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Case No: ZZ20D66240

IN THE FAMILY COURT SITTING
AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2023

Before :

SIR JONATHAN COHEN

Between :

CG

Applicant

- and –

DL

Respondent

- -

Mr J Southgate KC and Ms M Foster (instructed by **Boodle Hatfield LLP**) for the **Applicant**
Mr S Webster KC and Ms H Boyle (instructed by **Kingsley Napley**) for the **Respondent**

Hearing dates: 15, 17, 18 May 2023

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 25 May 2023 by circulation to the parties or their representatives by e-mail.

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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:

Introduction

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 met in 1991 and cohabited from 1992 or 1993. They married in 1998 and separated around the end of July 2020. I therefore treat this as a marriage of some 27-28 years.

3. Both W and H are 59 years of age. They have two sons, the elder aged 19 and the younger aged 13. Both children are in full-time privately paying education, the elder son at a college in the USA and the younger son at public school in England.

4. The history of the marriage can be taken relatively shortly because it is agreed, one matter excepted, that up until the time of separation this would be a paradigm case for equality.

5. W's background was in journalism but after the birth of the elder child her work outside the home dried up and she increasingly became a full-time mother and homemaker. H was a financial journalist until about the time that cohabitation began, when he became an equities analyst. After several career moves he joined a start-up hedge fund in 2007 as a founding partner and resigned in 2014 to consider his options. It was during this career break that he decided to set up his own hedge fund business, which I shall call SC, and he used his leave to make the necessary plans.

6. H self-funded the working capital of SC using savings built up during the marriage. The amount put in was £3.855m by way of founding capital from 2015-2016 followed by a total of another £9m invested in his name from January 2018 onwards. In addition, at the outset he invested with the business his SIPP with a current value of £2.6m and a bond now worth net of CGT £1.754m. I shall refer to this in greater detail later in this judgment.

7. Throughout the period spent deciding whether or not H should set up his own business and the subsequent period of trying to make it a success, H accepts that he had the full support of W, both in terms of belief in him and practical help, but also in the form of her agreement to the investment of what was in effect all their capital outside their homes into the business.

8. In early 2017 H commenced a short-lived affair. He ended it after about six weeks and told W. That commenced a period of acute stress for the family because H's former girlfriend began a campaign of public and private harassment and stalking of both H and W. Its effect was difficult for H, but it was acutely traumatic for W. It was deeply unpleasant in its character and even now has left a residue of deep distress.

9. During 2017 H was told by the woman that she was pregnant by him and having taken advice as to what sum he would be likely to have to pay in proceedings brought under Schedule 1 of the Children Act 1989, in January 2018 he transferred to W the same sum, namely £1m. In fact, the woman was not pregnant.

10. The parties do not agree as to how I should treat this sum of money. W contends that it was a gift to her expressly to use as she wished and made by way of partial amends for H's misbehaviour and that it would be inequitable if she should be required now to share it with H. H says that I should treat it as one of the resources available to W and that it should be shared along with the other matrimonial assets.

11. The woman was charged with stalking and the criminal proceedings did not conclude until May 2019. The parties had to endure a trial which collapsed and the stress of a further trial.

12. To compound an already very difficult situation, the parties' elder child disclosed that he had been abused at school. This is only relevant because the parties do not agree about the wisdom of proceedings against the school and who should fund any litigation.

13. H left the matrimonial home at W's request at about the end of July 2020 and since then has lived in rented accommodation. W has remained in the matrimonial home with the children.

The assets

14. The parties have a home in London and a home in the country. Both are free of any charge and are worth, respectively, £2.75m and £775k. The parties agree that W should keep both properties. The former has already been transferred to W by H and the latter has always been held in W's sole name.

15. They agree the value of all their other assets as set out in the schedule so as to produce a total of £27.188m inclusive of pensions. £5.789m is in W's name, including the value of the two properties net of CGT and costs of sale, and £21.329m is in the name of H (net of an outstanding income tax liability and a small sum in respect of outstanding legal fees). Of the assets in H's name the vast bulk are invested in SC, and total £16.803m gross of £943k CGT on realisation, together with his SIPP. H's liquid investments outside SC are limited to ca £2.1m net of his tax liability and inclusive of his share of the joint accounts.

