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.

Neutral Citation Number: [2023] EWFC 206

Case No: BV20D070774

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 November 2023

Before :

Stephen Trowell KC sitting as a Deputy High Court Judge

- -

Between :

GA

Applicant

- and -

EL

Respondent

- -

- -

Brent Molyneux KC and Geroge Coates) (instructed by DMH Stallard LLP) for the Applicant
Jonathan Southgate KC (instructed by Vardags Limited) for the Respondent

Hearing dates: 6 - 10 November 2023

- -

Approved Judgment

.....

STEPHEN TROWELL KC

Stephen Trowell KC :

1. This is an application for financial remedies made at the end of the parties' marriage. Mr Molyneux KC and Mr Coates appear for the Applicant Wife, who I shall refer to as the Wife in this judgment. They are instructed by DMH Stallard LLP. Mr Southgate KC appears for the Respondent Husband, who I shall refer to as the Husband. He is instructed by Vardags Limited.

2. The costs incurred to litigate this matter are large. On the Wife's side they are estimated at £684,918 (that does not include her costs with a different solicitor at an early stage in the proceedings). On the Husband's side they are estimated at £1,121,979.

3. There is one significant issue between the parties, namely, how to divide the proceeds of sale of a business, X Ltd, between them. (Three minor subsidiary issues were resolved by the parties by agreement during the course of the hearing. One involved some relatively small joint assets; one involved a fund for child school fees; one involved a dispute over how much the Husband should pay to the Wife in respect of an agreement to meet expenses in relation to the children. When an order is drawn in this matter it will reflect those agreements. I am grateful to the parties for sorting those points out.)

4. Through a holding company the parties had together a 50% interest in X Ltd. The shares in the holding company were held as to 30% by the Wife and 70% by the Husband. The Wife seeks an equal division of the 50% interest in X Ltd. The Husband proposes the Wife should have 37.5% of that 50% interest in X Ltd and he should have the balance, i.e., 62.5%.

5. X Ltd was started and incorporated during the marriage.

6. X Ltd has been valued by a Single Joint Expert, Fred Brown of Grant Thornton, as worth either £28.1m (in his report) or in round terms £39.2m (in answer to questions on the report from the Wife) at the time of separation. It was sold for a headline figure of £70m, albeit some of the consideration is deferred and not of certain value, and some of the consideration is by way of equity in a new holding company.

7. The Husband says that a significant part of the value of the proceeds of sale derives from his post separation labour. He says that part is therefore non-matrimonial and because of that is not to be divided pursuant to the sharing principle.

8. The Wife says that the business is matrimonial and that what happened after the parties separated was that the matrimonial business was brought to market.

9. The difficulty that the Wife needs to confront is not merely the SJE evidence, but the evidence that the business had clearly grown between separation and sale. That growth can be measured across a range of metrics: turnover, profit, and number of employees to name a few.

10. The difficulty that the Husband needs to confront is that the company that was sold was the same company doing the same things (albeit more of them) that was created during the marriage and that the time from separation to sale is only from the 25 November 2019 to the 16 February 2022, some 2 years and 2 ½ months.

11. In making my decision as to the division of the proceeds of sale, I will need to consider the authorities to which I have been referred which set out the approach the court should take to post-separation accrual generally and post separation increase in the value of a business in particular. I will need to consider legal arguments raised by the Wife that there should be no departure from equality in circumstances where there has been no delay in bringing the matter to trial.

12. Subject of course to what conclusions I reach on the law, the areas on which I am going to need to make findings of fact to determine the issue between the parties are those that help me understand what appears to be a significant change in the value of the business and might inform my decision on how the proceeds of sale should be divided between the parties. To do that I need to consider and make findings on the following:

    a. Which of the values from Fred Brown as at the time of separation is of most assistance to me;

b. To what extent the deferred and uncertain nature of some of the compensation materially reduces the impact of the apparent increase in value;

c. Whether, and to what extent, the apparent change in the value of the business is on the one hand down to a change in the business caused by the Husband's work after the separation or on the other hand due to one or all of (i) the unreliability of Fred Brown's valuation, (ii) passive growth in the business, (iii) a change in market conditions, or (iv) an element of good luck on the sale price that was achieved.

13. I shall also need to consider other arguments advanced by the parties as to why their proposed division is to be preferred. Namely, on the Husband's side that I should attach weight to the way the shareholding was held during the marriage, and on the Wife's side what she says is an apparent acknowledgment by the Husband in December 2021 by way of email that the proceeds of sale of the company would be divided equally between them.

14. I shall in this judgment set out (i) the general background and the history of the litigation, (ii) the law, (iii) my findings on the issues pertinent to the disposal, (iv) the parties' arguments and my conclusions.

15. I have had the benefit of the trial bundle, written openings and oral and written closing submissions from counsel, oral evidence from Fred Brown, the Wife and the Husband. I note here that Mr Coates ably delivered the closing submissions on behalf of the Wife because Mr Molyneux KC lost his voice.

16. It had been my intention to deliver this judgment on the Friday of the five-day final hearing, but the case did not run as easily as had been anticipated so I sent out a draft judgment writing and the judgment was handed down on the 27 November 2023.

17. I shall record my findings below, but I make these general observations about the oral presentation of the witnesses. Fred Brown was entirely professional in his evidence. He was clear and helpful in answering questions. The Wife was nervous but straightforward. It is clear that she felt wronged by the Husband arguing against an

equal division. The Husband, who had to experience a long cross examination, appeared, on a number of issues, a calculating witness. Instead of merely answering questions I formed the view he was considering how his answer might impact on his case. Nonetheless, save on one emotional point set out below, I consider his evidence to be reliable.

Background and History of the Litigation

18. I have been provided with an agreed chronology. There is little issue between the parties as to the general background and I will take those matters shortly. It is however necessary to set out the progress of these proceedings because there is an allegation of delay made against the Wife's side.

19. The parties started to cohabit in October 2005 and married in 2007. They agree they separated on the 25 November 2019. Their cohabiting relationship therefore was some 14 years.

20. The parties have 2 children: F who is 15 years old and R who is 13 years old. Both now attend private school. R moved from state school following the sale of the company in September 2022. They now divide their time broadly equally between their parents. It is the Wife's case (not completely accepted by the Husband) that until summer 2023 they spent 2/3 of their time with her, and only 1/3 with the Husband. The Husband does accept that the children did spend more time with the Wife.

21. The Wife is aged 50. She does not work other than some charity work. She had worked full time until 2012 as an administrator but reduced her hours to part time in 2012 when F started at primary school. In November 2021 she had a brief 3-month job which was full time, but she has not worked since January 2022, when she gave up that job. She gave up the job because she felt it was incompatible with looking after the children. She lives in the former family home. This, on the scale of wealth of this case, is a modest property worth some £733,000. It is mortgage free.

