursue allegations of fraud in this regard. H and W agree that the children should be repaid what is outstanding of the gift from RWS but there remains an issue as to who should be responsible for repayment. W argues that H should repay the full amount. H says that it should be met equally. Without descending into the complaint made by the children against H and/or the Trustees, it is nonetheless necessary to consider the state of W's knowledge and the approach that she adopted in November 2017.

74. On 27 November 2017, W wrote to PWS as follows:

'*[H] has told me that he owes the trust 750,000 pounds, is that correct? I would like to know that the children's money of £1,050,000 will clear [H]'s debt. Thank you, hope all is well*'.

75. On 28 November 2017, PWS replied confirming that the outstanding loans (including interest) totalled £486,868, broken down as to £382,061 to the trust and £104,807 to J Ltd. He also stated that he anticipated the family would require a further £120,000 for the current year to end September to cover the expenses the Trust had been paying on the family's behalf (Mortgage, utility bills and insurances). The total required, he suggested, was £607,500.

76. The same day, W replied as follows:

"*Thank you so much for getting back to me with such a clear breakdown of all expenses and debt. I have never actually seen a breakdown before, so this is very helpful.*

If I could suggest we pay [H]'s debt of £486,868.88 as well as the living and car/home insurance of £120,448.32 which as you say adds up to the total amount of £607,317.20.

The money from the children's £1,050,000 leaves us with £442,682.88, £350,000 of which is still intact under M's name and L has signed her remaining money to [H] (there should be over £100,000 left over for her) That sum of money (£442,626.88) can be used for tuition fees and all living expenses therefore we will not need to borrow the £120,000 and the dividend [sic] [H]'s [sic] gets won't need to be

deducted as he won't be borrowing.

Thank you so much for all your help P, if [H] does ask for loans in the future I would like to be fully informed before any decisions are made, because I am frequently left out of the loop."

77. It is clear from this exchange that despite W's denials during her oral evidence, she was well aware that the children's gifted funds were going to be used, with her agreement, in part repayment of the Settlement loans and towards future living expenses and I so find. I can see no basis upon which H alone should be responsible for their repayment.

Distributions of Income

78. These began in 2016 and thus eighteen years after the creation of the Settlement. At a meeting of the Trustees in April 2016, RWS expressed his wish that income distributions be made at a time as soon as was prudent – at a time when ABC had cash reserves which could be distributed to the Settlement (gross of tax). This led to income distributions being made to various of the beneficiaries during the period October 2016 to October 2018.

79. The first income distribution (other than through the sub-trust which had ceased to exist in 2013) to H and the children was thus made some eighteen years after the Trust was created.
    a. 4 October 2016: £70,125 and £23,375 respectively;
    b. 6 October 2017: £74,250 and £24,750 respectively; and
    c. 23 October 2018: £82,850 and £25,492 respectively.

80. There have been no further income distributions since then.

81. As the Minutes of the meeting held on 8 July 2016 reveal, the treatment of these income distributions and their interplay with the repayment of loans created some constellation within the wider family. It was equally RWS's wish that any income distributions should first be applied to discharge the loans from which various family members had benefited. His approach was that any distribution made to a particular branch of the family should be applied towards that branch's overall indebtedness, irrespective of which family member within the branch owed the money. This was applied just as rigorously to the other siblings as it was to H and his branch of the family.

82. The income distributions in 2016/17 and 2017/18 were essentially ledger entries since they were entirely set off against debt. In October 2018 (i.e. the tax year 2018/19) c. £10,000 of the income distribution was applied towards the then outstanding loans. I accept PWS's evidence that in order to make those 2018/2019 distributions, ABC borrowed against securities held in Switzerland.

83. I pause here to observe that L has signalled her intention and that of her siblings to challenge the Trustees in respect of income distributions which it is alleged they ought

to have received. I informed L that this was between her and the Trustees and a matter for the Chancery Division. I do not propose to say anything further on this subject.

Whether the RWS Trust is a nuptial settlement

84. It is a threshold requirement of the Court's jurisdiction under s. 24(1) (c) that there be an '*ante-nuptial or post-nuptial settlement (including a settlement made by will or codicil) made on the parties to the marriage*'.

85. There is no doubt that the Trust is a settlement within the meaning of s.24(1)(c). The issue is its nuptiality. That is a question of fact.

