Neutral Citation Number: [2023] EWFC 136

Case No: ZZ21D44117

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2023

Before :

MR JUSTICE MOSTYN

- -

Between :

Susan Nancy Baker	**Applicant**
- and –	
Andrew Hartill Baker	
	Respondent

- -
- -

Tim Bishop KC and Tom Harvey (instructed by Stewarts) for the Applicant
Andrzej Bojarski (instructed by Penningtons Manches Cooper) for the Respondent

Hearing dates: 17 – 21, 24 July 2023

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in public. There are no reporting restrictions attaching to this judgment.

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as 'the wife' and to the respondent as 'the husband'. This is my judgment on the wife's claim for financial remedies following divorce.

2. The wife was at the time of the hearing 75 years of age and is American. The husband is 74 and is English.

3. The husband is in poor health physically and mentally. He is wheelchair-bound. A report of exceptionally high quality dated 26 January 2023 from Dr Marcus Rogers, Consultant Clinical Neuropsychologist, established that the husband lacked capacity to conduct these proceedings. My order of 27 February 2023 recorded that Mr Colin McPhee had agreed to act as, and was, his litigation friend in these proceedings, pursuant to FPR 15.3.

4. Dr Rogers's report stated:

> "As regards Mr Baker's mental capacity in relation to both his finances and his capacity to represent himself in Court, I am inclined, with the benefit of the additional information now made available, to draw his broader mental capacity into greater question. It is evident from these records that when he becomes physically ill, Mr Baker's state of mind renders him very clearly incapacitous in respect to all his responsibilities, suggesting that at best he should now be viewed as being at risk of having only "fluctuating capacity".
>
> Given the evolution of his medical conditions over the past year and its impact on his mental functioning, I am now of the opinion it would be unsafe to assume that Mr Baker's cognitive abilities are sufficiently intact and stable at any given time for it to be assumed he is able to retain sole responsibility for his complex financial and legal affairs, to litigate current proceedings in person or as a party represented by solicitors and counsel or himself, or to give evidence in these proceedings.
>
> Mr Baker has clearly retained the ability to communicate verbally, but even though he is now relatively physically well, given the dramatic fluctuations that can occur in his cognitive abilities if he becomes ill, I think it would be in his best interest for it to be assumed he requires some oversight in respect to both his finances and his legal affairs. Such precautions, I think, are made particularly essential given the fact that Mr Baker had, two months prior to my initial assessment in December 2022, been referred to a memory clinic for diagnosis of a suspected dementia process. This, combined with his hospitalisation and associated episode of delirium less than one month prior to my initial assessment, serves to illustrate the likely trajectory.

> The periods of ill-health are unpredictable in terms of exact timing, but reflect systemic, dynamic problems that compromise his cognitive functioning. There is also no strong evidence he is choosing to modify life-style behaviours, such as his use of alcohol, that render him more vulnerable to mind-altering conditions such hyponatremia. As such, one could predict that the frequency and duration of incapacitous periods are likely to increase, rendering the practicalities of managing his position at any given point in the future very challenging. Whilst I cannot conclude he lacks capacity at the present time, I do believe he falls in that difficult category of individuals who have "fluctuating capacity." This is particularly relevant if he is expected to represent himself in Court on any particular day. Such a "discrete demand" at any given time necessitates a "continuity of capacity," as effective preparation might require several weeks of clarity prior to the event. There can be no guarantee that his thinking abilities would not fluctuate during the period in which such continuity would be essential."

The finding of fluctuating capacity meant that when looking at the matter "longitudinally" the husband could not be said to have capacity to conduct these proceedings, as that requires continuous capacity over a prolonged period. Whether he had the capacity to give oral evidence would depend on his state at the time. In the event, it was not suggested that he lacked capacity to give oral evidence before me, and he did so. However, when assessing his evidence I must keep in mind the findings of Dr Rogers.

Core facts

5. The parties were married in 1986. There are no children of the marriage. The husband says that they separated and the marriage was over by 2000. The wife says that it endured on an intermittent basis until 2013. The parties executed a separation agreement in New York in November 2015. The wife petitioned for divorce here in May 2021, and Decree Nisi was pronounced on 27 January 2022. It has not been made absolute. Her Form A seeking financial remedies following divorce was issued on 4 June 2021.

6. Attributing to the husband the value of the property in Somerset in which he lives, as well as the value of the property in Docklands (they were both paid for by him but the former is in his partner's name and the latter in the joint names of him and his partner), the net value of his visible assets is about £5.6 million[1]. The net value of the wife's assets is about £5.8 million.

7. These figures are after deducting all the costs of these proceedings, both paid and unpaid. The wife's total costs amount to £1,377,827; the husband's to £426,458. A total of about £1.8 million.

The wife's claim and the main issue

[1] I give my reasons for this attribution at para 95 below.

8. The wife seeks the award of a lump sum of £9.34 million. That is the sum she calculates is due to her under the separation agreement executed by the parties, following full legal advice, in New York in November 2015. The husband's stance is that the parties' mutual claims should all be dismissed, but that there should be no repayment to him of the maintenance pending suit paid by him.

9. Were such a lump sum to be awarded in favour of the wife, and were the husband to have no other assets, the result would be to leave him insolvent to the tune of £3.8m. But Mr Bishop KC says that such an award would not have that effect as the husband has at least $35 million secreted. Mr Bishop KC does not pull his punches. He does not argue that the husband should be "treated" as having $35 million (£27.4 million) which he has recklessly dissipated. While such a judicial add-back finding is not unknown, it is essentially fictive as it is not real money. Lady Justice King, when a puisne judge, once memorably referred to such money as "pixie money" – i.e. money that is at the bottom of the garden with the pixies.

10. Mr Bishop KC strenuously rejects any suggestion that the $35 million he says should be brought into account is pixie money. He asks the court to find that it definitely exists. Where it is held, and by whom, in what shape and in what currency, may be unknown, but, he says, it definitely exists.

11. If that be so, then the total assets would be £39 million and the award to the wife would leave her with £15.2 million or 39% of the total, which is fair enough, argues Mr Bishop KC.

12. There are no real issues of law in this case. The wife's case stands and falls on the primary issue of fact, namely whether the husband has squirrelled away at least $35 million. If he has not, then the issue is simply what award should justly be made to the wife from the husband's visible assets having regard to the terms of the separation agreement. That is a very straightforward exercise, and I did not hear much evidence or argument about it. The evidence and argument almost entirely revolved around the primary issue of fact. This judgment is dominated by my findings of fact on the primary issue.

