IN THE CENTRAL FAMILY COURT Case Number ZZ20D02734

B E T W E E N:

P Applicant

- and -

Q Respondent

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.

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.

The wife was represented by Mr Ken Collins (Counsel, acting on a Direct Access basis).

The husband was represented by Mr Simon Sugar (Counsel, instructed by OGR Stock Denton, Solicitors).

Judgment of His Honour Judge Edward Hess dated 10th February 2022

1. This case concerns the financial remedies proceedings arising out of the divorce between P (to whom I shall refer as "the wife") and Q (to whom I shall refer as "the husband").

2. The case proceeded to a final hearing over four days on 7th, 8th, 9th and 10th February 2022.

3. Both parties appeared before me by Counsel: Mr Ken Collins for the wife (acting on a Direct Access basis, though the wife instructed Burgess Mee Family Law, Solicitors, for a portion of the proceedings) and Mr Simon Sugar for the husband (instructed by OGR Stock Denton, Solicitors). I am grateful to both Counsel for the helpful and clear way they have respectively conducted their cases – both parties have been represented before me at a first class level; but it has, of course, come at a cost. The wife has incurred a total of £169,604 in legal costs and the husband a total of £87,775.

4. The court was presented with two electronic bundles running to a combined total of more than 600 pages and a number of other documents have been exchanged during the final hearing. I have considered all the documents presented to me, in particular I have considered:-

    (i) A collection of applications and court orders.

    (ii) Material from the wife including her Form E dated 22nd December 2020, her answers to questionnaire dated 15th February 2021, her replies to a schedule of deficiencies dated 9th April 2021 and her narrative statement dated 22nd December 2021.

    (iii) Material from the husband including his Form E dated 23rd December 2020, his answers to questionnaire dated 2nd February 2021, his replies to a schedule of deficiencies dated 8th April 2021 and his narrative statement dated 23rd December 2021.

    (iv) A statement from the husband's mother, R, dated 22nd July 2021.

    (v) A letter in German from the wife's father, S, dated October 2004, for which an English translation has been agreed by both parties.

    (vi) Exchanges of material on possible jobs for the wife, housing need and mortgage capacity.

    (vii) Material from various SJEs on tax issues: from Germany, Mr Lohr and Ms Laura Halpaus of AHW and, from England, Mr Mark Levitt and Mr Aarti Patel of Blick Rothenberg.

    (viii) Properly completed ES1 and ES2 documents.

    (ix) Selected correspondence and disclosure material.

5. I have also heard oral evidence from the wife, the husband and from the husband's mother, all subjected to appropriate cross-examination.

6. I have also had the benefit of full submissions from each counsel in their respective opening notes and their closing oral submissions.

7. The history of the marriage is as follows:-

(i) The wife is aged 48. She is German by origin, though is bilingual in German and English.

(ii) The husband is aged 45. He is English by origin, though is also bilingual in German and English.

(iii) They met as students and started a relationship of cohabitation in December 2005 and married in August 2006.

(iv) The marriage produced two children:-

(a) T is aged 11; and

(b) U is aged 10.

(v) The parties purchased a family home in London together in joint names with a joint mortgage in 2010 and lived together there with the children. My overall impression is that in the children's early years the wife was their primary carer and the husband was the primary breadwinner, working in the energy business, though it is clear that the wife also is an impressive business performer.

(vi) In 2016 the family made two very important decisions:-

(a) First, the entire family moved to Germany. The family home in London was rented out and the parties jointly rented accommodation in Germany, which became their new family home. As a result of that move the children have adapted to life in Germany and attend school there and there is a German court order dated October 2021 in place which secures their childhood primary home as being in Germany (I assume they are also bilingual in German and English).

(b) Secondly, the parties jointly set up and developed an energy business of their own, known as 'X GmbH'. This was a company based in Germany. This was very successful and a large numbers of customers were recruited and in September 2019 the business was sold to a larger energy company, Y Ltd, their business effectively becoming the German arm of Y Ltd. Both the wife and the husband acquired valuable shares in Y Ltd as part of the buyout deal and both were employed by Y Ltd, the husband as CEO of the German business (based in Germany) and the wife as Chief Product Officer (which caused her to have to spend time in both Germany and England).

(vii) Unfortunately, at almost exactly the same time as the business takeover in 2019, the marriage broke down and the parties separated. The breakdown has clearly left its scars, but issues of cause and blame are not relevant to my task and I do not propose to comment on them.

(viii) Initially the parties were able to agree an arrangement whereby the children remained in the family home in Germany and the parties came and went respectively by agreement so there was always one parent present. The attractiveness of this arrangement to the husband did not survive its reality for very long, however, and the arrival of Covid in March 2020 made it much more difficult for the wife to travel between England and Germany and the arrangement fell into desuetude.