22. The Husband is aged 52. He works for X Ltd (under new ownership). He works a 22 ½ hour week and receives in return what his counsel describes as a nominal salary of £50,000 pa as well as pension contributions of £40,000 pa and the possibility of a

bonus. He is subject to a restrictive covenant following the sale of X Ltd prohibiting him competing until 2026. He lives in rented accommodation with a new partner and her child.

23. In 2008 the Husband and his business partner, Mr B), started and incorporated the business X Ltd. This business, through software which the Husband developed, enables companies who use call systems to analyse time spent on the phone and how well their call and contact systems work. The Husband and Mr B initially held an equal number of shares. In 2018 there was some corporate restructuring. A holding company was put in place. The Husband's shareholding in the trading company were translated into shares in the holding company and then passed to another company Y Ltd. The Husband and the Wife held the shares in Y Ltd. 70% were owned by the Husband and 30% by the Wife. At the same time Mr B's shares were similarly rearranged, effectively passing to Z Ltd. The shares in Z Ltd were then owned by Mr B and his wife. Their shareholding is more equal than the distribution between the Husband and the Wife.

24. The Husband petitioned for divorce on the 1 April 2020. There was a decree nisi on the 14 January 2021. That has not been made absolute.

25. In February 2020 each side instructed solicitors: the Husband - Vardags; the Wife - Boots Starke Goacher. The Wife moved to DMH Stallard in December 2021 after her solicitor retired.

26. There followed voluntary Forms E, questionnaires, schedules of deficiencies and on the Wife's side an expert to value the company. I am told that valuation was not Part 25 compliant, and it has not been put before me.

27. In April 2021 the Wife was asked to sign a confidentiality agreement and in May 2021 she was told that X Ltd was going to be marketed for sale. In July 2021 a presentation was sent out to market the company prepared by ABC Advisory, who acted for the company on the sale. Bids were made by interested parties in September to October 2021. There was on an uncertain date a second round of bidding for the preferred bidders. In about November 2021 an exclusivity agreement was entered into with A

Ltd, and they proceeded to conduct due diligence enquiries. It was hoped they would complete the sale in December 2021 but that was put back. The sale to A Ltd completed on the 16 February 2022.

28. The sale is described to be of 57% of X Ltd. The consideration was divided equally between Y Ltd and Z Ltd. Y Ltd was then dissolved. The assets of Y Ltd are divided between the parties in accordance with their shareholding. As a consequence of that sale and dissolution the Husband received cash of some £17.42m pre-tax (£14.2m net) and the Wife received cash of some £7.46m pre-tax (£6m net). Further the Husband received loan notes worth approximately £7m gross and the Wife received loan notes worth approximately £3m gross. These loan notes carry interest. That is rolled up. The loan notes are payable in either 2032, or if there is an onward sale of X Ltd. Tax will be payable on what is received from them at that time. The loan notes are only payable if there are funds in a newly created company, referred to as Midco which sits between the trading company and Topco. I am told that is likely. Further the parties received preference shares and ordinary shares in Topco. The preference shares are for £3.5m gross for the Husband and £1.5m gross for the Wife. They are payable on a resale of the business, but only if X Ltd sells for 2 ½ x what A Ltd paid for it. The amount is then payable on a sliding scale down to nothing if the sale is only at twice the purchase price. This is what the parties describe as a claw back. The ordinary shares are a mixture of B and C shares in Topco. The C shares are also subject to the same clawback. I was told, after the hearing, that the B and C shares have equal voting rights. The B and C shares passed to the parties on a 70/30 split. These, as I understand matters, will have value if X Ltd does very well. Neither party has attributed a value to them as matters stand.

29. In advance of the sale on September 2021, I am told that the majority of non-company assets were divided equally by agreement. That process has now completed (or in one case there is an agreement which will affect completion) such that the only issue that remains before me is in relation to the division of the proceeds of the sale of X Ltd and the dissolution of Y Ltd.

30. It was accepted by the Husband during cross examination that it was in fact him that asked for a stay on the negotiations in relation to the financial remedy arrangements

now before me in so far as they were to deal with the proceeds of sale of the company. Understandably the stress of selling the company was as much as he could cope with at that time. I accordingly find there was no undue delay by the Wife.

31. In June 2022 some 4 months after the sale completed the parties exchange updating disclosure. The Wife's open offer, still relied on by her, was made on the 10 August 2022. In September 2022 the Wife initiated these proceedings.

32. In November 2022 there were fresh Forms E and a First Appointment dealt with on paper which included an allocation to a High Court Judge. There followed a private FDR on the 13 and 14 December 2022. That was unsuccessful.

33. The Husband made an open offer on the 4 January 2023, which, though clarified by letter of the 29 September 2023, remains his position today.

34. The matter returned to court on the 4 April 2023. At that hearing an application made by the Husband for a single joint expert to value X Ltd as at the date of separation succeeded and Fred Brown of Grant Thornton was instructed.

35. Fred Brown's report was received on the 31 July 2023. There followed anticipated questions from the Wife, which led to answers, including the higher value of X Ltd, in November 2019. The answers were received on the 13 September 2023.

36. On the 18 October 2023 at a PTR before Mr Justice Peel an application was made by the Wife for further expert evidence, disputing the value of X Ltd in November 2019. That is reported as *GA v EL* [2023] EWFC 187. That application was refused.

The Law

37. In the circumstances of this case neither side have drawn section 25 of the Matrimonial Causes Act 1973 to my attention. I do remind myself of its terms and reflect that the welfare of the children will not be at risk however I deal with this application. Indeed, the parties agreed a fund to secure the children's private school fees at the beginning of the hearing, and likewise both parties agree that their needs will be met however I

decide this application. I do highlight section 25 (2) (f) as a matter I should have particular regard to, namely:

The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

38. The House of Lords in *White v White* [2000] UKHL 54 has made clear that the overall requirement in applying section 25 is to achieve fairness.

39. In *Miller & McFarlane* [2006] UKHL 24 the House of Lords identified three principles that should guide the court in trying to achieve fairness. As Moor J summarised them in *DR v UG* [2023] EWFC 68 they are:

a. The sharing of matrimonial property generated by the parties during their marital relationship;

b. Compensation for relationship generated disadvantage; and

c. Needs balanced against ability to pay.

40. The argument in this case focuses on (a), the sharing of matrimonial property generated by the parties during their marital relationship. It has not been a matter of argument before me that the phrase 'during their marital relationship' usually means while the parties' relationship is one of mutual support as a married couple, not the length of the marriage from wedding to decree absolute. It is however the Wife's case that fairness does require in the circumstances here that the marital relationship should be deemed as continuing until this hearing.

41. It is not controversial that the application of the sharing principle to non-matrimonial property is as rare, to use the phrase common in the law reports 'as a white leopard'. That of course does not mean that non-matrimonial property cannot be divided between the parties to meet needs. Needs are not relied on in this case. Nor is it controversial that the sharing principle (absent a needs argument) will usually lead to equal division

of matrimonial property, subject to the possible application, which is no part of this case, of a 'special' contribution.