Non-disclosure: outline of the evidence on the primary issue

13. The evidence supporting the wife's case includes some contemporaneous documents, extracted compulsorily from third parties both here and in the USA, which are at variance with the husband's case about what assets he held, and at what values, at various historical points in time. In addition, the wife can rely on the abysmal quality of the husband's written and oral evidence which was a combination of bluster, avoidance and dishonesty. Further, she can rely on the failure by the husband to call a key witness, Mr Neal Rotenberg, who acted as the husband's accountant for years. If there were skeletons buried, he would have known where they were.

14. As against that, the husband relies on the extensive, very carefully prepared, and highly credible sworn written and oral evidence of Mr Andrew Fink, which went to the very heart of the wife's case of non-disclosure. Mr Fink is a qualified attorney but has worked for years as an investment financier. While I do not generally place much emphasis on the quality, in terms of demeanour, of oral evidence, Mr Fink's testimony was not only forthright, but indignantly so. It was obvious that he has no

allegiance to the husband. More importantly, Mr Fink, a qualified legal professional and practising financier, had absolutely no motive to lie and to expose himself to the consequences of perjury. His evidence is in a number of respects irreconcilable with some of the key contemporaneous documents, making the court's task when determining the primary issue of fact less than straightforward.

Demeanour

15. In terms of demeanour the wife was by far the better witness. She answered questions directly and unemotionally. Her body language was not aggressive or avoidant. In contrast, the husband, in terms of demeanour, was an exceptionally poor witness. He was rude, argumentative, avoidant of direct questioning, truculent, and capped his testimony with a highly offensive and inflammatory remark.

16. In *Cazalet v Abu-Zalaf* [2022] EWFC 119 I stated:

> "46. And so I turn to the evidence given in this case. The wife was by far the better witness. Her evidence was generally clear and given in reasonable tones. She generally answered questions directly. In contrast the quality of the evidence of the husband was poor. He was combative, evasive, rhetorical, strident and in some respects obviously untruthful. For example, he flatly denied that the wife had a key to his home in Belgravia. Yet there is a WhatsApp message from him in which he expressly states that she has the keys to his house.
>
> 47. However, this case is a good example of the perils of placing emphasis on the demeanour of a witness, or placing too great a reliance on a witness's irrelevant lies or other low conduct, when finding facts or exercising a discretion. In my judgment, the demeanour of a witness when giving evidence is unlikely to be a reliable aid either to finding facts, or exercising a discretion on uncontested facts. It is not just that a dishonest witness may have a very persuasive demeanour - that is of course, the first trick in a conman's repertoire. But the opposite side of the coin is equally problematic in that a truthful witness may unfortunately have a classically dishonest demeanour. It is obvious to me that over-reliance on the "quality" of the evidence of a witness, good or bad, can lead to facts being found, or discretion exercised, by reference to influences that are irrelevant."

17. What I was trying to say was that, in common with Lord Bingham[2] and Lord Leggatt[3], I consider demeanour to be a highly unreliable method of judging veracity. The court has to decide the case on the evidence, and the evidence comprises the documentary material and the spoken words of the witnesses. I cannot accept that, in any material

[2] Lord Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging (2000)).
[3] Lord Leggatt, At a Glance conference: 12 October 2022 Keynote address "Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf

way, the evidence includes the thespian performance with which witnesses speak the words of their oral testimony. Thus, in *Cazalet v Abu-Zalaf*, although that wife was by far the better witness in terms of demeanour, I found on the evidence of both parties that (a) the court had correctly found that the wife could not reasonably be expected to live with the husband and had therefore rightly pronounced decree nisi on her behaviour petition, and (b) the fact that over a year later they chose to resume their dismal, toxic, cohabitation did not undermine in the slightest the objective judgment enshrined in the decree that they could not reasonably be expected to live together.

18. There is another very important reason why a trial court must be on its guard against the influence of demeanour. If the court is not on its guard, the influence of demeanour may insinuate itself into a trial judge's subconscious and contribute to the formation of an adverse perception of the witness as an unworthy person who does not deserve to succeed in the litigation. The formation of such a perception would be a form of bias. It is for this reason that I constantly remind myself when, in terms of demeanour, a witness is giving oral evidence very poorly, to put thoughts of annoyance and irritation out of my mind.

19. I shall approach the evidence in this case in the same way. I must examine the actual evidence and, in order to avoid the formation of bias, put my irritation, indeed affront, at the shocking, grossly offensive way in which the husband gave his evidence to one side.

20. The wife's case is that the hidden money derives from one of two sources, which I shall call respectively Envigo and Lediba. Mr Bishop KC argues that the husband has hidden away somewhere at least $25 million deriving from Envigo, and at least $10 million deriving from Lediba.

Envigo

21. In January 2002 the husband became Chairman and Chief Executive Officer of Life Science Research Inc ('LSR'), a Nasdaq publicly-listed company. It is an agreed fact that in November 2009 the husband held 2,326,116 out of 14,862,935 issued shares in LSR which were at that time trading at $8.50 meaning that his shares were worth nearly $20 million.

22. On 23 November 2009 the company was returned to private ownership by means of a leveraged buy-out. The purchaser was a Delaware company formed for that purpose called LAB Holdings LLC. The price was $197 million of which $114 million was equity provided by LAB Holdings.

23. LAB Holdings was equally owned by Savanna Holdings LLC (a Delaware Company) and Jermyn Street Associates LLC (a Nevada Company) ("JSA"). The buy-out was an elaborate and protracted transaction requiring the expenditure of much time and expertise by Mr Fink and an associate called Mr Cragg.

24. Unsurprisingly, private equity was in on the act. P2 Capital Partners, a US-based strategic equity investor, participated in the buy-out. Savanna Holdings was an entity formed by P2 to enable their participation. There is no evidence to suggest that the husband had any interest in Savanna.

25. JSA was the entity formed by the husband, Mr Fink and Mr Cragg to enable their participation. Mr Fink and Mr Cragg did so through another company called Jermyn Street Capital ("JSC").

26. The buy-out resulted in the issued shares being reduced in number to 14,505,768. Of these **6,628,808** shares were acquired by investors through JSA for $56.3 million at $8.50 per share. 5,882,353 shares were acquired by Savanna for $50 million. About 2.1 million shares were acquired by management or warrant holders. Other than 55,500 shares which were the subject of options in favour of the husband, it was not suggested that any of these latter shares were acquired by him.