(ix) A further complication has been that the wife has (since October 2021) ceased to be employed by Y Ltd and is currently not in paid work, but has instead enrolled on an MSc Course at the LSE in London whilst seeking other employment. Although the wife is suspicious that the husband deliberately caused her to lose her employment with Y Ltd, he vehemently denies this fact and the issue has not been pursued by the wife before me. Nonetheless, it is relevant for me to note that the wife is currently without paid employment.

(x) Accordingly, the situation has developed, more or less by default, such that the husband lives in the rented family home in Germany and the wife lives in the family home in London. The effect of this is that the husband has become the primary carer of the children, an outcome which is clearly painful to the wife. Nonetheless, this has not deterred the wife from wishing to base herself (home-wise and job-wise) in England and she wishes to continue residing in the family home in London and to have a job primarily based in London, but to visit the children in Germany as often as she is able. The husband wishes to purchase a property in Germany as and when he can afford to do so.

(xi) Under German child support law there is a formula for calculating what level of child support the wife should pay the husband (as a proportion of her income) and I am not being asked to make any orders in relation to that. Plainly, the husband has some costs associated with being the children's primary carer, including the employment of an au pair.

(xii) Divorce proceedings were commenced on 6th March 2020. Decree Nisi was ordered on 6th October 2020. Decree Absolute awaits the outcome of the financial order proceedings and is not, in itself, controversial.

8. The financial remedies proceedings chronology is as follows:-

(i) The wife issued Form A on 1st October 2020.

(ii) Forms E were exchanged in December 2020.

(iii) A First Appointment was heard by Recorder Campbell QC on 6th January 2021.

(iv) Questionnaires were answered in February 2021 with further responses in April 2021.

(v) A private FDR hearing took place on 22nd June 2021 before Mr Alexander Chandler; but sadly no settlement was reached.

(vi) A post-pFDR directions hearing took place before DDJ Smith on 28th June 2021.

(vii) Narrative statements were exchanged in December 2021.

(viii) A final hearing has taken place before me on 7th, 8th, 9th and 10th February 2022.

9. In dealing with the claim I must, of course, consider the factors set out in **Section 25 and Section 25A Matrimonial Causes Act 1973** together with any relevant case law.

10. Section 25Matrimonial Causes Act 1973 reads as follows:-

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A or 24B above in relation to a party to the marriage, the court shall in particular have regard to the following matters:-

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
(c) the standard of living enjoyed by the family before the breakdown of the marriage;
(d) the age of each party to the marriage and the duration of the

marriage;

(e) any physical or mental disability of either of the parties to the marriage;

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

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

11. Section 25A Matrimonial Causes Act 1973 reads as follows:-

> (1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(*a*), (*b*) or (*c*), 24 or 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

12. Accordingly, I bear in mind that I must give first consideration to the welfare while a minor of any child of the family who has not attained the age of eighteen. In this case both children of the family are under 18. It is therefore necessary for me to consider how their respective needs and interests will affect this case.

13. In relation to the "**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**" many of the figures are not controversial and I do not need to deal with them in detail, but I have a number of important disputed issues to determine, which I do as follows.

14. I need first to deal with the current net value of the shares respectively held in Y Ltd. The following picture has emerged:-

(i) The husband currently holds 143,190 shares in Y Ltd.

(ii) The wife currently holds 137,610 shares in Y Ltd.

(iii) It has been agreed for the purposes of this hearing that the shares are each currently worth £19.59.

(iv) The husband's current shareholding is therefore worth a gross total of 143,190 x £19.59 = £2,805,092.

(v) The wife's current shareholding is therefore worth a gross total of 137,610 x £19.59 = £2,695,780.

(vi) Although there has been some argument about this, I think it was common ground by the end of the argument, and if it was not then it is the view I take, that to ascertain a true current net value of the shares I need to deduct the tax liability which would arise if all the shares were disposed of now. This exercise has involved some complications arising as a result of the different tax regimes under which the parties are operating and it has created some differences of opinion, but I set out my determinations below.

(vii) For this exercise I have decided to use a conversion rate of €1 = £0.84 or £1 = €1.19, this being the conversion rate at the moment that I am writing this judgment.

(viii) Having looked through the expert evidence on the tax which would be incurred on a disposal now of all the shares I propose to adopt the estimated figures included on page 432 of the main bundle (which is the last word on the subject from Mr Patel in his email of 31st January 2022):-

(a) The husband's tax liability to the German tax authorities would be €904,817, which I convert to £760,046, using the exchange rate above.