86. There is no statutory definition of a nuptial settlement. I accept and adopt Mr Richardson's clear and cogent submissions in this regard. As is clear from the line of authorities leading to *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam), for a settlement to be nuptial in the context of a particular divorce it has to be directed at the particular marriage which is before the court and one which makes continuing provision for one or both of the spouses.

87. Per Hill J, in *Hargreaves v Hargreaves* [1926] P42:

"*Mr. Middleton's argument comes to this. He says that any settlement inter vivos made upon either of two people who at any subsequent date marry is a settlement which the Court can deal with under this section, because it is ante-nuptial, and that any property dealt with by such a settlement is to be regarded as property settled. In my view that cannot be. This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage.* ***It refers to it because what it is dealing with is what we commonly known as a marriage settlement, that is, a settlement made in contemplation of, or because of****, marriage and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning" (*emphasis added*).*

88. Per Hill J in *Prinsep v Prinsep* [1929] P 225 at 232 [emphasis added]:

"The main point in issue is whether the settlement of August 25, 1920, is a "post-nuptial settlement on the parties" within the meaning of s. 192 of the Judicature Act, 1925. ***Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife?*** *If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that* ***it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state.****"*

89. *Joss v Joss* [1943] 1 All ER 102, per Henn Collins J 103 [emphasis added]:

"I think, therefore, that the settlement in question, in order to come within the section, must answer the narrower test. ***It is not enough that it should have been made by a***

spouse after the marriage; it must also have been made "because of" the marriage. *Having regard to the trend of the decided cases, I do not think that that phrase "because of" is meant to invite or require a search for a sole or a prime or proximate cause or even a causa sine qua non. If that were necessary, it is at least doubtful whether the settlement in Melvill's case could have stood the test. What is really meant, I think, is that* ***the particular marriage must be a fact of which a settlor takes account in framing the settlement****. If the particular marriage is recited or referred to, it is patently a factor. Hence, a settlement made before marriage, but not in relation to or contemplation of the particular marriage, is not within the section, but it is within it, if from its recitals or substance it is apparent that it is related to a particular marriage. Similarly, in the case of a settlement made after marriage. If the marriage is recited or expressly referred to, it is patently a factor; but, if it is not recited or referred to, it may still be a factor; and, since the marriage is an existing fact which the settlor must have had in mind, the absence of recital makes little difference."*

90. Per Singer J, in *Joy v Joy Marancho* [2015] EWHC 2507 (Fam) at 101: "*I must therefore ultimately have regard to the question whether H settled NHT in contemplation of marriage. I accept the formulation contained in Burnett v Burnett [1936] P 1, at 16,* ***that in order to bring the section into operation, there must be a marriage which is the subject of a decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made'.*** *The evidence I have heard and read falls short of establishing that matters stood thus between the parties in December 2002. Despite the breadth and diversity of arrangements which have been held to fall within the meaning of a nuptial settlement for the purposes of this provision, there must always be some nuptial element. Here that was lacking. The answer is as short and can be as simply stated as that and does not require further elaboration or citation of authority."* (emphasis added).

91. In considering the particularity of this Settlement to the marriage, as Mr Richardson submits, it is to be noted that:

(i) As to the beneficiaries, the principal beneficiaries are the settlor's children. The beneficiaries as a general class are the principal beneficiaries, the children and remoter issue of the principal beneficiaries, the spouses, widows and widowers of the principal beneficiaries and of such children and remoter issue. As Mr Richardson submits, the structure of the Settlement, in its very articulation of its beneficial class, is that of a dynastic trust. Importantly, it is focussed on the children of the settlor because they are his children, regardless of their marital status on the date on which the Settlement was created or at any future date. The beneficial class is one of bloodline, with spouses, widows and widowers as adjunct beneficiaries, dependent for their status on their continued marriage to one of the bloodline beneficiaries. It is fundamentally not directed at the marriage of any of the bloodline nor any particular marriage of any particular member of the bloodline.

(ii) The powers of the Trustees to appoint capital or income are entirely discretionary. Only if H (and/or his siblings) were still alive in 2078 would the

ultimate default trusts apply. In such circumstances it must be right that the settlor could not have expected the outright appointment of the trust assets to the principal beneficiaries.

(iii) The various letters of wishes prepared by the settlor[12] are entirely consistent with these propositions.

(iv) This Settlement lacks the particularity that might well have existed had sub-trusts been created for each of the 4 branches of the family, with successive life interests for H then W and then trusts in remainder for the children. I note that in 2015[13] H suggested something similar to this and it was roundly rejected by the Trustees.