27. The shares acquired by JSA of course included the 2,326,116 shares held by the husband. The balance, 4,302,692 shares, were acquired by a number of investors who duly executed subscription agreements, which were produced by Mr Fink. Mr Fink was asked a series of questions in writing to which he gave replies as follows:

> "Q: Did Mr Baker own any shares in LSR via third parties or intermediaries ? If your answer is no, please state the basis upon which you assert this to be correct. If your answer is yes, please indicate how many shares and through which other entities and provide documentary proof in support of your answer.
>
> A: Not that I am aware and none that he disclosed to the SEC.
>
> Q: Who is the ultimate beneficial owner of each of the interests recorded to be held by the investors in JSA as shown on the share register?
>
> A: Please see the executed Subscription Agreements attached.
>
> Q: Are you personally acquainted with each of the investors?
>
> A: Only insofar as they are investors in JSA.
>
> Q: Are you able to confirm if they made the investment on their own behalf or on behalf of someone else? If so, please state the basis upon which you are able to provide this confirmation.
>
> A: Please see Subscription Agreements attached.
>
> …
>
> Q: Are you aware if Mr Baker has any interest in Savanna or P2 Capital? If you assert that he does not have any such interest, please state the basis for this assertion.

> A: I am not aware of Mr Baker having any interest in Savanna or P2 Capital. These are independent SEC-registered entities."

28. Under cross-examination by Mr Bishop KC these answers were put to Mr Fink and this exchange ensued:

> "Q: You didn't say anything about who the ultimate beneficial owner of any of those entities was. You knew very little about who the JSA investors were, didn't you?
>
> A: Susan Baker will tell you these are very real investors. These are not fictitious people that have been made up, these are investors.
>
> Q: You don't know about any private arrangements that the husband might have with any of these people.
>
> A: I only know what I have provided you with.
>
> Q: page 998. At (i) you are asked if Mr Baker has an interest in Savanna or P2 capital. It is possible for Mr Baker to have a 9.9% interest in Envigo through private arrangements and for you not to know about it.
>
> A: I can't answer that question.
>
> Judge: Would it be possible for him to have you as a nominee?
>
> A: Everything done is publicly filed and acknowledged if there was an arrangement it would have been made public. In their 13D filing there is no reference whatsoever to a beneficial ownership by Mr B because he has none[4]."

29. Mr Fink's clear evidence was that on the same day as the buy-out the husband transferred 1,046,752 shares (45% of his shareholding) to JSC as a fee for the extensive advice and assistance given by Mr Fink and Mr Cragg in organising the whole transaction. The consequence of the transfer, according to Mr Fink, was that the husband's shareholding reduced to 1,279,364 shares.

30. Mr Fink's clear evidence was that on that same day, the husband also paid off a $5 million margin loan from Raymond James. In his affidavit Mr Fink stated:

> "Also simultaneous with the closing of the LBO on 23 November 2009, Andrew Baker was required to repay a $5m margin loan from Raymond James. The Raymond James loan pre-dated the LBO transaction, and I did not have any direct involvement in that transaction. As far as I understood the situation to be, the Raymond James margin loan was required

[4] The obligation to make a 13D declaration of beneficial ownership only applies to public companies and so would have applied to LSR before 23 November 2009 and to Envigo/NOTV on and after 5 November 2021.

> to be paid off at the closing of the LBO. Andrew Baker raised the funds to repay the loan through the sale of 589,541 shares of JSA at $8.50 a share (equating to $5m). This further reduced Andrew Baker‘s shareholding in JSA to 689,823 shares, which reduced the value of his holdings to $5.8m."

31. In answer to a subpoena in New York Mr Fink on 18 May 2023 produced a document entitled "Project Lion Capitalization Tables: Members Schedule" (pages 973 and 977 of the bundle – they are identical – "the Fink version") which appears to be contemporaneous. This shows the husband as having 689,823 shares, which does corroborate Mr Fink's evidence that 589,541 shares were sold to pay off the Raymond James $5 million margin loan.

32. With his affidavit of 25 April 2023 Mr Fink produced the JSA subscription agreement. This had showed at Schedule 1 that the husband held 443,826 shares at 24 November 2009 (page 949). This was obviously incorrect as his shareholding did not fall to that level until 29 April 2014 (see below); the correct version showing the husband's shareholding at 689,823 shares as at 24 November 2009 was not produced until 18 May 2023 (page 970). Under cross-examination it was put to Mr Fink that these documents could not be seen as contemporaneous but must have been retrospectively created. He replied:

> "I have no interest in helping Mr Baker or Mrs Baker. It is comical that I am being cross examined on this. I am giving you accurately to the best of my knowledge and to the best of the knowledge of the team that I work with."

That said, it is clear that the first Schedule 1 document must have been retrospectively created. This is of some concern.

33. In answer to further questions Mr Fink stated on 5 July 2023:

> "Q: To whom did Mr Baker sell 589,541 shares of JSA raising $5m? Please provide a copy of the share register before and after this transaction which corroborates your answer.
>
> A: The sale was contemporaneous with the closing of the LBO and funded pro rata by the JSA members.
>
> …
>
> Q: Did the JSA shareholders make a loan to Mr Baker of $5m and if so, please provide a copy of the loan document and evidence of the repayment of the loan.
>
> A: Mr Baker sold shares to raise proceeds of $5m. As far as we were aware, he used the proceeds to repay a margin loan that he had established with the brokerage firm, Raymond James."

34. Under cross-examination Mr Fink gave this emphatic answer:

> "My account is 100% correct. Raymond James was a margin loan, Susan and Andrew were aware of it. Reductions happened over the better part of 14 years, these things all happened and if they were not reflected in subsequent representations of what Andrew Baker's ownership was, that representation was erroneous."

35. At $8.50 per share the husband's shareholding was valued at $5.8 million at the end of 23 November 2009; a sizeable loss compared to its $20 million value a few hours earlier. However, the husband did receive on the buy-out $4 million in respect of his LTIP and as a severance payment. That payment is discussed under "Lediba" below. No doubt the husband was content to shoulder this loss, anticipating a substantial increase in the value of the shares (which duly happened – see para 45 below).

36. Mr Bishop KC is deeply sceptical about the authenticity of these transactions. Mr Fink had produced at least one contemporaneous document showing that the husband's shareholding had shrunk to 689,823 shares (page 977; page 970 cannot be seen to be contemporaneous, for the reason I have given above). However, Mr Rotenberg's file obtained in the USA under subpoena had a document in it which also had the hallmark of being contemporaneous (page 1047). It is also entitled **Project Lion Capitalization Tables, Members Schedule** and shows the husband having 1,279,364 shares ("the Rotenberg version"). As explained above in para 29, that is the exact number of shares that the husband had <u>after</u> he paid the "fee" to Mr Fink and Mr Cragg but <u>before</u> he paid off the loan from Mr James by selling 589,541 shares. The Rotenberg version also says that the total number of LSR shares held by JSA was 7,218,350, which is difficult to understand as the number was always 6,628,809.

