Neutral Citation Number: [2024] EWFC 176

Case No: ZZ21D47299

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2024

Before :

MR JUSTICE FRANCIS

- -

Between :

DR	**Applicant**
- and -	
(1) ES	**Respondent**
- and –	
(2) JS and KS	

- -

- -

James Ewins KC and Andrew Campbell (instructed by **Hughes Fowler Carruthers**) for the **Applicant**
Joseph Steadman (instructed by **Farrers**) for the **First Respondent**
John Machell KC, Gregor Hogan and James Finch (instructed by **Forsters**) for the **Second Respondents**

Hearing dates: 09 – 13 October

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Approved Judgment

This judgment was handed down remotely at 10.30am on 09 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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.

Mr Justice Francis :

Introduction

1. DR and her husband ES (known to all as E) are enmeshed in financial remedy proceedings following their separation. For the sake of convenience, and intending no discourtesy to the parties, I shall refer to them respectively as "the wife" and "the husband". This is my Judgment in respect of preliminary issues which centre on:
    a. the husband's alleged obligation to pay £826,392 to his parents for a one third share of a company called X Ltd;
    b. the beneficial ownership of a company called Y Limited (hereafter referred to as "Y");
    c. the husband's alleged obligation to pay £37,866 to his parents for a one third share in Y;
    d. the husband's alleged obligation to pay £989,076 to his parents for a one third share in the former matrimonial home ("the FMH").

2. The husband's parents, JS and KS, are joined as Second Respondents. Throughout the hearing, with their agreement, the Second Respondents were referred to respectively as "J" (the husband's father) and "K" (the husband's mother). I shall also so refer to them in this Judgment.

    a. The wife has been represented at this hearing by James Ewins KC and Andy Campbell. The husband has been represented by Joseph Steadman. J and K have been represented by John Machell KC, Gregor Hogan and James Finch. I am grateful to all counsel and to their instructing solicitors for the helpful way that this case has been managed and presented.

The preliminary issues identified

3. It is not in issue that Y was originally registered in the sole name of the husband and that, accordingly, he was the sole legal owner. However, the husband and his parents assert that, from the moment of its incorporation in 2004, the husband held his share in the company on trust for himself, J and K in equal shares. This assertion was only made known to the wife when the husband completed and served his Form E in 2021 in response to her claim for a financial remedy order.

4. In 2023, as I shall explain later in this Judgment, the husband and his parents entered into a scheme whereby there was a buyback of the husband's asserted one third beneficial interest in Y and it is asserted by the husband and his parents that J and K are now the 100% legal and beneficial owners of Y. Accordingly, J and K seek a declaration that:
    a. at the time of incorporation of Y, until the March 2023 buyback scheme, the husband held his share in Y on trust for himself, J and K in equal shares;
    b. the husband was at all times liable to pay for his one third share in Y, calculated at £37,866; and
    c. following the buyback of the husband's share in March 2023, J and K are the 100% legal and beneficial owners of Y.

5. The wife asserts that this is a sham and that the husband was at all material times the beneficial owner of Y. Mr Ewins has made clear that, in the event that I find in her

favour, she will apply to set aside the 2023 buyback scheme. The wife also denies that the husband was expected to pay for his one third share in Y.

6. The principal company through which J and K operated their business is called X Group, with X Limited operating as the parent company. It is not in issue that the business was operated by J and that his wife played no effective part in the business side of things and was the homemaker. It is common ground that, prior to X Group being incorporated in May 2004, J and K held their respective interests 50/50 in what was then a partnership. When X Group was incorporated, the shares were split equally into three, with each of the husband, J and K having been allocated one share. It is now asserted by the husband, J and K that it was never intended that the husband be gifted these shares and they assert that the husband must pay them for the value of his one third, which they assert to be £826,391. Accordingly, in these preliminary issue proceedings, J and K seek a declaration in those terms.

7. The wife says that this is also a sham, that the husband's parents never expected or intended that the husband would have to pay for his share and that the husband and his parents have conspired together to reduce or defeat her financial remedy claims. In reality, this is an allegation made against J, it being clear to me that K will do as asked by her husband when it comes to business matters.

8. The FMH is the home where the husband grew up and lived with his parents and, when married, where he lived with the wife and, in due course, with their own children. The husband is an only child. J and K assert that it was never intended that the husband should be gifted one third of this property and that the husband was at all times liable to pay for his one third share. This is said by J and K to be £989,076.

9. Thus:
    a. the total amount that J and K assert that they are owed by their son is £1,853,334, being the sum of the three items in paragraphs 1 (a), (c) and (e) above. I note that this amount is said by them to have been due since 2004, long before the husband and the wife were married, although seemingly not demanded until the husband and the wife separated.
    b. Conversely, the wife denies that the husband is indebted to his parents and asserts that the husband is a one third owner of the FMH, a one third owner of X Group and the sole beneficial owner of Y.
    c. The wife says, through her counsel, that the total amount "at stake" is some £27 million. The wife further asserts through her counsel that my determination on this preliminary issue "will have a significant impact upon the financial remedy claims", whether based on sharing or needs or a blend of the two.