(v) W was unable to plead that the settlor made the Settlement because of the marriage or that but for the marriage of H and W the Settlement would not exist or that the settlor was in any way motivated by their marriage or that he wished particularly to direct a benefit on the couple as a married couple. Moreover, during cross examination by Mr Thorpe, W accepted that the fact of this marriage did not inform why RWS created the Settlement. She agreed, too, that RWS was providing for the WS bloodline for future generations, by putting ABC into the Settlement so that it could be preserved.

92. For these reasons, I am satisfied that the Settlement is not a post-nuptial settlement within the meaning of s. 24 (1) (c).

93. For the sake of completeness, however, I should also add that had I found it to be so, I would not have proceeded to find it appropriate to exercise any discretion to vary the Settlement. Mr Becker's difficulty in identifying how the Settlement should be varied is telling. Even during final submissions, neither H nor the Trustees knew what case they were meeting.

94. It is clear from *Ben Hashem* that the court should only entertain the possibility of a variation where it is **necessary** to do so in order to do justice between the parties. I agree with the submission that this principle ought to have sounded a strong warning to W before such significant costs were incurred and the matrimonial assets, from which the parties' needs could adequately have been met on a sharing basis, thereby denuded. I accept Mr Mold's submission that W's concession through Mr Becker, that a *Thomas v Thomas* approach would achieve the same end, ought to have been fatal to any variation application.

95. Moreover, as Munby J (as he then was) stated in *Ben Hashem* the court ought to be very slow to deprive innocent third parties of their rights under the settlement. W's pleaded case, albeit abandoned, that the Trust period be accelerated, was as draconian as could be imagined. I accept the submissions made on behalf of H and the Trustees that its effect would have been to terminate the trustees' discretionary powers in

[12] 11.01.11, 06.02.18 and 2019

[13] Para. 6 of the Minutes dated 4 November 2015

clauses 4 and 5 of the Trust and since all the Principal Beneficiaries are still alive, to bring into effect clause 6 (a) so that H and his siblings would each acquire an absolute 25% interest in the Trust. This would defeat the interests not only of H and W's children but all of the grandchildren and great grandchildren of the settlor and would be entirely contrary to his wishes. Furthermore, no thought appears to have been given by W to the tax consequences of the Trust being collapsed or indeed of any capital being appointed to H.

96. The latest Trust Accounts (y/e 2020) reveal an accumulated income fund of £1,491,830. The assets of the Settlement are predominantly the shares in a private company. Although as Mr Mold points out, it would be for the board to decide whether there were sufficient funds to declare a dividend to the Trust and the company has not been joined, in my judgment the reality is that it is the Trustees who would make the decision (given the Settlement's 100% shareholding), just as, in 2016, RWS (as Settlor and Trustee) expressed his wish that income be distributed. However, when dividends were historically declared this was a) at a time when the company profits permitted such dividends; and b) distributions from the Settlement were for the large part essentially ledger entries because of the outstanding loans to various beneficiaries within the individual family branches. I shall deal with the Settlement's ability to make income distributions and the company's ability to declare dividends when I deal with the 'resources' argument below.

97. PWS makes the point, which I accept, that any variation of the Settlement in H's favour (or indeed any provision made otherwise than by variation) would likely prejudice the interests of the other beneficiaries, including minors, who would be able legitimately to argue that they had been disadvantaged.

The Resources Argument: Thomas v Thomas

98. Whether or not 'judicious encouragement' as a concept survives *Villiers*, the question for the court to consider is the *Charman*[14] question:-

> [12] There has been some debate at the hearing of this appeal as to the nature of the central question which, in this not unusual situation, the court hearing an application for ancillary relief should seek to determine. Superficially the question is easily framed as being whether the trust is a financial 'resource' of the husband for the purpose of s25(2)(a) of the Matrimonial Causes Act 1973 (the 1973 Act). But what does the word 'resource' mean in this context? In my view, when properly focused, **that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so**...

99. Again, it is a question of fact. I find the answer to that question to be a clear no. As to liquidity within the Settlement, as I have said, the latest Trust Accounts (y/e 2020) reveal an accumulated income fund of £1,491,830. PWS explains, however, that (i)

[14] *Charman v Charman* [2006] 2 FLR 422

monies have been retained to be applied towards the Settlement's IHT charges and other tax liabilities on its income receipts; and (ii) The Trustees have incurred significant legal fees to protect the interests of the beneficiaries (albeit that by my order much of this will be recovered).

