IN THE FAMILY COURT
SITTING AT THE CENTRAL FAMILY COURT

Neutral Citation No. [2025] EWFC 46 (B)

Case No. 1683-1305-9861-9259

14th February 2025

BEFORE RECORDER NICHOLAS ALLEN KC

BETWEEN

DF

Applicant

and

YB

Respondent

Alexis Campbell KC (instructed by Mishcon de Reya) for the applicant
Katie Cowton KC (instructed by Irwin Mitchell) for the respondent

Hearing dates: 25th – 28th November 2024

JUDGMENT

1) I am concerned with the final hearing of W's application in Form A dated 4th May 2023.

2) In this judgment I shall refer to the parties as 'W' and 'H' respectively. This is just a convenient shorthand and no disrespect is intended.

3) W was represented by Miss Alexis Campbell KC instructed by Mishcon de Reya LLP. H was represented by Miss Katie Cowton KC instructed by Irwin Mitchell LLP. I am grateful to both Miss Campbell and Miss Cowton for the quality of their written and oral advocacy. Both said everything which could reasonably have been said on behalf of their respective clients. I am also grateful to their respective solicitors for their preparation of the case.

4) In advance of the final hearing I was provided with (and read) an e-bundle running to 325 pages and detailed position statements from both counsel. I was also provided with a supplemental bundle running to 602 pages to which I was taken in evidence and submissions.

5) I heard the final hearing over four days from 25th – 28th November 2024. The original time-estimate included time for judgment consideration and delivery on the fourth day. However submissions were not made until the fourth day as a result of which I reserved judgment.

6) In this judgment I shall not refer to every argument raised by the parties in their written and oral evidence or in their counsel's submissions. It is fair to record, however, that the oral evidence in particular encompassed issues far wider than was necessary (and this was the case before the parties reached agreement on many of the issues between them). I shall not record these issues or analyse the same. I have however borne all that I read and was said to me in mind.

7) I was provided with a Chronology initially prepared by W's advisers to which H's advisers added their comments/corrections. It is clear that the Chronology had not been prepared in accordance with paragraph 21 c. of the Efficiency Statement dated 11th January 2022 which for a final hearing requires the applicant to file no later than seven days before that hearing *"a composite chronology recording in neutral terms the key dates of the parties' relationship and of the litigation and where any unagreed events are clearly denoted."* For this purpose (which also includes the preparation of the case Summary in Template ES1 and the Schedule of Assets in Template ES2) *"the parties must collaborate before the final hearing to produce these key documents. It is unacceptable for the court to be presented at the final hearing with competing asset schedules and chronologies."*

8) Although there was such collaboration in advance of the final hearing in relation to the ES1 and ES2 and by counsel during the hearing in the preparation of a composite ES2 by the start of closing submissions (for which I am extremely grateful) there appears to have been no such collaboration in relation to the composite Chronology. As Peel J observed in *GA v EL* [2024] 1 FLR 1004 at [2] breaches of the two Efficiency Statements (one for High Court allocated cases and one for cases allocated below High Court Level) are *"wholly unacceptable"*. Further, if such a document is drafted in contentious terms it risks being of limited assistance to the tribunal for whose use it is principally prepared.

Background

9) W was born in 1979 (aged 45). She is a EU national. H was born in 1977 (aged 47). He is a British/Country C national. The parties met in 2002, cohabited from Summer 2003, and married in 2006. The parties moved abroad (principally for H's then employment with RLC) in 2015 and lived between Country A and Country B. In 2019 H moved to Country C and in January 2020 to Country D. W returned to the FMH with the children so they could be schooled in England as had been agreed. H returned to England at weekends and for holidays.

10) The parties separated in 2022. It is therefore a marriage of 19 years (including six years of pre-marital cohabitation).

11) W issued an application for a divorce order in 2022. The conditional order was made in July 2023. In accordance with conventional practice it has not yet been made final.

12) The parties have two children – twins, aged 12. Both children live with W in the FMH. T1 attends XA School and T2 attends XB School. Both schools are fee-paying.

13) In 2023 H issued proceedings under the CA 1989 seeking a child arrangements order. The FHDRA was heard in January 2024 and an interim hearing took place the following month. Thereafter the parties reached agreement at the Dispute Resolution Appointment in April 2024 and a consent order was made by District Judge Bishop. The order provides that the children spend eight nights with W and six nights with H per fortnight during term-time and school holidays are to be shared equally. An ISW was instructed during the currency of the proceedings and the consent order provided for him to be engaged for a further six months to assist the parties. As I understand it these arrangements were effective until July 2024 when T1 broke her leg. Since that time she has not spent time with H.

14) W's Form A was issued 4th May 2023. The case was formally reserved to me as a 'complexity case' on 23rd June 2023 and I have been responsible for case management throughout. On 31st August 2023 I approved on paper an order which vacated the First Appointment listed on 1st September 2023 and provided for a PFDR Appointment before Geoffrey Kingscote KC on 14th November 2023. On 16th January 2024 I approved on paper an order relisting the PFDR Appointment before Mr. Kingscote KC on 25th January 2024. On 19th February 2024 I timetabled the case to final hearing. On 29th October 2024 W applied for a penal notice as H had not served his s25 statement as directed. It was served on 31st October 2024 but as I was not made aware of this I made an order in the terms sought on 4th November 2024 (amended under the slip rule on 14th November 2024). I ordered H to pay the costs of this application to be summarily assessed at the final hearing in default of agreement.

15) This case has been fought at significant financial cost to both parties. Excluding estimated implementation costs - £10,000 on H's side and £24,000 on W's side - the financial remedy proceedings have cost W £566,289 and H £378,611 – i.e. a total of £944,900. These figures include VAT which (on H's case but not W's) he will incur because he will have been UK tax resident from 6th April 2024. This is a very significant figure. It is even more so given that in her Opening Note Miss Campbell stated there was *"very little in dispute … about the principles to be applied and their application to the facts of this case"*. Miss Cowton agreed stating in her Opening Note the case *"is neither factually nor legally complex … this is a clean break case, with a broadly equal division of the assets"*.