(b) The wife's tax liability to a combination of the German and UK tax authorities would be €50,642 plus €44,684 plus £516,663, which I convert to £596,737, using the exchange rate above.

(ix) Accordingly, I propose to insert into my schedule for the husband's current shareholding a net total of £2,805,092 minus £760,046 = £2,045,046.

(x) Accordingly, I propose to insert into my schedule for the wife's current shareholding a net total of £2,695,780 minus £596,737 = £2,099,043.

15. The wife has sought to persuade me that I should disregard the £30,000 which she still has which came as a tax free lump sum on the cessation of her employment with Y Ltd. I note its source, and I note that she plans to use it as income in the months immediately ahead, but the money exists and I do not think it would be correct to exclude it from the schedule.

16. It has been common ground that the wife owns shareholdings in two companies and that these are worth a total of £57,939 and I include this figure on the schedule. The wife has had a belief, and has asserted, that the husband also had some other shares – three companies were mentioned as possibilities – but the wife has not really pursued these assertions and has produced little or no evidence to support them and, having heard the husband's response, I have not been persuaded that such shares exist and accordingly I shall enter a zero figure on the schedule for him.

17. The asset schedule as originally formulated sought to include quite a number of chattels at a purported valuation figure. I expressed the view, and I think both sides accepted it, that the way to deal with these was (the motor cars aside) to divide them in specie on a broadly equal basis. I propose to deal with the case on the basis that this provides the way forward and I have invited the parties to seek to reach an agreement on these matters while I am writing my judgment.

18. It has been common ground that the husband owns and drives a Tesla motor car (and I accept his figure of £20,450 as being its current sale value) and that he has placed deposits for a new Arial motor car (a sort of mini road licensed racing car) of £34,000 and for a new Tesla of £1,720. The wife has no motor car at all. The husband accepts that I should include the deposits in the asset schedule, but says it would be unfair to include the Tesla motor car. I disagree. It is a valuable asset and the wife has no equivalent and I shall accordingly include it in the asset schedule.

19. I now turn to an issue which has created a good deal of argument and ill feeling between the parties: the extent to which assets affected by the respective transactions between each party and members of their own family should be included on the asset schedule. The following picture has emerged:-

    (i) As originally formulated, the wife's case asserted that the husband had given his sister £25,000 to which she was not entitled and that this money should be added back into the asset schedule. Having heard the husband's explanation about this in oral evidence the wife withdrew this assertion and I am satisfied this was the correct thing to do.

    (ii) The wife also asserted, however, that the husband had done something similar in relation to his father. Again, I heard the husband's explanation in oral evidence. The wife did not accept it, but I found it to be persuasive and the wife has not established to my satisfaction that the husband's father is holding money for him and I reject the wife's claim in this regard.

(iii) A third claim by the wife, this one relating to the husband's mother, requires rather more detailed consideration. The facts (as I find them to be, on a balance of probabilities) are these. The husband's mother, R, is an educated lady (a graduate of Cambridge University) of some wealth, having (as she told me) sold her business for £2,000,000 in 2007. She is also a pleasant lady with a generous heart who has been happy to use her wealth to help those whom she loves, including her three children. In 2010 she generously advanced £150,000 to each of her three children to assist them with their respective housing costs. No documentation was drawn up contemporaneously or later to record the terms of the advance, and I have not been told of any tax planning advice having been given at any time which would give it context. No demand was ever made for repayment of these sums. Nor was there ever any discussion about the circumstances in which repayment would or might be expected, although I was told that one of the daughters had in fact returned some of the money (£30,000 to £40,000) to her mother on a voluntary basis. In her written statement of 22nd December 2021 the husband's mother wrote:-

"The agreement with all three of my children was that these were loans within the family, to facilitate their housing improvements, and on the understanding that this is my money that I choose to use to fulfil the needs of individual family members as they arise. The bottom line is that when I am no longer able to look after myself (I am now 76) they would repay the money in a reciprocal, supportive, manner."

In her oral evidence before me she expanded on this to say that she could not envisage any circumstances in which she would pursue the loan debts due from her children to a court by way of litigation and, if they remained unpaid, she would simply rearrange her will to reflect that any child who had not made any repayment had had the benefit of the unredeemed loan.

(iv) In the context of the negotiations between the husband and the wife about money it had, at least as early as April 2020, become an issue as what was the status of the £150,000 advanced by R (his mother). On 9th April 2020 the husband (without the benefit of legal advice) wrote an email to the wife saying:-

"I fail to see how you are being taken advantage of by me offering to split all of our joint assets 50/50 with you, after paying…my mother's down payment on my inheritance – which she brought forward explicitly so that we could raise a family in a house we owned rather than renting".