100. I have of course asked myself whether the Trustees' decision not to make any further income distributions since October 2018 has been influenced by these divorce proceedings and ancillary claims. However, between now and April 2023 the Settlement has projected liabilities totalling £2,594,450 which includes tax and professional fees. In 2028, a gross dividend receipt of £2,922,000 will be required from ABCH to enable the Settlement to meet the final instalment of the IHT charge of c. £1.8m.

101. As to the position of ABCH, the latest accounts with which I have been provided are for the year ended 2019. They reveal net current assets (as opposed to fixed assets) of £1,688,369. The accounts pre-date the Covid-19 pandemic. I accept PWS's evidence that ABC does not anticipate having available resources to secure the funding of distributions out of the Settlement for at least a few years. This arises in part because of the pandemic which has adversely impacted property values and the turnover/cashflow of ABC and ABCM and also because of the loss of the D investment management fees on its liquidation. As PWS explained the group is primarily invested in retail, offices and public houses. Across the board, demand has declined and ABC's turnover from rental income has decreased. Tenants have taken advantage of the moratorium, others have exercised break clauses and it will be a challenge to acquire new tenants, particularly with the new practice of working from home. Outgoings continue even where office and retail space is vacant. As a result, cash resources at ABC (which might otherwise have been available as dividends) have been used to support ABCM (by way of loan) and ABC may need to utilise some of its available funds to pay down some the some of its secured borrowing (although the group is not particularly debt-burdened). The Trustees' approach historically has been to preserve capital (not to sell to release funds) and to ensure the financial security of the underlying assets rather than pushing for annual income distributions when not affordable. Now would not be a good time to sell in any event. Finally, whenever dividends are declared to be paid down into the Settlement, the latter will incur a tax liability of 45%.

102. PWS was cross examined as to whether the Trustees might advance capital to H for the purposes of meeting his housing needs, whether by outright appointment or loan. PWS rejected the possibility of an outright capital appointment but had accepted (in his written evidence) that H would be treated in line with the other principal beneficiaries in terms of income distributions as and when the Settlement was able to make such distributions. He did not consider that this would be possible for a few years. Given the history of capital loans being made by the Settlement (in H's case alone £1,243,837 over 5 years), this was of particular interest. PWS confirmed that all requests for a loan from the Settlement would be considered individually and that any loan made would attract interest as before. If the borrower had demonstrable security any loan could be repaid from income distributions as has occurred in the past, but

repayment would have to be made within sensible time limits. Although PWS initially stated that he could not entirely rule out the possibility of a loan, he made clear that (i) he would not support a loan to purchase property in Israel; (ii) any loan would require the unanimous decision of the Trustees; and (iii) having spoken with a fellow Trustee, the resounding answer to each of the propositions put to him was no. In any event, I accept PWS's evidence that the need to accumulate funds will have a direct and important impact on the ability to make loans and that the Settlement is simply not in a position to do so, nor will it be for the foreseeable future.

103. As Mr Mold submits, there is considerably overlap between the 'resources' argument and the variation argument. The intention of the settlor (whilst not binding) was always to preserve capital within the Settlement for his bloodline. I found PWS to be a clear, compelling and truthful witness. There was not one aspect of his written or oral evidence that caused me to doubt for one moment the independence and bona fides of the Trustees. I am far from satisfied that the Trustees, having been apprised of all relevant facts, would respond positively to a request by H to make funds available to him for his needs for the foreseeable future. Indeed, given the history of the family intervening in H's financial affairs, the fact that no outright capital distribution has ever been made save in relation to the sub-trust which had a specific purpose and was related to the historic endeavours of H and PWS and the Trustees' observance of their fiduciary duties towards all the discretionary beneficiaries, I find it far more likely that the Trustees would not do so. Nor does it appear that the Settlement has, or is likely to have within the foreseeable future, sufficient funds to make a loan to H to meet his housing need. Those are my findings.

The Trustees' costs

104. Before I return, full circle, to outcome in the context of the resources now available, it is necessary first to consider the Trustees' costs, where liability for these should lie and their quantum.