10. It is further asserted on behalf of the wife that J and K are "the *de facto* claimants in this preliminary issue hearing". I agree with this submission and no issue is taken with it on behalf of J and K. Accordingly, I have treated J and K as the claimants. The burden of proof therefore falls upon J and K. The burden of proof is the normal civil standard, namely the balance of probabilities. In essence, the wife asserts that the husband and his parents have closed ranks and have pretended to fall out with their son in order to prevent the release of any funds from Y and in order to defeat the

wife's financial remedy claims. She says that the timing of this is remarkable, that just as she makes a financial remedy claim against the husband, suddenly the husband is no longer the owner of these valuable assets and instead owes his parents the sum of £1.853m set out above. She asserts that the whole thing is a sham to defeat her claims against the husband.

11. At a directions hearing on 6 March 2023, I was persuaded that the ownership of these three assets, namely Y, X Group and the FMH, and the £1.853m, are the fundamental issues in this case. It seemed to me that this was classically appropriate for a preliminary hearing. Plainly the husband's parents have no part to play in the financial remedy claims between husband and the wife, but of course they have the right to come to court to assert that the wife is mistaken or, worse, greedy and misguided, to try to bring a claim against assets which do not belong to the husband but to them. Moreover, of course, if I find in favour of the wife, I shall need to make orders that will directly impact J and K since I would be likely to be making orders regarding assets which they say belong to them.

The family

12. The husband and the wife were married in 2009. There are two children of the family:
L and M.

13. The wife is in her late 30s. She has been a homemaker during the marriage. Without doing anything more, for the moment at least, than assert some well understood principles, the wife will obviously be likely to run a sharing claim in respect of the marital acquest, by which I mean the acquisition and growth of capital during the course of the marriage. Doubtless some of the growth in Y since its incorporation at nil value in 2004 will have pre-dated the marriage, but much of the growth is likely to have taken place since the parties married. I would expect that those acting for the husband will seek to persuade me that much of that growth was passive, rather than as a result of something done by the husband that would make it more likely to form part of the marital acquest. These are arguments that I expect will form part of the next hearing when I am asked to assess the wife's financial remedy claims.

14. In early 2012, the wife was diagnosed with multiple sclerosis and her treatment is ongoing. I say no more about her medical condition for the purposes of this preliminary hearing, although plainly it will be relevant to the final hearing, particularly, I suspect, in regard to her earning capacity and future needs.

15. The father is in his early 40s. It is a running theme of his that his parents were disappointed by his lack of motive for work after he left university, and a considerable amount of evidence was given by them suggesting that he had fallen into bad company whilst at university. It is clear, however, that the value of Y has grown considerably since its incorporation in 2004. J made clear in court that his son has "been a bad boy", a subject to which I shall return in the context of dividends etc. The wife asserts that this is a smokescreen, although I suspect that J is very much aggrieved to be in court over the breakdown of his son's marriage and aggrieved at

the amount that he has had to spend on the costs of these proceedings.

16. The husband and wife's relationship broke down in September 2020. Nevertheless, the parties and their two children had continued to live with husband and his parents at the FMH. It is a substantial five-bedroom property. The children have become tragically caught up in the battle that rages between their parents and between their parents and K and J. At an early directions hearing, I was told about deeply offensive remarks which the children were said to have made to their mother. When I saw what had been said, and written, it seemed to me that the kind of deeply offensive language that they had used was adult in nature, although I must stress that this was a view and not a finding. At that point the children were effectively estranged from their mother and living with their father.

17. There was a long and extremely expensive Children Act section 8 hearing in December 2022, at which it was found by HHJ Renvoize that there had been psychological manipulation and alienation of the children from the wife by the husband and that J and K had "played a role" in this. So significant were the findings that the Judge made at that hearing that she ordered that the children should move immediately from the father to the mother. Furthermore, the Judge's order prevented the children from having any contact at all with the father and with J and K for at least 12 weeks after her Judgment, with the matter to be reviewed thereafter. The Judge was so concerned about the way that these children had been treated and the way that they were suffering, that the husband was required to engage in family therapy with the wife and the children as a pre-condition to any ongoing contact. I am told, and accept, that J and K have not themselves engaged with any family therapy, although I am told that they would very much like to see their grandchildren. This is plainly a very tragic situation for all. This family is surrounded by wealth yet is tragically fractured. I am told that the husband is engaging in the therapy required by the Judge and it must be hoped that, in due course, the husband will be able to have a warm and loving relationship with his children. The failure of J and K to engage in therapy which would help them to persuade Judge Renvoize that they should re commence contact with their grandchildren is somewhat telling and I can only express the hope that, in due course, they will choose to put the needs of their grandchildren, whom I am sure they love, before their own hurt feelings. However, I have come to the very clear view during the course of the hearing before me that J is a man who is very much motivated by money. He has chosen to deprive himself of that wonderful relationship of grandparent and grandchild and, even worse, to deprive his grandchildren of that relationship.

