Neutral Citation Number: [2023] EWFC 177

Case No: ZZ21D50645

IN THE FAMILY COURT SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2023

Before :

SIR JONATHAN COHEN

Between :

ES	**Applicant**
- and -	
SS	**Respondent**

- -

Mr N Yates KC and Mr B Wooldridge (instructed by **Hunters Law LLP**) for the **Applicant Wife**
Mr H Oliver KC and Ms J Palmer (instructed by **Stewarts Law**) for the **Respondent Husband**

Hearing dates: 3-6, 9-10 October 2023

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Approved Judgment

This judgment was handed down at 2.00pm on 13 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives once anonymised.

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Jonathan Cohen :

1. I am dealing with the claim by the Applicant wife ('W') for financial remedy orders following the breakdown of her marriage to the Respondent husband ('H').

2. The parties married in September 2005. There was no or no significant premarital cohabitation. They have three children, aged between 12-16 years. All three children are in full-time privately paid education. They live with both parents under an agreed Child Arrangements Order.

3. Both parties are now tax resident in the UK but have a domicile of origin outside the UK.

4. W grew up in a different European country and is a citizen of that country. W was deemed domiciled in the UK for tax purposes from either 6 April 2017 or 6 April 2020, depending on the conclusions from a review into her residency status for 2008/09 to 2010/11.

5. H grew up in the US and is a US citizen. He is subject to US tax. He became deemed domiciled in the UK for tax purposes from 6 April 2017.

6. W worked at a government agency in X country. When she came to England in March 2000, she worked in finance until October 2004. Since the birth of the parties' first child, W has been a full-time mother and homemaker.

<u>Pre-marital assets</u>

7. The parties met in 2004 and married the following year. W was then aged nearly 35 and H was 44 years old. He had a background of work and success in the private equity sector. The date of the marriage more or less coincided with the date of his ceasing work in ABC, a private equity firm.

8. It is relatively straightforward to ascertain what his wealth was at that time. He had bank savings in the approximate sum of £2.222m. He owned two pieces of real property, namely:

   i) A European farmhouse with 25 acres of land. This had been purchased in 1997 and renovated by 2000. It had been the property of H and his former partner and had been transferred into H's sole name in 2004. During the marriage, a small additional area of forestry was purchased. The property has a current value of
   £700k and after costs of sale and significant US and UK tax has a net equity of just under £500k.

   ii) A farm outside Europe comprising 27,000 acres purchased in 2004. It was subsequently sold in 2008 producing proceeds of £727k.

9. These property assets should be regarded as non-matrimonial. W has sought to argue that her contribution to the European property and their use of it makes it a joint matrimonial asset. I accept H's evidence that it was somewhere where they took a summer holiday each year with additional short stays some years at Easter and/or autumn. The maximum length of time they lived there was 3 months in 2006 and thereafter the visits did not exceed one month.

10. I regard the fact that they declared themselves as resident there in order to hasten the obtaining of their connection to the electricity supply as irrelevant. Likewise, the fact that they each had a domestic tax code and identity card. The purchase of the additional woodland via a company of which W was an equal shareholder adds nothing in circumstances where the funds came from H and the value attributable to the land must be minimal. I have been given no figure for the stand-alone value of the forestry. W made no meaningful contribution of any sort to the property.

11. At the time of leaving ABC H had acquired through that and his previous employment the right to equity (including carried interest) in the approximate sum of £9.7m. These were funds that were to be paid out to him over the next few years. The treatment of them is a complex issue. It is complicated by the following factors:

    i) For many years after 2005 H received no income. He did not have a job from the date he left ABC in 2005. Having set up his own business with partners in 2008 he did not receive an income until April 2014 from when he drew £150k p.a. until April 2018, when it reduced to nothing for a year. It is only after March 2019 that H has been able to draw a very significant income.

    The result is that for most of the marriage the family were living on the receipts that H received by way of distributions arising from carry in private equity funds earned pre-marriage.

    ii) During the course of the marriage H transferred into W's name approximately £6.0m in various tranches. This was done for tax saving reasons and to take advantage of W's tax status. I accept H's evidence, not challenged by W, that the understanding was that if he had asked for the funds to be returned to him by W, as he did on at least one occasion, she would have complied. He managed the matrimonial finances during the marriage, although W took an interest in them.

