Neutral Citation Number: [2024] EWFC 389

Case No: 1690-8004-0586-6795

**IN THE FAMILY COURT**
**Sitting in the HIGH COURT OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2024

**Before** :

**The Honourable Mr Justice Cusworth**

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**Between :**

**Dale Andrew Vince** — **Applicant**

**- and –**

**Kate Vince** — **Respondent**

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**Lewis Marks KC and Janine McGuigan** (instructed by **Katz Partners LLP**) for the **applicant**
**Richard Todd KC and Lily Mottahedan** (instructed by **Dawson Cornwell LLP**) for the **respondent**

Hearing dates: 9-16 December 2024

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# JUDGMENT

This judgment was handed down remotely on 17 January 2025 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 public but a transparency order is in force. 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 must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

**Cusworth J :**

1. Introduction. This judgment follows the final hearing of the application for financial remedy made by Dale Vince ('the husband'), who is now 63 (born on 29 August 1961). Kate Vince ('the wife'), is now aged 50 (having been born on 16 February 1974). This case has been listed before me for 2 weeks from 9 December 2024. I have heard and read evidence from the parties, and full and detailed written and oral submissions from counsel on both sides, Richard Todd KC and Lily Mottahedan for the wife, and Lewis Marks KC and Janine McGuigan for the husband. Although there have been three expert accountants involved in the case, fortunately by the commencement of the hearing they had narrowed any remaining issues between them to a sufficient extent that by agreement I have not had to hear from any of them. I have however seen their extensive written material.

2. The wife is described by her counsel as a homemaker, and the husband is a well-known green energy entrepreneur. He was an early pioneer of wind turbines or windmills, and built some of the earliest commercially viable turbines to be connected to the National Grid. He is the sole shareholder of the Green Britain Group Limited, which has two main subsidiaries – Ecotricity Group Limited ('EGL') and Ecotricity New Ventures Limited. EGL was incorporated, then as The Renewable Energy Company Limited ('REC'), along with a business called Western Windpower Limited, on 7 April 1995. The husband and his then partner Karen Lane were appointed as directors a few days later. He argues that the true inception of this business can be traced further back to 1991, when he had the idea of building a large windmill on a hill (Lynch Knoll) near his home in Stroud, and it is certainly true that he made a number of planning applications in the following years for wind monitoring masts. In 1992 he became the UK agent of a German wind turbine manufacturer, Enercon. Initially, his success in getting approval for his various projects was mixed, but he persevered.

3. The husband has gone on to set up a number of businesses retailing to customers focussing on supplying the end user with green energy. He was later responsible for the roll-out of the first national electric vehicle charging network through 'The Electric Highway'. His group of companies now spans energy generation and supply to consumers and businesses, the manufacture of small domestic wind generators, and some other green 'start-ups'. The group owns the football club Forest Green Rovers. At times, his businesses have run into financial difficulties. Following Covid, there was a real risk that they would not survive, until the sale of the Electric Highway in 2021 led to a very significant cash injection. Currently, the single joint expert, Sarah Middleton of PWC, values the husband's business interests at £153.5m pre-tax, and after a number of significant political and charitable donations which have recently been made. The husband has been politically active, and

EGL made a fair proportion of those donations to the Labour party ahead of the 2024 General Election. That, and the other major donations made by the business, remain an issue between the parties which I will discuss below.

4. The parties have a 16-year-old son who lives with the wife in the former family home, Rodborough Fort, and attends a local sixth-form. The husband also has two adult sons from previous relationships, Dane aged 41, who is the son he shares with Kathleen Wyatt, and Sam aged 36, who is the son he shares with his late ex-partner and ex business partner in EGL, Karen Lane. Shortly after the parties began living together, Sam came to live with them full-time. He and his family now live in separate accommodation on the grounds of the family home, and Dane lives nearby with his family in Stroud.

5. The marital relationship. First, however, there is an issue between the parties about the effective length of their marital relationship. The wife started working at the business as an employee in January 1997. The parties then began a relationship in mid/late 1999, with what the wife describes as 'intermittent cohabitation' in her flat by the end of that year, and then 'formal cohabitation' in a new flat purchased by the husband for £150,000 in January/February 2000. The husband says that he stayed sometimes with the wife but sometimes in a hotel, after the breakdown of his previous relationship. He puts the start of things to the end of 1999, but accepts that they were cohabiting by February 2000.