18. All of this, says the wife, is evidence of the fact that J and K have been ready, able and willing to close ranks with their son against her in order to "do down" her claims. I can well understand why the wife asserts this. However, as I said in court, and repeat now, whilst the Judge's findings in the Children Act proceedings are an essential piece of the sad history of this case, I have to analyse this case on the basis of the evidence which is before me. But I am satisfied, having read and heard all that I have, that it would be wrong for me to ignore the fact that an experienced Judge has found that the children's paternal grandparents were prepared to close ranks with the father against the best interests of their own grandchildren. Very often in these cases, Judges look to grandparents for some "common sense" and as a useful bridge between the parties to move forwards in the interests of the relevant children. Here, the Judge

found that the paternal grandparents had consciously and knowingly acted in a way which was detrimental to the best interests of their own grandchildren. From all that I have read and heard, I think it likely that J has required this of K.

19. J is an extremely successful and hard working self-made businessman who created a hotel and commercial property portfolio. His wife K has doubtless supported him and the family at all times, but it is clear from everything that I have heard and read that she has not been much involved in the creation and the operation of the businesses and nor has she been the decision maker in relation to the business assets transferred to Y.

Costs

20. I was told at the commencement of this hearing that the costs of this preliminary issue hearing then stood at:
    i. the husband: £133,100;
    ii. the wife: £410,596;
    iii. the husband's parents: £590,603.

    and Accordingly, the parties have already spent in excess of £1.1 million to get as far as this preliminary issue hearing. Regrettably, because the time estimate for this case was inadequate, there has been significant delay in producing this Judgment. Doubtless the costs will have increased since the figures referred to above were given to me. Not for the first time, I find myself overseeing a "big money case", saddened by the fact that, instead of using their wealth to enable them to negotiate a practical and decent settlement, the parties have chosen instead to spend what is, to most right minded people, a fortune on legal fees. I am told that the total costs bill, including the s8 proceedings, is close to £4m, which is a staggering amount of money. My comments are not in any way a criticism of the lawyers involved. The parties are, of course, entitled to spend their money however they wish, but it would be so much more sensible if litigants such as this could use their significant resources to accommodate a sensible compromise rather than to fight with the finest legal teams available in this field of work in England and Wales. After all, the children, who are the first consideration of this court pursuant to section 25 of the Matrimonial Causes Act 1973, are the children of both the husband and the wife and the grandchildren of the husband's parents. I venture to suggest that if more thought had been given to the children and less to self-interest, the parties would have arrived at a sensible accommodation and invited court to make an order by consent. It is, in my judgement, a tragedy for children to find themselves in a family gripped with such bitter dislike and bitter determination to win at all costs. The definition of win from the children's perspective is, I suggest, entirely different from the definition of win that is assumed by the parties. The notes and letters that were sent by these young children to their mother are some of the most abusive that I have ever seen from children of this age to a parent, and yet materially these children want for nothing. I express the earnest hope that the adults responsible will end messages like these and that they will reflect on the damage that they have caused.

The legal framework

21. Unsurprisingly, given the quality of the representation, the legal framework applicable in this case is broadly agreed. I mean no discourtesy to the industry of counsel by not setting out all that they have written. In essence, it is clear to me that the documents in this case are central to my determination.

22. I have reminded myself of the well-known passages in the Judgment of Leggatt J, as he then was, in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm), where he said at para 18:

> *"Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."*

And then further in that same case at para 22:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and Is honest, evidence based on that recollection provides any reliable guide to the truth."*

23. I bear in mind very much what is said in that Judgment, particularly in the context of what I have referred to above regarding the Children Act proceedings. My starting point in the enquiry upon which I am engaged in this preliminary issue hearing will be the documents themselves. I shall then go on to consider the written and oral evidence. J and K put their case very much in terms of what they refer to as "the common understanding". The common understanding case put forward on their behalf is one that relies very much on oral evidence. Hearing the parties give live evidence in court, and comparing that with the documentary evidence, has enabled me

to form a very clear view of where the truth lies in this case.

24. I have been taken to a number of authorities in this case and my failure to refer to each and every one of them does not mean that I do not have them in mind, but it would be impossibly long if I was to go through, in this Judgment, all of the authorities to which I have been referred.

25. It is agreed that the principles to be applied in determining whether or not an express trust arises are as follows:
    a. An express trust is (archetypically) created by the actual intention of the person in whom the property is vested to hold it on trust for another (*Lewin on Trusts* 20th ed at §5-002; *Snell's Equity* 34th ed. at §21-019).
    b. However, in a case not involving land, the trust need not be reduced to writing but can be apparent from the party's words or conduct (*Lewin* at §3-019; *Snell's Equity* at §21-019). The court will execute the settlor's intention '*however informal the language in which it happens to be expressed*' (*Lewin* at §5-002).

26. In relation to constructive trusts, it has been held that (per Edmund-Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co. (No.2)* [1969] 2 Ch. 276 at 300G):

> '*English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court in technicalities in deciding what the justice of a particular case might demand*.'