12. Both parties recognise the difficulty in advocating an approach as to how these funds should be treated. In general terms, pre-acquired assets do not fall for division between the parties to a marriage unless needs require. H contends that, in addition to ring- fencing the European and non-European properties, I should adopt a broad approach and treat £6m, being half of his bank savings and value of his equity stakes, as being non- matrimonial and to be ring-fenced, and the other half as matrimonial. W argues that save for the pre-existing bank savings and shareholdings, H's inheritances and both parties' pensions, all other assets should be treated as being joint, either as a result of mingling or by way of gift to her, and thus that only some 750k should be ring-fenced.

13. I have been referred to many authorities on the treatment of pre-existing assets, mingling and gifts. I have studied Hart v Hart [2017] EWCA Civ 1306 and a series of first instance decisions.

14. I agree with Mr Oliver KC and Ms Palmer acting for H, that I should not approach this issue in an all or nothing manner. I have to balance the provenance of funds with their use and investment during the marriage. The putting of assets into W's name does not mean that she automatically becomes entitled to an equal share in them, particularly in circumstances when it was not intended that these funds were to be for her use and

where they were no more than a tax-efficient investment and subject to H's ability to direct their use.

15. I have pondered long and hard about how to approach this. Apart from the European property which remains in bricks and mortar, the cash funds which H brought into the marriage, whether vested or not, total about £12.5m inclusive of the proceeds of sale of the non-European property. I cannot see a basis for treating the bank deposit of £2.2m differently from the funds which materialised over the next couple of years.

16. I must take an overall view of what would provide a fair solution. My conclusion is that I should treat 35% as non-matrimonial, namely £4.375m. To that I add the net value of the European property at 497k. H will benefit from £4.872m of the almost £13m he brought into the marriage and the balance will be shared.

17. In so deciding, I give weight to the fact that W's tax status has enhanced what H brought into the marriage, the fact that some of the sum has been spent (H calculates it as about
£1.5m) on family expenses and some has gone into the family homes in London and S County, which should be regarded as joint assets. These factors lead me to conclude that the credit that H should receive for his pre-marital accrual should be less rather than more than 50%.

The financial history of the marriage

18. H's exit from ABC was traumatic. His earnings prior to departure had been high, exceeding $2m in 2003 and $1.4m in 2004. This was prior to distributions received or due for equity interests. Following his exit, he spent time trying to work out what he wanted to do with his life and in which country the couple should live. It was only in 2007 that he decided that his future was in London.

19. In July 2008 H and three partners launched XYZ LLP ("XYZ"). The timing turned out to be very unfortunate as some 6 weeks later the global financial crisis struck. H's original aspiration that XYZ should be a private equity business had to be moderated into one which focussed on non-fund investments (NFIs).

20. This involved intensive work by XYZ to identify suitable investments for others to invest into. Thereafter XYZ would become heavily involved in the development and management of the entity to build up its value until it was sold by the investor, with XYZ receiving a share for its endeavours. Literally hundreds of businesses were examined for the purposes of investment. Very few were selected, and the initial deals did not generate returns until late 2016. XYZ specialised in a particular sector and the majority of its projects were in that area.

21. Between 2010-2015 XYZ completed five investment opportunities backed by third party investors, four of which have been the subject of exits which globally produced modest returns to XYZ, somewhat below expectation. One, D Co, has not yet exited. This is retained within the M Trust structure to which I will return. Between 2015-2018 there were no investments.

22. During 2018-2020 XYZ arranged 5 investment opportunities that were funded and controlled by a single external investor. The investments made were as follows:

Investment	**Date XYZ granted economic interest**	**Exit of investment**	**Outcome of investment**
E Co	March 2018	February 2023	Significantly above target – XYZ declared total gross receipts to H of €49.9m, of which €1.1m was retained as working capital.
F Co	October 2018	Not sold – fully vested October 2023	
G Co	March 2020	February 2023	Above target – XYZ made gross distributions to H of €5.3m
H Co	March 2020	Not sold. Fully vested March 2025	
I Co	December 2020	Not sold. Fully vested December 2025	

23. The sale of E Co in February 2023 has been a significant focus of the litigation. This is easily explained: as the proceedings developed, there was in the normal way a private FDR. It took place on 29 September 2022 and produced an agreement under which W was to receive £9m in liquid assets out of an agreed total of approx. £24.5m. This amounted to about 36.7% of the presumed assets, albeit that H took on the burden of a potential tax liability which had only just emerged in an uncertain, albeit anticipated not very large, amount. However, before the order was drawn up and within some 6 weeks after the agreement, W's solicitors picked up on reports that there had been a sale of E Co for a very substantial sum.