37. The Rotenberg version showed that an entity called Duncanson BV (presumably a private limited company (besloten vennootschap) in the Netherlands Antilles) held 722,400 shares. Mr Bishop KC is highly suspicious of this entity as its name and its holding were highlighted in the document, presumably by Mr Rotenberg or someone in his office. He postulates that Duncanson BV held these 722,400 shares on behalf of the husband.

38. This holding by Duncanson BV would not have come as a surprise to the wife's advisers as the Fink version itself refers to it.

39. Mr Fink was clear in his evidence that Duncanson BV was not a nominee for the husband, and he would have known because those shares were sold to Birch Grove Capital of which he was an owner.

40. Mr Fink had no explanation for the Rotenberg version in Mr Rotenberg's files, either what it was doing there or what it meant. Mr Bojarski suggests that it must have been a draft or preparatory document. That may be true, but the highlighting by Mr Rotenberg of 722,400 shares held by Duncanson BV gives grounds for concern.

41. Mr Bojarski rightly submitted that there would be no point of nomineeship of these shares where the Rotenberg version proclaims direct ownership by the husband of 1,279,364 shares (and the Fink version of 689,823 shares). I agree, and I note that the Rotenberg version itself suggests otherwise (as does the Fink version). It shows that the remaining LSR shares acquired by JSA were paid for by investors in three family

groups: the Stephens Group, the Knafel Group and the Kaufman Group. One of the investors within the Stephens Group was Andrew Stafford-Deitsch. Duncanson was listed under the heading "ASD Affiliates" along with a number of other investors. ASD is a cipher for Andrew Stafford-Deitsch. This does not suggest that Duncanson BV was a nominee for the husband. In his re-examination Mr Fink explained:

> "Stephens is one of the largest and wealthiest families in the United States. They have invested. They were investors in Envigo as well before we did the LBO in 2009. There is no way that they have anything to do with Andrew Baker. TFO is a Middle Eastern family office that came in with us. ASD affiliates are Andrew Stafford Deitch who is one of the principals of the Stephens group and those are all his family members and friends that he brought in and Cub Holdings was healthcare research analyst from DLJ, who followed the company and who had been an investor before the LBO and requested that they be allowed to stay in and we allowed them to stay in. So no. And then Knafel are again one of the larger family offices in the United States."

42. And he concluded his evidence with this exchange with me:

> "Q Were you ever given to understand that Mr Baker had some secret or nominee holdings in addition to what was declared.
>
> A: Never."

43. Another document in Mr Rotenberg's files was an organogram of the Lediba Foundation structure, which I deal with below. That document showed that the Lediba Foundation held a BVI company called Pipadini Group Ltd which in turn held a USA company called Life Science Research **Ltd.** LSR's name is Life Science Research **Inc.**

44. The husband's evidence was that he knew nothing about Pipadini and had nothing to do with it. This is unlikely to be true. Much more relevantly, Mr Fink had never heard of Pipadini.

45. Mr Fink then went on to explain that on 22 December 2010 the husband sold 195,122 LSR shares held for him by JSA for $3.3m to put towards a sale-and-leaseback transaction between LSR and an entity formed by the husband called Science Park Development. Accordingly, the number of shares in LSR held by JSA for the husband fell to 494,701. This is 3.4% of LSR. At that time, shares were trading at $17 so his holding would have then been worth $8.4 million.

46. According to Mr Fink the husband's 3.4% shareholding in LSR held for him by JSA had not altered by February 2014.

47. One of the documents obtained from Mr Rotenberg's file was an application by the husband dated 26 February 2014 to Coutts to obtain further borrowing on his home in Somerset. In its attendance note, Coutts record that the husband stated he owned 20%

of LSR and that his net wealth was £55 million. The application was later supported by an email from Mr Rotenberg dated 11 March 2014 which stated that the husband owned a 9.9% interest in LSR. Mr Rotenberg repeated this identically on 19 March 2014 to the Bank of Montreal, another possible lender.

48. These figures of 20% and 9.9% are perplexing, because none of the husband's shareholdings, which I have described above, correspond to either percentage ever having been held by him. The percentages held by him in LSR have been as follows:

Shares	%
2,326,116	16.0%
1,279,364	8.8%
689,823	4.8%
494,701	3.4%

49. Not one of the transactions described by Mr Fink has ever left the husband with 20% or 9.9% of the shares in LSR. In February 2014, 20% would have amounted to 2,972,587 shares; 9.9% would have amounted to 1,471,431. As he had at that time 494,701 visible shares he would have to have hidden somewhere 976,730 (at 9.9%) or 2,477,886 (at 20%) shares. Where? In my judgment it is inconceivable that if there were some kind of nominee arrangement involving that many shares, Mr Fink would not have known about it. And I believe Mr Fink when he says he did not know of any such arrangement.

50. Accompanying Mr Rotenberg's email of 11 March 2014 was a schedule which put the value of the husband's shares in LSR at $70 million. At that time the share price was $20.50, so this amounted to a representation that the husband had about 3.4 million shares, which again is baffling, as he had never held that many.

51. In his skeleton Mr Bishop KC says:

> "It is highly significant that the husband has corroborated his assertions to Coutts by his accountant (and to other banks/institutions). This shows that they were solid figures and accurate representations as to the scale of his wealth. The corroboration wards off mistake. The verification of a qualified accountant, who confirms his involvement with the husband for over 10 years and was used by Coutts as appropriate due diligence for their decision to lend the husband £2m. Again, the assertion that the husband had 9.9% of LSR in 2014 is irreconcilable with H's case to this court about his wealth in 2014 and not easily reconciled with what is said by Mr Fink. Again the question arises, what has happened to this huge $70m business wealth."

52. On 29 April 2014, according to Mr Fink, LSR purchased Harlan Laboratories from Genstar Capital. The transaction was funded with $40m of equity ($20m from Savanna and $20m from Harlan). For this purpose the husband sold 50,875 shares for $1,042,946 at $20.50 per share. In consequence his shareholding of LSR shares reduced to 443,826, or to 6.7% of the LSR shares held by JSA. Mr Fink has produced the members' schedule at page 975 of the bundle which shows the husband holding

443,826 shares. The documents provided by Mr Fink back up his account of the progressive reduction of the size of the husband's shareholding.