105. I remind myself of the observations of Holman J in *Daga v Bangur* [2018] EWFC 91. In that case a husband sought financial provision from a wife. She had limited assets of her own but was within the class of beneficiaries of two discretionary trusts. As Holman J said, the two trusts were the 'focus or target' of his application (just as W's have been here), and he asked Holman J to make orders against the wife, in the expectation that the trusts would provide her with the means of paying them. Holman J gave a salutary warning:

> *"I say at the outset that I perfectly understand, and, indeed, have some sympathy with, the frustration that one party of no, or only relatively modest means must feel when he or she is aware that there is great wealth on the other side of the family, but is unable to tap into it even for the purpose of buying a home. But this tragic and destructive case should stand as a cautionary tale to those who would embark on expensive litigation which they can ill afford in the hope of prising money from a discretionary trust. A very*

careful and cool appraisal needs to be made at the very outset as to how realistic a prospect that really is."

106. FPR r. 28.3 does not apply as between W and the Trustees. Under FPR r. 28.1 the court may make any order in relation to costs as it thinks just. FPR r**.** 28.2 specifically invokes CPR r. 44, subject to certain exceptions as set out in r. 28.2(2).

107. The general CPR rule in CPR rule 44.2(2) (a), that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply to family proceedings. However, in *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233, CA Butler-Sloss LJ held that in financial remedy proceedings, '*prima facie costs should follow the event'*. In *Baker v Rowe* [2009] EWCA Civ 1162 Wilson J stated:

> '*Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore be responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion'.*

108. This was adopted by the Court of Appeal in *Solomon and Ors* [2013] EWCA Civ 1095 in the judgment of Ryder LJ:

'*The starting point for what are described as 'clean sheet' cases is that costs follow the event*'.

109. I remind myself of the headline point that but for the application under s. 24 (1) (c), the joinder of the Trustees would not have been necessary. That is the 'event' to which I must have regard. It was W who sought joinder of the Trustees some 18 months into the proceedings and post-FDR. From August 2020 to September 2021, it was W's case that the Trust should be collapsed. Her case appears primarily to have been based on the false premise that H had an absolute entitlement under the Settlement, that he was largely responsible for its present value and that she was entitled to share in its assets.

110. W's application under s. 24 (1) (c) should simply never have been made or, at best, it ought to have been abandoned once sufficient disclosure in respect of the Settlement had been provided. Instead of withdrawing her case, W's attack against the Settlement became even less meritorious and more costly when she sought a valuation of the underlying Trust assets on the basis that she was entitled to a share of such assets.

111. It was not until the final hearing that W abandoned the draconian remedy which she had sought of collapsing the Trust. Even then, she was unable to particularise the variation that was sought.

112. Pursuant to CPR Part 44.2(4), the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. The court is to have regard to all the circumstances, including:

a) the conduct of the parties;

b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

c) any admissible offer to settle.

113. There can be no doubt that W has not succeeded in her case against the Settlement (CPR 44.2(4) (b)).

114. Under CPR Part 44.2(5) the conduct of the parties includes:

> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
>
> *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*

115. CPR Part 44.2(5) (b) and (c) are highly relevant. It will be evident from the findings I have made that I consider W should be responsible for the Trustees' costs. In addition to the costs orders already made against W in favour of the Trustees (£78,009), the outstanding fees yet to be determined are £507,628. All parties agree that I should summarily assess them. The Trustees seek indemnity costs.

116. However tempting though it may be, on a human level, to reduce W's exposure to costs, Mr Mold and Ms Benson make very compelling submissions as to indemnity costs. W's submission that somehow the Trustees have brought this upon themselves by taking a 'very negative stance' does not bear scrutiny.

117. The discretion as to whether to assess costs on the standard or indemnity basis is '*a wide one to be determined in the light of all the circumstances of the case'* per Clarke J, *Balmoral Group Ltd v Borealis Ltd & Ors* [2006] EWHC 2531(Comm). The following guidance from Clarke J is well established:

> "*To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case- which takes the case out of the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs".*

118. The term "*norm"* is not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as 'normal' but was intended to reflect "*something outside the ordinary and reasonable conduct of proceedings".*

119. As was made clear in *Three Rivers District Council and others v Bank of England* [2006] All ER (D) 175:

"*Whilst an indemnity costs order does carry at least some stigma, the purpose of such an order is not to punish the paying party* ***but to give a more fair result for the party in whose favour the costs order is made****"* (emphasis added).