42. What is controversial in this case is what should be considered as matrimonial property in circumstances where a company which was matrimonial grew in the period following separation such that its value significantly went up.

43. The Husband's case is that the increase in the value of the company after separation is non matrimonial and in broad terms should not be shared. The Wife's case is that (a) fairness requires the marital relationship to be considered as continuing up to this hearing notwithstanding the agreed separation, (b) case law requires the court to ignore any post separation growth at trial unless there has been undue delay, and (c) that the company is matrimonial property and further the company's growth here is not because of any new endeavour but simply more of the same so the growth is matrimonial.

44. I shall start with the two Court of Appeal decisions to which I have been referred: *Jones v Jones* [2011] 1 FLR 1723 and *Hart v Hart* [2017] EWCA Civ 1306. In the Court of Appeal *Jones* was concerned with how to deal with pre-marital contributions. It is Mr Southgate who makes reference to it. He wishes to draw to my attention that Wilson LJ preferred a method of first ascertaining what portion of the total assets were non-matrimonial and then dividing the remaining non matrimonial assets equally, to what he described as a 'by and large' approach of allocating to the Wife such lesser percentage of the assets than 50% as was considered to be fair to reflect the fact that some of the assets are non-matrimonial. I immediately note however that given *Jones* is dealing with pre-marital contributions it may be that a different approach is required here.

45. *Hart v Hart* is again a case dealing with pre-marital contributions. The conclusion of Moylan LJ in that case is that the formulaic approach is not one that the court is required to adopt. The concept of matrimonial property he reminds us is a legal construct and an asset can be a mixture of marital or non-marital endeavour such that it will be artificial to attempt a sharp division. The court must approach its task with the degree of particularity or generality as is appropriate.

46. Mr Molyneux and Mr Coates draw my attention to paragraph 86 of *Hart* in which Moylan J reminds us of what Lord Nicholls said in *Miller* that it is artificial to draw a sharp dividing line between matrimonial and non-matrimonial property. He cautions as to the costs and the unreliability of expert evidence, reminds us of proportionality and that 'fairness has a broad horizon'.

47. That, Mr Molyneux and Mr Coates point out, is in relation to pre-marital assets. The division of post marital assets will be incapable they say of any clear division. I will need to consider that point in due course when I consider the cases on post marital assets, but I remark at this stage that (i) I will need to reflect on the broad horizon of fairness, and (ii) this may well be a case if I do need to discriminate between marital and non-marital assets where I cannot adopt a formulaic approach for the reasons set out by Moylan LJ.

48. I turn now to the decisions of the High Court to which I have been referred and on which I have heard argument: *SK v WL* [2011] 1 FLR 1471, *Evans v Evans* [2013] 2 FLR 999, *Cooper Hohn v Hohn* [2015] 1FLR 745, *JL v SL (no. 2)* [2015] EWHC 360 (Fam), 1 FLR 745, *C v C (Post Separation Accrual)* [2019] 1 FLR 939, *E v L (financial remedies)* [2021] EWFC 60, and *DR v UG* [2023] EWFC 68.

49. *SK v WL* was a case when a company formed during the marriage was sold 3 ½ years after separation for substantially more than it was valued at the time of separation. Moylan J did not accept the valuation evidence produced by the husband to support the value of the company at the date of separation but did accept the sale price achieved 'reflects the development of the company after the separation and was in part the product of the husband's work during this period.' Moylan J considered the case in the round, including that the husband accepted he was trading with the wife's notional share and that he had lost a significant sum since separation and divided all the assets on a 60/40 basis to 'fairly reflect' the work undertaken by the husband in respect of the company after separation.

50. The principle informing this decision is clearly that work after separation which increased the value of the company is non-matrimonial property and therefore justifies an unequal division.

51. The response to this case on behalf of the Wife is, in short, to adopt the analysis of Moor J, as set out in *DR v UG* that it is not binding on me and that it would not be decided in the same way if decided now.

52. I consider on the face of it that *SK v WL* is an analogous case to the one with which I am dealing and appears to be decided in accordance with the relevant principles which have to be applied. It is of course with hesitation that I would set myself at odds with Moor J and I will need to consider *DR v UG* in due course.

53. *Evans v Evans* is another decision of Moylan J. In it he sets out a similar approach to post separation endeavour as he did in *SK v WL* namely that the husband should receive a greater proportion of the assets (55% of everything) than the wife because of post separation labour giving rise to non-matrimonial property. It is relied on by Mr Southgate for that reason. There is a distinction however with this case, to which I draw attention, namely that this labour would take place after the financial remedy hearing.

54. *Cooper-Hohn v Hohn* is the well-known decision of Roberts J in which she comprehensively reviews the law on post-separation accrual. I cannot do justice here to the review she gives of the authorities in this area. I draw attention instead to her conclusion [186] that the fair outcome of that case has to reflect some departure from equality to reflect the contributions made by the husband in the 2 or more years since separation.

55. In getting to that conclusion she draws attention to a number of points that I must flag up (i) the need to discriminate between passive and active growth, (ii) the investment fund, which is the asset that has grown in value in that case, has been 'churned' i.e. the assets have been 'worked' and such work represents an active and ongoing contribution to the generation of wealth; (iii) Roberts J also finds that the husband had made a 'special' contribution, which of itself justifies a departure from equality.

56. My Molyneux and Mr Coates point me to the special contribution as explaining the departure. That is not a full explanation. The judge sets out [285], 'I cannot ignore the extent of the very significant post-separation accrual in this case. That factor, taken

together with what I have found to be a special contribution on the husband's part during the marriage, leads inevitably to a departure from equality of outcome.'

57. Mr Southgate draws my attention to paragraph 187 which deals with the relevance of the date of separation. I set that out below because it is highly pertinent to the issue in this case as to when the partnership generating matrimonial assets ends:

> **[187]** For these purposes, I propose to take March 2012 as both the date of separation and the date when the parties ceased to operate as a partnership *qua* spouses. Without doubt, their respective roles as parents to their four children continued uninterrupted as did the routine of their daily working lives within TCI and the foundation. However, to the extent that the husband went on outside the marital partnership to claw back the very significant losses made after 2008 and thereafter, predominantly from 2013 onwards, to generate wealth on an exceptional scale, in my judgment fairness requires me to take account of that contribution as one which created wealth which falls outside of the marital acquest. I do not regard the parties' subsequent attempts to explore the prospects of repairing the marriage as part of the continuum of its course. The separation in March 2012 was not a temporary separation but a permanent one. In the 8 months between March and November 2012, I heard about nothing which might persuade me that the marriage was continuing to operate in its essential character as a partnership between spouses.