16) In relation to the private law children proceedings W incurred costs of £220,148 and H incurred £115,703 – i.e. a total of £335,851. Again these figures include VAT (on H's figures since 6th April 2024).

17) Across both sets of proceedings the parties have therefore spent £1,280,751 (reduced by £42,363 if VAT is not payable by H). Even if the costs of implementation are not the combined £34,000 anticipated by the Forms H1, the parties will therefore have spent c. £1.3 million in legal costs by the conclusion of these proceedings.

18) The financial remedy costs (and no doubt the children costs likewise) reflect that this case has been extremely hard-fought on both sides.

19) W's costs of both sets of proceedings are materially higher than H's. It is common ground that both parties' paid and unpaid costs should be 'top-sliced' from the schedule of assets. The effect of this in a case where the net assets are to be divided equally is that in effect H will pay one-half of the difference between the two figures. Very broadly (as the precise figure depends on whether H is considered liable for VAT from 6th April 2024 on his fees) H will therefore in effect pay c. £150,000 towards W's costs.

20) In light of the above and more generally both parties reserved their position on costs until receipt of my draft judgment.

21) There have been several open offers in this case by both parties - by W on 2nd February 2024, 12th July 2024, and 18th November 2024 and by H on 9th February 2024, 13th September 2024 and 22nd November 2024.

22) It was (and is) common ground between the parties that there should be an equal division of the parties' capital assets and that such a division will meet the parties' respective capital and income needs. The disagreement has been what the capital assets should be taken to be and therefore by whom a balancing payment should be made and in what sum.

23) The last open offers made before the final hearing required (*per* W's offer of 18th November 2024) for H to pay W a lump sum of £780,000 within 28 days and (*per* H's offer of 22nd November 2024) for H to pay W a lump sum of £60,000 within 14 days. Each offer required both parties to pay £200,000 each into an education fund.

24) After the end of the court day on 27th November 2024 (i.e. the third day of the final hearing) the parties negotiated and reached agreement on many of the issues. In the interests of brevity I shall not set these out. The remaining three issues were:

a) the quantum of the lump sum to be paid by H to W to equalise the parties' net assets (which depends on a resolution of the remaining issues of computation) and the time for payment;
b) whether W should share in anything received by H for the loan made by him to Mr. NS on a *Wells*-basis or whether that should be 'added back' and factored into the lump sum; and
c) (as set out above) any subsequent costs applications.

25) Prior to her closing submissions Miss Cowton handed me a document headed *'Summary of Issues After Discussions – 27.11.24'* which listed *'Points Not Agreed'* (the three set out above) and *'Points Agreed'* (which also included and highlighted a few points not discussed and/or not resolved). Miss Campbell emphasised to me that as the document had been based on H's open proposals as drafted by his solicitors some of the exact language was not agreed. However both she and Miss Cowton expressly confirmed that the substance of the agreed points represented a *Xydhias* agreement to which both parties were bound and therefore I was free to resolve (i) the three issues that remained not agreed; and (ii) (if needed) the few points highlighted as not

discussed and/or resolved without either party being able to resile from the same.

26) I should record that at the outset of the hearing Miss Campbell sought H's removal as a trustee of four trusts settled by H in the children's names in 2018 and the appointment of a professional trustee in his place. I raised the question as to my jurisdiction in relation to the same. Miss Campbell said they could be treated as a nuptial settlement capable of variation. Miss Cowton disagreed not least because the parties had been excluded from benefiting from the trusts. Without deciding the issue I referred Miss Campbell to FPR 2010 r.9.11(1) which provides that where such an application is made "*the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any child concerned, direct that the child be separately represented on the application*" and *DR v GR (Financial Remedy: Variation of Overseas Trust)* [2013] 2 FLR 1534 in which Mostyn J stated at [34] that *"in any future case [I] would clearly state that r 9.11 must be complied with."* No such direction had been made in this case nor had it been said there was no need for one. Thereafter having taken instructions Miss Campbell confirmed that she was making no application in relation to the trusts.

27) In deciding what orders to make pursuant to ss23 and 24 I must apply the factors set out in MCA 1973 s25 (as amended). I have borne all aspects of this section in mind. The overall requirement in applying s25 is to achieve fairness (as made clear in *White v White* [2000] 2 FLR 981) with the three principles that should guide the court in trying to achieve fairness (needs, sharing, and compensation) identified in the later case of *Miller/McFarlane* [2006] 1 FLR 1186.

28) It is common ground that (i) this is a sharing case in that the division of the assets on both parties' cases will be more than sufficient to meet both parties' capital and income needs; and (ii) compensation for relationship generated disadvantage does not arise. It is also agreed that (i) both parties have the same housing needs (the parties' respective property particulars cover a range from £3m - £3.8m); and (ii) it is a 'clean break' case.

29) I should also record that this is not a case in which MCA 1973 s25(2)(g) 'conduct' is said to be a relevant consideration. Allegations of 'conduct' were not made in W's Form E at 4.4 nor did I give directions in relation thereto on 31st August 2023, 16th January 2024, or 19th February 2024. The need for any such allegations to be case managed (usually by way of some form of 'pleading' process) has been made clear in Peel J's decisions in *Tsvetkov v Khayrova* [2024] 1 FLR 937 and *N v J* [2024] EWFC 184. W's narrative statement also confirmed at paragraph 80 that she was not running a 'conduct' case. I specifically raised the same with Miss Campbell during her opening and she confirmed it was not being said by W that the issues raised by her should have any impact on the substantive outcome.

30) Notwithstanding the above there was a significant focus on H's behaviour in W's narrative statement, Miss Campbell's Opening Note, and in her cross-examination of H.

31) There is no doubt that H is guilty of having behaved poorly - and at times very poorly - during and since the parties' separation. He sent messages to W from January 2023 onwards which were highly abusive, offensive, and misogynistic both of her and her solicitors. He was asked by W's solicitors to desist from the abuse and he did not do so. Miss Cowton accepted in her written

closing submissions that these messages were *"wholly unacceptable"*, *"unpleasant"*, and *"in some respects threatening"*. She was right to do so.

32) However Peel J is clear that (i) conduct in accordance with both statute and case law is *"only to be taken into account if it is of a highly exceptional nature"* (*N v J* at [2]); and (ii) the applicant must prove *"there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required"* (*Tsvetkov v Khayrova* at [43] iii)).