27. Mr Machell and his team submit on behalf of J and K, and again there is no disagreement about this, that the imposition of a constructive trust arises '*by reason of the unconscionable conduct of the legal owner of property…it must include those instances where it is the legal owner's denial of the beneficial interest of another which is unconscionable*' (*Lewin* at §8-010). Thus, contends Mr Machell, an institutional constructive trust can '*arise where a person has accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty*' (*Lewin* at §8-011). Such a person '*does not receive the trust property in his own right, but by a transaction which was intended to create a trust <u>from the start</u>*'(emphasis supplied)).

28. In *Williams v Central Bank of Nigeria* [2014] UKSC 10, Lord Sumption held at [9] in relation to institutional constructive trusts that:

> '*The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed.*'

29. At [55], Lord Neuberger approved the observations of Millett LJ in *Paragon Finance Plc v BD Thackerar & Co (a firm)* [1999] 1 All ER 400:

> '*...the Courts of Equity treated as a trustee not only an express or implied trustee and a trustee de son tort?, but also a person, who "though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the [claimant]". As he then said, such a person is known as a constructive trustee, and "really is a trustee", as "his possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust"*.'

30. Next Mr Machell reminds me that the editors on *Lewin* observe at §8-015 that the common thread of situations where institutional constructive trusts are found to arise is '*the enforcement of an agreement or a common understanding in relation to the property which is said to be held on trust*' (emphasis supplied). They further opine that (at §8-016):

> '*…institutional [constructive] trusts are imposed by operation of law on someone who has accepted or assumed a fiduciary position in circumstances such that it would be unconscionable for him to assert a personal beneficial interest in property acquired as fiduciary and deny the beneficial interest of those for whom he undertook to act. In these cases, the person on whom the trust is imposed is seeking to retain the trust property beneficially, but has accepted or assumed his fiduciary positions willingly and is therefore treated very much like an ordinary express trustee*.'

31. Mr Machell and his team also remind me of the principles that have been developed in relation to common intention constructive trusts in the context of the purchase of real property (*Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53). Mr Machell asserts that those principles can be applied to *non*-real assets (*Lewin* at §10-050). Thus, asserts Mr Machell, the principles may also apply where a business is acquired in the name of one party (*Lewin* at §10-051) and, in *Webster v Webster* [2008] EWHC 31 (Ch), HHJ Behrens applied the *Stack* and *Jones* principles to the question of whether the claimant had an interest in shares by virtue of a common intention constructive trust.

32. Mr Machell asserts, and again this is uncontroversial, that the principles will, not, however apply where the relationship between the parties is *purely* commercial (*Crossco No. 4 Unlimited & Ors v Jolan Limited & Ors* [2011] EWCA Civ 1619 at [85]-[87]). However, they can be applied when family members together purchase property as an *investment* (see, eg, *Agarwala v Agarwala* [2013] EWCA Civ 1763 where the property was purchased with the view to running a B&B business).

33. Finally, on this legal issue, Mr Machell has helpfully reminded the court that, where they apply, the principles were summarised in *Jones v Kernott* [2011] UKSC 53 at [51]-[52] **[Authorities/198-200]**:

> 1. The starting point is that equity follows the law. Thus, in a "single name" case (ie the property is registered in only one party's name), the

party asserting a beneficial interest must first satisfy the court that he has a beneficial interest at all.

2. That presumption (ie that equity follows the law) can be displaced by showing (a) the parties had a different common intention at the time they purchased the property or (b) they later formed a common intention that their shares would change.

3. Their common intention to share the property otherwise than as set out in the legal title is to be deduced objectively from their conduct.

4. Where it cannot be deduced what their intention was as to their *shares* in the property, the answer is each entitled to what the court considers fair (by way of imputation of intention).

34. Mr Ewins and his team have provided a similarly helpful analysis of the law. Given the broad measure of agreement regarding the applicable legal principles I do not intend to overburden this already long Judgment with their analysis. Although, of course, Mr Ewins articulates the legal principles in a different way, his conclusions are not materially different. With respect to all of the lawyers in this case, there is a danger that over analysis can over complicate what I have come to decide is not as difficult as it might first appear.

X Group and Y Ltd

35. X Group was incorporated in May 2004. That is the year that the husband left university. J says, and I have no reason not to accept this, that prior to X Group being incorporated in May 2004, he and K held their business interests 50/50 in a partnership.
36. J says, and again I accept, that he became aware of a new portfolio of properties available for purchase. He explained that these properties are different in nature from those in X Group and that they would be suitable to be held in a separate corporate structure.

37. It is obvious from the evidence that I have read and heard that J (and possibly K as well) was disappointed that his son did not seem to have the same work ethic that has driven J, who was rightly proud of his great success as an entrepreneur.

38. J's accountant at the time was L, who was the architect of a corporate structure whereby a number of properties and businesses formerly owned variously by J, K and E were placed into X Group.