24. W's solicitors applied for disclosure, which was given in part voluntarily and in part following my orders, and it eventually emerged that H's share of the receipts was no less than €49.9m gross, of which €1.1m was retained as working capital.

25. This needs to be seen in the context of the valuation that had been given of H's interest at some £4m, on which W relied at the FDR; that is about 10% of what was actually received. The total amount obtained for the disposal of E Co was some 5 times the value attributed to it in XYZ's financial models.

26. H rapidly accepted, as he had to, that the agreement reached at the FDR should be set aside. He did not accept that he was guilty of non-disclosure and said that the nature of the agreement with the external investor meant that he had no knowledge or information whatsoever about the sale process. I shall deal with this argument briefly later on.

27. G Co sold in February 2023 for 3 times the value that had been attributed to it by XYZ.

28. It is against that background that I need to determine what if any interest W should receive in F, H and I Cos.

29. In 2020 H and his partners finally managed to create a fund structure to achieve a new Private Equity Fund. The preparation for its launch started in Autumn 2019 and fund raising began in February 2020 but was stalled until July 2020 by covid. It only received its first funding in December 2020 and became paid up in February 2022. I shall call this New XYZ. The fund is at an early stage. As can be seen in a table in the bundle, as at 31 December 2021 only 9.4% of the committed capital had been drawn down. New XYZ's percentage of that sum drawn down was approx. 0.87%. This becomes relevant as I have to consider the arguments on both sides as to whether or not H's interest in New XYZ is a post separation accrual.

<u>The date of separation</u>

30. The parties have spent a long time before me arguing about this date. In some marriages the date of separation is easily identified but in this case it is far from straightforward for a number of reasons:

   i) This was a marriage that had been limping for a long time. There was no sudden event to bring it to an end.

   ii) Whatever their feelings about each other, the parties shared a desire to keep the children protected from and in ignorance of the breakdown of their parents' relationship.

iii) At the time I find it likely that the parties would have physically separated, lockdown came in and prevented it.

31. On 4 October 2019 W purchased R house. It is where she now lives. She did not discuss its purchase with H, although he became aware of it. It was a property in the same street in which they had been living in a rented home with the children. It needed work being done to it before occupation.

32. In November 2019 she twice wrote to H asking him to move out of their rented home and made it clear that she could see no future in the marriage. H refused to move out. From January 2020 they occupied separate bedrooms.

33. In March 2020 with lockdown about to happen the parties moved to their weekend home which was far more spacious than their London home.

34. In July 2020 the lockdown rules were relaxed, and the parties were able to spend time away from their weekend property, H in particular made various trips abroad and in the UK. In January 2021 W moved into R house.

35. It is H's case that in November 2019 W told him that she had decided to separate from him permanently and they agreed to hide the fact from the children. He says that the marriage was over by that date, if not earlier. He points to her Form E where she put the date of separation as being in January 2020. W says that this was in error, and it should have been January 2021.

36. In my judgment the date of separation was in the early part of 2020. I do not think that it is necessary or reliable to be more precise than that. On 25 June 2020 W instructed solicitors to write to H to inform him that she had reached the view that the marriage was at an end and seeking his proposals as to how to formalise the breakdown.

37. I do not regard the fact that they talked of going on a camping trip with the children in July 2020 or that they spent W's birthday in October 2020 or Christmas 2020 under the same roof as indicative of the marital partnership still continuing. Rather, it was an attempt to make life easy for the children.

38. But for lockdown, I think it very probable that W would have moved into her new home in Spring 2020 when the works had been done, but, notwithstanding the energy spent on debating this issue, nothing turns on the exact date of separation. Of course, underlying this dispute is W's desire to obtain a greater share of the NFIs and New XYZ and H's desire to minimise her interest in them.