33) Peel J further stated in *N v J* (i) at [37] that he *"tentatively [took] the view"* that the words of Macur LJ in *Goddard-Watts v Goddard Watts* [2023] 2 FLR 735 at [74] which may have suggested that conduct could be relevant even though there was no direct financial consequence did not represent a departure from the traditional view that an identifiable financial consequence was invariably a necessary ingredient for conduct to be reflected in the award; and (ii) at [39] (ii) that although he *"accept[ed] that the statute does not specifically refer to a financial consequence, and it is therefore wise not to rule out completely the theoretical possibility of conduct being taken into account absent such a financial impact"*, his review of the authorities suggested *"such cases will be vanishingly rare"*.

34) Taken at their highest there is no identifiable negative financial impact upon the parties which has been generated by H's poor (and at times very poor) behaviour in this case and therefore there is no causative link between his acts and any financial loss. This is not otherwise one of the potentially *"vanishingly rare"* cases to which Peel J referred. This is therefore not a case for H's behaviour to be reflected in the award.

35) Miss Cowton submitted that Miss Campbell presented the case as she did notwithstanding that she confirmed it was not a 'conduct' case as part of a strategy to make me wholly sympathetic to W and wholly adverse to H in determining the substantive financial issues. This she said was *"impermissible"*. I do not need to decide whether Miss Cowton is correct in this regard. H's conduct is not something I shall take into account in deciding the fair division of the parties' assets. Where my sympathies may or may not lie is irrelevant.

36) Although not relevant to conduct nor ultimately to any of the computation issues that I have to determine, I do wish to record however I accept as true W's answers to me at the conclusion of her evidence that H never asked for her views in advance of making an investment, that the parties rarely argued *"because I said yes to everything"*, that she did not dare after many years to ask questions and she *"did what I was told to do"*. Having heard both parties give their evidence and hence having had the opportunity to see something of their respective personalities I am wholly satisfied that this is a fair characterisation of their marriage. H is clearly the more forceful. I am fortified in this view given that when it was suggested to H by Miss Campbell that he made the decisions about money in the family he replied with a smile and self-evident pride *"Yes. And I am pretty good with my decisions"*.

37) Wholly separately, I wish to record my disquiet that H was cross-examined in relation to his Citibank portfolio documents that it transpired neither H nor his solicitors had seen within the

litigation. I make absolutely no criticism of Miss Campbell when I say this: she was under the erroneous impression they had been sent by W's solicitors to H's solicitors and would therefore have been shared with H. In fact they were still being held by W and were not handed over by her solicitors to H's solicitors until the third morning of the final hearing. This would appear to have been a *prima facie* breach of *Imerman* principles as set out by Mostyn J in *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] EWHC 1735 (Fam).

38) I remind myself that the burden of proof is on the party who makes a particular allegation/seeks a particular finding and that the standard of proof is the balance of probabilities; no more and no less.

39) In considering the parties' evidence, I have given myself a 'Lucas' direction (named after *R v Lucas* [1981] QB 720) which can be over-simplified to be that just because a person may have lied about one thing it does not automatically follow that they are lying about everything. I deliberately say 'over-simplified' because I am conscious that in *Re A, B, and C (Children)* [2022] 1 FLR 329 Macur LJ described the judge's self-direction (at [58]) as having been *"formulaic"* and *"incomplete"*, that (at [54]) such a formulation *"leaves open the question: how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact?"* and thereafter cited from the Crown Court Compendium of December 2020. I have given myself the entire self-direction as given in criminal proceedings and have read the relevant extracts from the Crown Court Compendium in full.

40) As is conventional I shall consider the issue of computation before the issue of distribution. However, in light of the *Xydhias* agreement (and in fact largely before this) issues of distribution had been largely agreed.

Computation

41) On W's behalf it was submitted that the parties' net assets were £14,738,186. H contended for a figure of £13,329,432. The differences between these figures is £1,408,754. Working from H's figures to W's figures the differences can be tabulated as follows:

	Total *per* H	**£13,329,432**
1	Discount on Citibank Private Equity/Real Estate	£723,459
2	Mr. NS loan	£394,077
3	Company Y + Director's loan	£180,196
4	H UK income tax	£76,245
5	H UK CGT on Golf Club debenture	£21,900
6	H Twickenham debenture	£8,900
7	W income tax on Jersey savings	(£3,042)
8	H legal fees (VAT – £10,000 set off for implementation)	£32,363
9	W unpaid financial legal fees (implementation)	(£24,000)
10	W children fees	(£1,343)
	Total *per* W	**£14,738,186**

42) I shall consider these issues in turn.

Discount on Citibank private equity/real estate portfolio - £723,459

43) H stated that he would probably need to liquidate some or all of the private equity elements of his Citibank holding to enable him to purchase a mortgage-free property in the UK. He stated there was not always a ready market for the sale of these investments, and they are normally sold at a discount. A 30% discount was sought on H's behalf. Miss Campbell accepted on W's behalf that this was an appropriate percentage if I decided that any discount was justified.

44) The resolution of this issue largely turns on how liquid (or otherwise) H's other assets which he may need to realise to purchase a new home (assuming he does so purchase) should be considered to be. This is against a background that W's assets will be liquid once the FMH (which is to be retained by her) is sold.

45) On H's behalf it was said that:

a) there is no ready/obvious market for his flat in Country D and given its type and location and the market has been materially impacted by the current absence of prospective Russian purchasers;
b) interest on his Golf Club shares/loan notes has never been paid out but has been rolled up and the company has substantial debt with no liquidity and H has been informed he would need to take a substantial discount to sell;
c) there would be a delay before H could sell his Golf Club membership as there are ten memberships unsold and four/five other members already wish to sell. As memberships for the club and members are sold in turn at least ten need to be sold before H can do so;
d) H is required to hold $250,000 in regulatory capital with his current employer ("PMO"); and
e) he is committed to pay £200,000 into an education fund, will be required to pay a balancing lump sum to W, and has both costs liabilities and tax liabilities.