53. On 25 June 2015 LSR was rebranded as Envigo.

54. As mentioned above, on 5 November 2015 the parties executed a separation agreement. Appended to the agreement as Exhibit A is the husband's schedule of disclosure. Mr Bishop KC is withering in his description of this document. He says:

> " …this was a dishonest disclosure because (at the very least) he failed to disclose his interest in Jura / the Harley Street property. Nor did it refer to Lediba (see below). Nor did it refer to several other assets mentioned to Coutts such as a Geneva account containing £1.2m and an Ontario property worth £1.5m. Further, it values his business interests at $10.5m - $13m, irreconcilable with the $70m referred to in the preceding paragraph from only 18 months before. But what it does say is that, as at November 2015, the husband owned 17.5997% of JSA. This is a most particular and detailed number, in no sense a rough figure. Of course, the husband knew exactly how much of this company he owned and formally disclosed it. There was no reason to overstate his interest, quite the reverse.
>
> It is clear that the husband was willing to understate his wealth but it is impossible to accept that he would have accidentally overstated his wealth. The very precision of the number shows that the husband knew exactly what part of JSA he owned then and it was not the part asserted by Mr Fink. This begs the question: what has happened to the money produced by the sale of this 17.5997% share? The husband and Mr Fink only tell us what happened to the disposal of the 6.695%".

55. One would think that the very precise figure for the husband's percentage ownership of JSA, given to four decimal places, of 17.5997% on 5 November 2015 is unlikely to be a mistake. But following the transactions detailed above his percentage ownership of the LSR shares in his name held within JSA (stated by me to four decimal places) was as follows:

shares	%
2,326,116	35.0910%
1,279,364	19.3001%
689,823	10.4064%
494,701	7.4629%
443,826	6.6954%

It was never 17.5997%. The origin of this strangely exact number was obviously Mr Rotenberg. The format of the disclosure schedule is in the distinctive style of Mr Rotenberg (see para 47 above, where I referred to the schedule provided to Coutts by

Mr Rotenberg). Mr Rotenberg's file also contains an email sent to Mike Wilson of the Bank of Montreal on 15 July 2015, where he (Mr Rotenberg) likewise expresses himself to four decimal places. It states:

> "Mr. Baker has requested that I confirm that he and/or his spouse and related trusts own the following: …
>
> 9.4249 (*sic, semble 9.4249%*) Interest in Jermyn Street Capital, LLC(JSA) – JSA owns an (sic) 6,970,272 shares of Lion Holdings , Inc. which owns a premier global clinical research organization with operations around the world. Annual sales of this entity are approximately $500 million"

56. The file contains a yet further email again to Mike Wilson dated 25 April 2016 which states:

> "My firm represents Mr. and Mrs. Baker in regards to their US taxation. Mr. Baker has requested that I confirm that he and/or his spouse and related trusts own the following:
>
> 6.7 *(sic, semble 6.7%*) Interest in Jermyn Street Associates, LLC (JSA) - JSA owns 6,970,272 shares of Lion Holdings, Inc., which owns a premier global clinical research organization with operations around the world. Annual sales of this entity are approximately $430 million"

57. I did not hear oral evidence or submissions about these latter two emails so I merely observe that at no point did the husband own 9.4249% of the LSR shares held in JSA; that the number of LSR shares held by JSA was 6,628,808 not 6,970,272; and that the name of the company was Life Science Research Inc not Lion Holdings Inc.

58. I would however further observe that the email of 25 April 2016 is (*mirabile dictu*) correct when it says that the husband held 6.7% of the LSR shares held by JSA – see para 52 above. It would seem that for all his pretence of numeric precision, Mr Rotenberg's accuracy is most charitably described as sporadic.

59. On 3 June 2019, according to Mr Fink, Envigo sold its services business to Labcorp and acquired Labcorp's products business. The total consideration was $595 million from which was deducted $514m of debt, expenses, working capital adjustments and escrow payments resulting in $24m of proceeds going to shareholders. According to Mr Fink, the husband received $534,735 for his share of the cash proceeds. By this stage his percentage shareholding of the issued Envigo shares was 2.32%. Mr Bishop KC did not dispute that if the husband had only 443,826 Envigo shares then $534,735 is an approximately correct figure for his share of the proceeds (2.32% of $24 million is $557,778).

60. In June and July 2019 the husband sought further borrowing from Coutts in relation to his Somerset and London properties. In their "Credit Fact Find Internal" documents Coutts record that the husband stated that he held "10% of Envigo Inc (previously Life Science Research)". An email from Mr Rotenberg had been provided in May

2019 but unlike his previous letter this one (perhaps wisely) did not vouchsafe a percentage figure for the husband's shareholding in Envigo.

61. The representation by the husband that he owned 10% of Envigo is completely at variance with his visible share of Envigo which at that time was 2.32% (see above). If true, he must have secreted 7.68%. At that time Envigo had 19,096,891 issued shares and so he must have hidden somewhere 1,466,641 shares. Again, where? It is again inconceivable that if this is true Mr Fink would not have known about it.

62. In his skeleton Mr Bishop KC states:

> "There is a glaring discrepancy between the 10% of the whole of Envigo which the husband told Coutts he owned in 2019 (and in 2014) and what he and Mr Fink have told this Court."

63. On 5 November 2021, according to Mr Fink's careful evidence, Envigo was sold to Inotiv (NOTV) for \$485m consisting of \$210m of cash and \$275m of NOTV equity (i.e. Envigo shares converted to NOTV shares). \$112m cash was made available to shareholders after payment of debt, expenses and escrow. The husband received \$2,296,164 in cash and 177,695 NOTV shares in place of his 443,826 Envigo shares (40.037% being the Envigo to NOTV share exchange ratio). Mr Bishop KC does not challenge the mathematics, and the figures are all a matter of public record.

64. If the husband held 9.9% or 10% of Envigo when it was purchased by Inotiv then he would have been obliged to have made a 13D declaration to the SEC to that effect, on pain of dire penalties in the event of breach. He made no such declaration.

65. The NOTV share price at closing on that day was \$54.72 per share. The husband's 177,695 NOTV shares were therefore worth just under \$10 million. Unfortunately since then the share price has collapsed – they are trading today at \$4.92, making the husband's 177,695 shares worth a little under \$680,000.

Conclusion on Envigo

66. I agree with Mr Bishop KC that the husband's evidence was appalling. He submitted:

> "We submit that H's oral evidence has been of an equally inadequate quality [to that in *NG v SG*] and has aggravated his earlier lack of candour as evident in his written evidence. There was not a trace of any contrition or recognition of fault. Quite the reverse, he plainly felt that this case and his requirement to give evidence was a terrible impertinence and that he was entitled to say whatever he liked irrespective of the truth."