<u>Standard of living</u>

39. Notwithstanding the wealth that was available, I accept that the standard of living was modest for people of their resources. They did not live in high end properties. Although they owned a home in central London which they had lived in from 2007, they rented it out in 2016 when worried about their financial situation and thereafter lived in rented accommodation. Their holidays were usually spent staying with family members or, more recently, travelling by car or camper van around the UK. They normally used budget airlines. Occasionally they would go to fancy restaurants or to the opera. Their children were educated privately but even now the total annual cost of educating all 3 children is £70k. That cost was by far and away the biggest expenditure that the family would regularly incur.

<u>E Co</u>

40. It is unnecessary for me to go into the sale of E Co at length. I am prepared to accept H's evidence that he was kept out of the vital discussions of what the anticipated price was to be, but it is clear that he knew in July 2022 when he was involved in the preparation of the Information Memorandum that a sale was probable. In the first half of October he knew of the non-binding bids that were made. He revealed neither piece of information to W at the time and did not volunteer information until asked.

41. H accepts that he must pay the costs on an indemnity basis of and surrounding the abortive FDR. Of course, the fact that H received so much more for his interest in E Co than the accounts of XYZ suggested was probable feeds directly into the issue of whether W should be entitled to a Wells sharing order in respect of the outstanding NFIs, and how much weight I can put on the valuations currently given to them.

Valuation issues

42. The parties have helpfully been able to narrow the extent of their disagreement so that the only entity whose value I am asked to determine is H Co. Of course, if I were to make a Wells sharing order as W asks, the precise value of the entity becomes immaterial.

43. It is helpful at this juncture to set out the principles underlying the making of such an order. I adopt with respect the statement of King LJ at paragraph 151 of Versteegh, where she says "*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 Section 25a of the MCA 1973) to make an order which would achieve a clean break between the parties*".

44. In the same case Lewison LJ quoted Mostyn J in WM v HM (Financial remedies: sharing principle: special contribution) [2018] 1 FLR 313 where at paragraph 24 he said "*Generally speaking a Wells sharing arrangement ... should be a matter of last resort, as it is antithetical to the clean break. It is strongly counter intuitive, in circumstances where one is dissolving the marital bond and severing as many financial ties as possible, one should be thinking about inserting the wife as a shareholder into the husband's company…"*

45. But, I must not overlook paragraph 135 where reference is made to circumstances where any other course might lead to "*considerable unfairness*".

46. I agree that the assets in this case are sufficient to meet W's claim without the need for such an order and that the current values of the NFIs are valued at broadly similar figures by the two experts. I take into account also that there is no guaranteed fixed end date on which the Wells sharing would cease to apply, so that the parties could remain entangled a little longer than 2025, which is the latest vesting date.

47. W argues that the valuations given within XYZ's accounts are unreliable. She says that they were massively out in the case of E Co, and significantly so for G Co and, if the deal had proceeded, which it did not, for H Co.

48. On the other hand, H's expert says that he regards the accounts as being models of their kind. H argues that it was unforeseen external forces which have led to the marked variations to which I have referred, in the case of E Co.

49. I do not need to go further than to say that there is clear scope for events, whether foreseeable or not, to lead to a valuation being significantly out, with the risk of injustice to one or other party.

50. It seems to me that there are important differences to be drawn between the assets which W asks should be the subject of such an order. She asks that a sharing order should be made in respect of the following:

H Co (968k in issue)

F Co (257k in issue)

I Co (Agreed nil value)

D Co (Nil value)

L Co (261k in issue)

H's interest in New XYZ.

I deal with them in turn.

51. In my judgment H Co and F Co fall into a different category to the other entities. XYZ was granted its interest in F Co in October 2018 and H Co in March 2020. F Co is fully vested and H Co has 18 months to run until vesting. Both have value and both have been the subject of interest by an outside investor.

52. The F Co investment was made in 2018 but only after identification of it as a target in 2017. One small part of its projects has very recently received three expressions of interest, the biggest of which would, if it comes to fruition, increase the value of H's personal investment by up to £1.4m.

53. H Co was identified as a project in 2019 and was fully funded in March 2020. It received an offer from the majority shareholder in October 2022 which was increased in March 2023. Neither resulted in a sale and the trail appears now to have gone cold. The valuer instructed on behalf of W takes the value at being the midpoint between the two offers. H's valuer says that this is illogical, and he took the higher figure but then discounted it by 25%, in particular for delayed receipt. It is not necessary for me to resolve this difference but both valuers arrive at a figure significantly more than the valuation which appeared in the company's assessment.