46) Against this background it was submitted that H will need to access his Citibank private equity/real estate portfolio in the coming years to meet his housing and income needs and if he cannot access these monies they remain wholly illiquid and are risky and he cannot de-risk. By contrast W has no liquidity issues and no risk.

47) On W's behalf it was said that:

a) the private equity element represents about 21% of the gross value of the entire fund and the real estate element just 4%;
b) the assertion that the funds were illiquid and needed to be discounted by 30% to reflect the loss H would suffer if he had to liquidate the funds came very late in the day;
c) this is a self-serving presentation as H is unlikely to purchase in England and risk losing his non-domiciled tax status. H wishes to retain the apartment in Country D, and W believes H will continue to be based in Country D and rent while he is in the UK. H's new partner, who he continues to be in a relationship with, lives in Country D with her son and this is a further reason H will not relocate to the UK; and
d) H's evidence in relation to the property market in Country D was given for the first time in oral evidence. It was wholly unevidenced. There is no evidence (which would require expert

opinion in any event) that the property will be hard to sell or there is any present impact on value.

48) I am satisfied that even if H were to purchase in England he would not need to realise his Citibank investments. The value of the Country D property is £1,093,213. There is no independent evidence that this is not readily realisable. The value of the Citibank investment excluding the private equity/real estate elements is £3,120,860 net of liabilities. These two together total £4,214,074. Taking W's lump sum claim at its highest – i.e. £780,000 - and after payment of the agreed £200,000 into the education fund he will have in excess of £3.2 million. H's other assets more than offset his other liabilities so if he chose to do so H would have sufficient to purchase at c. £3 million plus SDLT (which is £271,250 on a purchase at that amount) and other costs. I am also satisfied that H could fund a purchase by realising other investments even if he chose to retain the property in Country D (not least because this would be a second home and therefore would not need to be as big or expensive). I shall therefore not make the 30% discount sought.

49) I also agree with Miss Campbell that H is a long-term investor (as shown by his investments in M, S, EHS and P). In my view this makes early realisation of the private equity and/or and real estate investments even more unlikely.

50) I am fortified in my conclusion because (as Miss Campbell observed) this issue was raised for the first time in H's open proposal of 13th September 2024 which attached an email from BL of Citibank dated 5th September 2024 which suggested a c. 30% discount if the assets were liquidated. If liquidation of this portfolio was a real possibility I would have expected it to have been raised as an issue far earlier.

51) The Citibank portfolio is therefore valued at £5,532,389 (net of liabilities) rather than £4,808,930.

<u>Mr. NS loan – CHF439,790/£394,077</u>

52) H made an interest-free loan of CHF500,000 to Mr. NS in January 2019. W was aware that the loan was made but H accepted that he *"probably"* did not tell her in advance. W seeks that this should be subject to an 'add back' and therefore factored into the lump sum. H states that W should share in anything received back by him on a *Wells*-basis (i.e. by way of a deferred contingent lump sum).

53) It may be proper to 'add back' a notional sum into the assets of a spouse who has recklessly depleted the matrimonial assets thereby disadvantaging the other spouse (*Norris v Norris* [2003] 1 FLR 1142 per Bennett J). In *Vaughan v Vaughan* [2008] 1 FLR 1108 Wilson LJ (as he then was) said (at [14} the requirement was for clear evidence of dissipation with a *"wanton element"* and could not apply to sums expended in meeting needs.

54) The various authorities were reviewed in *Evans v Evans* [2013] 2 FLR 999 per Moylan J (as he then was) from which the following propositions can be derived:

a) an 'add-back' argument requires an analysis of what <u>both</u> parties have been spending. It

is not sufficient to simply point out certain aspects of one party's expenditure [105]. Context is important [111];

b) para [14] of *Vaughan* was cited with approval - *"a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) …"* [105];

c) reattribution must be justified in the context of the case. It is a form of conduct and, as such, it must be *"inequitable to disregard"* [106]; and

d) there are therefore two elements (i) a factual/evidential element - is there clear evidence of *wanton* dissipation; and (ii) a legal/discretionary element - would it be inequitable to disregard it/is a notional reattribution required in order to achieve an outcome which is fair [107].

55) As to *Wells* sharing, the Court of Appeal (arguably) suggested in *Versteegh v Versteegh* [2018] 2 FLR 1417 that *Wells* sharing - by which funds are paid by one party to the other when received by the former - is an anathema to the clean break and should therefore be avoided if at all possible. As Sir Jonathan Cohen noted in *ES v SS* [2023] EWFC 177:

> [43] It is helpful at this juncture to set out the principles underlying the making of such a [*Wells* sharing] order. I adopt with respect the statement of King LJ at paragraph 151 of *Versteegh*, where she says "*I fully accept that the making of a Wells Order is something that should be approached with caution by the court and against the backdrop of a full consideration by the court of its duty to consider whether it would be appropriate (per Section 25a of the MCA 1973) to make an order which would achieve a clean break between the parties*".
>
> [44] In the same case Lewison LJ quoted Mostyn J in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313 where at paragraph 24 he said *"Generally speaking a Wells sharing arrangement … should be a matter of last resort, as it is antithetical to the clean break. It is strongly counter intuitive, in circumstances where one is dissolving the marital bond and severing as many financial ties as possible, one should be thinking about inserting the wife as a shareholder into the husband's company …"*
>
> [45] But, I must not overlook paragraph 135 where reference is made to circumstances where any other course might lead to *"considerable unfairness"*.

56) In the earlier case of *BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 it might be said that Mostyn J had expressed a slightly different view:

> [85] … Sometimes in order to achieve fairness the court has to reach for *Wells* sharing, or contingent lump sums (as in *Charman*), or deferred interests by way of a charge. These are commonplace. The court has to strive to make the break as clean as is reasonably possible, but I emphasise the qualification. Fairness is not to be sacrificed on the altar of finality.

57) In my view it is right to treat the making of *Wells* orders with a degree of caution as they are self-evidently antithetical to a clean break. This means they are rightly not *"commonplace"*. However, and with due respect to the view that Mostyn J expressed in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)*, I am not sure this means that they ought to be a *"matter of last resort"*. I consider they ought to be considered in the context of how the

court can best achieve objective fairness (or best prevent objective unfairness) between the parties.