16. There is a significant dispute about the value and treatment of SC of which H now owns a 62.5% share. His previous sole ownership has been over the years reduced by share awards to key employees and there is no issue taken as to the appropriateness of this course. A related services company of which H is the sole owner has a value of £129k.

The business model

17. The fund operates investments on behalf of a relatively small pool of investors. It invests only in stocks which it has intensively researched. Its investments are a combination of long positions (where the fund gains from an increase in the relevant share price) and which are held for 1-4 years and short positions (where the decline in the share price produces a gain for the fund) and which are held for a shorter period of 12-18 months in general.

18. The investment decisions are taken by H and H alone, advised by a small team around him. The investors in the fund expect H to invest material amounts of his own wealth in the fund. To do so gives them confidence in him and the business. There is an important key man clause written into the fund in unusually stringent terms.

19. The income streams of the business are (i) management fees, calculated at about 1% of assets under management ('AUM') and (ii) performance fees against a high-water mark. The AUM fees are paid each year and looked at over the whole life of SC amount to about 60% of its income. Performance fees are necessarily highly variable and in some years are non-existent.

20. It is impossible to predict what H's income from the business might be because it depends on the performance of the investments. In some years he has earned extremely heavily, the maximum that he received being over £10m. At worst, his drawings have been limited to his monthly withdrawals of £12.5k gross.

21. A SJE was appointed to value SC. In his first report Mr Taylor concluded that the theoretical value of H's stake was £12.5m-£22.5m before CGT but that the vast majority of this value would be ascribed to personal goodwill and that a sale would be highly unlikely to proceed on a cash basis.

22. W was unhappy with the valuation and obtained permission to instruct Dr Bateson as an expert. In the meantime before Dr Bateson reported, Mr Taylor updated his report, reducing the value to £3.1m-£6.3m before CGT.

23. Dr Bateson reported that the value was in the bracket £14m-£34m dependent on the period of time over which the value was to be achieved.

24. At a meeting of the two experts they reached a measure of agreement which included that:

    i) it would be very difficult to sell SC today;

    ii) SC might grow substantially in value in the future; and

    iii) the most realistic exit for H would be a transfer of his equity to the analysts and other partners in the business over a period of time rather than a sale to a third party. This would of course be subject to the purchasers' ability to fund the purchase. There is no evidence that any employee is in fact in the position to fund a purchase.

<u>The performance of the business</u>

25. There is a modest disagreement between the parties and the two experts about the performance of SC although in my judgment nothing turns upon it. In broad terms it has tracked the relevant index and peer group comparables. In its early days SC won various awards but more recently has struggled.

26. More importantly, in the three calendar years 2020, 2021 and 2022 the redemptions of the business have exceeded subscriptions. To put it another way, the AUM has declined. That trend has continued in 2023 so that the AUM, which at its peak

reached $1bn, will have reduced to some $300m by the time of the next redemption date at 30 June 2023. This impacts on the income of the business.

27. None of this is to be taken to suggest that this is the result of bad management. It is much more the consequence of global events, in particular Covid, the Russian invasion of Ukraine, and inflation.

28. H's evidence was that he believed the business had now turned a corner and its value has gone up by 16% so far this calendar year. As a result, the fund value which at the end of 2022 was approaching 30% below the high-water mark figure required to make payable a performance fee is now only 10% down. H believes that the assets in which he has invested the investors' funds are significantly undervalued. If he is right then it might be reasonable to assume that a performance fee would become payable in 2024, if not in 2023.

29. H has taken steps to reduce the expenses of the business including not replacing leaving personnel and moving to cheaper offices. He is proposing to offer a personal guarantee that he will cover any shortfall between the fee income received from AUM and the expenses of the business. He says that this will send a strong signal to the investor base about his confidence for the future.

30. It is instructive to look at the breakdown between management fees received and performance fees and interest. As I have mentioned, the former have somewhat exceeded the latter over the lifetime of the business. In only one year have the performance fees exceeded the management fees but in that year the performance fees (for the business as a whole rather than just H's 62.5% interest) were some £13.2m against management fees of £4.7m. Thus it is simply shown that H has the capacity in favourable market conditions to earn very large sums. Over the last five years he has received in total £30.68m gross, the highest figure being his profit share in 2021 (based on the calendar year 2020) when he received £10.336m gross as his profit share.