54. These investments were in each case made after the usual prolonged investigative stage whilst XYZ examined the company.

55. It is clear to my mind that the value attributable to H's interests in these entities is in part a product of the matrimonial endeavour. W is entitled to share in it. She is not entitled to an equal share because H will continue to actively work in the companies post separation to maximise the return that all the investors will obtain on an exit.

56. It is important that I do not minimise the work that H and his colleagues do to increase the value of the NFIs to achieve maximum value. I accept that a great deal of work is done, as H explained to me. I do not accept the argument of Mr Yates KC and Mr Wooldridge for W that H can only benefit from the work that he has personally done on the NFI; in a small business such as XYZ there are a range of activities which have to be covered and it is impractical to say that because H is at times involved in

other activities and the work is done by his colleagues there should be some reduction in the assessment of the post-separation accrual.

57. Although H's position has changed over time, in his closing submissions H offered a 40% share in F Co and a zero share in H Co. W sought 50% of F Co and 45% of H Co. My conclusion is that W should receive 40% of H's receipt from the F Co investment net of all taxes and expenses and 20% in respect of H Co. That differential reflects the differing dates on which the investment was made and the work to be done.

58. H rails against the injustice of such an outcome with its potential for continued argument and ill feeling between the parties. I do not accept that argument. H will provide W with the annual statement that he receives in respect of the value of those companies and full information of the terms of any exit. This is not an onerous burden.

59. It would be wrong for me to overlook the potential for H to receive a very much larger sum from these entities than the current valuation, or indeed a lower sum. It would be wrong of me to ignore the history of the E Co exit. There may have been macro- economic circumstances which led to the extraordinary uplift in E Co, but equally the same sort of events could happen again. In circumstances where W is entitled to a share in the assets and where any exit is likely to take place within a relatively modest timescale, this is the best – indeed the only - way of doing fairness between the parties.

60. In those circumstances it is unnecessary for me to engage in the debate about the precise value of H Co. For what it is worth I agree with H's expert that deal costs should be deducted. Both valuers have in other respects, adopted perfectly reasonable arguments about which they cannot agree, but what this argument is about is not the precise value of H Co and F Co, but how an unforeseen event such as happened with E Co should be catered for. Not to do so risks avoidable injustice.

61. I take a different view in respect of the other NFI assets. I Co was only the subject of XYZ's interest in December 2020, after the separation of the parties and it has no current value. I treat it as non-matrimonial. D Co and L Co both fall within the trust structure which is intended to be preserved for the sole benefit of the children, as I will explain later.

62. New XYZ is a recent enterprise and does not fall within the matrimonial acquest. I accept, as W argues, that it was a venture that H had been thinking about for much of the marriage. I accept that its personnel, particularly the senior management, is identical with the team with which H has been working for most if not all of the lifetime of XYZ, but, it is plainly a different form of venture and its commencement in any form post-dates the separation of the parties.

63. H asks me to award W only 45% of the E Co return and zero in respect of G Co. W will receive 50% of the E Co proceeds. E Co was worked on from at least 2017, with the investment complete by March 2018. The sale was not completed until March 2023 but was in pipeline from mid-2022.

64. G Co is slightly different. The lifespan from investment to exit was 2020-2023, albeit that XYZ's intensive interest began in 2019. It would be proper for W's share of the

proceeds to be reduced to 25%. It follows, correspondingly, that H should pay 75% of the tax attributable to G Co and W 25%.

The M Trust Structure

65. These are trust funds established by W as settlor from money which H had put in her name. H is the protector and has the power to approve or veto all payments. He also has the power to replace the trustees. The current beneficiaries are W and the children, but H as protector has the ability to ensure that W receives no benefit and for him to benefit instead. The fund was established with the intention of benefitting the children and remoter issue.

66. Winding up the structure will bring an immediate tax charge of £725-823k, depending on which of the experts' figures are taken, with the prospect of inheritance tax payable in due course. If the Trust remains in place, the first tax charge will not arise immediately, and in the future will depend on later liquidations and distributions of trust assets, and their value. The IHT protections will remain available.