120. I accept the submissions of Mr Mold and Ms Benson that indemnity costs are justified on the basis of:

a. W's unreasonable conduct of the proceedings insofar as the Trustees are concerned, including but not limited to her failure to particularise her claim for variation having abandoned the draconian remedy sought of collapsing the Trust, but not abandoning the variation application itself;

b. Her pursuit of a wholly speculative and entirely groundless sharing claim against Trust assets which had no foundation in law and/or was based on false and/or exaggerated evidence as to H's role in PCP, all abandoned at final hearing after H and the Trustees had been put to very considerable expense during the interlocutory stages;

c. Reliance on assertions which she subsequently abandoned (as irrelevant) at trial.

121. There are other examples of W's litigation conduct upon which the Trustees rely, such as her failure to notify the Trustees of the hearing at which her joinder application was to be heard in October 2020, her flawed and inchoate Part 25 application in respect of ABC and her failure to prepare bundles and preliminary documents for the final hearing. I would add that some of the documents that W had in her possession and sought to rely upon (in incomplete form) were clearly *Imerman* documents relating to the Settlement. There were moments during W's oral evidence when it became clear that she had set her face against engaging with the Trustees' case or even reading and digesting some of the documents which set out their narrative as opposed to her own.

122. Moreover, despite having been prohibited by District Judge Duddridge from relying on allegations of fraud, there has been an undercurrent to W's case throughout the proceedings, whether always directly articulated or not, including during the final hearing, that the Trustees have acted in bad faith.

123. It is the cumulative effect of such complaints within the context of a fundamentally flawed case which, in my judgement, justifies indemnity costs.

124. In assessing costs on an indemnity basis, it seems to me it is reasonable to adopt a broad approach of 80% of the total. Accordingly, I summarily assess the Trustees' outstanding costs in the sum of £406,102 in addition to the orders already made in the sum of £78,009. These shall be paid by W.

Needs and outcome

125. As I have indicated, there is no doubt that during their marriage the parties enjoyed a high standard of living (hedonistic according to PWS) and a pleasant home in London. The marital standard of living cannot always be replicated after divorce. The tragedy of this case is that whilst it was always likely that the parties would have to make some adjustment following separation, the scale of the inevitable adjustment they now face is directly attributable to costs. Mr Thorpe and Ms Faggionato make the compelling point that H will inevitably bear some of the brunt because of the way W, and not he, has chosen to conduct this litigation.

126. The needs (and sharing claims) of **both** parties must be assessed in the context of what is available and not in a vacuum. Whilst there would have been sufficient marital capital to provide each party with a suitable property for c. £1.75m and a relatively generous income for life, it cannot be overstated that parties cannot expect to litigate with impunity. I have found that the combined net liquid marital assets are now reduced to **£4,201,968**, in addition to which H has illiquid shareholdings and will remain within the class of discretionary beneficiaries of the Settlement.

127. If each party were to recover half of the matrimonial assets, they would now exit this long marriage with liquid capital of £2,100,984 (within, I note, coincidentally, a whisker of H's proposal to W of £2,079,757). But for the Trustees' costs, would that have been sufficient, I ask myself, to meet the parties' respective needs **in the context of what is now available** (as compared to what would have been available but for the monstrous costs of these proceedings)? The answer is yes.

128. H seeks c. £1m to purchase a property in Israel. Although he has for some time lived in a property owned by his sister, it is entirely reasonable that he wishes to purchase his own property. He has adduced revised property particulars for W (with three bedrooms) in London with a price guide of c. £1m. Inevitably, given what is left, he no longer suggests that W's housing need be met by a fund of c. £1.75m. Whilst I recognise that these properties represent a significant departure from the family home in terms of size and location, the family home is subject to a substantial mortgage and the funds to retain it are simply not available. Nor are the funds available any more to purchase a property for c. £1.75m. I am satisfied, given what is left, that £1m plus associated costs of purchase of c.£50,000 would adequately meet W's present housing needs.

129. In terms of income, although W has previously stated that her income needs were significantly higher, at final hearing it was submitted on her behalf that her reasonable annual need was £60,000, commensurate with the maintenance she has been receiving since separation. A Duxbury fund of c.£736,486 (rounded to £736,500) would provide this but only until W's age 70 (in ten years' time) when it would reduce by one third to £40,000. A fund of c. £934,000 would be required to produce an income of £60,000 for life. I have found this a difficult point. On the one hand, given the length of the marriage, the standard of living enjoyed during the marriage and the likelihood that in about 4 years, H will again receive further income distributions from the Settlement of c.£70,000 to £80,000 per annum, it could be argued that it would not be

fair that W's income is so constrained from age 70. On the other hand, I remind myself that W's costs have increased by c. £319,000 and H's by £772,000 since H's October 2020 offer and that W alone is responsible for the Trustees' costs. **£1,575,111** has effectively been wasted in costs since H made an open proposal which was well within the ambit of what the court might at that point have found fair. These are not just numbers on a page. They have consequences.