(v) In June 2020 the husband, without any demand from his mother, and without reference to the wife, simply paid to his mother the sum of £150,000, asserting it to be the repayment of the loan. He argues that this money has now gone and should not appear on the asset schedule. The wife argues that this payment was a cynical manipulative device to remove

£150,000 from the asset schedule so that it did not have to be divided 50:50 with the wife on sharing principles.

(vi) In October 2004, before the parties had even met, the wife received €30,000 from her father, S, to enable her to fund a course of MBA study at the European School of Management in Paris. I have seen a document, which I accept is contemporaneous, and which records the arrangement. It was an "*interest free loan*" for which "*a date for repayment has not been set*" and the arrangement includes the term that "*as long as the father does not demand any extraordinary urgent repayment, the daughter will repay the loan back at her own discretion*". The years passed and the wife made no repayment and no demand was ever made by her father. The existence of this potential liability is not mentioned in the wife's Form E of December 2020, nor in her narrative statement of December 2021; and appears for the first time as an issue in the case as recently as the letter dated 12th January 2022. The wife told me she had completely forgotten about this liability until going over old papers and talking to her father in the last few weeks. I have not seen any demand for payment by the wife's father nor has he appeared at court or written demanding that the liability be recognised. The wife told me that she didn't expect her father to pursue the debt, but felt that he could and that she had raised this issue in view of the points taken by the husband in relation to his transaction with his mother.

(vii) These transactions – the advance of money to the husband and the wife by their respective parents – seem to me to be really quite similar in their circumstances and both raise some questions of law which are not uncommon in financial remedies cases.

(viii) The first question is whether these advances should be regarded (in strict legal terms) as gifts or loans. As a matter of general principle, for an advance of money to be a gift there must be evidence of an intention to give – the *animus donandi*. In neither instance in this case has either party produced persuasive evidence of such intention in the respective advancing parent and I am inclined to accept what the husband's mother told me and what is contained in the 2004 document. On the face of it, both these transactions are loans which could, in theory, be enforced.

(ix) In the family court, however, that is not the end of the matter because the inclusion or exclusion of a technically enforceable debt in an asset schedule can depend on its softness/hardness. This is perhaps an elusive topic to nail down, but it falls for determination in the present case as in many others.

(x) I have looked at a number of authorities which deal wholly or partly with this point and I include the following in that category: *M v B* [1998] 1 FLR 53; *W v W* [2012] EWHC 2469; *Hamilton v Hamilton* [2013] EWCA Civ 13; *B v B* [2012] 2 FLR 22; *Baines v Hedger* [2008] EWHC 1587; and *NR v AB* [2016] EWHC 277. I have also looked at an article by Alexander Chandler (as it happens the pFDR tribunal in this case) on the subject: *Family Loans an intervener claims – taking the bank of mum and dad to court* [2015] Fam Law 1505. I derive the following summary of principles from this reading:-

(a) Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges' computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.

(b) There is not in the authorities any hard or fast test as to when an obligation or loan will fall into one category or another, and the cases reveal a wide variety of circumstances which cause a particular obligation or loan to fall on one side or other of the line.

(c) A common feature of these cases is that the analysis targets whether or not it is likely in reality that the obligation will be enforced.

(d) Features which have fallen for consideration to take the case on one side of the line or another include the following and I make it clear that this is not intended to be an exhaustive list.

(e) Factors which on their own or in combination point the judge towards the conclusion that an obligation is in the category of a hard obligation include (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly.

(f) Factors which may on their own or in combination point the judge towards the conclusion that an obligation is in the category of soft include: (1) it is an obligation to a friend or

family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations.

(g) It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other side of the line, and it is for the judge to determine, looking at all of these factors, and maybe other matters, what the appropriate determinations to make in a particular case in the promotion of a fair outcome.

(xi) Applying these principles to the present case I have reached the following conclusions:-

(a) The debt owed by the wife to her father is very much at the soft end of the scale. It seems most unlikely that, these proceedings apart, the debt would ever have surfaced. It still seems most unlikely that the wife will be required to make any repayment and the fact that she had forgotten about it until January 2022 supports these conclusions, notwithstanding that there was a contemporaneous loan document.

(b) The debt owed by the husband to his mother, for me, falls very much into the same category - very much at the soft end of the scale. As the husband's mother told me herself, she was unlikely ever to demand repayment of the loan and would certainly not have contemplated going to court for its enforcement. I am satisfied that both the husband and his mother were quite content, until the intervention of the argument on the divorce, to leave things be without any repayment. They both were content to regard it as an advance on the husband's inheritance.