39. In addition, the new portfolio of properties referred to above was acquired with a 100% loan to value ratio (through NatWest) and placed into a newly formed company, Y Ltd, which was incorporated in May 2004. Doubtless J's proven track record, business acumen and gravitas was central to the grant of this substantial mortgage. J said in evidence that he wanted to make E know what it was like to have to take on substantial loans and that Y was set up with this in mind. As I shall expand upon below, I regard it as highly material that, on its incorporation, Y had little or no

value, although the case now put forward by J is that the husband owes him and his wife £37,866 for his one third share in Y, implying a value for Y at the time of a bit over £100,000.

40. **DELETED**

41. J gave a personal guarantee in relation to the borrowings in respect of the new portfolio transferred into the name of Y. This is unsurprising, because it is obvious that a mortgagee would be unwilling to give a loan equal to 100% of the value of the portfolio without some sort of personal guarantee. I have no doubt that J had more than enough wealth in his own name, or the name of other businesses, to be able to give a substantial and dependable guarantee.

42. It is a matter of clear record that 100% of the shares in Y were put into the husband's sole name. The burden of proof is firmly on J and K who must persuade the court that the beneficial ownership of the Y shares is different from the legal ownership. Mr Machell correctly submits:
    a. that the husband's intention is central to the issue of whether an express trust was created; and
    b. that a constructive trust depends on agreement or common understanding.

43. It is important to note, in my judgement, that the shares in X group, which was created contemporaneously (but for a few days) with the incorporation of Y, were split as to 1/3 to J, 1/3 to K and 1/3 to the husband. It is very difficult to understand why it was that the legal ownership of X Group was properly reflected by its shareholding whereas, according to J, K and the husband, the shareholding in Y did not represent the beneficial ownership. It is clear that J is a careful and sophisticated businessman and, I am afraid I have to say, that I find it hard to reconcile why the shares in Y would have been put into the husband's sole name if that did not reflect the beneficial ownership. Why do it this way? Mr Machell's answer that "family relations, particularly when they include small businesses, are often not neat and tidy or documented". That answer cannot, in my judgement, withstand analysis. We are not dealing here with a company purchased "off the shelf" by unsophisticated people. We are dealing with a sophisticated businessman who was advised by professional accountants. I cannot accept that they "got it right" with the X Group and "got it wrong" with Y.

44. Mr Machell asserts that the wife "cannot and does not advance a positive case". Given that I am making decisions in this case about events that took place before the wife even met the husband, this is obviously correct. However, as agreed by all and recorded by me above, the burden of proof is on J and K to establish that the reality of beneficial ownership is different from the legal ownership. The following are, in my judgement, significant pointers that help me to decide where the truth lies:
    a. the company accounts, prepared by Raffingers (the same firm that created the structure in the first place) recorded the husband as the sole beneficial owner of Y. The first year end accounts, to June 2005, record the husband as the sole beneficial owner.
    b. The Y accounts to June 2006 record the husband as the sole beneficial owner. The accounts also record that the husband held no non beneficial interests in

the company shares.

c. Raffingers, who are Y's accountants, have a file which expressly provides for any beneficial owner of the company to be noted. Neither J nor K are recorded as **beneficial** owners.
d. The Raffingers file describes the husband as "the main or only contact" for Y.
e. All Y accounts from 2005-2021, apart from 2008-2010, show the husband as the sole director and **owner**.
f. In a letter to NatWest, Y's mortgagees, in 2004, is an organogram which describes Y as 100% owned by the husband.
g. There is no contemporaneous documentary evidence in support of a trust structure.

45. In paragraph 23 of his statement dated 8 June 2023, J stated:
"Prior to the portfolio coming up for sale, I had already mentioned to K my concerns about E's lack of responsibility and that I needed to do something to change this. After the agreement to purchase the portfolio but before Y was incorporated, I made the decision to put Y in E's name. I recall discussing this with K before I told E about the idea. My reason for making this decision was to get E back on the straight and narrow following his association with people who I thought were a bad influence on him. I desperately wanted him to grab the business with both hands and really take pride in it."

46. In paragraph 25 of the same statement J said as follows:
"I recall there being a discussion between myself and E at home, over dinner, during which I told him about the idea of the new portfolio. This was shortly before Y's incorporation and so I imagine it was in or around early May 2004. I made it clear to E that we were putting it in his name on behalf of all of us and that I wanted him to make a success of it – for him and us as a family."

47. I am afraid that I cannot understand the logic of this. Why would the husband be any more likely "to grab the business with both hands and really take pride in it" just because the shares were registered in his name if there was, as J asserts, an agreement that the husband would, in reality, hold two thirds of the shares in the company for his parents. It is an assertion which I find very hard to accept. Whether J is deliberately lying to this court or has been able to convince himself of the truth of something because he has re-written history it is not currently necessary for me to conclude. I am, however, satisfied that J's evidence about the alleged agreement that husband would hold Y on trust for himself, J and K in equal shares is something that I am unable to accept.

48. It is also important to stress, in my judgement, that since the properties in Y were subject to a loan to value ratio of 100%, J and K were in one sense actually not giving the husband anything other than **the potential** to succeed. This is the way Mr Ewins opened the case when he said, in his opening note:
"Concurrently, a residential property portfolio became available for purchase. That presented a golden opportunity to bring E into the fold and for him to begin his journey towards taking over the family property business himself. But J did not want to hand over significant equity just yet to the inexperienced, unproven E. So a compromise was reached. The property portfolio would be put in E's name so that he would know that he had to take some responsibility and be incentivised to work hard.