67. It is clear to me that the husband's personality is a toxic mixture of arrogance and dishonesty. He is an inveterate liar. He lied to the wife in the negotiations for the separation agreement. I find that he has lied to Coutts for the purposes of obtaining credit. He has lied systematically to this court during these proceedings. His initial disclosure was an absolute disgrace. As Mr Bishop KC says, he seems to regard these proceedings as an impertinence and a joke.

68. I make allowance for the fact that his mental difficulties so eloquently explained in Dr Rogers's reports on his capacity, have probably aggravated these traits.

69. The law is not so mono-dimensional as to conclude automatically that if a party has lied to the court, then the fact in issue about which the lie was told must be decided adversely to that party. Mr Bojarski rightly stated:

> "The court must always be cautious in using a 'lie' as evidence of 'guilt' without other corroborating evidence (*R v Lucas* [1981] QB 720). That is all the more important in the circumstances of this case given that it is now known that "when he becomes physically ill, Mr Baker's state of mind renders him very clearly incapacitous in respect to all his responsibilities" and that over the course of 2022 "it would be unsafe to assume that Mr Baker's cognitive abilities are sufficiently intact and stable at any given time for it to be assumed he is able to retain sole responsibility for his complex financial and legal affairs, to litigate current proceedings..., or to give evidence in these proceedings. He has also been diagnosed with early-stage dementia. It is not uncommon for individuals suffering with problems such as the husband to disguise them out of shame and embarrassment; continuing to answer questions and provide information even though their powers of memory and comprehension are unreliable. The court cannot be sure how long it is since the husband last had full cognitive capacity. It is very likely that it was impaired long before the actual diagnosis by Dr Rogers in early 2023. …
>
> Given what is now known about H's mental health and his lack of capacity, H's conduct during the proceedings needs to be seen in that context. In view of H's capacity issues the court should carefully and cautiously follow the principled approach to drawing inferences, as outlined in para [16] of *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211"

70. In that case I stated:

> "[16] Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then:
>
> (i) The court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.
>
> (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got …".

It is for this reason that it is important that the influence of demeanour must be firmly checked. Otherwise, there is a risk that false inferences, grounded on an all too human response to an arrogant and contemptuous demeanour, may be drawn.

71. The wife's case as presented by Mr Bishop KC is that the husband somehow held 9.9% of LSR as stated by Mr Rotenberg in his emails respectively to Coutts on 11 March 2014, and to BMO on 19 March 2014. Mr Bishop KC stated in his closing submissions:

> "**The husband owned 9.9% of LSR Envigo after the 2009 go-private transaction:**
>
> a. H's statement to Coutts in Feb 2014 that he was worth £55m;
>
> b. Mr Rotenberg's email to Mr White of Coutts dated 11 March 2014 [340]; the husband said in evidence that this was accurate including in respect of the 9.9% LSR assertion;
>
> c. The schedule behind the letter which put H's private company interests at $70m;
>
> d. Mr Rotenberg's email to Mr Irwin of Bank of Montreal dated 19 March 2014;
>
> e. H's statement to Coutts on 17 June 2019 that he had 10% Envigo worth $40m
>
> f. H's statement to a different Coutts employee on 14 July 2019 that he had 10% of Envigo worth $40m.
>
> …
>
> We also make a *Prest* point: where is the evidence from Mr Rotenberg? He has been H's accountant for the past 20 years. He would be able to give evidence from his own knowledge of H's affairs and as the auditor of the group as to the ownership of Envigo and H's interest. Unlike Mr Fink, his knowledge is not limited to JSA. He also knows about the whole of LSR / Envigo and Lediba. The chart was in his papers. And yet…. No Mr Rotenberg. The reason is obvious. Mr Rotenberg would not support what the husband is trying to say.
>
> If the husband had 9.9% of Envigo he should have received $2.356m from the 2019 sale proceeds if (and it is a big if) they were only £23.8m. In this regard, we remind the Court that $63.3m went out to an affiliate of JSA as the third lien holder and we have no idea what happened to this money or who the affiliate was. We asked Mr Fink and he claimed not to know and it was not much clarified by his oral evidence. the husband claims he only got $667k [199] and so there is $1.7m missing.

> Far more significantly, and recently, the husband should have received 9.9% of the $210m cash and $270m shares in Inotiv under the 2021 sale. This equates to $20.8m in cash and about 1,148,000 shares in Inotiv (29m shares in Envigo x 0.4 conversion to Inotiv stock x 9.9%). These would be worth about $5.7m today. The husband has disclosed receiving cash of $2.3m and 177,695 shares so there is $18.5m and about $4.9m worth of shares missing."

72. Mr Bishop KC tabulated his case as follows:

	$ '000
Due from 2019 sale: $23.8m x 9.9%	2,356
Due from 2021 sale: $210m x 9.9%	20,800
Due Inotiv shares: 11,600,000 x 9.9% =1.148m shares x $5	5,742
Less cash disclosed $667k (2019) and $2.3m (2021)	(2,967)
Less shares disclosed 177,695	(888)
Missing value	25,043

73. The key documents in support of this case have been set out by me above and are summarised in Mr Bishop KC's submissions which I have quoted at para 71 above. Items (a), (e) and (f) are representations made by the husband to his bankers for the purposes of gaining credit. In my opinion, given that he is an inveterate liar, very little, if any, weight should be attributed to such representations. The court sometimes has to find in relation to evidence from a dishonest witness, that nothing will be accepted from that witness unless it is corroborated by other evidence. That is the case here and I would extend that caution to anything that the husband has said about his means to anybody unless it is absolutely clear that he would have no motive to lie whatsoever. I placed no weight at all on his supposed admission to Mr Bishop KC that his representation to Coutts of owning 9.9% of Invigo was correct. This was a classic "if you say so" answer given by a witness who had no interest in speaking the truth about anything. It was meaningless.

74. Obviously, when it comes to seeking to obtain the financial advantage of credit from moneylenders, a dishonest person has every motive to remain true to form.

75. It is my finding that the evidence does not come close to establishing that the husband has used either Duncanson BV or Pipadini Group Ltd as repositories for secret holdings of LSR shares.

76. In his closing submissions Mr Bishop KC referred to some oral evidence given by the husband as follows:

> "It was also very illuminating when he gave evidence in response to questions from the Bench on Friday 21 July. He stated that he had hoped to get $100m from Envigo. This only makes sense if he had 9.9% of it. If he had 1% or 2 %, the company would have had to sell for $10-20bn to generate $100m for H and it was never going to do that. Further, H said it all went wrong in the company and he got peanuts; but we know that in fact the first sale washed out the debt and the

> second sale of $485m was practically all equity. On this basis H’s 9.9% was worth $48m which is not far different from the $40m he was telling Coutts in 2019. It is, of course, irreconcilable with what H has said in these proceedings.”