(c) Having heard and read the evidence I am satisfied on a balance of probabilities that the husband's primary motivation in making the payment of £150,000 to his mother in June 2020

was because he was concerned that the wife would share half of it if he did not do this. I do not accept that he had any significant sense of an obligation to make the payment at this point, either legally or morally.

(d) I do not think it would be right for me to raise the husband's debt to his mother to hard debt status simply because he has repaid it. To do that would be to reward and encourage manipulative behaviour and would, to my mind, be unfair.

(e) My decision is that both of these debts were very soft and, for me to do fairness between the parties, the consequence of that is that I should not include the wife's debt to her father on the asset schedule, but should re-credit the £150,000 to the husband's side of the schedule.

20. The wife has sought to persuade me that the tax credits that she has received from the German tax authorities (now put at £36,596 – on the first day of the hearing it was put at £68,063) as a result of her studying at the LSE may be recouped and should therefore be regarded as a debt in the asset schedule. I have seen evidence that the tax credits were obtained, but I have seen no evidence at all that they will or even might be recouped by the German tax authorities. The wife has not established the existence of such a debt to my satisfaction and I therefore do not propose to include this on my schedule.

21. Having made these determinations I am now able to set out my assessment of the assets and debts for distribution in this case.

22. The situation can be summarised as follows:-

REALISABLE ASSETS/DEBTS

Joint

Property in London [1]	871,992
TOTAL	**871,992**

Wife

Redundancy monies from Y Ltd	30,000
Bank accounts in sole name	150,828
Net value of shares held in Y Ltd (as above)	2,099,043
Other shares	57,939
German Life policy	2,260
Deposit on German rental property	6,651
Amex debt	-882
LSE tax relief recoupment	0
Debt to her father	0
Outstanding Legal Costs [2]	-8,782
TOTAL	**2,337,057**

Husband

Bank accounts in sole name	158,136
Net value of shares held in Y Ltd (as above)	2,045,046
Other shares	0
Tesla motor car	20,450
Ariel Motor car deposit	34,000
Tesla deposit	1,720
Monies transferred to his mother	150,000
Amex debt	-1,092
Outstanding Legal Costs [3]	-5,537
TOTAL	**2,402,723**

PENSION ASSETS

Wife

Smart pension CE	5,999
TOTAL	**5,999**

Husband

Legal & General pension CE	369,373
TOTAL	**369,373**

[1] This figure is based on a value of £1,250,000 less notional sale costs at 3% less the outstanding mortgage of £340,508 = £871,992

[2] This figure is based on a total of incurred fees of £169,604 less a total of fees paid of £160,822 = £8,782

[3] This figure is based on a total of incurred fees of £87,775 less a total of fees paid of £82,238 = £5,537

23. In relation to "**the income, earning capacity…which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire**" and "**whether it would be appropriate to require periodical payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party**" the following picture emerged:-

    (i) The husband is working as the CEO for Y GmbH and is earning €130,000 per annum gross or €74,000 per annum net = £62,160 per annum net or £5,180 per month net and expects to continue in this role for the foreseeable future.

    (ii) The husband also receives 'Kindergeld', the German equivalent of child benefit, of €5,256 per annum = £4,415 per annum or £368 per month.

    (iii) As and when the wife is earning an income she will be obliged to pay child support to the husband which will be calculated in accordance with a statutory formula which operates in Germany.

    (iv) The wife was working at a similar level of seniority in Y Ltd to that of the husband at a similar salary, but this employment was terminated with effect from 31st October 2021, although the notice of termination was sent in April 2021 and, the wife's consequent unfair dismissal claim was compromise by an agreement made in July 2021.

    (v) The wife, sensing a period of necessary refocusing, took the decision to enroll for an MSc at the LSE and she is currently engaged, and wishes to complete, that course. She has simultaneously (she told me in her oral evidence) been making job applications and, although no job offers have yet been secured, she got "*pretty close to one*" and is reasonably confident of securing one at c £90,000 to £110,000 per annum gross and believes that there are more jobs suiting her skills in England than in Germany so that her job, and thus her home, would primarily be in London in England. She would ideally like to focus on her MSc course in the immediate future and look to start work in paid employment in about June/July 2022. One of the things she would want to establish in negotiations with a new employer is the ability to '*work from home'* for sufficient periods to allow her to be in Germany with her children to join in their care for a reasonable proportion of her time and she would need some sort of accommodation in Germany for that purpose.

    (vi) I found myself impressed with the wife's tenacity, commitment to hard work, optimism for the future and clarity of purpose and I am satisfied that her plan for the future is a well thought through and reasonable one in her circumstances and was explained honestly to me and I am content to accept it.

(vii) It follows that this is not a case in which issues of spousal maintenance arise, other than in the context of a fairly short period while the wife reestablishes herself. My inclination is to take this issue into account in alighting upon an overall fair distribution of capital rather than making any spousal periodical payments order as such.