67. At the FDR it was agreed between the parties that the trust would continue with W exiting from it, but it subsequently transpired that this would not be possible.

68. As a result, W has reconsidered her position and would like the Trust wound up now, notwithstanding the tax consequences. She does not want either her or the children to remain involved in H's tax structures.

69. There is a curious paradox in that H expresses his fear of future discord with W if she shares in the NFIs as a reason for there not to be Wells sharing and yet argues for the continuation of the M Trust, while W argues that discord points to M Trust being wound up while she seeks to retain a share in the NFIs.

70. In my judgment it is appropriate that H and W should be put irrevocably in identical positions in respect of this trust. They should have equal control and there should be two joint protectors (unless one can be agreed), with one appointed by each party. H was content when I ventilated this proposal and was happy for W to receive the annual accounts and a statement of distributions. This proposal would have to be considered by the trustees and so I will need to adjourn this small aspect of the claim to see if the necessary amendments to the Trust can be made.

71. It is the intention of the Court and the parties that any tax charge will be borne by the Trust. Only if that is not possible will I need to deal with protecting W against any tax liability that might fall upon her as settlor, it being my preliminary view that such liability should be borne equally by the parties. I shall consider this issue further if it becomes necessary at the same time as I consider the Trust amendments referred to in the immediately preceding paragraph.

72. As L Co and D Co are both within the M Trust structure it is unnecessary to debate their value.

Other Computational Issues

73. Whilst I have ruled that W should not benefit from H's relatively modest interest in New XYZ I am clear that she should be entitled to 50% of H's working capital in the old business which was retained from his share of the E Co receipt.

74. H currently holds in his accounts some £41.81m from the proceeds of sale of E/G Cos and the sterling value of the working capital retained for him from the E Co sale is £916k. I can see no reason why both sums referable to E Co should not be shared equally.

75. H has substantial tax liabilities totalling some £11.7m. They arise almost entirely from the proceeds received from E and G Cos, and in particular the former. Just as the proceeds of E Co are to be divided equally, so must the tax liability attributable to it; the G Co tax liability should be divided 3:1.

Inheritance/Pensions

76. H has received a property from his mother's estate and is owed a further payment by way of inheritance. It is agreed that these are and will remain non- matrimonial, as will the parties' pensions which accrued entirely before marriage.

P investment

77. H set up an investment in a relatively modest sum in P fund. The valuers agree that it is worth £212k with a tax liability of £44k. Initially H put the fund in W's name but some 18 months later, in 2012, it was transferred by W at his instigation to him. The tax advantage remaining in W's name had vanished. W has had next to nothing to do with the investment since then. She wants it to be transferred back to her, but I can see no reason why it should be. It will remain in the name of H. Its value is a matrimonial asset which will be shared equally.

W's tax liability

78. W has a potential personal tax liability of just under £2.27m which may arise if she was tax resident in England in the years ending 2009, 2010 and 2011. It would follow if that were the case that previous tax returns submitted by her were incorrect so that the liability would carry with it interest and potential penalties. H regards a correction as completely unnecessary and bringing about an avoidable liability.

79. W rightly wishes to follow the advice of the tax experts instructed by her. H's attitude as to whether or not this is a liability that should be shared has varied. My clear view is that if W does have a liability, then it is one that should be shared equally. H was the one who took the lead in dealing with finances during the marriage and it would be wrong to leave W with a liability which at least in part came about at H's instigation.

80. However, I accept H's point that he does not want to be subject to an ever-increasing potential liability simply because W does not get on and sort it out. I shall limit H's potential liability to 50% of the liability and professional costs that arise in its settlement or £1.2m, whichever is the lower. It is right that the professional costs incurred in resolving this issue should be shared just as much as the principal liability.

Costs

81. There are two particular issues in relation to costs that I am asked to deal with. The first is that W asks me to add back the disparity between the costs which she has incurred which total of £2.751m and her costs of £2.125m, the difference being some £626k. Whilst I accept that I have the jurisdiction to do this, as happened in YC v ZC [2022] EWFC 137, it is not an approach that I intend to adopt. First, the differential is not so striking as to take one by surprise. It would be unusual if the figures on each side were identical and the difference is not stark.