Valuation

31. The attempts of the experts to value the company have not advanced the case in terms of outcome. Both agree that the business is unsellable at the moment and only in their oral evidence did it become clear that the figures that they were estimating were simply their best calculation as to the value of the business to H, rather than the value to any third party. In other words, it was a form of capitalisation of a predicted profit share. Dr Bateson assumed a figure of £12m in the event that H were to plan his retirement over a period of five years but that was on the basis of a 100% interest (when H owns only 62.5%), it was pre-tax and assumed minimal running costs of the business. Mr Taylor was more pessimistic but both experts readily recognised that their calculations were theoretical and could be a long way out depending on external events.

32. I recognise that it is desirable to settle upon a valuation if such an exercise can be completed, but there is no absolute requirement to do so if it would be no more than a wild guess (see King and Lewison LJJ in *Versteegh v Versteegh* [2018] 2 FLR 1417).

33. I do not think in the circumstances of this case that it is right to put any reliance upon the figures save for pointing out that they, as do the actual results, show the potential for H to receive very substantial benefits over the remaining years of his working life.

H's retirement/succession plans

34. In his Form E in September 2021, H indicated that he hoped to retire in a maximum of five years but as time has gone on this date has been pushed backwards. His current anticipation is that he will work full-time for about the next three years. He will then gradually hand over to his successor over the following three years and might spend several years thereafter acting as a shadow consultant.

35. The key to the success of H's plans would be his ability to instil in the investors confidence in his chosen successor. The man whom H has selected has been in employment as a senior analyst since the start of the business but H is the one who has taken all the big decisions and it is H who will have to sell his successor to the investors. Chemistry is crucial.

36. If H were to succeed in retaining his investors for his successor, then H will continue to benefit by way of profit share to a reducing extent for a period of perhaps as much as eight years. If he fails to retain the confidence of the investors the business will end up being closed, probably over a period of three to five years. It is impossible to predict which will be the case. As yet the process of succession has not begun.

37. It follows therefore that I cannot put a value on the business but I can be cautiously optimistic that for a limited period of time it will produce significant rewards for H.

38. In looking at the history of the business, it is important to remind oneself of the origin of the funds which H has invested in the business and in particular the timing of when those funds were invested. After its initial establishment in 2015-2016 with opening deposits, the following further sums were transferred by H into SC as part of his investment:

2018	£750k
2019	£1.5m
2020	£5.25m
2021	£500k
2022	£1m

39. In addition, the SIPP of £2.63m and the bond of £1.94m gross of tax (at current figures – I do not have the historic figures) were invested at the inception of the business. All these investments were made from funds saved during the marriage and all of them were made with the blessing of W, including the £1.5m invested after separation.

40. H's understandable desire to ensure that he kept the confidence of his investors led him to say in evidence on several occasions that insofar as W's lump sum could not be met from the liquid assets outside the business, it would be better for her to retain a share in the business rather than H having to reduce his investment in the business in order to achieve an immediate clean break. It was only in re-examination that H proffered that he would prefer a clean break. If he were equivocal, that is understandable when he does not yet know what the lump sum award will be. W's position has always been that she wishes to have a share in the business, which she regards as jointly created, both by way of performance fees and in any realisation value that is achieved.