Like X Group, the portfolio would be put in a limited a company that would acquire the portfolio using a 100% loan-to-value mortgage secured against the entire portfolio. E would feel the challenge and pressure of owning his own company, of being responsible for its assets, its debt and its profit, and would be motivated by the money making opportunity this presented."

49. I agree with and adopt that paragraph. It is very significant, in my judgement, that the husband was not being given equity, he was being given opportunity. In my judgement, it is entirely consistent with everything that I have read about and heard from J that he would provide his son with this excellent opportunity to make money, doubtless with the benefit of J's skill, experience and guidance. It was now up to the husband to see what he could make from this business opportunity.

50. Mr Ewins also makes the submission, with which I agree, that there was an obvious benefit, from an inheritance tax perspective, in having properties in a company owned by the husband, rather than the husband in due course inherited from his parents. J said in his evidence that he was not much concerned about IHT planning, particularly at his age. I accept the generality of that evidence but I also remind myself that the incorporation of Y was a scheme created by accountants. It clear that Y is a company which was created for the husband and that it acquired a portfolio of properties and that, from the outset, the company had no value. But it is a sensible and obvious starting point for me to record that in 2004 Y was a company with a substantial portfolio, but no effective equity, and that this company was legally owned by the husband. This would mean that if the properties increased in value and/or the husband was able to repay the NatWest lending, the equity in the company would belong to its shareholder, i.e. the husband. It is a simple matter of basic tax rules that such a gain would be free from Inheritance Tax if in the husband's name rather than that of his mother and/or father.

51. In the absence of any evidence to the contrary, I am bound to find that J would have been open and honest with HMRC in all his dealings with them. I have seen no evidence to suggest that either J or K had in any way dealt in their will or otherwise made provision for that alleged one third share in Y.

52. A Paragraph 10 of the opening note prepared on behalf of J and K begins as follows:

"J and K's case, however, is that it was never intended that E should be gifted any shares in either family or the family business. Thus, it was agreed with E that he would have to pay for his one third interest in X Limited."
The paragraph then continues a little further down:
"In respect of Y there was the same agreement such that E held two thirds of Y for J and K subject to having to make a payment towards his own one-third share. J and K maintain that they would not have gifted to E what would effectively amount to 1/3 of their wealth which they built up over 30 years at time [sic] when E was just about to leave/had just left university. E admits that there was such an agreement that he held his share in Y in that manner."

53. I find it difficult to know what to make of this is in sofar as it refers to Y, and I have recorded above, that Y had no equity in it when it was created, albeit that the 100% loan to value would not have been available but for J's backing. Moreover, what

does, "there was the same agreement" mean? There was no need for any agreement regarding the X Group because the shareholding was clear.

54. Paragraph 11 of the same opening note asserts as follows:
"It is J and K's case that albeit not formally held under X Group, Y forms part of, and operates within, the wider X Group under J's overall management and control."

Whilst I accept that J may well have undertaken much of not most of the running and management of Y, that does not in any way affect its legal ownership.

55. L and his son M, of O, were the company accountants from the creation of Y in 2004 until 2010. It was L who had set up the scheme by which the new portfolio was transferred to Y and by which 100% of the Y shares were vested in the sole name of the husband. It is their evidence that Y was treated as if it was part of X Group and also that it was J who made all the important decisions regarding both X Group and Y. They say that it was to J that they looked for instructions regarding the company accounts and audit. It does not surprise me at all that the experienced and successful J wanted to make the decisions regarding both X Group and Y. It is obvious that he regarded himself as a better businessman than his son and I dare say that this was correct. J refers in his written and oral evidence to his son's inexperience. It is entirely natural that he would want to help his son to learn how to run a property business. Moreover, I do not see that the fact that J made the decisions about Y derogates from the fact that Y was owned by his son. It is entirely reasonable that J would want to assist his son and, having seen J give evidence, I doubt very much that he would have found it easy to leave the running of Y to his son, who had infinitely less experience. I do not see that the issue of instructions and control is inconsistent with ownership being with his son. J is plainly immensely talented in the property world and why should he not wish to help his son's company flourish? I do not follow the argument advanced on behalf of J and K that *de facto* control necessarily evidences ownership. I am clear that where the oral evidence conflicts with the contemporaneous evidence, it is the latter to which I should look first, and then consider the oral evidence and the reasons why witnesses might assert what they do.

56. It is not disputed that, in 2011, new accountants were instructed to act for Y. The new accountant now acting was O, from a firm called P. When O took over the account 2009 and 2010 accounts referred to Y as a subsidiary of X Group and showed J as a director. O corrected what he regarded as an error and henceforth the Y accounts show the husband as the sole director and the sole shareholder in the company. I find that this deliberate correction by O as important evidence which appears to undermine the case put forward by J and K. From the outset of this Judgment, I explained why it is that the documentary evidence can all be a far more reliable account than the assertions made by interested parties with fading memories. Moreover, I have already set out the circumstances in which the Judge in the Family Court found that J and K had been prepared to side with their son contrary to the best interests of their grandchildren. The wife's case is that this is exactly what J and K have done now in relation to the financial remedy proceedings.