6. In *IX v IY* [2018] EWHC 3053 (Fam), Williams J analysed the questions to be asked when considering the relevant commencement date for a pre-marital relationship as follows:

> [68] …cohabitation prior to marriage is relevant because it may indicate that, prior to the formal commencement of marriage, the parties had entered into the sort of partnership involving the mutual support, working together, rights and obligations which may be indistinguishable from those which arise when parties begin to live together only after marriage. It seems therefore that what the court should be looking for is a relationship of the sort which carries with it sufficient markers which justify being treated as a marriage. …What the court must be looking to identify is a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage. Of course in very many cases, possibly most cases, this will be very obviously marked by the parties cohabiting, possibly in conjunction with the purchase of a property. However in other cases, and this may be one of them, it is not so easy to identify. The mere fact that parties begin to spend time in each other's homes does not of itself, it seems to me, equate to marriage. In situations such as this, the court must look to an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship which may then either be added to the marriage to establish a longer marriage or which becomes a weightier factor as one of the circumstances of the case.

7. Here, the parties' relationship before the end of 1999 does not, I consider, have a sufficient feeling of permanence to it to merit being classed as a part of their marital relationship. Whilst the wife may have wanted a long term and committed relationship from the

husband, I also accept that until the parties' full time cohabiting relationship began in the new flat some time after the new year, the husband cannot be said to have committed to it. Whilst the husband describes even their cohabitation in early 2000 as still being 'experimental', given that the experiment evidently proved successful, I consider that February 2000 is the appropriate date for the commencement of the marital relationship, by which time the necessary mutuality of commitment between them was present. The couple actually married six years later on 16 February 2006.

8. The parties' separation took place at some point after a conversation between them in late March 2021 when the husband evidently told the wife that he no longer loved her and believed that the relationship had broken down. I do find that he was clear in what he said to her, but that, of itself, is not necessarily enough to stop the clock on a marital partnership, when both the marriage itself, and the couple's essential cohabitation, continue. Many couples live effectively apart under the same roof for many years before eventually separating. I am also satisfied that the wife told her solicitor Simon Bruce when she consulted him later in 2022 that they had separated in April 2021. However, it is also true that for the rest of that year, and until February 2022, they continued to be married, to live effectively under the same roof as a domestic unit, and also on occasions continued their physically intimate relationship.

9. The husband points to the fact that he bought himself a houseboat towards the end of that year as evidence that he already considered the marriage at an end. However, he must have known that the wife's feelings were not so clear, and by continuing to sleep with her he would only have encouraged her in the hope that their marriage might be restored. There is a difference between beginning and ending a marital relationship. Both have to want it and to commit to it at the start. At the end, whilst one partner may unilaterally decide that the relationship is over, and even communicate that feeling, if they continue to live with and sleep with their partner in the matrimonial home, and do not issue a petition, but also with normal life continuing for their child, the clock will very possibly continue to tick until they end that physical cohabitation, and leave no possibility behind that things may recover. I find that this is what has happened here. Every case is of course entirely fact specific, and it is the case that some marriages continue in an internally separated state for many years.

10. Eventually, the husband did vacate the family home at the wife's request, in February 2022, initially living on his houseboat. The wife's divorce application is dated 31 October 2022. A conditional order was made on 19 May 2023. A final order was made at the outset of this hearing on the husband's application.

11. Whilst the couple remained married, and living under the same roof, after a relationship of more than 20 years, I consider it unfair to the wife to take the date of separation, and so the ending of the marital partnership in financial terms, as the date when the husband told her that was what he wanted, when nearly a year then passed before he actually moved out, or ceased to behave towards her in many ways as he had during the earlier years of their marriage. I thus take this as a marital relationship of 22 years, from February 2000 until February 2022.

12. The Principal Issues. It is clear that this wife has made a full contribution to the marriage. I acknowledge that she continues to fulfil her homemaking role post-separation in maintaining and running the family home for their son and as a place where the wider family continue to come together. It is also the case that the parties have managed to agree, at the outset of the trial, that their earlier division of non-business assets, on a broadly equal basis, should be maintained and does not require further adjustment. With the areas of dispute between the accountants being largely resolved between them, the principal issues between the parties at this hearing (aside from the length of the marital relationship) have been:

    a. How to treat the significant donations that EGL has recently made to the Labour Party and to the Green Britain Foundation (which is a charity effectively directed by the husband), and a few others. These donations have a gross value, per PWC, of £12.5m.

    b. Any value to be ascribed to the husband's pre- and post-marital efforts in the business, and how they should affect the wife's entitlement to share in the business's value.

    c. In circumstances where the husband himself made significant efforts to sell the business in 2022, whether he should now be able to claim any discounts for realisation costs, illiquidity or uncertainty against the sum that is due to the wife, on the basis that he is now choosing to continue running EGL.