The offers of the parties

41. The parties' competing proposals have been helpfully put into a schedule which I now reproduce.

Issue	**W**	**H**
Real property	W to retain FMH and country home.	Agreed
Sums to be excluded from sharing	W to retain first £1m from net assets as referable to 'gift' from H for 'conduct'.	H to retain first £2.4m from net assets to reflect post-separation accrual.
Balancing payment	Balancing payment from H to W so that matrimonial assets (excl. pensions) are shared equally.	Joint accounts to be closed and balances shared equally; balancing payment from H to W so that matrimonial assets (excl. pensions) are shared equally, to be paid by 13 October 2023.
Pensions	Pension sharing order to provide equality of income and capital values.	Pension sharing order to provide equality of capital values.
Child maintenance	H to pay £45,000 pa in respect of each child until each completes tertiary education to first degree.	H to pay £24,000 pa for younger child until he finishes secondary education.
School fees	H to pay school fees and extras, and for dental/orthodontic treatment until the start of tertiary education.	H to pay school fees and extras.
University costs	H to pay each child's university fees and living expenses (inc. accommodation costs) until completion of PhD, and for dental/orthodontic/optician costs until completion of a PhD.	Subject to review if SC ceases to be operational, H to pay university costs and living expenses to the conclusion of first degree, and university costs in a sum to be directly agreed (inc. costs of rented accommodation).
Legal costs of action against school	H invited to contribute 50% of legal fees associated with action being brought on child's behalf.	N/A

SC	H to pay W 25% of net receipts received by him from SC plus 25% of net receipts received by him for the disposal (in part or in whole) of his interest in SC. These payments to be secured by H assigning to W all his interest in the business.	No ongoing payments to W; clean break.

Needs

42. W's housing needs are properly met by the provision of the London and country homes. Her share of the assets would, even absent a share in the business, provide her with sufficient capital to enable her to enjoy a comfortable lifestyle from the lump sum that she will receive.

43. H is living in a rented property in Chelsea where he would like to buy at about the same value as the London family home. In addition, he would like to buy a country cottage. He has the assets to do so but that would require him to remove a significant sum of money from the business, which is currently not an option. As a result he will continue to rent for the foreseeable future.

The issues between the parties

Post-separation accrual

44. For reasons that will become clear I deal with this argument first of all. H seeks to ringfence £2.433m as being net post-separation income. It breaks down into the sums of £2.026m in the year from 1 January 2021 and £407k in respect of the year beginning 1 January 2022. These are the sums that H received by way of profit allocation in each of the two years and excludes the modest basic salary that he receives on a monthly basis.

45. I am in no doubt that I should not accede to his argument in respect of the year beginning 1 January 2021. I agree with Mr Mostyn QC (as he then was) in his analysis in *Rossi v Rossi* [2007] 1 FLR 790 when he said at para [24.4]:

> **[24.4]** […] 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.

46. I have also borne in mind the dicta of the Court of Appeal in *Cowan v Cowan* [2021] 2 FLR 192 where at paragraph 70 Thorpe LJ said:

> **[70]** In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial […] The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit.

47. Not only did this period commence only five months after the date of separation but it was at a time when funds built up during the marriage were being transferred by H with W's approval into his investment in SC. It would be completely artificial to draw

a line in the sand on the date of separation and to say from that moment onwards wealth is not to be shared at all.

48. The second period is more difficult. It commenced some 17 months after separation. H was still building up his investments in the business with funds built up during the marriage. However, the business activities inevitably over a period of time become that much more distanced from the end of the marital partnership. I have determined that I should exclude from the sharing principle 50% of the second year's profit share, namely £203.6k.

The £1m gift

49. H's position until December 2022 was that he would pay W an additional lump sum of £500k over and above the sum required to divide the parties' assets equally (which would have resulted in W receiving £1m more than H). This was reduced to £300k in December 2022. He has since changed his mind and offers no additional lump sum, he says to reflect the further legal fees the parties have incurred, and he says that the £1m gift should be regarded as one of the resources available for sharing. That is a stance he is entitled to take. Parties are to be encouraged to make generous proposals which they may, if they think appropriate, retreat from at trial.

50. However, in this instance I do not think that H is right about the £1m gift. It was a payment made by H to W "to make amends" for his behaviour and its appalling aftermath. I accept that the money is a matrimonial asset that is available for sharing but the circumstances of its giving are highly relevant. There is no need for H to share in this sum and it is fair to both parties that W should be entitled to keep it in its entirety, as was intended when given to her. I regard it as immaterial how she wishes to use it albeit if she does wish to use it for charitable purposes as she states that is praiseworthy but is entirely a matter for her.