58. I consider this accords with the principles which I should apply.

59. *JL v SL (no. 2)* is a case of Mostyn J. He sets out in that case what he had earlier said in *Rossi v Rossi* [2006] EWHC 1482 (Fam). He identifies that post-separation accrual is a difficult subject conceptually, 'as it is often a hybrid creature'. The passage from *Rossi* quoted in *JL v SL (no. 2)* contains the following sub paragraphs which challenge the analysis that flows from the cases referred to above:

> 24.3 Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.
>
> 24.4 If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation

> the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.

60. 24.3 appears to exclude from post separation accrual labour which brings about an increase in value of matrimonial property. It is not easy to square that analysis with the approach taken by Moylan J in *SK v WL*, where the company was matrimonial or Roberts J in *Cooper-Hohn*, where the fund was matrimonial (a point acknowledged by Mostyn J at [40]). Nor is it easy to square the assertion with the principle that assets generated by labour after the relationship has ended are not matrimonial property. The reference to the claim of an unascertained share from the other spouse purportedly justifies this position. That is a reference to a phrase of Thorpe LJ in *Cowan v Cowan* [2001] EWCA Civ 679. I shall return to that.

61. 24.4 is a point aimed at income rather than capital growth, but it does bear consideration in so far as it highlights entirely properly that one cannot overlook the non-financial contribution of the domestic party. This is a point relied on in this case by counsel for the Wife.

62. There is a further passage of *JL v SL (no 2)* which does ameliorate the apparent disagreement with Roberts J. Having considered how Roberts J dealt with the fund in Cooper Hohn, which Mostyn J characterises as 'sharing unequally in the increase in value achieved by the husband alone in the period of separation' this is said:

> **[41]** This approach is to my mind undoubtedly correct for those assets which were in place at the point of separation. They remain matrimonial property but the increase in value achieved in the period of separation *may* be unequally divided. I emphasise *may*. Obviously passive growth will not be shared other than equally, and there will be cases where on the facts even active growth will be equally shared, as happened in *Kan v Poon*.

63. It would however not be right to say that there is no difference in approach between Moylan J, Roberts J and Mostyn J. The approach of Mostyn J expressed in para 24.3 of *Rossi* (i.e., an increase in value of an asset created during the marriage in a period following separation cannot be considered as non-matrimonial property save if there is

no 'unascertained share') will lead someone following that approach to different conclusions as to what is and what is not matrimonial property.

64. *C v C (Post-Separation Accrual)* is a decision of Roberts J. It is drawn to my attention by Mr Southgate. It is a case in which the husband had set up a separate account into which he paid performance related remuneration which he claimed, and was accepted by the court, to be non-matrimonial property. Mr Southgate wants me to take note that Roberts J recognised the wife's ongoing (i.e., post separation) contribution to the welfare of the family but did not consider that such contribution matched the husband's post separation earnings or gave the wife an entitlement to an equal share in them. I do so note, but I also note that the Judge does say that those contributions are relevant to the overarching circumstances of the case including fairness of outcome.

65. *E v L* is a further case of Mostyn J and is relied upon by Mr Molyneux and Mr Coates so as to effectively remove any post-separation accrual unless there has been undue delay. I set out in full paragraph 73.

> **[73]** In my view there are already in this field too many uncertainties and subjective variables. The law needs to be transparent, accessible, readily comprehensible and should propound simple and straightforward principles. In my experience convention and tradition dictate that save in cases where there has been undue delay between the separation and the placing of the matter for trial before the court, the end date for the purposes of calculation of the acquest should be the date of trial. This rule of thumb should apply forcefully to assets in place at the point of separation which have shifted in value between then and trial. For new assets, such as earnings made during separation, I would apply the yardstick in *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790, at [24.4] where I stated: 'I would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation'.

66. Mr Molyneux and Mr Coates have a powerful point as to the impact of paragraph 73 if I were to follow it. The blunt submission by Mr Southgate is that Mostyn J is wrong. It is obvious that paragraph 73 is not compatible with paragraph 187 of *Cooper-Hohn*. It is necessary for me in evaluating paragraph 73 to consider the problem that Mostyn J is addressing here and to consider the solution that he is proposing. What he is addressing is unpredictability in the law. It is obviously right, and this case is an example of the problem, that unpredictability causes cases to fight and more costs to be incurred.

67. Further Mostyn J makes reference in paragraph 72 to the judgement of Thorpe LJ in *Cowan v Cowan* [2001] EWCA Civ 679. That was an appeal following the decision of the House of Lords in *White v White* [2000] 2 FLR 981. It was heard before the decision of the House of Lords in *Miller & McFarlane*. It is the source of the repeated references in the cases considered to the phrase 'traded with the wife's unascertained share'. I must now turn to it.

68. In *Cowan* the Court of Appeal were responding to the decision in *White* and entirely recasting the financial remedy order in favour of the wife from one of reasonable requirements at first instance to one of a proportionate division. The passage quoted by Mostyn J from *Cowan* is as follows:

> 'The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in Baco. The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit.'

69. The question I must ask myself is whether these words carry the weight which Mostyn J appears to put on them. I note in that regard that they did not prevent Moylan J and Roberts J from assessing assets deriving from post separation labour as non-matrimonial assets. I agree with Moylan J and Roberts J that these words do not bar the existence at trial of post-separation non-matrimonial assets. It is of course right that assets must be assessed as at the date of the trial, but that does not exclude a consideration as to whether the assets are matrimonial or not. That is a task that the courts now often need to perform. It is a matter for the particular facts of the case whether what the husband (to use the genders of *Cowan*) is in fact doing when he pleads post marital contributions is investing the wife's unascertained share or creating fresh wealth through labour.

70. I must return however to the words of paragraph 73 of *E v L.* Looking at the costs in this case it is difficult not to see a great deal of force in those words. It does strike me that in many cases these words will prevail. An overnice calculation of the post separation element of a case is likely to cost both parties more than that assessment is worth. Where I must depart from those words is that there may be cases in which

fairness does require a consideration of assets accrued by post-separation labour. A rule of thumb, even one promulgated by as experienced and influential a judge as Mostyn J, cannot act as a bar to a fair assessment.

71. I turn now to *DR v UG.* This is a judgment of Moor J. In that decision he accepts that in principle post separation endeavour can create non-matrimonial assets before trial but he finds on the facts of that case that it has not. Mr Molyneux draws my attention to Moor J's analysis of earlier cases. I will not repeat the points here save to return to the criticism of *SK v WL* referred to above. As expressed, that criticism is rooted in the *Cowan* point. For the reasons already expressed while I see that there is force in the *Cowan* point in relation to an investment, I do not see how it undermines assets created by labour.

72. I do further note that Moor J makes clear that he does not consider post separation assets require the creation of a 'truly new venture'… 'without the use of matrimonial assets'. What he says is that 'It will depend on the circumstances, although the assets used may be a relevant consideration as to whether the circumstances justifies departure from equality.' In that case Moor J concluded the post separation argument failed in part because the Husband's hand was 'no longer on the tiller' of the business (he had reduced his hours of work to 3 days a week and then 1 day) but mainly that the parties' matrimonial home was charged to fund the MBO of the business in which he alleged post separation accrual, so the 'trading with an undivided share' had a particular resonance.