24. In relation to the "**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**" I have the following observations:-

(i) Both parties have the usual needs in terms of housing and day to day income and pension provision. There is enough capital in this case, and a high enough level of earnings and earning capacity, for me not to have to analyse needs issues in great detail.

(ii) I will, of course, note and factor into my analysis the fact that the husband has some additional needs arising from his primary carer status of the children, but to an extent these will be ameliorated by the payment of child support per the German statutory formula as well as Kindergeld.

(iii) I will, of course, note and factor into my analysis the fact that the wife has some additional needs arising from her decision to live in England, but regularly visit the children in Germany, albeit that this arises out of her own decision and choice to base herself in England.

25. I note in passing that I have in my mind the **standard of living** that the parties jointly enjoyed during the marriage, the **ages of the parties**, the **duration of the marriage,** the respective **contributions** of the parties and the **loss of potential pension benefits** arising from the divorce, though none of these play a very large part in the overall analysis. For the reasons discussed above, I have included in my schedule the £150,000 advanced by the husband's mother in 2010, but since this money was used to purchase and improve a jointly owned family home in which the family lived for some years, and was thoroughly mingled into the family's overall pot, I do not regard this contribution as being of great significance in this case.

26. Happily, neither **conduct** nor **disability** play a role in this case.

27. I want to say something at this stage about the sharing principle. As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage.

28. In the words of Lord Nicholls in *White v White* [2000] UKHL 54:-

"…a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

and in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24:-

"This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals…The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

29. In the words of Mostyn J in JL v SL [2015] EWHC 360:-

"Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination."

30. I propose to bear in mind all of the above principles in analysing what orders the court should now make to promote a fair outcome in this case.

31. Accordingly, I now turn to the parties' respective open positions.

32. The **husband's open offer** is that:-

(i) The family home in London should be transferred to the wife.

(ii) The wife shall commit to obtaining the release of the husband's name from the joint mortgage on the London property, failing which the property should be sold and 100% of the net proceeds paid to the wife.

(iii) The husband shall take over the benefits and obligations of the German property rental and pay £6,651 to the wife in compensation for the loss of the right to the deposit.

(iv) The wife shall transfer 55,000 of her Y Ltd shares to the husband.

(v) There will be a 50% pension sharing order against the husband's Legal & General pension.

(vi) The husband will pay £24,000 to the wife a lump sum representing capitalised spousal periodical payment, otherwise a clean break.

(vii) There shall be no order as to costs, save that the wife shall commit to paying her half share of the SJE supplemental report, which she has not yet paid.

33. On the basis of my asset schedule above this offer would leave the capital position as follows:-

	Wife	**Husband**
Own realisable assets	2,337,057	2,402,723
London property transferred to W	871,992	0
German Rental deposit to H	-6,651	6,651
W to transfer 55,000 shares to H	-1,077,450	1,077,450
Lump sum from H to W	24,000	-24,000
TOTAL REALISABLE ASSETS	**2,148,948**	**3,462,824**
% REALISABLE ASSETS	**38.2%**	**61.8%**
Own pension assets	5,999	369,373
50% PSO of H's pension	184,687	-184,687
TOTAL OVERALL ASSETS	**2,339,634**	**3,647,510**
% OVERALL ASSETS	**39.1%**	**60.9%**

34. It must be noted that it is common ground that the transfer of Y Ltd shares from the wife to the husband would trigger an immediate liability against her for tax. This liability does not show up separately in the above table because the tax liability (albeit latent) is already within the figures, but both counsel have invited me to proceed on the basis that a transfer between the parties would turn the latent liability into an immediate liability at the rate of £4.34 per share. Thus, a transfer of 55,000 shares would turn a latent liability of £238,700 into an immediate one.

35. The **wife's open offer** is that:-

(i) The family home in London should be transferred to the wife.

(ii) The wife shall commit to using her best endeavours to obtaining the release of the husband's name from the joint mortgage on the London property, but her failure to achieve this outcome, provided she has used her best endeavours, shall not trigger a sale.

(iii) The husband shall take over the benefits and obligations of the German property rental and pay £6,651 to the wife in compensation for the loss of the right to the deposit.

(iv) The wife shall retain all her Y Ltd shares.

(v) There will be a 50% pension sharing order against the husband's Legal & General pension.

(vi) The husband will pay £48,000 to the wife a lump sum representing capitalised spousal periodical payments, otherwise a clean break.

(vii) There shall be no order as to costs, save that the wife shall commit to paying her half share of the SJE supplemental report, which she has not yet paid.