13. Non-business assets. Between them, the parties own (or accept paying for) 5 properties and a houseboat, the husband's with a combined net equity value of £5,510,750, the wife's (including Rodborough Fort) of £5,224,901. The husband has a total of £920,904 in bank accounts and shares, the wife has £1,519,021. The wife also has a small pension worth £82,195. The wife has 2 substantial loans – one to Level in respect of her legal fees - totalling (£3,312,381), whereas the husband has (£424,928) in outstanding legal fees and (£1,906,051) outstanding on his Ecotricity Group Director's Loan Account. The wife

points out that the sum of £950,000 was added to that loan only last month to provide an additional property for his son Sam.

14. Accountancy evidence. That the accountants have now largely agreed matters in relation to the value of the business is a recent development. In a joint statement dated 9 December 2024, the first day of this hearing, they narrowed the issues between them, which had been much wider, to the following numbers - the remaining differences being down principally to issues as to how to calculate a Terminal Value for one element of the business - Eco Retail. Mr Bezant, for the husband, came to a value for the group (leaving aside donations) of £148.4m. Mr Rodwell, for the wife, came to £165.8m. The single joint expert, Ms Middleton, came to £153.5m. I have not been asked to hear from the accountants in relation to the differences between them, on the basis that, given the inherent fragility and uncertainty of business valuations of this type, it would be almost certain that I would find favour with the central position of the SJE. I agree, and will adopt her figure.

15. Ms Middleton and Mr Rodwell have also been invited to consider the liquidity position of the company, and their final view became available during the course of the trial. They agreed that the Eco Group has surplus cash of approximately £48.5m, but the timing and extent of any extraction would be dependent on cash flow and regulatory requirements. There is also surplus property (£5.1m), and shares in Good Energy (£17m) that could be sold and their proceeds extracted. Ms Middleton concludes that surplus cash and assets of between £32.1m and £42.1m could likely be extracted in the short term (of which the surplus cash would be between £10m and £20m). Mr Rodwell considers that to be a conservative estimate. He points out that if cash currently assigned to the future funding of new ventures were to be considered available, the liquidity range would increase to between £50m and £60m. Further, if overdraft or loan facilities were to be available in future, then more cash could safely be extracted now. Without resolving that question, I am satisfied that my determination below is one that the husband will be able to pay within the timescales that I will stipulate.

16. Business Valuation. Whilst of course it is a positive that the accountants' views have largely converged, a fact which shores up to some degree the habitual fragility of such valuations, I must nevertheless keep well in mind the inherent uncertainty which will always come with these figures. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092, Moylan J (as he then was) said at [5]:

> 'The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an

award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained.'

17. In *Versteegh v Versteegh* [2018] EWCA Civ 1050**,** Lewison LJ developed this theme and explained the problems, when he said at [185]:

> 'The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092, Moylan J said at para [5] that 'valuations of shares in private companies are among the most fragile valuations which can be obtained'. The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Secondly, even where valuers use the same method of valuation they are likely to produce widely differing results. Thirdly, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourthly, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifthly, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A (Ancillary Relief: Property Division*) [2004] EWHC 2818 (Fam), [2006] 2 FLR 115, at paras [61]–[62]; and *D v D and B Ltd* [2007] EWHC 278 (Fam), [2007] 2 FLR 653 (both decisions of Charles J).'

18. Notwithstanding that, of course, I must balance the fact that all three experts have now produced valuations which are now appreciably within the same bandwidth, so that there is a greater measure of certainty here than there is in relation to cases where the court is left to select from the views of competing accountants. And further, I remind myself that the sale of this company was not only contemplated but actually attempted following the parties' separation in 2022, so not only is it marketable, but there is also clearly a market. This is relevant to the question of any discounting which might be appropriate which I will consider below.

19. I will now turn to the three principal issues to be determined before the fair value of the wife's claim in this case can be determined:

a. <u>How to treat the significant donations that EGL has recently made to the Labour Party and to the Green Britain Foundation, and a few others.</u>

20. This issue has generated much sound and fury within the litigation. The wife has applied for an order under s.37 of the Matrimonial Causes Act 1973 setting aside all of these transfers of assets out of EGL and to, principally, the Green Britain Foundation and to the Labour Party. In doing so, she has sought to sidestep the requirement in that section of the

Act that requires the disposition to have been by a party, as opposed to by a company. That requirement was addressed by the Court of Appeal in *Crittenden v Crittenden* [1990] 2 FLR 361, where Dillon LJ said at p.365 F to H:

> "It seems to me plain that any reference to property in s.37(2)(a) must be a reference to property which, as explained for instance in s. 24A, is property in which either or both of the parties to the marriage has or had a beneficial interest, either in possession or in reversion. It cannot mean any property generally, whomever it may belong to, because s.37 is concerned to supplement primary provisions in the earlier sections of the 1973 Act. Therefore, s.37 cannot itself attach to a mere dealing with the company's property.'