73. Finally, I was referred to a recent case of *CG v DL* [2023] EWFC 82 (Fam), a decision of Sir Jonathan Cohen. Mr Molyneux and Mr Coates draw my attention to the judge's refusal to allow a post-separation argument and by the references made by Cohen J to *Rossi* and *Cowan*. It is right that the judge did refuse the first part of the post-separation argument on the basis that it related to profit allocation from the Husband's hedge fund for a period only 5 months after separation, but at the time the husband was building up a pot of post separation income he was investing matrimonial assets into his hedge fund. The judge did allow 50% of the profit allocation for the following years profit share to be considered as money that should be excluded from the sharing principle on the basis that the business activities become more distanced over time. I do not consider that case affects the principles I am to apply.

74. I take the following from this consideration of the cases to which I have been referred:

a. Post separation non marital assets can exist at the date of trial even where there has been no undue delay;

b. In assessing post separation non marital assets I must guard against counting in the product of passive growth;

c. I should remain mindful of the extent to which the person claiming post separation assets is simply benefitting from investing the unallocated funds of the other spouse;

d. I should not overlook the domestic contribution which may be taking place by the other spouse;

e. While a formulaic approach may be better than a 'by and large' approach I will have to make such assessment as I best can on the facts as I find them.

75. In the light of those conclusions, I turn to the facts of this case.

Which value of X Ltd is of most assistance to the court

76. The first issue I need to determine is which of the two values of X Ltd in November 2019 I should use as the better indicator of its value at that time.

77. The difference arises because the figure in Fred Brown's report of £28.1m is made on the basis of calculations and estimates using information available in November 2019, including management accounts for October 2019, while the figure given in answer to the questions raised by the Wife of £39.2m uses the information which was advanced in the marketing presentation sent out in July 2021. In particular this included actual accounts for the period ending in February 2020 and 2021 and projections of growth for 2022 through to 2024.

78. Mr Brown explained to me that he had, when writing his report, asked what future growth was anticipated in November 2019. There was very little provided to him. He had a budget for 2020 and the Husband's answer that he expected the current growth to continue for that year, but nothing beyond. That was, as he recorded on a number of occasions in his report, a limitation on the scope of his work. In his oral evidence he described that limitation as significant.

79. In his report he looks at a number of valuation approaches, but he attaches most weight to a Discounted Cash Flow calculation. This he explains was because the business was fast growing. He provides 3 scenarios as to future growth for purposes of his Discounted Cash Flow calculations as to value (the first is then disregarded as being too negative in the estimate of future growth). Each of the 3 posit gradually falling rates of growth, on the basis that as a company gets bigger it is harder to maintain high growth rates.

80. The marketing presentation provided him with accounts for the year ending February 2020 and for the year ending February 2021. Mr Brown relates to me that those figures do not substantially differ from the assumptions he had made in his second scenario. Where there is a significant difference however is in relation to the projected growth for 2024. In the report the projected growth was 10% for 2024 under scenario 2. In the marketing material it was 23%. That changed the multiple that he applied from 3 to 4.5, which in turn led to the significant increase in estimated value.

81. Counsel characterise the difference in value as being the difference between hindsight and foresight. Mr Molyneux and Mr Coates say to me that the appropriate value for me to use is the hindsight value as containing better information. They are referencing here that whereas there were projections for 2020 and 2021 in the valuation in the report there are now actual accounts. Mr Southgate says that hindsight valuation unfairly factors in the work that the Husband has done between November 2019 and July 2021 in that the Husband's hard work after November 2019 was part of what produced the figures in the 2020 and 2021 accounts, and that is his post-separation labour.

82. The real difference however on the calculation of Mr Brown, as he explained in evidence, is the multiple. The multiple derives from the projected revenue for 2024,

and that is a projection of future growth made with the sales information. The difference is not then one of hindsight: it is a projection but a more optimistic one than he had made.

83. That the key difference is projected revenue however takes us back to the flagged limitation in the preparation of the report. The question arises as to whether the difference in value is simply a difference brought about by the marketing process, namely that when selling a business care is taken to provide growth projections.

84. Mr Brown's answer is that he made a reasonable assessment as to future growth in his calculations in the report. He is careful to use the word reasonable rather than reliable. That is what he reasonably believed a purchaser would have paid at that time. Indeed, he agreed when I put it to him that the contingent nature of some of the remuneration offered in relation to the 2022 deal may reflect caution at that time by the purchasers as to the estimates of future growth. I do note that what he did not have when writing the report was an assessment of the growth of the business provided by the business, as was available on sale, which might have been supported by argument and information and might have altered his assessment as to growth.

85. I remind myself that the question Mr Brown was answering in his written answers from which the higher valuation derives is one that asks him to recalculate the valuation using the actual and forecast growth in the sales brochure. It did not invite him to consider whether the growth forecast was reasonable.

86. When asked, Mr Brown expressly preferred the figure in his report as the value of X Ltd in November 2019, than the figure in his answers to questions. He has given me good reason why he does so, namely that as things were in November 2019 his estimate as to future growth in 2024 was reasonable.

87. When asked about changes in the company after November 2019 but before the brochure in 2021, which might have given good reason to advance a higher value for the company, he answered in general terms on the basis of reading of changes to the company in counsels' notes. He candidly accepted that those developments were outside the scope of his report. He did say that the growth in the company both as to

head count and turnover and its diversification would be likely to be explanations as to a higher value. Further, Mr Brown did give evidence both orally and in written answers to questions as to different market conditions in 2021 and 2022.

88. I shall return to these points when considering the change in value of this business but having listened to his evidence I reach the conclusion that the lower value of £28.1m is the better of the two values for me to hold in mind as an estimate of value for the business in 2019. I do however need to remind myself that it is a reasonable rather than a reliable figure and is subject to a significant limitation. Given the company did in fact sell for significantly more, albeit after it had grown, and given the higher valuation which Mr Brown came to on the basis of the marketing presentation I must bear in mind that any error in the £28.1m figure is likely to be that it is too low. I propose then for the purposes of any rough and ready calculations to round the valuation at the time of separation up to £30m.

To what extent the deferred and uncertain nature of some of the compensation materially reduces the impact of the apparent increase in value

89. The second issue that I deal with is how I value the sale. It is clearly not a sale of 100% of the company for a sum of cash, which is how the valuation of Fred Brown is constructed.

90. Pre-tax the parties received cash of £24.9m. A small part of that cash is not the proceeds of the sale of X Ltd but assets which had built up within Y Ltd from dividends from X Ltd that had not been distributed from Y Ltd. The £24.9m compares with a valuation of Y Ltd of £15.5m, by Mr Brown on the basis of the £28.1m valuation of X Ltd in his report. On its own the cash compensation is 160% of Mr Brown's value.