W's outstanding renovation costs

51. There is one other small issue which I need to deal with before turning to the schedule of assets. W has spent a large sum of money on the matrimonial home since separation. She has said that she intends to spend a further £110k to complete its renovation. With that sum spent, the home would achieve the figure provided by the valuers of £2.75m. She says that I should therefore subtract this sum from her assets.

52. Whilst I understand the logic of her argument, I do not accede to it. W has the benefit of two homes in her name which she will retain and which are decorated and furnished to her taste. H owns no home. If he were to house himself in the same manner as W is housed, he would have to spend far in excess of £110k on purchase costs and on necessary renovations and furnishings. I have not subtracted that figure on his side of the schedule and it more than counterbalances W's outstanding expenditure.

53. Further but less importantly, W's schedule of outstanding costs was presented so late in the case that H was deprived of the opportunity of questioning her about it.

Pension

54. The parties are agreed that 43% of H's SIPP invested in SC should be transferred to W. When that has been done W's pension funds will have a value of £1.433m (£1.132m coming from H's SIPP and £301k coming from W's own pension). It will bring about a broad equality of both fund value and annual pension.

Schedule of assets

55. The parties have helpfully drawn up an agreed schedule of assets which excludes the vexed question of the value of SC but includes the small SC services company (£129k) and the regulatory capital in SC which will in due course make its way back to H (£400k).

56. The schedule shows a total of £24.183m exclusive of pensions. If I remove from that one half of the 2022 profit share the figure for division reduces to £23.980m. From that needs to be ringfenced the £1m gift to W.

57. One half of the balance of £22.980m is £11.490m. Of that sum W already has the value of the two homes, her own savings, half of the joint accounts which total £5.488m, leaving a balance to be found by H of £6.00m plus £1m; which is to be made up by a transfer of the balance of the joint accounts of £592k and an additional payment of £6.408k by H. This would leave W with £12.49m (51.6%) of the liquid assets and H with £11.69m (48.4%).

The business

58. Much the hardest issue in the case has been how I should approach the business. W's case is that she should have a *Wells v Wells* [2002] 2 FLR 97 award in respect of 25% of the business by way of lump sums equal in value to one quarter of H's share of profits and of any capital realisation, unlimited in time. It is her case that the business is the product of marital endeavour in which she has fully supported H in every possible way and that its profits, present and future, are substantially the product of the risks and hard work undertaken in establishing and building up the business during the marriage. She chooses the figure of 25% somewhat arbitrarily but reflecting the fact that as time goes on what H will receive from the business will become increasingly non-matrimonial in nature.

59. H's position is that the parties should go their own ways and that any future receipt by W from the business profits is no more than her attempting to share in H's earning capacity after the end of the marriage. He says it would be wrong that his future endeavours should be the subject of any claim by W.

60. It is important to bear in mind that in the assessment of the matrimonial assets as set out in the schedule, the parties have included H's investments held in his name within the business. These are investments made with marital funds. However, nothing is included in the schedule for the value of his interest in the business which is also in part the product of marital funds.

61. As I have already explained, the current value of the business cannot be ascertained with any degree of reliability. The experts agree that it is unlikely that any third party would be willing to purchase the business. However, they do also agree that the

business has a real and significant value to H by way of profit share of an unpredictable size over the coming years.

62. This issue has arisen in a number of authorities to which I shall now refer.

63. In *Cooper-Hohn v Hohn* [2015] 1 FLR 745, Roberts J had to consider the distribution of enormous personal wealth built up through a hedge fund business. One of the many issues that she had to determine was the extent to which W should benefit from the future success of the fund. In that case, like this, there was no value which could reliably be ascribed to the fund. At para [121] she said:

> **[121]** […] *I take the view that the TCI Fund and the structure within which it operates are very much his, to the extent that since their inception it is accepted that, once set up, the wife has played no part in the wealth creation function they have performed. To this end, I find it difficult, if not impossible, to conceive of circumstances in which this husband would surrender the autonomy he presently enjoys in order to make money for someone else, whatever financial inducements might be put on the table. For the reasons expressed above, I am equally persuaded that it is unlikely that investors would wish to stay in a fund in which the husband no longer exercised that autonomy of control over investment decisions.*
>
> **[122]** *In the event that TCI as a structure open to external investors is collapsed at some point in the future, I am persuaded that it is highly probable that the vast bulk of the husband's personal assets will thereafter be managed 'in house' from a family office from which he will continue, I suspect, to do much the same as he does now, albeit with more limited resources to deploy.*
>
> **[123]** *For these reasons, I do not propose to attribute to the TCI management entities any present or future value over and above that which can properly be attributed to their underlying assets. Thus, in this aspect of the dispute as to computation, I propose to adopt the presentation put before me by Mr Marks and Miss Clarke. In other words, I shall take the value of the TCI entities as being US$111.5m.*
>
> **[124]** *Before leaving TCI, I make this point. The fact that I have declined to accede to any Wells sharing of the hypothetical future value of the Group does not mean that the income which it generates for the husband is irrelevant in terms of the consideration of the fairness of any award which I make in this case. I am satisfied that, for so long as the structure exists and for so long as the Fund continues to perform in the way it has done, this husband will continue to receive a very substantial personal income as a result of his ownership of the structure, directly or indirectly. Whether or not he chooses to give that income, or part of it, away is entirely a matter for him. The fact that he has such an earning capacity is nevertheless one of the circumstances which I shall need to consider in due course*

62. She continued at [195]:

> **[195]** *In this case, and in relation to the argument that the husband was throughout 'trading with the wife's undivided share of the assets', I have reached*

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

64. And at para [291]:

> **[291]** *In terms of the husband's future income stream, part of this will find reflection in the uncrystallised contingent incentive fees which will flow in over the next 4 years. I have not made an allowance for these in the adjusted Net Asset Register for reasons which I have explained (see paras [137]–[139] and [188](iii)). Whilst it is true that they reflect a significant amount of post-separation endeavour and new investments represented by the husband's unmatched contribution, they are nevertheless likely to fall in (in whatever sums eventually become payable) as a significant accretion to the substantial income he generates through receipt of his share of the management fees. In that sense they are, in my view, more properly categorised as a quasi-income receipt rather than a capital receipt. Because of the impossibility of drawing an accurate 'bright line' in determining what value should properly be attributed to the 'marital' element of this category of receipts, I have decided that the fairer way of dealing with this aspect of the case is to reflect the husband's far greater future income as one aspect of my determination in respect of the overall fairness of the percentage division which the wife will receive.*

65. It can thus be seen that although a figure or full explanation of the extent of the benefit which W received from the business going forward is not identifiable, that she did receive an award in respect of its future wealth creation by way of an enhanced percentage is clear.

66. This issue was commented on by Mostyn J in *JL v SL* (No.2) [2015] 2 FLR 1202 at paragraphs [40]-[42]:

> **[40]** *When I first read this [paragraph] I wondered if I had sighted a white leopard, as Roberts J appears to be suggesting that the wife would receive a share (not on a needs basis) in property that was "outside the marital acquest" and which was therefore non-matrimonial property. But on reflection I think I was wrong. I think the proper analysis is that Roberts J was saying that the fund*

retained its matrimonial character but the wife would share unequally in the increase in the value achieved by the husband alone in the period of separation.

[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.*

[42] *On the other hand there will be cases where the post-separation accrual relates to a truly new venture which has no connection to the marital partnership or to the assets of the partnership. In such a case the post-separation accrual should be designated as non-matrimonial property and save in a very rare case should not be shared.*

67. H relies on *Waggott v Waggott* [2018] 2 FLR 406 and in particular paragraphs [121]–[124] of the judgment of Moylan LJ:

[121] *First: (i) is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?*

[122] *In my view, there are a number of reasons why the clear answer is that it is not.*

[123] *Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723.

[124] *Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Baroness Hale's observation in Miller that, even confined to '[i]n general', 'it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation' (at para [144]) or her observation as to the effect of '[t]oo strict an adherence to equal sharing' (at para [142]).*

68. I do not accept H's characterisation of a *Wells* order in these circumstances as feeding into H's future income. Simply because it is impossible to fix a value on an asset it does not mean that it is removed from the sharing principle. I respectfully agree with the analysis of Mostyn J in *JL v SL.* If H were left with the entirety of the future return of the business it would mean that he would receive the whole of the benefit of what was built up during the marriage and W would receive no part.