21. Roberts J considered this and other authorities in *C v C* [2015] EWHC 2795 (Fam), where she then dealt with the possibility that the company for these purposes might be considered the alter ego of a disposing party at [70]:

> 'As the Supreme Court made abundantly clear in *Prest v Petrodel*, there is nothing in the 1973 Act and nothing in its purpose or broader social context to indicate that the legislature intended to authorise the transfer by one of the spouses to the other of property which was not his or hers to transfer. Whilst an order directing the transfer of shares held by one of the spouses will be uncontroversial, delivery of value pursuant to that transfer may well be impossible if, for example, the shareholder and the company are both resident abroad in jurisdictions which may not recognise and/or enforce English court orders. Section 24 of the 1973 Act is not be construed as providing a remedy to this problem by artificially enlarging or widening the definition of what constitutes "property to which the first-mentioned party is entitled, either in possession or in reversion". If and insofar as a party to matrimonial proceedings deliberately attempts to frustrate the exercise of the court's powers by disposing of assets, section 37 MCA 1973 enables such dispositions to be set aside if certain circumstances are met. However, as Lord Sumption pointed out at para 40, page 490G :-
>
> "Section 37 is a limited provision which is very far from being a complete answer to the problem, but it is as far as the legislature has been prepared to go."
>
> [71] The principle which emerges from the decision of the Court of Appeal in *Crittenden…*, whilst a free-standing statement of the law in 1990, has been significantly buttressed by the unanimous endorsement of the Supreme Court in *Prest v Petrodel*, some twenty-three years later.'

22. So, whilst it is evident that the application under s.37 was misconceived, and must be refused, it has in any event not been the wife's primary case that these transactions should actually be reversed, and nor, in any sense do they need to be. Mr Marks urges that they should be treated as applications for *Vaughan* style add-backs, which would require Mr Todd to demonstrate a reckless or wanton element to the spending, he says, which was simply not present. Mr Todd says that, given that these significant sums were given away after the wife had indicated that she was not in agreement, then the payments can be seen

as reckless. He points to the fact that prior to the breakdown of the marriage the scale of the donations made by the company have never been anything like those made in the recent past. In effect he says that whilst of course it was open to the husband to determine that EGL should make the donations, they should be made from his own share of the assets and not from the wife's.

23. In so far as funds have been donated by EGL to the Labour party, that can be seen to have been timed to precede the recent general election, and was at a time when the company's coffers had been filled up by the sale of the Electric Highway. It was therefore both foreseeable and hardly inexplicable that the company should choose to make a specific large donation at that time. I am satisfied that the husband's motivation in endorsing that transaction was political, and not related to these proceedings. Given the very substantial liquidity available at the time, and the significant growth in the value of the business in recent years, it was not, although very large, as I find disproportionate or unreasonable. It can be looked at in the context of the significant growth in the value of the company in recent years in which both parties will share. I will not therefore notionally add that sum back to the value of EGL.

24. I do not either find that the smaller charitable donations meet the threshold for an 'add-back', nor are the funds donated in any sense still capable of being counted amongst the parties' resources.

25. As to the donations to the Green Britain Foundation, the same would apply to that element of the payments which have since been applied by the Foundation to charitable purposes. This charity is in effect the charitable arm of the husband's business enterprise, and that he should make funds available if required when he can afford to do so is entirely in keeping with the way that he has managed his affairs, and not something for which I will now sanction any add-back. The money that has been spent, or allocated to specific purchases or costs by the charity, I will not therefore treat as still available to him.

26. However, in circumstances where around £4.5m of the money donated has not yet been so used, and is simply sitting in the bank accounts of the Foundation rather than in those of EGL as formerly, I see no good reason not to treat those funds as though they were still amongst the husband's resources, even though they are now at the disposal of the charity that espouses the causes that have been his for so long. It would be unfair to the wife if those funds were also disregarded, and I will therefore treat them as still being part of the value of the company. In doing so, I am not 'adding back' money that has been spent, but

rather treating as being within the husband's resources money which, whilst technically it has been earmarked for the charity by EGL, even irrevocably, has nonetheless not actually been applied in any way. Mr Marks terms it an 'excess donation'. I will treat the money as if still an asset of the business in quantifying the wife's share, notionally allocated to the husband. Money such as this, still present but earmarked elsewhere, is in a very different class from funds in other cases which have long ago been spent and gone.