I have to say that nobody listening to the husband could seriously have placed any reliance on this figure of $100 million which he bandied about. It struck me as delusional braggadocio.

77. Therefore, the critical material on which I am invited to find that the husband has secreted $25 million boils down to two emails in March 2014 from Mr Rotenberg (items (b), (c) and (d) in Mr Bishop KC’s submissions quoted by me at para 71 above).

78. The problem with Mr Bishop KC’s case is that it requires me not only to give decisive weight to those two emails but further to disbelieve the evidence of Mr Fink. Mr Bishop KC *n'a pas hésité à appeler un chat un chat.* He stated that if I had any lingering suspicion that Mr Fink might be telling the truth then that would be done away with by the contents of Mr Rotenberg’s file extracted under subpoena. Without mincing words, to agree with Mr Bishop KC would require me to find Mr Fink guilty of perjury.

79. I do not agree with Mr Bishop KC. In my judgment Mr Fink’s evidence was exhaustive, careful and obviously truthful. In contrast, for the reasons set out above, Mr Rotenberg is to be regarded as highly unreliable.

80. Further, if Mr Bishop KC were right and the husband had at that time tens of millions of pounds stashed away he would not have been needing to have gone to Coutts or to other moneylenders for credit.

81. It has been said that Roger Casement was hanged on a comma[5], and it is my opinion that if I were to accede to Mr Bishop KC’s submissions this would be the matrimonial finance equivalent.

82. I have no idea why Mr Rotenberg, a qualified accountant subject to professional standards, allowed himself to be drawn into the husband’s lies to Coutts and other moneylenders to obtain credit. I also have no idea why Mr Rotenberg on behalf of the husband gave such a strangely precise figure of a 17.5997% holding of the LSR shares held by JSA, although my initial concern as regards its ostensible precision has faded with my growing realisation of just how unreliable Mr Rotenberg is.

83. It is not disputed that at the beginning of the story the husband’s interest in LSR comprised 2,326,116 quoted shares. In my judgment Mr Fink has in his extensive written and oral evidence comprehensively demonstrated what happened to those shares. I am completely satisfied that at no point did the husband ever have any more shares in LSR or Envigo than those recorded by Mr Fink and summarised by me in this judgment. I therefore do not find proved on the balance of probability that the husband has secreted somewhere, whether in Duncanson BV, Pipadini Group Ltd, or

[5] https://www.theguardian.com/education/2019/jun/27/the-man-hanged-because-of-a-comma. However, it is clear from the judgment of the Court of Criminal Appeal in *R v Casement* [1917] 1 KB 98 that the presence or absence of the comma was not the basis of the decision.

elsewhere cash or other assets referable to the sale of LSR/Envigo in the sum of $25 million or any other sum.

84. In this case principle No. (ii) in *NG v SG* is to the fore. As to the wife's case on the husband's LSR/Envigo shares I am not satisfied, on an assessment of the evidence, that the husband has got hidden funds. It would therefore be wrong to draw inferences that he has any such funds based simply on his dishonesty. Further, for the avoidance of doubt, I do not attribute in this regard pixie money to the husband in the sum of $25 million, or any other sum.

Lediba

85. In 2005 the husband set up a Liechtenstein foundation called Lediba. One of the documents extracted from Mr Rotenberg was an organogram which showed that Lediba as parent or grandparent owned 23 offshore companies and other entities in all the usual places: BVI, Gibraltar, Guernsey, Bahamas, Panama and the USA. Obviously, you would not go to the trouble of setting up such an elaborate structure for it to hold a paltry sum.

86. In his cross-examination the husband stated:

> "I was living in Europe I was not paying taxes. I have an accountant in Liechtenstein and his advice was what I was following. Lediba was his creation and did not file any statements or assets. Mr Nesensohn was comfortable using the assets. I never saw any bits of paper about it.
>
> Mr Bishop KC: Lediba was stuffed full of companies for your benefit?
>
> The husband: Mr Nesensohn had organised it, yes.
>
> Mr Bishop KC: It was an extremely valuable entity all for your benefit?
>
> The husband: It was my trust or foundation that Mr Nesensohn had set up. Record keepers of Lediba put it that way."

87. Mr Bishop KC has tabulated this limb of the wife's claim thus:

	$
Salary	5,721
Bonus	1,255
Forecast	902
Sundust	810
Harlan Bonus	1,086
SPD	3,459
Pension received as salary	1,744
Jura ($300k pa avg x 14 (years since 2009)	4,200
LTIP and severance pay	4,000
Proceeds of Canadian sale	350
MDM	3,100
Hartill ($4.1m less shareholder loan $2.9m)	1,200
Geneva bank a/c	1,700
	29,527
Less purchase of 29 Old Yorke Road	(250)
less works to Harley St	(1,500)
Less works to Parish's House	(1,250)
Less living expenses / support for partner / support for W, average $1m p/a	(14,000)
	(17,000)
Surplus	**12,527**
round down to	**10,000**

88. It can be seen that the biggest element in the calculation is the estimate of the cost to the husband of running his life over these 14 years. An annual figure of $1 million has been taken as an estimate. It can further be seen that the figure of $12,527,000 has been "rounded down" by 20.2% to give the figure of $10 million which Mr Bishop KC seeks me to find, on the balance of probability, the husband has secreted somewhere.

89. Mr Bishop KC argues this limb of the wife's case thus:

> "It is not conceivable that H has spent all of this huge sum [of $26 million] … Envigo was also paying H's rent and numerous other expenses directly. Until 2017 he was providing W with support and until 2020 he was paying the CPW mortgage. He has supported [his current partner] and their children (although he told Coutts and this court that she was successful in her own right and had an income from her wedding event business).
>
> H says that he has only two bank accounts and that whilst living in Monaco he paid for all his expenses (save for the apartment, which he says was paid for by Envigo) in cash. The Societe Generale bank statements attached to H's Form E show very few cash withdrawals (similarly, his Coutts current

> account). It is inconceivable that on all fronts H was spending more than $1m p/a in addition to all of his company benefits and paid accommodation. That would account for depletion of $14m, leaving £12.5m unaccounted for. 94. We submit that H must have no less than $10m of accrued income held offshore. This is probably very conservative.