82. Secondly, H has been subject to an extremely extensive enquiry about his finances. This is not a criticism of W. H has brought this upon himself by his failure to give timely information about the E Co sale. But, the burden has largely fallen upon him to produce a very large amount of information and documents.

83. The further issue is that of the assessment of the indemnity costs which H has agreed to pay arising out of his failure to inform about the prospective E Co sale. This is in effect the wasted costs of and surrounding the private FDR. H has agreed the principle that he should pay the costs and both parties wish me to summarily assess them. W seeks £290,575. H offers £167,000.

84. The point of substance is the claim for almost exactly £80,000 plus VAT which was W's share of the payments made to the first SJE and her solicitors' costs of considering the report.

85. The SJE was abandoned by both parties who considered her work to be deficient. W says that if the case had settled at the FDR, as it should have, W would not have had to incur the extra costs of the new SJE. Whilst I sympathise with both parties having to incur the costs of new experts, I cannot see the logic of requiring H to pay W's share of those costs.

86. I therefore deduct £96k from the total of £290k and to the result of £194k I apply a 10 % reduction by way of summary assessment, so as to produce a sum payable of £176,400.

School Fees

87. As my determination amounts to a division of approximately 60:40, the parties agree that the liability for education fees should fall on them in the same proportions.

Tertiary education maintenance

88. I am asked to decide how child maintenance should be appropriated between W and the children when in tertiary education. W says it should be reduced by 33% and H says it should be reduced by 50%. I have heard no argument and the parties ask me to rule as a matter of discretion. My determination is that provided the child in question is living away from home during the college term, the reduction should be 50%, but 33% if still at home.

Open proposals

89. On 14 July 2023 H made an open proposal which was responded to by W four days later. Those proposals and H's revised offer have broadly proceeded on the basis that W would keep her home at R house and her savings (together valued at £4.5m) and be responsible for her own outstanding legal fees, currently some £745k. There were many additional provisions which it is unnecessary to recite. W sought to have the M Trust structure wound up whilst H wished to retain it whilst extracting W from it. So far as the NFIs are concerned, W wished to share equally in F Co and receive 45% of the receipts from H Co and I Co. H wished to retain all the NFIs entirely for himself. There were many other provisions relating to the issues which I have had to determine where the parties were apart, and it is unhelpful for me to spell them all out in this judgment. By my calculations there were some 22 areas of contention.

90. The most important difference between the parties was as to the size of the lump sum. H's initial offer was £17m. He made it clear that this was an offer that he would be unlikely to repeat if the case did not settle. W sought a lump sum of £21.634m, which would produce an almost equal division of the assets subsequently revised down to £19.586m. Just before trial H reduced his lump sum offer to £13.210m.

91. By the end of the trial the figures had changed again, and on the basis that W kept R house and her savings of £2.2m net of her costs liability, H offered a lump sum of £12.354m and W sought £19.570m, both exclusive of the indemnity costs assessment.

92. My award cannot be directly compared with previous offers as I have taken the M Trust structure out of the ownership of the parties and because I have treated the NFIs in a different way to that advocated by either party.

Determination

93. The schedule (not attached to published judgment) shows where the assets will fall:

i) I exclude the European property and the inherited property; the other properties are to be shared equally, with H retaining them all except R House.

ii) W and H's funds and liabilities are to be retained by the holder and shared equally save for the removal of £4.872m pre-marital accrual, the funds and property inherited by H from his mother, and the G Co proceeds and associated tax liability which are to be divided 75:25.

iii) F and H Co will be the subject of Wells sharing as indicated.

iv) H will retain New XYZ; the retained working capital from the E Co proceeds will be shared equally.

v) To achieve this end, H will pay a lump sum of £15,201,470.

vi) It is intended that M Trust will be retained for the children and any tax liability be borne if practicable out of trust assets, and if not shared between the parties as determined at a further hearing.

vii) H will give an indemnity against W's potential personal tax liability and professional costs limited to £1.2m, with security to be agreed or ordered.

viii) H will pay indemnity costs summarily assessed at £176,400.

94. I have cross-checked this outcome to see where it leaves the parties. In round terms, W will exit the marriage with 40% of the assets and H with 60%. I regard this as a fair outcome and one that reflects the provenance of funds pre-marriage and post-separation endeavour.