91. There are then the loan notes (£10m); the preference shares (£5m) and the equity in Topco (unquantified).

92. I have no evidence to help me consider how I should value these but, I can usefully compare the bid made by A Ltd with the second placed bid in the sale of X Ltd. B Ltd offered £52m in cash for X Ltd. I have no reason to believe that the Husband and his business partner would have taken a lower bid. That the bid from A Ltd was preferred

should therefore mean that even with the deferred consideration the bid for X Ltd is worth in excess of £52m. If in round terms I were to make a rough and ready assessment I consider it appropriate (taking my figures from the Bid Analysis) to value the sale at about £60m gross. That allows £40m for cash, £20m for loan notes (not received for some time, carrying interest and not certain) and nothing for the preference shares (which may come in at full value, but may not). That is, I accept rough and ready, but it is the best I can do.

93. If I compare my rough and ready £30m at the time of separation with my rough and ready £60m at the time of sale I must conclude that there has been significant increase in X Ltd (and thereby in Y Ltd) in the period while the parties were separated.

Explanations as to the change in value of the business

94. The Husband set out in his section 25 statement that he undertook a lot of work in the business after separation and before sale which made a material difference to the sale price. The principal point he makes is that revenue grew after separation and before sale. That is unquestionably true however one measures it. Turnover in 2019 was some £3.7m and in 2022 was £7.6m. Mr Molyneux was able to easily demonstrate that Mr Southgate exaggerated this growth significantly when he said in his note that the business grew exponentially (albeit to be fair to Mr Southgate he used the phrase colloquially). In fact, the rate of growth slowed. Nonetheless the growth is, as the Husband said in evidence, enviable. This was of course a factor referred to by Mr Brown.

95. As to what he did to increase revenue: first he says he recruited. Total employees increased from 18 (2019) to 30 (2022). He was cross examined to the effect that this was just the company continuing to recruit at the rate it had been recruiting. Broadly that is right but that does not mean that this was not a significant amount of work, both in recruiting and deploying staff thereafter. I agree with the Husband that this will have added value to the company. More employees gainfully working for the company will generate more money. The number of employees was a point to which Mr Brown referred.

96. The Husband sets out that he worked hard on software quality assurance and compliance and continual improvements in the platform and reliability. He was cross examined on this. As between him and Mr B, he is the technical man and Mr B is the salesman. He is the man who is responsible for the software that allows the business to provide a service to customers. It is therefore inevitable that as the company grows so software problems, compliance and improvement issues would come back to him, or those that he manages. I find that it is inevitable this would cause more work and it is inevitable that successfully managing those issues was important to getting and retaining business.

97. The Husband says he was responsible for the company's response to the coronavirus pandemic. It was put to him that everyone working from home was a boost to the business. He acknowledged that as it turned out it was. As he described it the lockdowns were opportunities from which X Ltd was able to profit but that advantage was not something which just happened. Work was required to allow the firm to take advantage of the opportunity. I accept his evidence that he was responsible for that work.

98. He had said in his statement that he had made improvements that assisted in the diversification of the customer base. X Ltd, he had related, had a vulnerability in that it had too much work from one customer. In his statement the work from that customer was put at 70% at the beginning of the period and he had, he related, reduced it to 45% before sale. He corrected his written evidence at the beginning of his oral evidence. The 70% figure related only to UK revenue, whereas the 45% was a percentage of worldwide revenue. He did not in examination in chief give a revised percentage but accepted in cross examination that the 70% should in fact have been 49%, when it was pointed out that only 70% of the business's revenue was UK revenue. I do not therefore attach any weight to his contribution to diversification.

99. In oral evidence Mr Brown made the general point that where a business has two owners and makes the advances that this business has made it is likely that it has been driven forward by those two owners. That observation, combined with the evidence recorded above does lead me to conclude that the Husband has made a significant contribution to the increase in value of this business.

100. Further, the Husband related that the sale process came with a lot of work. The Wife gives evidence which corroborates that. Namely that she had to look after the children more during this time because the Husband was busy. I accept the Husband's evidence in this regard.

101. I turn now to consider what other factors should lead me away from considering him as being responsible for growth.

102. The first is the unreliability of the accountancy evidence. I have recorded above that I prefer the lower of the two estimates which derive from Mr Brown's calculations as to the sale value in November 2019 when the parties separated. Nonetheless I have already recorded that Mr Brown considered his valuation reasonable but not reliable because of the lack of estimates provided to him of future growth. All accountancy evidence is fragile – a point which is often made in financial remedy cases involving companies - but in the light of what I am told is a significant limitation, I must be careful in attaching too much weight to this value above and beyond the point that there has been significant increase in the value of the company. I cannot, for instance use it (even if I were to be able to assess the value of the contingent elements of consideration) to embark on a formulaic calculation of the post separation growth in the value of the company.

103. The second is the passive growth in the business. At its core this point is that the driving force for the growth of the business is the software that the Husband wrote sometime before separation and continues to be used by the business. Mr Molyneux was able to demonstrate that the rate of growth of the business had slightly fallen during the separation period, so in his phrase the company was just going forward on a 'steady as she goes basis'. The Husband conceded that there is some force in this argument. And he does refer to it in his statement as a reason why his proposal is more than a sharing of the 2019 value of the business. He does however make the point, as fleshed out above, that growing a business requires a lot of work. I agree with that. I conclude that there is a significant element of passive growth but there is also active growth. This is a further reason why I must deal with the issue in the case by making a proportionate division.

104. The third is change in market conditions. I have the benefit of a graph provided by Mr Brown which shows there was a spike in the value of publicly quoted businesses operating in the same area in September 2021. Multiples went from 9 in October 2019 to 16.4 in September 2021 before falling to 8.9 in April 2022. Mr Brown said private companies were likely to have moved in the same direction as the graph, but not as sharply. The bid in this case was made in about September 2021. The deal was not completed until February 2022. Mr Southgate cross examined Mr Brown as to whether the market on completion was more significant than the market when the bid was made. Mr Brown did accept that deals may fall apart if conditions change, and that he would expect purchasers to be under a duty to reconsider the deal under prevailing market circumstances. He did however make the point that bids become 'sticky' and that an indicative offer made when the market was high may not fall apart if the figures still work for the purchaser. The evidence is that the claw back was introduced after the original bid. There was speculation that was a response to the changing market. I cannot determine that, but I do find that the spike in prices is likely to have increased the value of X Ltd.

105. On the same topic, Mr Molyneux and Mr Coates took me and the Husband to the sales brochure prepared for X Ltd. That document set out 4 market trends which favoured X Ltd: the shift to working away from an office; cloud convergence and digital engagement; growth of customer engagement with contact centres; growth in communications analytics. The Husband agreed that these 4 trends, which he speculated had been brought about by lockdowns, all favoured X Ltd.