130. Therein lies the tension. I regret to say that the need for W now to adjust to what I am sure she will consider to be hardship is the direct consequence of her conduct of this litigation. Mr Thorpe and Ms Faggionato urge me to tread carefully in respect of any invasion of H's capital and submit that I should only do so to an extent that alleviates **undue** hardship to W. I agree with that approach. But for the way in which W has pursued her case, it is likely that her income needs would have been more generously interpreted and but for the order I propose to make that W pay the Trustees' costs of £484,111, she would have had these funds available to supplement her Duxbury fund. Ultimately, I have concluded, in all the circumstances, that W's income needs will be adequately met by a fund of £736,486. In reaching that conclusion I propose also to set off (and discharge) the costs order of £66,000 made against her in H's favour.

131. Accordingly, I find that W's needs (net of liabilities) are £1,785,500. This is, of course, less than she is entitled to on a sharing basis (£2,100,984). However, the costs orders which have already been made and which I propose to make in favour of the Trustees (£484,111 in total) are such that, on an equal sharing of the net matrimonial liquid capital, W would recover only c. £1,616,783. This would not meet her needs, the shortfall being c. £168,717, rounded to £169,000. I bear in mind, too, that some of W's capital is in the form of jewellery and chattels which she will have to realise in order to meet future income need. It is likely that the sale of chattels will be piecemeal and the value realisable less reliable than bricks and mortar or money in the bank. I consider that W ought to have £20,000 for a motor car and be able to retain some items of sentimental value (a further £20,000). Applying a very broad brush, I therefore consider that W's shortfall will be in the region of £209,000.

132. To give effect to my findings as to W's needs, she would require the following:

	£
Housing and income needs	1,785,500
Car/chattels	40,000
Family Home Charges	27,988
Costs	653,583
Trustees' costs	484,111
Children	375,558
L/Ballards/half HSBC	72,245
Total required:	3,438,985

133. I must ask myself whether it would be fair to invade H's capital to this extent in order to meet W's needs, particularly in circumstances where responsibility for the Trustees'

costs lies squarely at her door and H's own capital has already been unreasonably denuded because of costs. Although I have found that the Trustees would not advance capital to H (whether outright or by way of loan), I do find it likely that H will receive further income distributions in about four years' time as PWS speculated (on a bestcase scenario) and that these will likely be at the same approximate rate of between £70,000 to £80,000 npa. Whilst H will thus have to fund his income needs from capital once the Washington property is sold, this will be for a limited period, and he is unlikely to have to amortise his capital thereafter to meet his need for income. Moreover, he will retain his shareholdings and will thus be the economically stronger of the two, although I acknowledge that there is no evidence before the court as to any market for his shares at the present time. They may not be matrimonial assets susceptible to sharing, but they are resources. I have given careful thought as to whether there should be some form of *Wells* sharing in respect of the shareholdings but have concluded that this would not be principled. Once W's needs are met, there are no grounds to share non-matrimonial capital. Litigants are repeatedly warned in reported cases of the need to approach litigation reasonably and realistically and to engage in meaningful negotiation.

134. If W's *adjusted* needs are to be met, H would recover £3,263,771 (48.7% of the remaining gross marital assets) from which he would have to pay liabilities of £1,371,414 (leaving him with 45% of the remaining net marital assets). After the purchase of a property in Israel, he would be left with capital of £892,857 (of which his car/chattels represent £343,220). I am satisfied that this will meet his needs. He will also retain his shareholding which may be the source of liquid wealth in the future, and he will, on the balance of probabilities, benefit from future income distributions from the Settlement. I recognise that W's litigation conduct has reduced H's assets because of the fees he must now pay to his lawyers, albeit that I consider the costs of £722,000 incurred over an 11- month period to be excessive. H may be left with the impression that he is effectively paying some of the Trustees' costs by the back door and/or that W has litigated with impunity. That is not my intention. Whilst I recognise that the asset base is much reduced by W's litigation conduct, I am satisfied that this very modest departure from equality is justified on the basis of (i) needs and in particular my finding that W would suffer **undue** hardship were the assessment of her needs to be further reduced; (ii) W's exclusion, on Decree Absolute, from the class of beneficiaries (MCA 1973 s. 25 (2) (h)); (iii) H's likely future income from the Trust such that he will not have to amortise capital; and (iv) H's other resources, albeit presently illiquid.