58) In her witness statement W alleged that Mr. NS was warehousing this money in some way and was deliberately withholding this to help H in the divorce. In her Opening Note it was said by Miss Campbell that W assumed H had arranged with Mr. NS to avoid returning the monies. However W accepted in cross-examination that there was no evidence of this. I therefore cannot (and do not) find the same. Further on 13th September 2024 H (belatedly) provided some evidence in relation to Mr. NS' financial position namely (i) letters from the town tax office of Country E dated 18th July 2024 which suggest he and his wife owe tax of c. [currency]468,000 for 2020-22 inclusive; (ii) his home is valued at c. [currency]2.226m and is subject to a mortgage of [currency]1.858m; and (iii) he has no savings. H also exhibited to his narrative statement an email from Mr. NS dated 16th October 2024 which said "*I am still in negotiations with the Country E tax authorities over issues dating back to 2012. With an outstanding debt and penalties of 602k [currency]"* and set out the steps he had taken to avoid bankruptcy and the loss of his job and home.

59) If this is a full summary of Mr. NS' financial position then (as Miss Cowton submitted) it evidences an inability to repay. If it is not, then (as Miss Campbell submitted) it does not.

60) The only other evidence is that (i) this is a loan made in January 2019, some four years before the end of the parties' marriage; and (ii) Mr. NS has to date only repaid £50,000 in three tranches in April 2020.

61) There is certainly no evidence that (as W asserted in her narrative statement) Mr. NS is *"an extremely wealthy [Country E] associate of [H's]"* nor (as Miss Campbell asserted in her Opening Note) he is *"living as a tax exile in [Country E]"*. Such evidence as there is shows the opposite of what W is trying the establish.

62) Based on the balance of probabilities I am therefore driven to find that Mr. NS does not have the funds to repay H now and he may not be able to do so in the future. As such (and adopting the words of MCA 1973 s25(2)(a)) this is not a financial resource that H either has or is likely to have in the foreseeable future.

63) I cannot treat H as having an asset which he does not have and may not have. It would therefore be unfair for W to receive a lump sum now on the basis that he does. The only fair outcome is therefore for this debt to be subject to *Wells* sharing if it is ever repaid.

<u>Company Y/Director's loan - £180,196</u>

64) H is a director of Company Y which was incorporated in April 2014. Company Y is a corporate wrapper that holds £250,000 worth of shares in BH Limited, £250,000 of Loan Notes (upon which interest of £140,453 has accrued), 341 shares in EHS, and a DLA.

65) There is a dispute as to what is Company Y's net value. H's accountant, PX, valued H's interest at £511,351 as at 30th September 2024 or £409,681 net of tax. Following the October 2024 budget,

PX prepared an updated valuation to include the increase in Capital Gains Tax and revised the value of H's shareholding to £451,195. With the addition of the director's loan account owed by Company Y of £23,343 Miss Cowton contended for a figure of £460,257 (on the basis that the value of EHS (£14,281) be excluded on the basis that it be subject to *Wells* sharing).

66) On W's behalf Miss Campbell submitted that PX's valuation was misleading and/or unreliable for a number of reasons including (i) there should be a very significant DLA rather than only £23,343; (ii) EHS' value refers to its net book value per the accounts (£11,671) but H's original investment in 2018 was £250,000; (iii) his first valuation had included a liability of £108,505 to Company Z but as this company had been dissolved it was unlikely to be paid; (iv) it failed to offset income and/or capital losses that had been incurred; and (v) Capital Gains Tax of £141,534 should not be deducted. She therefore ignored the corporate structure and used the gross value of the BH Ltd shares, loan notes and interest – a figure of £640,453.

67) The difference between these two figures is £180,196.

68) The evidence in this regard is unsatisfactory. There is no evidence of a greater DLA. There are many reasons why a net book value may not reflect the original investment. I do not know whether there are any losses that can be offset against gains. As to whether Capital Gains Tax would be payable if H was non-resident for tax purposes Miss Cowton submitted that tax would be payable in Country D.

69) It is impossible for me to know what the accurate position is. However, ultimately I have no evidence to gainsay PX's figures nor his methodology. No other accountancy evidence has been adduced. I shall therefore adopt his figures.

70) Company Y is therefore valued at £460,257 rather than £640,453.

<u>Tax - £98,145</u>

71) H stated in his narrative statement that he had no intention of returning to live in Country B or to renew his residence permit. H has rented a property in England since early 2024. It is said on H's behalf that he should be allowed to live in the UK where he has shared care of the parties' children and where he intends to purchase a home and so pay UK tax as calculated by his accountant.

72) In *White v White* [2000] 2 FLR 981 Lord Nicholls of Birkenhead referred at p996 to the wife's criticism of the use of net values after deducting estimates of the costs of sale and CGT likely to be incurred if the parties' farms were sold given that the husband still owned and used them. He rejected the submission made on the wife's behalf that the use of net values in such a situation should be discontinued. He stated that *"there can be no hard and fast rule, either way"* but that *"[w]hen making a comparison it is important to compare like with like, so far as this may be possible in the particular case"* and in the present case "*a comparison based on net values is fairer than would be a comparison of [W's] cash award and the gross value of the farms"* because under her award the wife had money to invest or use as she pleased and the

husband's equivalent, as a cash sum, was the net value of the farms as they would have to be sold before he could have money to invest or use in other ways.

73) In *K v L (Ancillary Relief: Inherited Wealth)* [2010] 2 FLR 1467 Bodey J did not follow this approach (at least not in full) when dealing with the treatment of latent CGT. On the husband's behalf it was argued this should not be taken off the gross value of the assets because the wife's shares were held offshore, and they never needed be brought onshore thus attracting CGT as she could meet her needs from dividends remitted onshore and taxed without touching the capital. On the wife's behalf it was said that CGT should be taken off as being the entirely conventional practice and because she should be entitled to access her resources how she liked, as and when she might wish to do so. So the only way to compare like with like was by the use of net figures.