36. On the basis of my asset schedule above this offer would leave the capital position as follows:-

	Wife	**Husband**
Own realisable assets	2,337,057	2,402,723
London property transferred to W	871,992	0
German Rental deposit to H	-6,651	6,651
Lump sum from H to W	48,000	-48,000
TOTAL REALISABLE ASSETS	**3,250,398**	**2,361,374**
% REALISABLE ASSETS	**57.9%**	**42.1%**
Own pension assets	5,999	369,373
50% PSO of H's pension	184,687	-184,687
TOTAL OVERALL ASSETS	**3,441,084**	**2,546,060**
% OVERALL ASSETS	**57.5%**	**42.5%**

37. I note in passing that since the wife is not proposing any transfer of Y Ltd shares from the wife to the husband, the tax liabilities remain latent.

38. It is immediately apparent that the parties' respective positions both depart from equality quite significantly in their own direction and it is necessary for me to analyse the merits of the respective reasons advanced as to why this should be the case.

39. On the wife's side she points to the facts that she is currently unemployed and that she will have the additional costs of travelling to Germany to be with the children. The husband's position is significantly more secure, she argues. I think there is something

in both of these points, but given what I have found about the wife's earning capacity and future earnings I am not sure that this argument could justify a departure from equality at anything like the asserted level.

40. On the husband's side he points to the fact that the proposed division of assets would leave him with an asset pool very much dominated by shares in Y Ltd (in contrast to the wife's receipt of the secure bricks and mortar of the London family home) and that this leaves him at substantial exposure to risk of the potential vagaries of the international energy market. As I write this judgment Russian troops are massed on the border of Ukraine and, if that situation got out of hand (as it might), the world supply of natural gas would or could be severely interrupted and the value of shares in Y Ltd (which relies on purchasing gas at reasonable wholesale prices) could be dramatically adversely affected. Mr Sugar's erudite submissions on this subject have properly drawn my attention to *Wells v Wells* [2002] EWCA Civ 476 and, in particular, to Moylan LJ's judgment in *Martin v Martin* [2018] EWCA Civ 2866, which included the following comments:-

"81. Do different assets have different levels of risk? Is Mr Pointer right when he submits that cash and shares in a private company have the same level of risk? I propose first to consider the matter from a general perspective before specifically addressing the issue of valuations, in particular of shares in a private company, and their role in the determination of financial remedy claims.

82. The first Court of Appeal decision in the field of financial remedy which is generally recognised as drawing direct attention to this issue is Wells v Wells. As the headnote states, the Court of Appeal decided that:

> *"The judge … had erred in awarding the wife the bulk of those assets which were readily saleable at stable prices, leaving the husband with all those assets which were substantially more illiquid and risk laden."*

In the judgment of the court, given by Thorpe LJ, it was said at [24]:

> *"Having read the skeleton arguments and the judgment we were at once struck by the security of the result that the wife had achieved in contrast to the risks confronting the husband's economy".*

Later in the same paragraph, Thorpe LJ referred to how sharing could be achieved in a clean break case:

> *"In that situation … sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk laden assets."*

Later in the judgment the question was asked, at [26]: "is the judge's allocation of the risk-free realisable assets fair?". The answer was that it was not.

83. I appreciate, of course, that the context of Thorpe LJ's observations in that case were very different from this case. The company in that case was in a "precarious

state" and the trial judge had been unable to place any value on the shares: at [8]]. However, the idea that, "it is important to compare like with like", as Lord Nicholls said in White v White [2001] 1 AC p. 612 G, could not be described as unexpected. Further, Thorpe LJ's general guidance has been followed in many subsequent decisions: see, for example, Baron J in P v P (Financial Relief: Illiquid Assets) [2005] 1 FLR 548 and Bodey J in Chai v Peng & Ors (Financial Remedies) [2018] 1 FLR 248. Indeed, Thorpe LJ himself, in Myerson v Myerson (No 2) [2009] 2 FLR 147, at [19], referred to Wells as being "the case that first draws attention to the reality that fairness can be jeopardised by a judicial order allocating all the shares to the husband and all the cash to the wife".

84. More recently in Versteegh v Versteegh, Lewison LJ said, at [185]:

> *"... 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".*

85. Accordingly, even if we were not bound by precedent, I consider (a) that, contrary to Mr Pointer's general submission, assets have different levels of risk; and (b) that, as a matter of principle, the court must take this into account when applying the sharing principle.