57. O gave evidence that, at his meeting with J in February/March 2012, J told him specifically that Y was held beneficially in equal shares between J, K and the husband. He explained that his policy was to prepare accounts on the basis of the

legal ownership as recorded at companies house and that, therefore, he showed the husband as the "controller" of Y. Mr Machell, on behalf of J and K, seeks to explain this away as, "whether this is right or wrong as a matter of strict accounting, it is a readily believable explanation as to why he amended the accounts in 2011 onwards". Mr Machell obviously recognises the difficulty that he faces when the husband is listed in the accounts as "controller" and he makes this submission:
"what is clear, however, if the listing of E as PSC in 2017 and as "controller" in the accounts did not reflect the reality that J has in control [sic] of Y and its finances as a part of the wider X Group as shown by the contemporaneous material."

58. I dare say that O found it difficult to walk the tightrope between duty to J and the duty to this court. The upshot of his own evidence is that he prepared accounts which did not reflect the true position. These accounts would have been seen not only by HMRC but by the mortgagees. I prefer to find that O and that his correction of the anomalous years referred to above was in accordance with his professional duty. I do not need to go as far as finding that O lied to this court; I simply say that the documents speak for themselves and that the attempt to tell a different story very many years later has not impressed me. If, which I am not, I was in any real doubt about this I remind myself of two things: the first is that the burden of proof is, as I have said above, firmly upon those who allege that the written record is incorrect. Secondly, all of this evidence unfolds against the backdrop of the findings of the Judge in the Family Court that we are dealing here with a couple who have been prepared to align themselves with their son to turn against their grandchildren their mother. In the circumstances, it does not surprise me at all that they are prepared to do the same things in relation to the family finances. Anger and resentment was evident throughout the evidence that J gave to the court.

59. The evidence given by both J and K (in reality all the evidence came from J) was that they were disappointed with their son's university experience and they wanted him to take responsibility and be encouraged to take an active role in their business. They believe that he had been "wayward" at university and that they "wished to get him back on the straight and narrow". J continues that he decided to award his son a one third share in the business and that "the same was to apply to Y". He continues that "he made it clear to E in a discussion over dinner that they were putting it in his name on behalf of the three of them and that he wanted to make a success of it – for him and the family". I remind myself that, at this point, Y was a company with little or no value since the properties were fully mortgaged. It is hard to understand why a sophisticated businessman such as J would put all of the shares in this new company in his son's name if, in reality, it was to be held as to 1/3 each between him, his wife and his son. Moreover, it is J's evidence that he had no interest in IHT planning and I am told, and accept, that there is no evidence in any of the documents produced that IHT planning was ever discussed again. Whilst this may meet the point made on behalf of the wife that each of the arrangements now contended for by J and K are inconsistent with sensible IHT planning, it does not provide an answer to the simple question as to why the shares were all put in the husband's name if the intention was that he and his wife should each own one third. I have to assume, unless I am told to the contrary, that J and K both wanted to make true and fair declarations to HMRC.

60. I have to accept that the wife's case is still faced with the evidence of O that he was told in 2012 by J that the husband was the beneficial owner of just one third of the Y shares. I anticipate that O felt somewhat conflicted in giving his evidence to this court. Once again, I find myself going back to the passage of Leggatt J (as he then was) and the reliability of documentary evidence. It may just be that I have to find that the accounting years 2008-2010 are an unexplained anomaly. It is rarely possible in a case to explain everything, but the documentary evidence is overwhelmingly against the case contended for by J and K.

61. The situation between the parties is that J and K (in reality, just J since K plainly does whatever J asks in relation to financial matters) say that they have fallen out with their son and the husband says that this is correct. The husband, J and K, having asserted that the husband has a minority share in Y, have refused to release any funds from the company to allow the husband to meet his and the wife's outgoings, the children's income needs, legal fees, family therapy, school fees and other outgoings. There is obviously concern, on the wife's side, that this will be used by all three of them to defeat the wife's claims for a lump sum and/or income within her financial remedy claim. As I have set out above, the issue massively affects the value in the case. It may well be, now, that the husband has fallen out with his parents, especially his father. J repeatedly referred to the husband as having been "a bad boy". It may very well be that J is furious about the fact that he and his wife have been, as he sees it, dragged into their son's divorce proceedings. I dare say that he is extremely annoyed about the costs that he has had to incur in these proceedings.