74) Bodey J cited from *White v White* as above before concluding at [60] that although the likelihood of the wife ever actually having to pay out significant amounts of CGT on her shares was a very modest one, as it would require a *volte-face* in respect of both her stated intentions and her historic lifestyle, it was equally the case that in the fullness of time and as things turned out she may wish to bring some of her assets into this jurisdiction as she had done on some occasions in the past, thus attracting CGT on the proportion remitted. He acknowledged that *"[t]here is no way of anticipating this in any informed way"* and *"[s]o taking a broad brush, I would deduct latent CGT on an arbitrary £10m worth of her shareholding."* He concluded that this *"discretionary although speculative approach is open to me, as there is 'no hard and fast rule' and because I think it is the best way to produce a fair and realistic determination on the issue …"*.

75) Bodey J returned to this issue in *X v X (Financial Remedies: Share Value Discount: Date for Computation of Assets)* [2017] 2 FLR 840 when considering the quantum of discount on the husband's shares to reflect the pivotal position which he was seen to hold as regards the future prospects of his company. Having determined the discount on the shares to be 8% whether sold or transferred to the wife in *specie* he went on at [71] to state that this discount needed to be factored in regardless of whether or not the shares actually came to be sold or transferred so as to meet the wife's award and even if the husband ended up borrowing against his shares to fund the lump sum. In reaching this conclusion he accepted the husband's argument that, for the reasonably foreseeable future, his shares could not be turned into cash (except by borrowing against them) without this likely discount and the husband should be regarded as free to sell his shares if in the event he decided he wished to do so.

76) Bodey J stated that this was similar *"although obviously not identical"* to the necessary costs involved in realising property such as costs of sale and CGT. He stated that his decision in *K v L (Ancillary Relief: Inherited Wealth) "was a decision on different facts to do with bringing [shares] onshore at some time in the future, as to which the owner would have had a free choice not tied to meeting a court order."* He also referred to the quotation from *White v White* above and added that *"deduction is conventional in practice in litigation of this type in this Division."* Bodey J acknowledged that certain events might mean H might never suffer any or as much discount which would be beneficial to the husband and correspondingly disadvantageous to the wife but concluded *"not everything which has to be borne in mind about the unpredictable*

future can be taken into account with absolute precision at the time when the particular decision has to be taken."

77) In *Collardeau-Fuchs v Fuchs* [2023] 2 FLR 345 Mostyn J was required to consider the issue of latent US capital gains tax on two properties. The husband argued (at [64]) that *"in accordance with authority and convention"* these latent taxes should be allowed when calculating the net proceeds of sale to be shared with the wife. The wife argued that this was *"completely unreal because the husband will never pay such taxes, not least because he has millions of dollars of unused losses which he will be able to apply to extinguish the tax liability were he ever to sell the properties"*. The husband's response to that was that a tax loss was no different from cash in the bank, that money is fungible, it can take many shapes and forms and his tax loss was an asset, a *chose in action*, just as real as a piece of property or money in the bank. As the parties' PNA did not require him to use cash to reduce debt on properties, by parity of reasoning he should not be required to use an asset, namely a tax loss, to reduce a specific debt on the two properties namely latent taxes.

78) Mostyn J cited from *White v White* as above before stating at [66] that *"[f]rom this dictum a convention has arisen whereby latent tax which cannot be avoided, and which will likely be payable when a property is sold, is almost invariably deducted when computing the value of a property to go on the asset schedule."* He then referred to his own decision in *DR v GR & Others (Financial Remedy: Variation of Overseas Trust)* [2013] 2 FLR 153 where at [50](iv) he had stated that *"[a]lthough the normal rule as stated in White v White [2001] 1 AC 596 is that latent capital gains tax should be allowed the court must nonetheless be realistic. I consider it reasonable to allow this latent sum but I will bear in mind that it may be a long time before any such tax is paid by the husband (or anyone else) and that in the meantime the husband will continue to have the use of the assets."*

79) Mostyn J then referred to *K v L (Ancillary Relief: Inherited Wealth)*. Thereafter at [68] he referred to his own decision in *BJ v MJ (Financial Remedy: Overseas Trusts)* [2012] 1 FLR 667 where he stated at [69] that he had not taken into account the tax that the husband would pay were he to receive all the assets and remit them onshore as *"[t]his is completely unreal. The whole point of the structure is to avoid paying tax, and H has never remitted any offshore income. Mr. Castle argues that not to include it would result in an unfair imbalance as W would be able to remit onshore and would therefore have more freedom with, or at least fewer strings attached to, her money. But in order to have the benefit of the money here H does not need to remit income."*

80) At [69] Mostyn J then stated that *"the usual convention should apply"* as *"[t]his is not a case where the court is blinding itself to a truth that a party will never pay such latent tax because he has entered into arrangements the whole object of which is to avoid paying that very tax."* The taxes were *"very real, and the husband will have to pay them with money or with other assets in the shape of tax losses. The wife would be given very short shrift if she suggested that the calculation of the net value of these two properties should ignore the latent taxes because the husband has money in the bank and could just pay off the taxes. I agree with Mr Chamberlayne KC that there is no difference in principle or substance between the husband paying a tax debt in cash or eliminating it by deploying a loss."*

81) Most recently in *AT v BT* [2023] EWHC 3531 Francis J brought on schedule all of H's pre-marital and trust monies as a proper way of dealing with the compensation principle but as a *quid pro quo* he deducted all the tax that would be due if the trust was wound up even though he acknowledged that much of the tax would probably not be due. However in reaching this decision there was no detailed consideration of the above authorities.

82) The principle to be drawn from the above authorities is that latent tax will be deducted in the computation exercise unless it would be *"unreal"* to do so and this includes consideration of whether a party has specifically entered into arrangements the whole object of which is to avoid paying that very tax.

83) Both counsel addressed me on the question of whether HMRC would consider H to be tax resident in the UK since the start of the current tax year on 6th April 2024. In essence depending on the number of days spent in the UK in any tax year one needs to have a certain number of connections to the UK known as 'ties' (with 46-90 days requiring all four ties, 91-120 at least three, and over 120 at least two) in order to be tax resident for that year. It was said on H's behalf that as at the final hearing he had already been in the jurisdiction for 88 days, this would be 100 days by 31st December 2024, and c. 136 days by the end of the tax year. It was said that H had at least three of the ties. On W's behalf it was said that H had overstated the number of days as he often did not stay until midnight which was required for the day to be counted.