86. I would add, for the avoidance of doubt, that this is not confined to the issue of risk but extends to the quality of the asset so that liquidity and illiquidity can equally be relevant factors in their own right. An example of this, although much less significant now with pension sharing orders, is pension funds. In Maskell v Maskell [2003] 1 FLR 1138, Thorpe LJ allowed an appeal because the judge had "failed to compare like with like" when equating "present capital" with a pension fund, at [6]. In a later case, Martin-Dye v Martin-Dye [2006] 2 FLR 901, he made a similar point, at [48]: "there are obvious distinctions between a technical value ascribed to a pension in payment and a market value ascribed to a realisable asset such as a freehold, a portfolio of shares or a work of art".

....

92. Given the proximity of the decision in Versteegh v Versteegh, and also, as it happens, given that my views have not changed from what I said in H v H, I can see no reason why we should depart from the conclusions and guidance set out in the former, namely that valuations of private companies can be fragile and need to be treated with caution. Further, it accords with long-established guidance and, I would add, financial reality.

93. How is this to be applied in practice? As referred to by both King LJ and Lewison LJ, the broad choices are (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie: at [134] and [195]. However, to repeat, 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."

41. I very much bear in mind, and propose to follow, all of the points made by Moylan LJ above and note that the husband's wealth is going to be heavily reliant on the share price of Y Ltd. I also note that Y Ltd shares are not readily tradeable and can only be sold during a specific 'liquidity event', three of which have occurred since 2019, but there is no guarantee that any more will occur in the foreseeable future.

42. It is also appropriate, however, to note the following points on the specific facts of this case in the context of a broad evaluative exercise:-

    (i) The wife's wealth will also (albeit to a slightly lesser extent than the husband) continue to be heavily reliant on the share price of Y Ltd and the lack of liquidity in sale prospects.

    (ii) It is the husband's deliberate choice not to seek a sale and equal division of the net sale proceeds of the London family home to ameliorate the problem he has. I raised this option in the course of deliberations with counsel by posing the question: *If I were against the husband on his departure from equality point would he wish to put forward a structure of order whereby the London family home was sold and the net proceeds divided*? The answer came back in the negative.

    (iii) I formed the impression that the husband took an optimistic view of the future of Y Ltd, and as CEO of the UK arm he is in a position to make a better estimate than most and enters into the position with his eyes open. Whilst the agreed share price arose by reference to the share price fixed at the time of the last liquidity event, Y Ltd has subsequent to that (according to newspaper reports anyway) enjoyed substantial foreign investment, presumably inspired by an optimistic assessment of the future. Of course, that optimism may be misplaced and the husband could turn out to be another Mr Myerson, but on the other hand, as the then Mr Mostyn QC argued in *Myerson v Myerson* [2009] EWCA Civ 282 at paragraph 17 "*what has soared may plunge and what has plunged may soar again*".

    (iv) A transfer of shares from the wife to the husband will trigger an immediate tax liability – the husband's tax liability will remain latent whilst some of the wife's tax liability will become immediately payable.

43. All in all I have reached the conclusion that the arguments for a departure of equality should be treated as broadly balancing each other out.

44. Having taken into consideration all of the above matters I take the view that a fair outcome to this case is as follows:-

(i) The family home in London should be transferred to the wife.

(ii) The wife shall commit to obtaining the release of the husband's name from the joint mortgage on the London property, failing which (within the next two years) the property should be sold and 100% of the net proceeds paid to the wife.

(iii) The husband shall use his best endeavours to take over the benefits and obligations of the German property rental and the wife shall transfer the rights in the deposit of £6,651 to the husband. The husband should in any event indemnify the wife against any liabilities arising from the rental.

(iv) The wife shall forthwith transfer 20,000 of her Y Ltd shares to the husband.

(v) There will be a 50% pension sharing order against the husband's Legal & General pension.

(vi) There will be an immediate clean break.

(vii) There shall be no order as to costs, save that the wife shall commit to paying her half share of the SJE supplemental report, which she has not yet paid.

(viii) The chattels should be divided in specie on a broadly equal basis.

45. On the basis of my asset schedule above this offer would leave the capital position as follows:-

	Wife	**Husband**
Own realisable assets	2,337,057	2,402,723
London property transferred to W	871,992	0
German Rental deposit to H	-6,651	6,651
W to transfer 20,000 shares to H	-391,800	391,800
TOTAL REALISABLE ASSETS	**2,810,598**	**2,801,174**
% REALISABLE ASSETS	**50.1%**	**49.9%**
Own pension assets	5,999	369,373
50% PSO of H's pension	184,687	-184,687
TOTAL OVERALL ASSETS	**3,001,284**	**2,985,860**
% OVERALL ASSETS	**50.1%**	**49.9%**

46. This is my decision and I invite counsel to produce a draft order which matches these conclusions.

47. This redacted and anonymised version of the judgment has been agreed by both counsel as suitable for publication.

HHJ Edward Hess
Central Family Court
10th February 2022