135. It will be apparent that both the former family home and the Washington property will have to be sold. As to the interim position pending sale, the status quo should continue. If the Green Card and Y G funds are exhausted before the family home is sold, H should pay to W maintenance in the sum of £4,875 pm from the Washington rental income until that property is vacated. The maintenance will come to an end (with a section 28(1A) bar) upon sale of the former family home, or the permanent vacation of the Washington property, or twelve months after the date of this order (to incentivise the sale of the family home) whichever is the sooner. It is not clear to me

how the parties propose that the joint mortgage be met on the family home once the Green Card and Y monies have been exhausted and I invite the parties to consider this discrete point.

136. I have considered whether the neatest way of dividing the assets would be for W to retain her car, the chattels suggested by H (but only up to a value of £355,194) and the entire net proceeds of sale of the family home (up to a gross sale price of £4.95m). However, the children need to be repaid and they should not have to wait for the Washington property to sell. Nor should there be any scope for further difficulties in respect of enforcement. I suspect that because of the complications as to the occupation of the Washington property, the family homeE Gardens will be the first to sell. At that point, W will need to purchase an alternative property whereas H will be able to stay where he is until sale of the Washington property. However, both parties have significant litigation loans which will continue to accrue interest and I consider it important that each has some capital from the family to reduce their costs liabilities.

137. Accordingly, I propose to make the following orders:

1. The former family home will be sold.
2. The property will be marketed in accordance with the advice of the agents as to whether it should be advertised for sale as a whole or with the Mezzanine sold separately (or in the alternative). There will, of course, be liberty to apply.
3. The net proceeds of sale will be defined as the gross sale price less the amount required to redeem the mortgage and reasonable selling costs.
4. The net proceeds of sale (up to a gross sale price of £4.95m) shall be divided as to:
   (a) Repayment of the HSBC overdraft of £3,490;
   (b) Payment of the family home charges of £55,975;
   (c) Repayment of £751,117 to the children of the family;
   (d) 90% of the balance to W (£2,018,438) and 10% (£224,271) to H.
   (e) The Trustees' costs of £484,111 will be paid from W's 90% (by way of enforcement of the costs order).
   (f) I require an irrevocable undertaking from both parties that they will instruct the conveyancing solicitors to pay £751,117 to the children from the net proceeds of sale.
   (g) Any net proceeds of sale generated by a gross sale price in excess of £4.95m shall be divided equally between the parties.
5. I require an undertaking from H to take all necessary steps to secure vacant possession of the Washington property.
6. The Washington property will be sold once vacant possession has been secured.
7. The net proceeds of sale will be defined as the gross sale proceeds less the reasonable selling costs and repairs.
8. The net proceeds of sale, up to a gross sale price of $4.9m, shall be divided as follows:
   a. In payment of the parties' US taxes on disposal;
   b. In payment of W's UK taxes on disposal;
   c. In payment of any taxes which arose on the historic transfer of the property

into the joint names of the parties.

d. The balance shall be divided as to 78.86% to H (£2,290,989) and 21.14% to W (£614,086)

9. The chattels and collections shall be divided in accordance with H's schedule such that W recovers £371,170 and H £313,220.
10. W shall retain the Porsche and H the Aston Martin.
11. The status quo in terms of maintenance (including mortgage and bills) will continue (from the YG and Green Card monies) until the funds are exhausted[15].
12. Thereafter H shall pay to W maintenance of £5,000 pcm until the first to occur of the sale of the family home or until vacant possession of the Washington property is obtained, or for a period of twelve months from the date of this order whereupon there will be an income clean break with a section 28(1A) bar.
13. H's income claims are dismissed forthwith.
14. Save as aforesaid, both parties' capital claims are dismissed.
15. W shall pay the Trustees' costs summarily assessed in the sum of £484,111 from the net proceeds of sale of the family home.
16. Otherwise, no order as to costs.

HHJ Gibbons

8 November 2021
Corrected 10 December 2021

[15] The parties will have to address how the mortgage and utility bills are to be paid pending sale of the family home once the funds are exhausted. It may be that H's open proposal covers this.