84) Whilst I accept that strictly speaking English tax is not a matter for expert opinion evidence I do not consider that it is safe for me to place any reliance on the parties' respective contentions as presented to me. English tax residency is a complex issue. In my view some form of SJE opinion as to H's likely tax status in the jurisdiction perhaps prepared by specialist tax counsel and based on a detailed (and hopefully agreed) record of H's travel to and from the UK would have been required for me to base my decision on this aspect of the parties' competing cases.

85) As a consequence I have not found this an easy issue to decide. However, on balance, I have concluded that it would be inappropriate to deduct the tax for the following reasons:

a) H became resident in Country B for tax purposes with effect from Spring 2015;
b) H has maintained offshore tax status since this time;
c) H has not submitted any tax returns or paid tax in any jurisdiction since 2015;
d) in the document attached to his voluntary Form E dated 30th January 2023 headed *"Future Job Opportunities"* he stated that *"I am flying to Country B in February to renew my residency – It is my intention that whatever job I take I will remain offshore in Country D from April 1 2023 and be allowed into the UK 90 days a year"*;
e) H's WhatsApp and Our Family Wizard messages to W included (i) *"I want to go Country B"* (4th February 2023 at 9.31 pm); (ii) *"That's my goal"* (4th February 2023 at 9.31 pm); (iii) *"Not paying Country D taxes"* (4th February 2023 at 9.48 pm); (iv) *"Country B residency/Country C passport"* (4th February 2023 at 9.48 pm); (v) *"Country B resident – living in Country D"* (4th February 2023 at 9.53 pm); (vi) *"I am a Country B resident" "I don't recognize or acknowledge UK law"* (5th February 2023 at 12.42 am); and (vii) *"I am going back to Country B …"* (29th

June 2023). Other (undated) messages included (i) *"i will waive my Country B's residence at them"* (with the *"them"* being W's solicitors) (11.06 pm); and (ii) *"My Country B residency is a lock"* (11.09 pm). Although H no doubt sent some of these messages when intoxicated, as Miss Campbell observed sometimes *in vino veritas*. All are suggestive of someone who has the intention of renewing their Country B residency;

f) in his filed Form E dated 4th October 2023 H said at Box 3.2.1 that he "*may continue to live in Country D*";

g) H also holds an Country C passport. This of course allows him to travel freely across Europe without potentially alerting the UK tax authorities;

h) H accepted in evidence that he had last taken formal tax advice about his UK tax status several years ago and his recent enquiries were limited to an internet search. This did not strike me as the actions of someone who was certain he would be (or wanted to be) tax resident in the UK from 6th April 2024; and

i) H's decision to pay VAT on his legal fees since 6th April 2024 was one made close to the start of the final hearing and (as I understand it) H's instruction to Citibank to pay the £42,363 to his solicitors (the combined VAT on his fees for both the children and financial proceedings) was not given until during the final hearing.

86) There is some force in Miss Cowton's contrary submissions that (i) in the context of £13m+ assets the tax cost is relatively minimal (£141,534 CGT on Company Y, £21,900 UK CGT on the Golf Club Debenture, £76,245 in UK income tax (calculated on a *pro rata* basis from April 2024 – November 2024) and £42,363 being the VAT on legal fees); (ii) H's financial position now is very different to when RLC was trading (for whom H worked as a derivatives trader from 2008 until its collapse in 2020) when it was highly financially advantageous for H (and the family) for him to be offshore but these circumstances no longer pertained; (iii) the children were entitled to a proper stable home with H near their schools as with W; and (iv) why should H have to keep flying in or out of the jurisdiction carefully counting days and restricted in the time he can spend time with the children so that W can receive 50% of the tax saved.

87) However, in my judgment it is telling that H said – as recently as 30th January 2023 – that he would remain offshore *"whatever"* job he took. This was written at a time when H was working for American-based PMO, a proprietary trading firm but was also in discussions with a trading firm in London. H has worked for PMO since Spring 2020 and although his trading book was closed in Autumn 2022 (after he made significant trading losses in Summer 2022) he has remained working for them in a consultant role working between 7 am and 12 pm UK time since that time. In other words there has been no change to H's employment position since he said he would remain offshore.

88) Therefore in taking a realistic view on the evidence and determining in line with the above authorities as to whether it would be *"unreal"* to deduct the tax I do not consider it would be appropriate to do so. H's messages to W and the fact he has not taken any formal tax advice are particularly telling. On balance I am therefore persuaded by Miss Campbell's submission that H will arrange his affairs in such a way that the tax is not payable.

89) I am fortified in reaching this conclusion by the fact that if I am wrong the impact on H will be relatively minor given the quantum of the tax figures in issue.

Twickenham debenture - £8,900

90) This is a very minor issue. H holds a Twickenham debenture until 2029. In his Replies to Questionnaire dated 9th January 2024 he stated that the value for the remaining term is £26,400 (i.e. £6,600 for four years) – based on an email dated 16th October 2023. As the first of the four years has now passed, H reduced the value to £19,800 which he then reduced further to £17,500 to reflect the absence of a resale market to base a valuation upon. W used the unreduced figure.

91) I do not know whether the resale value of a Twickenham debenture has increased or decreased since October 2023. Although the term has reduced the value of each year could have increased. In my view if H wished to argue for a lower figure he could easily have sought an update from the Rugby Football Union. Having not done so, I shall use the original figure of £26,400.

W income tax on savings – (£3,042)

92) W used a figure of £12,168 for outstanding income tax payable on interest in funds in Jersey. H used a figure of £9,126. These figures are both drawn from a letter from W's accountants, WMP, dated 12th November 2024. The difference between these figures (£3,042) is the first of the two payment on account figures for the 2024/25 tax year.

93) On H's behalf it is said that tax of £12,168 reflects a full year's interest to April 2025 whereas the balance in the account is now far lower and hence less interest will have been earned. It is therefore said that £9,126 is a fairer figure.

94) Given that I do not know whether the actual figure for 2024/25 may exceed the payments on account and, if so by what margin, I shall act conservatively and adopt the higher figure.