27. Treating this cash as part of the husband's share is a matter of simple fairness, given both its continued existence and proximity to the husband. I am not 'adding back' money which no longer exists, on the basis that the husband has behaved 'wantonly'. I am determining that these funds - which are still available to the charity, but need not yet have been given to it by EGL - should still on the facts of this case be treated as part of the value of EGL for the purposes of determining the fair value of the wife's award.

28. Finally, I make clear that whilst it has recently become apparent that the husband has made significant gifts to both of his sons from former relationships, I do not criticise him for either gift, and will not adjust any figures as a result.

b. Any value to be ascribed to the husband's pre- and post-marital efforts in the business, and how they should affect the wife's entitlement to share in the business's value.

29. Post-Separation Endeavour. Having determined above that the marital relationship for this couple began in February 2000 and ended in February 2022, that is the period within which it can fairly be said that each of them were making an equal and matched contribution to the welfare of the family. On that basis, from the end of the marriage to the date of this trial was a further 34 months, and whilst there have not been any undue delays in bringing this case to court, the period is a relevant one in that there has been a significant increase in the valuation of the company over the past three years. Inevitably, Mr Todd for the wife has sought to downplay the husband's involvement in this growth, whereas Mr Marks for the husband points to his involvement in hedging strategies which, PWC have recorded, played some part in the company's gains over this post separation period. It is clear that the husband has played some part in the business' growth, but also that major external factors, as well as others in the wider business edifice, have been of no less importance. I am satisfied that the appropriate way to treat this time is for it to be added to the pre-marital years (once determined) as periods in the historical growth of the business when the husband's contributions were unmatched. However, it is certainly the

present valuation of the company by which the value of the wife's share should be calculated. I am satisfied that this strikes the appropriate balance in this case.

30. Pre-Marital Endeavour. As to the pre-marital period, Mr Marks and Ms McGuigan described the husband's case in their opening note thus: '*The gestation period of an idea for a green energy business is a long one, and even once safely delivered (not just with incorporation but with the construction and activation of the first functioning generation plant) full maturity has taken the whole of H's working life since he settled down in about 1990 after living a 'low impact' existence 'on the road' for his early adult years'*. Mr Todd and Ms Mottahedan respond by pointing to two principal points of issue: the evidence before the Supreme Court in *Wyatt v Vince* [2015] UKSC 14, and the business's measurable lack of substantial value at the time that the parties' relationship began, as I have determined in 2000. They argue that there is no justification for any derogation from a full half share of available value going to their client.

31. The case of *Wyatt v Vince* concerned financial proceedings brought by the husband's first wife, Kathleen Wyatt, the mother of the husband's eldest son Dane, long after their marriage had been dissolved in 1992. The relevant passage in the judgment, which first recounts the husband's earlier history, is at paragraph 18, where Lord Wilson records as follows:

> [18] Meanwhile, the husband was taking those first steps which, in retrospect, can be seen to have led to his phenomenal success. One year early in the 1990s, at the Glastonbury festival, he fixed a windmill to the top of an old pylon, installed batteries at its foot, plugged in four large mobile telephones and offered festival-goers a wind-powered phone service. Then he went to Cornwall to inspect Britain's first wind turbines. Thereupon he and a partner began to make wind-monitoring equipment. Then in 1996, following the grant of planning permission and with the aid of a substantial bank loan, he and two others, through a limited company, erected a wind turbine on the top of a hill at Nympsfield, near Stroud, by which they generated and sold electricity. Suddenly the company began to generate a substantial net pre-tax profit: it was £236,000 in 1997 and it doubled within the following 3 years. There is no need to chart the later expansion of the husband's businesses. The fact is, therefore, that it was only in the final years of Dane's minority that the husband was in a position to pay substantial maintenance for him.

32. Mr Marks responds to Mr Todd's argument that there is within this passage an issue estoppel by pointing out that that case involved his client's application to strike out Ms Wyatt's claim, and that the evidential elements in the judgment would have emanated largely from her case rather than any primary evidence offered by the husband. Having considered the husband's own evidence on the point however, I am satisfied that it is not inconsistent with the above passage. Whilst the husband points to the Lynch Knoll wind farm project as one that was '5 years in the making' prior to its completion in 1996, and

certainly the chronology suggests that a number of planning applications were made and remade in relation to different projects in this time, it was evidently not until 1995 that real progress was made in putting together a significant business venture. In that year, the Renewable Energy Company ('REC') was incorporated in April, as was Western Windpower Limited, a company which installed wind masts. In July, Lynch Knoll Windpark Limited was added, and around this time REC was granted a licence to trade in electricity. Whilst the husband has certainly shown that he was engaged and interested in wind power in the early 1990s, I am satisfied that it was from 1995 that the footings of the business which exists today were properly laid.