106. As to whether X Ltd got lucky on the sale, the case advanced by the Wife is based on a press release which celebrates the A Ltd investment and records that the chief Executive Officer is to be Mr D. He had worked for C Ltd, a major telephony service with which X Ltd were already involved. She says this made A Ltd special purchasers, because it created synergy. The Husband said that Mr D was an attraction to the A Ltd offer for him, but the attraction was no more than the hope that Mr D might be able to open doors. He also related that Mr D had moved on. Mr Brown points out that the A Ltd deal was a private equity deal and that special purchasers are usually found in trade deals. He was not however able to offer a firm view as to what had happened here. I do not find that A Ltd were special purchasers. Mr D, I accept, could do no more than open doors.

Parties' arguments and my conclusions

107. There are a number of arguments based on particular facts that I need to deal with before I turn to the parties' submissions generally.

108. On the Husband's side it is said that I should attach weight to the fact that it was agreed between the parties during the marriage that the Wife would hold only 30% of Y Ltd. This was contrasted with the more even holding between Mr B and his wife. It is not suggested that this division was any part of an agreement as to how the parties would divide their assets on a divorce. I am told by the Wife that she was told this arrangement was for tax purposes. That is plausible given that it means her allowances can be deployed to save tax on dividends and capital gains.

109. I do not see force in the Husband's submission. Applying the relevant principles what I need to consider in this case is what the matrimonial assets are to which the sharing principle applies. How the parties chose to hold those matrimonial assets during the course of the marriage, absent evidence that was meant to be an agreement that would guide the court in the event of a divorce, does not make any difference to the disposal I will order.

110. On the Wife's side my attention is drawn to an email written by the Husband on the 4 December 2021 following a query from the Wife as to whether an Escrow account was needed for everything. (In its context that appears to be the proceeds of sale of Y Ltd.) The answer from the Husband is that it doesn't. He makes a point first that some CGT will need to be payable straight away and then makes some calculations as to how a 50/50 division would mean that all that needs to be held in Escrow 'or just transferred to you to avoid further costs' is £3.68m. In the calculations he does put the parties' interests as equal, and nowhere does he say that this is only a theoretical calculation as to what would be achieved as a 50/50 division.

111. The Wife responds by saying that the 'fairest way would be to put the cash [part] of the sale …into a joint account' from where any tax or warranties payments are met. She goes onto say that she wants an 'open message from Vardags that states you accept an equal outcome of this divorce and that I am entitled to 50% of any personal or business capital. I have never had that from them, only you saying so.'

112. The Wife gave evidence to me that the Husband had said that to her.

113. The contemporaneous email response from the Husband is that there were difficulties in escrow accounts and a joint account. Instead of confirming that he thought the Wife was entitled to 50% he says, 'The way forward would be immediately to start communications with DMH and propose a settlement offer in principle.'

114. It is the Wife's case that I should take notice that the Husband recognised she was entitled to half and rely on that to order that she should receive half.

115. It is the Husband's case that these emails were to do with whether or not there was to be an escrow account. It is his case that there is no proposal and certainly no agreement. It was said if it had been understood that this email was considered to be evidence of an agreement or a proposal then there would have been an objection to putting it before me as it would have been without prejudice.

116. The Husband in oral evidence did not accept that he had said there should be a 50/50 division. It was put to him that he did not respond in those terms to the Wife's email when she asserted that. It was put to him that he had not said in response to the Wife at the time that his email as to the escrow account had been misunderstood by the Wife as an acknowledgment of a 50/50 division. He said that he can see now that he should have done these things, but he was under a lot of pressure at that time.

117. It was put to the Husband that the reason he did not respond straightforwardly with a rebuttal was that he was deliberately keeping quiet so that the Wife would co-operate on the sale. He denied that.

118. It is clear to me that the Wife did think that the Husband had suggested to her that there should be a 50/50 division. It is clear to me that she knew there was not agreement to that effect, hence she suggests the escrow account and hence she suggests an open message from Vardags. It is equally clear to me that the Husband was not wanting to commit to a 50/50 division. I find that he did not respond straightforwardly to the Wife, as he might have done by denying that he thought that there should be a 50/50 division

because – as was put to him – he did not want to do anything which might disrupt the sale.

119. Where does this take me? I cannot rely on this exchange as evidence of an agreement. I cannot rely on this exchange as evidence of what the Husband really thought. I can reach the conclusion that the Husband did not correct the impression which the Wife had because he thought it easier not to do so. That is not creditable behaviour, but it has to be seen in its context, which here is joint shareholders going through a divorce at the time of the sale of their principal asset.

120. This is not conduct that I should rely on as reason to enhance the Wife's award.

121. Mr Molyneux and Mr Coates put to me that while the Husband was working hard around the time of the sale the Wife had to look after the children more. The Husband agrees that there were occasions when he was so busy the children did spend more time with the Wife.

122. This is said to be a counter balancing post separation contribution on the Wife's side. At its extreme the argument is presented to me on the basis that any post separation endeavour is necessarily discriminatory in that it will be all but impossible for the spouse with domestic responsibilities to evidence post separation endeavour.

123. I do not accept the extreme argument. As was said in *K v L* [2012] 1 WLR by Wilson LJ it is part of the court's job to 'discriminate', or as Moor J paraphrases in *DR v UG,* 'differentiate' between different contributions.

124. Mr Southgate says on the particulars of this case it cannot carry the weight for which Mr Molyneux and Mr Coates contend. The Husband was still making a substantial contribution to the children's day to day care throughout the period of separation and I cannot just compute a contribution to their care by way of time spent. It is also right to note that it was his labour which provided the finance which was used to maintain the children.

125. I have been directed to the way different judges have in different cases dealt with this sort of point. As I have said already, I consider this to be a point that does need to be held in mind. On the particular facts here, I consider it to have some but not significant weight. This is a father who is emotionally committed to his children and has engaged with them practically as well as financially throughout. I do accept that the Wife has carried more of the practical and day to day childcare load during this stressful time, but it is to be hoped for that parents will co-operate when they have particular demands on their time.

126. Mr Southgate puts to me that I should bear in mind, when considering the Husband's post marital contribution, the low salary which he now enjoys and the fact that the restrictive covenant he has entered into will prevent him from competing until 2026. I am told that is a significant loss to him given this is the second time he has set up and sold a business.

127. Mr Molyneux counters that the Wife's earning capacity has been substantially lost as a consequence of decisions made in this marriage, so the non-compete clause is not a reason to give the Husband more.

128. I agree with Mr Molyneux. Both parties have made decisions that have the effect of damaging their earning capacity. Fortunately, there is capital which will mean that neither regret the decision.