H legal fees (VAT – £10,000 set off for implementation) - £32,363
W unpaid financial legal fees (implementation) – (£24,000)
W children fees (paid not outstanding) – (£1,343)

95) I have already determined that H is unlikely to be tax resident in this jurisdiction from 6th April 2024. Therefore the £42,363 in VAT (£34,958 in the financial remedy proceedings and £7,405 in the children proceedings) will not be payable by him.

96) I agree with Miss Cowton that it is right for the implementation costs of both parties to be removed. Therefore £10,000 is removed for H and £24,000 for W.

97) I understand that W's solicitors have confirmed that all the children costs have been paid. Therefore the £1,383 figure should be removed.

Summary

98) As noted above W contended for net assets of £14,738,186 and H contended for £13,329,432. I find the assets to be as follows:

	W	H
Family Home		£6,062,500
Apartment in Country D	£1,093,213	
Bank accounts - sole	£626,443	£12,310
Bank accounts - joint	£3,303	£3,303
Investments	£9,054	£5,532,389
Company Y		£460,257
PMO		£197,785
Golf Club debenture		£276,250
Twickenham debenture		£26,400
Mr. NS loan	*Share*	*Share*
Liabilities [added back *per* H]	(£113,949)[1]	£10,000
Total	**£1,618,063**	**£12,581,193**
	£14,199,256	

Distribution

99) In order to achieve an equal division of the parties' assets (as is agreed) and after both parties have paid into the children's education fund the 'net effect' is as follows:

	W	H
Family Home	£6,062,500	
Apartment in Country D		£1,093,213
Bank accounts - sole	£626,443	£12,310
Bank accounts - joint	£6,605	
Investments	£9,054	£5,532,389
Company Y		£460,257
PMO		£197,785
Golf Club debenture		£276,250
Twickenham debenture		£26,400
Mr. NS loan	*Share*	*Share*
Liabilities [added back *per* H]	(£113,949)	£10,000
Lump sum	£508,976	(£508,976)
Education fund	(£200,000)	(£200,000)
	£6,899,629	**£6,899,628**
Total	**£13,799,256**	

[1] Reflects W's unpaid legal costs after adjusting for the £24,000 in implementation costs (i.e. £110,907) + the higher Jersey tax figure (i.e. £3,042).

100) I shall round the lump sum figure and therefore my resolution of the issues set out at paragraph 24) above (save for costs) is as follows:

a) H shall pay W a lump sum of £510,000 (rather than the £780,000 sought or the £60,000 offered); and
b) the Mr. NS loan is to be shared on a *Wells* basis.

101) As to time for payment, W sought payment of £780,000 within 28 days of a sealed order. H offered payment of £60,000 within 30 days of the final order (although he sought payment within 14 days when he believed the balancing lump sum was to be paid by W to him).

102) In my judgment the lump sum of £510,000 should be paid within 28 days of a sealed order.

103) It is also of note that H has a greater earning capacity than W. He is presently earning $130,000/c. £100,000 pa gross. W considers H can earn far more than this as he has done previously. W has not worked outside the home since 2009. In her previous employment she earned (*per* H) c. £40,000 pa. Although it is well-settled (*Waggott v Waggott* [2018] 2 FLR 406 and other authorities) that an earning capacity is not an asset to be shared in the future it remains one of the s25 factors to which the court is to have regard. As a result of the differences in earning capacity, it is likely that whatever H may earn in the future he will not need to amortise his capital from the outset or at least not to the same degree as W is likely to have to do.

104) Notwithstanding the differences in earning capacity W has also agreed to share equal responsibility for the children's school fees and tertiary education expenses by making an equal contribution to the education fund.

Child periodical payments

105) H has a child maintenance liability for the children which was assessed by the Child Maintenance Service on W's application in September 2024 at £632.44 pm for both children. As part of their *Xydhias* agreement the parties agreed that H would pay child periodical payments of £7,500 pa per child from 1st January 2025 until the end of their secondary education. The parties therefore agreed that the extant CMS assessment would be discharged.

Other

106) I hope that the parties will be able to resolve by agreement the few points not discussed and/or not resolved which were highlighted in the *'Summary of Issues After Discussions – 27.11.24'* document. If not, I shall resolve the same on receipt of concise written submissions. However, the parties are warned that irrespective of any other decision I may reach about costs (should either party apply for the same) if I consider that either party acted unreasonably in relation to these remaining issues then an adverse costs order may well follow.

Addendum

107) I circulated this judgment in draft on 7th January 2025 and sought editorial corrections and/or requests for clarification by 15th January 2025. I received a small number of such corrections

from both counsel on 15th January 2025 and have accepted the same. Neither party made any requests for clarification nor asked me to resolve any of what had been outstanding points.

108) Thereafter (and in accordance with to paragraph 3.13 thereof) I raised with both parties' counsel the possibility of publishing this judgment in light of the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024 and sought representations in relation thereto. On 11th February 2025 Miss Campbell confirmed that W did not oppose publication of the judgment on a fully anonymised basis. On 4th February 2025 Miss Cowton stated that H's preference would be to keep the judgment private as he did not consider that it was in the children's best interests for there to be a judgment which relates to their parents, and ultimately them, in the public domain, even if anonymised. It was said there was no novel point of law, and no legal principles which would be of interest to a wider audience. It was also said there was no wider public interest in publishing the judgment, and there was no material relating to this case already in the public domain. However, if I did decide to publish the judgment then it would be important for it be fully anonymised, to include the anonymisation of the other jurisdictions and third parties involved.

109) Having considered the President's Practice Guidance and the parties' respective positions in relation to the issue I consider that it is appropriate for this judgment to be published. Having carried out the "*balancing exercise*" espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (and helpfully summarised in *Re J (A Child)* [2014] 1 FLR 523 per Sir James Munby P) which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, the judgment shall be published on a fully anonymised basis. This is also consistent with both parties' wishes if (as I have) I decided to publish.

110) Miss Campbell has confirmed that she has instructions to apply for costs. Miss Cowton considers any such application to be without merit. I shall deal with this application on paper following receipt of concise written submissions from both counsel.

111) That is my judgment.

RECORDER NICHOLAS ALLEN KC

Draft – 7th January 2025

Final – 14th February 2025