33. That of course also does not deal with Mr Todd's point about the lack of substantial value in that business at the start of the parties' relationship 5 years later. As it happened, a 'fair market value' for REC produced in November 1999 by Griffiths Marshall chartered accountants, for the purposes of calculating the interest of Mr Alder, one of the husband's early partners, put the value of the company then at just £753,000 (of which the husband had one third). For the purpose of these proceedings, Ms Middleton valued the whole of the husband's business interests in April 2000, at £1.1m, during a brief period when they had the benefit of a lucrative Thames Water contract which lasted only until March 2001. So, on any view, actual value, even if uprated, was absolutely *de minimis* at the outset of the relationship.

34. Mr Marks relies on Holman J's decision in *Robertson v Robertson* [2016] EWHC 613 (Fam), where an attempt was made to persuade that judge to adopt the methodology adopted by Wilson LJ in *Jones v Jones* [2011] EWCA Civ 41. Rejecting that attempt, and describing Jones as '*not the easiest of cases from which to extract a clear ratio or precedent*' he said:

> '[34] It needs to be stressed, however, that the methodology is a tool and not a rule. The overarching duty upon the court is to exercise its statutory duty under s 25 of the Matrimonial Causes Act 1973 …and to exercise the wide discretionary powers conferred upon, and entrusted to, it by Parliament in a way which is principled and above all fair to both parties on the facts and in the circumstances of the particular case.'

35. In that case, the *Jones* approach would have produced a result whereby less than £5m would be carved out for the husband as non-matrimonial, from a total pot of nearly £220m, after a relationship of 10-11 years (including years of living apart under the same roof before final separation). The judge accepted that the husband's business history could be traced back to 1996, and that his principal company ASOS had actually floated in

October 2001, nearly a year prior to the parties' first cohabitation in 2002. Noting that on a *Jones* basis, the division would be as close as 51%/49% he went on:

'[42] That, instinctively, seems to me to be so unfair to the husband on the facts and in the circumstances of this case, and so over-generous to the wife, that I propose, not merely by way of cross-check but in substantive exercise of my statutory duty, now to consider this case by reference to all the matters in s 25 of the MCA 1973 considered seriatim, though not in the order in which they there appear'…

[61]. …Much greater allowance must, in fairness to the husband, be made for the history in order, to borrow words from Lord Nicholls in *Miller* quoted in para [38] above, to 'reflect the amount of work done by the husband on this business project before the marriage'. But, in my view, the pre-existing shares cannot, in fairness to the wife, be carved out and left out of account altogether. They were not simply left in a drawer, to use a metaphor used during the course of the argument…

[63] In my view, not as an accountancy exercise, but in the exercise of broad judicial discretion, the only fair way to treat the remaining pre-existing shares …is to treat them as to half as the personal non-matrimonial property of the husband, and as to half as the matrimonial property of the parties to be evenly shared.'

36. Following that authority, Mr Marks suggests that far from disregarding the husband's efforts before the marriage, as Mr Todd urges, instead I should discount in the first instance by 50% the established value of the business in this case. Were I to do that, I am satisfied that that would be very unfair to this wife, who has been at the husband's side throughout a 22 year period (twice as long as the marriage in *Robertson*), and following a pre-marital period of endeavour which as being taken from 1995 was much less, in proportion to the marriage that was to follow it, than was the equivalent period for the Robertsons.

37. However, I reject any suggestion that the lack of value in the business in 2000 is of itself a sound reason to ignore completely the husband's pre-marital efforts as the wife contends that I should. I remind myself that in *XW v XH (Financial Remedies: Business Assets)* [2019] EWCA Civ 2262, Moylan LJ made clear at [158] that:

the judge was entitled to find that part of the proceeds of sale of the shares was non-marital property to which the sharing principle did not apply. He was also entitled to determine what proportion was not marital property other than by applying the expert's valuation increased by indexation. It was open to him to undertake, as he said, 'a broad evidential assessment' and to conclude that there was significant value not reflected in the formal valuation…'

38. Further, I am not persuaded that the divergences in the financial prosperity of the business at any particular points in time are a helpful metric. It is right that the business came close to collapse before the sale of The Electric Highway in 2021. That does not mean that all of the work done previously would as a result be accounted valueless, for the purposes of

later assessment. As cases such as *Robertson* make clear, whilst each case must be very carefully fact-specific, the principle that substantial monetary value is inevitably required at the outset before pre-marriage endeavour can be taken into account is clearly wrong. In each case the court must do what is fair, which will therefore rarely be exactly what another court has done at the end of another marriage. However, as I said some years ago in *JB v MB* [2015] EWHC 1846 (Fam) from [20]:

> '…It must be the case that a determination by the court which has no recourse to quantification, or delineation between what is matrimonial or non-matrimonial, risks being impugned as overly arbitrary. But this is a sphere in which Wilson LJ himself famously acknowledged in *Jones v Jones* [2011] EWCA Civ 41 at [35] that:
>
> > 'Application of the sharing principle is inherently arbitrary; such is, I suggest, a fact which we should accept and by which we should cease to be disconcerted.'
>
> [21] On the other hand, when dealing with issues, as here, of post-separation accrual to the value of a shareholding (which on W's case began life as very much a matrimonial asset, but has since been the subject of much endeavour by H over a significant period of years), the proportional division of the current value which must be undertaken is also, if not quite equally, the product of value judgment. It is, however, certainly in the context of this case, more satisfactory for the parties to have the exercise of discretion explained by reference to a share of what is matrimonial, and an explanation of why that determination has been so made, rather than simply to be told that *x*% of the whole combined pot will be the right proportion, for reasons rooted in the judge's experience but not more specifically articulated. That is not to say that such an approach will always be practicable, or even possible, nor that in any event it is any less arbitrary. It is simply that if such a determination can be made, then it must be a useful way-marker for the court and the parties to have been able to do so'.

39. In this case I consider that a fair approach will be to determine the marital period as a proportion of the whole period of the business's existence to date. That proportion of current value should be considered matrimonial. This is because I entirely accept that the husband's business success has been upon his particular vision, and from the point of incorporating the first of those businesses in 1995, he was putting in place the platform for that vision on which all his subsequent, albeit uneven, success has been based. What matters is not the value at any particular point along that road, but the value now, achieved by the founding of those companies then.

40. On the basis that I find the fair time to pin the origins of the husband's business successes as being in April 1995, the period over which endeavour has produced the value which now exists to be divided can be seen to be some 356 months to the time of this trial. Of that, I have determined that the marital partnership endured for some 22 years, or 264 months, which is 74.16% of the period during which the value was being acquired. Consequently, I am satisfied that it would be fair to both parties if I take the same

proportion of the value of the company as being the matrimonial element, against which the wife's share should be calculated.

c. In circumstances where the husband himself made significant efforts to sell the business in 2022, whether he should now be able to claim any discounts for realisation costs, illiquidity or uncertainty against the sum that is due to the wife, on the basis that he is now choosing to continue running EGL.

41. Returning to the question of the valuation of private companies, about which he had spoken in *H v H*, Moylan LJ in *Martin v Martin* [2018] EWCA Civ 2866 provided the following thoughts on company valuation and the judgments in *Versteegh:*

> '[93] …even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.
>
> [94] I would also add that this is not, as Mostyn J suggested, to take realisation difficulties into account twice. Nor, as submitted by Mr Pointer, will perceived risk always be reflected in the valuation. The need for this approach derives from the fact that, as said by Lewison LJ, there is a 'difference in quality' between a value attributed to a private company and
> other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome.
>
> [95] It might be said, as Mr Marks referred to in his submissions, that it would be unfair to award one party all the 'upside' in the event that the valuation proves to have been an underestimate. That, however, is intrinsic in an asset being volatile. There is potential for the value to increase as well as decrease. If one party is not participating in that risk and is obtaining what Thorpe LJ referred to in *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97 as a secure result, one aspect of achieving that result is that, because they do not have the burden of the risk of a decrease in value, they also do not have the benefit of an increase in value. As Bodey J said in *Chai v Peng and Others (Financial Remedies: Resulting Trusts)* [2017] EWHC 792 (Fam), [2018] 1 FLR 248, at para [140].

‘It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved.’

[96] …I would add, in I hope not too simplistic an observation, that it is all about weight and balance. Not placing undue weight on a valuation and seeking to achieve a fair balance of risk between the parties in the allocation of the assets.

42. In this case, as explained, there are reasons to consider the valuation a relatively firm one, given the eventual confluence of the experts. And I also take fully on board the point that the husband himself attempted to sell the business in wake of the marriage breakdown, and may well decide to monetise the asset at some point in the short to medium term. However, I am not satisfied that means that I should ignore altogether the costs which would be incurred in raising a sum to buy out the wife’s interest now, before considering the question of any discount on account of the nature of the shareholding as opposed to cash. The husband has reversed his previous position that the wife could herself have shares in the company, and in any event, I consider that outcome would now, in the wake of these proceedings, be unrealistic. I also accept Mr Marks’ point that, following these publicised proceedings, any sale of the business would have to be delayed for a matter of years if the best market price was to be obtained. It is not therefore reasonable to condemn the husband to being solely responsible for the costs of extracting from the business in fairly short order the value of the wife’s share.