69. It cannot be said that the benefits that will flow in the future relate to a new venture which has no connection with the marital partnership. Indeed, the four anchor investors were all attracted in or by 2017. The business is the continuation of what was created throughout the time that the parties were together. It would in my judgment be plainly unfair if W were not able to share any further in the benefits.

70. I fully accept that the further one goes from the separation of the parties the smaller the interest W will have because what is received will have less relationship to the partnership. I do not however accept that allowing W to share in the future benefits of the business infringes upon the principle of either the desirability of the clean break or the inability to claim against spouses' future income.

71. The proper way of W feeding into the profits is for her to receive a fixed percentage for a limited period of time. In arriving at figures I must bear in mind that the parties separated almost three years ago and that under my award by the end of the period from which she will share in the profits it will be six complete financial years. I agree that it is unnecessarily complicated to have a sliding percentage decreasing as time goes by.

72. I have determined that W should share in H's profits to the tune of 17.5% in the years ending 2023, 2024, 2025, and 2026. I have chosen the percentage as being one half of 35% of H's profit share which I believe is fair when taken over the whole of the period as reflecting the percentage attributable to the marital endeavour. I have chosen four years because there must be an end point and on H's evidence, which I accept, he will by then be into the process of handing over to a successor, which will no doubt include a progressive dilution of his shareholding. In the event of H disposing of his shareholding during this period, W will share to the same extent of 17.5%.

73. The parties rightly agree that H's very modest salary of £150k per annum should not be subject to this share.

Child maintenance

74. H agrees that he should pay the costs of his elder son's university tuition in America and his rent. The current cost of his tuition and lodging amounts to £62k per annum and is likely to increase over the next two academic years when he moves to lodgings outside the college. The issue between the parties is what general maintenance H should pay over and above these already very expensive items.

75. I need also to bear in mind three important points:

    i) In some years H has had only a modest profit share and the future of the business is unpredictable.

    ii) Both parties are well able to support both their children. The burden needs to be shared.

    iii) H has to pay a significant sum for his rented home whilst W has no such expense.

76. Taking into account the sum that H will be paying by agreement, I have decided that the additional living allowance should be £24k per annum of which two thirds will be

paid directly to the son and one third to the mother.

77. I do not award any additional figure for flights between the USA and England nor in respect of orthodontic works. The modest cost of a flight from the East Coast of the USA to England can be covered within the sum I have awarded. H has agreed to contribute to orthodontic costs if discussed with him.

78. H agrees to pay the school fees of his younger son. By way of general maintenance, I order H to pay the sum of £30k per annum.

79. I recognise that these figures do not meet W's aspirations but she will be well able to meet the shortfall herself.

80. After a strong judicial steer, W abandoned her claim that H should contribute towards the fees of any legal action that W might take in respect of their elder son's experience at school. The parties should not be expected to share the costs of something about which they so fundamentally disagree.

Time to pay

81. As mentioned earlier, H is under pressure not to withdraw his investments from SC more than is necessary. To do so he would need to inform his investors of what he was doing and why. Now that the parties know the sum that the Court is ordering H to pay and the extent to which W receives a *Wells* order, H will need to consider the period over which he asks that the payment should be made.

82. The parties have discussed security for outstanding payments. Whatever the feelings about the breakdown of the marriage, it is clear that W trusts H in terms of his management of the business because otherwise she would not have been content for the investments to be made in 2021 and 2022. I hope that they will be able to agree the issue of security and that they will not need to enter into complex legal arrangements to cover this issue. I too thought that H's word in relation to the business was likely to be trustworthy but, if they need to, the parties can revert to Court for directions as to implementation.

83. The touchstone in the division of assets between divorcing spouses is always that of fairness. If the parties agreed what was fair, then the matter would not have come before me. I regard it as fair that the division that I have imposed gives W marginally more of the assets than H will retain. This division properly reflects the assets they have built up together, adjusted for the monetary gift in the circumstances that it was made. Over the years to come that difference is very likely to be reversed as H continues to work in the business. That too is a fair and proper reflection of future endeavour.