62. In his June 2023 statement, J said this:
"They enjoyed a very high standard of living supported by the now multi-million pound property empire that J founded and E and been brought into. X Group paid out significant dividends, which the family shared. The family indulged a love of expensive cars: E and D had Bentleys, Ferraris and Lamborghinis; J *has a Rolls Royce Phantom; K has a Range Rover. They went on expensive holidays, enjoyed luxury goods and an expensive social life, their children were privately educated and they had household staff",*
It became clear to me that there is real resentment that by J that the wife is seeking a financial remedy order based on this costly standard of living, seeking capital that is "S family money". J and K have done what they can to deny the wife access to funds, even to pay her own legal fees. I am afraid that I believe that J and K have done here what they did in the s8 proceedings and "closed ranks" with their son to defeat, or certainly substantially curtail, the wife's claims. Their behaviour in relation to the children was truly shocking. I say "they", but I very much formed the impression that K has little choice but to obey her husband on such matters.

63. I was told by the wife, and accept as correct, that family therapy with the husband was delayed because of funding issues. It is beyond sad to see that these very wealthy grandparents did not immediately agree to fund the therapy that the judge regarded as crucial *for the benefit of their own grandchildren, their only grandchildren.*

64. J and K have failed to persuade me that the beneficial ownership of Y is any different from the legal ownership. As I have said, the parties separated in 2020 and by June 2022, J was describing himself as "chairman of the shareholders" of Y. In this capacity he refused to permit the husband to borrow from the company to make any

payments for his family. In due course, a buyout was raised whereby J and K acquired the husband's alleged one third shareholding in Y at what the wife asserts is a substantial discount calls a "wholly artificial transaction". This issue of the buyback was ventilated in front of me at earlier directions hearings. In the event the transaction has taken place and the money given to the husband has enabled him to meet his obligations including those under a legal services payment order that I made in January 2022. Clearly, having found that, in reality, the husband is the beneficial, as well as the legal, owner of Y, I am likely to be faced with an application to set aside the share transfer. This will come as no surprise to J and his legal advisers since the wife's advisers have always made clear that this is the course that they are likely to adopt if I find, as I have, that the husband is the sole beneficial owner of Y.

65. I am simply not prepared to make the finding that it was agreed that the husband would pay for his share in Y. The claim which J and K will now make against their son in relation to Y will presumably treble to about a hundred thousand pounds. Given my finding that I do not believe the case that is being articulated by J and K in relation to Y, I am not prepared to make the finding that they seek for the payment of £37,806. Moreover, that sum is *de minimis* in the context of the seven figure sum that the parties have spent in relation to costs in this case.

66. So far as the Y dividends are concerned, in the light of my findings articulated above, plainly the husband is entitled to all of the Y dividends since its incorporation in 2004. If he wishes to make some sort of reparation to his parents after this case is concluded (by which I mean not only this preliminary issue hearing but also the wife's application for a financial remedy order) then that is entirely a matter for him, but I am not prepared to let that interfere with the wife's just claims.

67. I take the same view in relation to the alleged debt of £989,076 for a one third share in X Group. The furthest that I am prepared to go is that there may have been some sort of understanding that the husband would make payment to his parents for his one third share in X Group when in due course called upon to do so. The fact is that he was not called upon to do so from 2004, the date of incorporation, until the wife made her financial remedy claim. I am bound to say that motive to mislead the court is apparent everywhere. Once again, I prefer to rely on the documentary record, of which in this case there is none. It may very well be that J is fed up with or even furious with his son. I also have regard to the wife's evidence in this regard, which was that *"it was made clear that everything – ultimately – would be passed to E as J's and K's only child, and then on to L and M as their only grandchildren".* Once again, I find that it defies common sense to assert that this alleged loan (on any basis soft loan) suddenly became payable coincidentally with the institution by the wife of her financial remedy application.

68. In relation to X group dividends, an account is going to have to be taken to see whether the husband has paid himself more than his one third entitlement. The evidence before the court would appear to support such a conclusion but this is not a finding. I keep an open mind as to this until such an account has been taken and I keep an open mind as to what steps I should take to deal with it in the event that he has received more than his fair share. I shall also, of course, have to decide whether his parents acquiesced this process, if it occurred.

69. I take the same view in relation to the FMH. The husband was a student when this property was purchased and it is absurd for the court to accept that as an unemployed student, he was being landed by his parents with a debt of almost £1 million. It makes altogether better sense to see this for what it was, which is a perfectly sensible solution which happened to have IHT advantages as well. Mr Machell complains that the wife is unable to advance a positive case in relation to the FMH. Of course she is, because she did not meet the husband until long after the purchase of the property. Mr Machell asserts that, *"the evidential backdrop is entirely consistent with J and K's case E has a continuing liability to pay for his one third share in the FMH"*. I disagree. What were the terms of this loan? When was it repayable? Was interest due? Was the deal that, if the husband was "a bad boy" (J's words), the loan would suddenly become due?

70. Accordingly, I have firmly concluded that J and K have failed to discharge the burden of proof resting upon them and I dismiss their claims. I shall, of course, hear argument in due course about the issue of costs but my preliminary view, which I feel it is only fair to articulate, is that this is a case where costs should follow the event the event is that the wife is the successful party. I believe that it would be wrong for me to start here on the basis of the "no order principle" and that the proper starting point is that the unsuccessful party should pay the costs of the successful party. As I have said, this is not my concluded view and I shall hear submissions on the subject in default of agreement.