43. In those circumstances, I am satisfied that it is reasonable, before quantifying the matrimonial value of the business, to deduct from the overall value the net cost that will be required to extract that sum by way of dividend from the business to enable the payments necessary to be made to the wife – offsetting the potential tax on the dividend required against corresponding reductions in sale costs and CGT which would accompany the reduced value.

44. Considering how to reflect risk in company valuations, Peel J has recently said, in *HO v TL* [2023] EWFC 215:

‘[27] …when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

i) The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common
where a party has a minority holding, or otherwise does not have overall control,

and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an "accountancy discount".

ii) To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance….
…It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be a termed a "court discount". Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets.

iii) The court might, in the right case, take both the valuation, which includes an accountancy discount, and apply a further court discount i.e. an amalgam of (i) and (ii). Moylan LJ in *Martin*… at para 94 considered that this would not be double counting: "...this is not...to take realisation difficulties into account twice"…

45. Mr Marks here seeks to reduce the value of the wife's entitlement by a further 10% (from 50% down to 40%) on account of this further discount effectively on account of illiquidity and risk – essentially emphasising the usual circumstance that cash is more valuable than a shareholding. Mr Todd says that no such discount is applicable here, given how recently the husband was proposing to give the wife shares and then to sell the company. Further, as set out above, the valuation here is largely agreed and the company saleable. Those points must make a difference, but the question for my judgment is whether they are enough to completely neutralise the volatility and uncertainty inherent in the husband's retaining the business, and the fact that he will have further work to do if he is at some future point, even if relatively soon, to realise his value. I am clear that the 10% discount that Mr Marks seeks is too much in any circumstances, especially given that it has been the husband's choice to retain the business, and that in any event he is not proposing to pay the wife out immediately, but rather over a period of between two and three years.

46. On balance, I am not persuaded that this is the 'right case' to apply a court discount to the wife's share, as this is not a case where the business value is seriously in dispute, or where there is no prospect of any immediate liquidity event. I accept that the business comprises the overwhelming majority of the parties' asset base. However, the husband himself has only recently indicated that he is no longer willing to sell the business, and has made a conscious choice to continue with it, he says because he no longer trusts the

wife. He is quite entitled to do that, and I will not order any sale if the order I make is complied with. But this is not a truly illiquid and far from marketable concern, rather the opposite. Aside from the implementation costs already taken into account, and the removal from division of the non-matrimonial element of the value, I am not satisfied that a further discounting of the wife's share would be fair to her in these circumstances. I consider that the wife should receive 50% of the marital element of the value in the businesses, and not less.

47. In the absence of any further court discount, it is however reasonable to permit the husband to defer payment of the full sum into three tranches as Mr Marks proposes, on the basis that the second and third tranches will bear compound interest at 4%. The first payment should be made within four months, by 30 April 2025, and the two further amounts annually thereafter.

48. Outcome. Applying all of the above, and adopting the methodology proposed by Mr Marks and Ms McGuigan, but using my figures and proportions as explained above, the relevant calculations are as follow:

    a. Adding £4.5m to PWC's gross value for the business of £160.2m produces £164.7m, or £122m net after costs of sale and CGT.
    b. There is a further £9.3m to be deducted for the amount by which the dividends required will exceed the corresponding reduction in costs and CGT – leaving £112.8m (rounded).
    c. Of that, the matrimonial element is £83.6m (74.2%).
    d. The wife's share without discount for cash is therefore £41.81m., which is evidently more than sufficient to meet her needs on any view.
    e. If paid in 3 tranches these would be in the sums (including interest) of £13.94m, £14.49m and £15.08m, totalling £43.51m.

49. Of the totality of the current assets, which I take to be £129.65m, including those outside the business and the excess donation, £9.3m have been deducted as the costs of implementation. Of the balance of £120.2m, £29.15m comprises the non-matrimonial element of the business, leaving £91.2m to be divided. Of this the wife will have a total of £45.64m, or 50.04% of what is matrimonial, including the value of the non-business assets she is retaining. This equates to 37.9% of the total asset base after deducting the implementation costs referred to above. In all of the circumstances, and after considering

all of the factors in s.25(2) of the Matrimonial Causes Act 1973, I am satisfied that this is an appropriate outcome for these parties.