129. Mr Molyneux puts to me that the Wife is jointly and severally liable with the Husband in relation to warranties given on the sale of their shares and that this should dictate that she should get an equal interest. Mr Southgate answers that these warranties were entered into as a shareholder, regardless of how many shares were held, and that his client will enter into a proportionate indemnity of the Wife to reflect whatever division I make of the proceeds of sale if I do decide to divide the proceeds in his favour. On that basis, I accept Mr Southgate's answer.

130. I turn now to the more general arguments.

131. Two of the arguments that are advanced on behalf of the Wife have already been considered at some length in the discussion of the legal authorities above : namely, (1) the *E v L* argument that without undue delay or an entirely new venture I am required to consider these assets matrimonial and divide them equally and (2) the *Cowan* argument as to the Husband having traded with the Wife's undivided share.

132. I reject the *E v L* argument for the reasons set out above.

133. As to the *Cowan* argument I remind myself that this is in fact a point about investing the Wife's undivided share. Mr Molyneux in this case drew my attention to passages in the Husband's first voluntary Form E dating from May 2020 when the Husband highlighted the risk to the business that Covid presented. His argument was then developed along the lines that it was possible that the business might have failed, and in that situation the Wife would have had to share the loss, so why should she not share the uplift.

134. The answer to that is that this is not an 'investment' style case. The Husband has not taken matrimonial assets and placed them on the stock exchange. Here there was an existing company which he worked very hard on to increase its value post separation. Yes, if the company had failed that would have changed this case completely. The court *might* in those circumstances be asked to consider recklessness on his part. It might not if the failure was beyond his control. That is a matter for another theoretical case. Here the business had grown significantly, and the court therefore has to consider what element of the growth derives from post separation endeavour on his part and is therefore not matrimonial.

135. Finally on the Wife's side it is argued that I should ignore post-separation growth in the business for a year by analogy with the authorities which follow *Rossi* and consider bonuses earned in the year post-separation as marital property. I do not agree with that as a matter of principle. It may be appropriate in many cases to treat bonuses relating to the year post separation as still marital because they derive from the position which the employee has achieved during the marriage. It is just a particular way of reflecting what I will in this case be taking into account as passive growth. It is to reflect the extent to which money that is being made after separation derives from work done

during the marital relationship. I shall be taking the same factor into account here when I consider passive growth, and in particular the extent to which the growth in the value of the business derives from the software that the Husband wrote during the marriage.

136. Mr Southgate advances to me two different models as to how I recognise the Husband's post separation contributions in this matter.

137. First, working on the value of X Ltd as a substitute for the value of Y Ltd (which is broadly fair) he says that on a valuation of £28,100,000 upon separation in 2019 and £70,000,000 on sale the matrimonial element is about 40% and the Wife's share is 20%. On the basis of the higher 2019 value of £39,350,000 the matrimonial element is 56.2% and the Wife's share is 28.1%.

138. Second, on a linear time apportionment of 11/14 years (2008 incorporation to 2019 separation, 2022 sale) then the matrimonial element is 78% and the Wife's share is some 39%. (He does in fact also advance 18 as a denominator taking the timescale to the end of the restricted covenant but I reject that for the reasons above.)

139. Mr Molyneux and Mr Coates say, of course, nothing other than 50/50 division.

140. I did explore with both sides in closing submissions whether I should divide the different elements of remuneration differently. I did so thinking that there might be different arguments because of the Husband's continued employment by the company. Both sides rejected that approach and I will not consider it further.

141. For the reasons set out above I do not consider that I can use the calculation derived from the accountancy evidence as sufficiently reliable to carry out a formulaic calculation. His value may be reasonable but, in his own opinion it is not reliable, and it suffers from a significant limitation. Further I do not have a simple cash sale price. Further still I have a series of other factors that need to be taken into account but are difficult to reduce to figures that can be inserted into a formula. I do think however it is worth doing some rough calculations.

142. Taking the post separation value as approximately £30m and the equivalent cash sale price as approximately £60m. I am looking at approximately 50% of that sale price as growth since separation.

143. I list now the factors that I have set out above that I need to keep in mind on the facts of this case which will act to increase or decrease that approximate 50% when considering what portion is non-matrimonial.

a. The unreliability of the accountancy evidence - this is significant but is already factored into my 50% growth figure above.

b. The significant increase in the metrics of the business – this too is significant and already factored into the 50% growth figure because the metrics are what is relied on to provide the 2019 valuation and what leads to the 2022 sale price.

c. The findings I have made as to the post separation work of the Husband – these too are very material but they lead to the increase in metrics and again are therefore taken into account in the 50% growth figure.

d. The growth deriving from the software created during the marriage – which I have said is a significant factor. This leads me to conclude that a sizeable part of the growth is passive.

e. The change in the market – this is not as large a factor given that by the time the deal was completed the spike had passed, but as set out above when combined with the market trends it must carry some weight given the 'stickiness' of the terms of the original bid.

f. The weight to be attached to the extra domestic contribution – this I have said is a factor but not a large one.

144. As I have said, I take the view that on the facts of this case I have to deal with this matter on a 'by and large' approach. I remind myself that many of the authorities to which I have been referred use the percentage of a 'by and large' approach across all

the parties' assets rather than just those stemming from the post separation labour that is being considered.

145. Bearing all these points in mind I consider that the appropriate proportionate division of the proceeds of the business as to 42.5% to the Wife and 57.5% to the Husband. That obviously can be seen as putting the non-matrimonial element of the growth at 15% but it is a 'by and large' approach given the uncertainties of the figures I have as to the company value upon separation and upon sale and that the impact of the factors I have taken into account cannot be readily reduced to a fixed figure percentage shift. I therefore do not consider it appropriate for me to break down my assessment into smaller calculating steps.

146. If I cross-check this figure with the straight-line apportionment, I see that I am increasing by 3.5% the Wife's share over what that approach would yield. I am comfortable with that given the findings that I have made. (On reviewing the draft of this judgment Mr Molyneux and Mr Coates suggested that I correct the arithmetic of the straight line division from the figures advanced by Mr Southgate to 11.8/14 which is 84%, yielding a half share of 42% and thereby giving only a 0.5% increase in my assessment over the straight-line apportionment. I record that, as anticipated by Mr Molyneux and Mr Coates, I remain comfortable with my assessment and feel no need to investigate the precise dates further.) Reflecting on the overall fairness bearing in mind all the section 25 factors, I consider this an appropriate outcome. The Husband receives 15% more than the Wife from the business to reflect his post separation endeavour.

147. That percentage is to be apportioned to the Wife of the net receipts across each class of compensation.

148. On the basis that the total net cash receipts to date are approximately £20.2m of which the Wife has received approximately £6m then she will need to be paid approximately £2.585m promptly. I will leave counsel to calculate the figures with more precision and, I hope, sort out the timing.

149. Further, I understand counsel have already agreed the most tax efficient way for me to make my order in relation to contingent assets and will leave that at this stage to them, together with the indemnity referred to above. Of course, if agreement cannot be reached then the matter will be referred to me together with any other consequential orders.