90. Mr Bojarski submits that a number of these figures are either too old or are obviously mere balance sheet numbers without any objective existence. His response to Mr Bishop KC's case can be expressed thus:

source	**Mr Bishop**	**period**	**Mr Bojarski**	**Mr Bojarski response to Mr Bishop**
Salary	5,721	2009 - 2017	5,721	
Bonus	1,255	2011 - 2016	1,255	
Forecast	902	2011 - 2016	902	Too long ago, but allow
Sundust	810	2014 - 2016	810	Too long ago
Harlan Bonus	1,086	2012	500	Too long ago, but allow the correct figure
SPD	3,459	2010-2012	0	An accounting figure
Pension received as salary	1,744	2009 - 2018	1,744	
Jura ($300k pa average x 14 (years since 2009)	4,200	2009 - 2023	2,800	Seriously overstated
LTIP and severance pay	4,000	2009	4,000	
Proceeds of Canadian sale	350	2017	350	
MDM	3,100	2012	0	Not a real figure
Hartill ($4.1m less shareholder loan $2.9m)	1,200	2012	0	Not a real figure
Geneva bank a/c	1,700	2014	0	The husband was obviously untruthful about this
	29,527		18,082	
Less purchase of 29 Old Yorke Road	(250)		(250)	
less works to Harley St	(1,500)		(1,500)	
Less works to Parish's House	(1,250)		(1,250)	
Less living expenses / support for partner / support for W, average $1m p.a.	(14,000)		(20,000)	TBKC's figure is a massive understatement
	(17,000)		(23,000)	
Surplus	**12,527**		**(4,918)**	No surplus – possible significant deficit

91. Mr Bojarski plausibly demonstrates that it may well be the case that there is in fact no surplus. For the purposes of my decision I do not need to make specific findings about the rival contentions, as I am satisfied by reference to other evidence that there is no surplus money secreted in Lediba. I am also not satisfied that this crude metric is a sufficiently sound evidential basis for me to conclude that this vast sum of $10 million surplus actually exists.

92. The husband's litigation friend has introduced correspondence with Mr Nesensohn. It was not explained to me why he was not produced to give oral evidence even by video. However, the evidence is plainly admissible. Mr Nesensohn explained that Lediba had been wound up in 2018 and the funds distributed to the husband. He wrote on 13 July 2023:

> "There are no assets and the final one was Jura which was distributed to Andrew personally years ago. We provided everything to his lawyers also years ago. Susan can phantasise (sic) as much as she wants there are no assets."

And later on the same day:

> "The structure used to be quite big. The only real value is the shares in Envigo which have not been in the structure and being held by Andrew personally. We have a duty to keep documents 10 years and the structure is much older has not been created by us and we have taken over Lediba only in 2008. All outflows to Andrew have been formalized on the level of Lediba. If we are requested to gather all docs available for the entire structure going back at least 10 years, this will be a major job and we will need to be paid. We still have an outstanding of about CHF 4k. Could you please arrange for a transfer of at least CHF 8k as payment and as a retainer of CHF 4k".

93. And on 15 July 2023:

> "From our side is very simple. Lediba distributed everything there was (Jura shares) to Andrew and we liquidated all privately held companies with the liquidation proceeds to Andrew. Today we do not hold any single penny for Andrew, actually for quite some years and to the contrary we have an outstanding of CHF 4k."

I cannot discern any motive for Mr Nesensohn to lie in this correspondence.

94. Mr Bishop KC is asking me to find the husband guilty of fraud based on his audit of receipts and expenses over a 14 year period from 2009 to date. I have to say that even when applying the lower civil standard of proof than that applicable in the criminal courts, a far more rigorous and exacting forensic exercise is surely going to be needed before the court could say that it is more likely than not that the husband has squirrelled away $10 million in cash or assets. I cannot say that I am satisfied on the balance of probability that this allegation has been proved.

The assets

95. I therefore find the net assets to be as follows:

	Husband	**Wife**
279 Central Park West, NYC net of taxes		1,853,620
Duffield Properties, NYC at $8.6m net of taxes		2,795,000
Keepier Wharf*	725,854	
CGT on Keepier Wharf (H's estimate)	(40,000)	
Parish's House*	2,106,552	
Liquid cash and investments	7,000	2,424,341
Jura Properties Ltd	2,404,063	
Inotiv Inc shares (177,695 at $7)	962,503	
JSA cash retention	209,267	
Jewellery/Watch	11,000	270,751
Total Assets	**6,375,239**	**7,072,961**
Liabilities	(773,800)	(742,062)
Outstanding costs	(51,223)	(486,004)
Net assets	**5,550,216**	**5,844,895**

* I attribute to the husband the interests of his partner in these properties. The Docklands flat was purchased in December 1997 in the joint names of the husband and his partner, unbeknown to the wife, by means of a deposit provided, and a mortgage paid, by the husband. Parish's House was purchased in the sole name of the husband's partner in March 2007 again by means of a deposit provided, and a mortgage paid, by the husband. In Mr Rotenberg's emails to Coutts and the Bank of Montreal in February and March 2014 he (Mr Rotenberg) stated that both of these properties were owned by "[Mr Baker] and his spouse and related trusts". The husband has recorded in his Form E the full value of the mortgage on Parish's House (£2.4 million) as his sole liability. In my judgment, for the purposes of the dispute between the husband and the wife, the presumption of resulting trust in the husband's favour is not displaced, and it is therefore entirely appropriate to attribute the values of these two properties to him.

96. It is sobering to note that if the parties had not litigated and spent £1.8 million in costs they would have respectively £6 million (husband) and £7.2 million (wife).

The separation agreement

97. In *Radmacher v Granatino* [2011] 1 AC 534, Lord Phillips for the majority stated at [64] – [65]:

> "What was the approach that the Board held in *MacLeod* should be applied to post-nuptial agreements? The Board held that the court should adopt the same approach as that laid down by Parliament for varying maintenance agreements in section 35 of the 1973 Act, "looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust" (para 41). The Board also endorsed the "oft-cited passage" from the judgment of Ormrod LJ in *Edgar,* which we have cited at para 38 above.
>
> These tests are appropriate for a separation agreement. …"

98. Where a party makes a financial remedy application the object of which is to enforce a separation agreement which contains income terms as well as capital terms the approach of the court when weighing that agreement in the discretionary exercise should be, in my judgment, to treat it in much the same way as an application to vary a consent order. It would be odd if there were a markedly different approach to the treatment of an agreement incorporated in a consent order and to an agreement incorporated in a separation deed.

99. The capital terms of a consent order would not be variable unless they amounted to a lump sum payable by instalments, and even then they would only be variable as to quantum if the *Barder* standard was met (see *BT v CU* [2021] EWFC 87 at [97]). By contrast, the income terms of a consent order would be readily variable. Some of the authorities even suggest that on a variation application the court should reassess the income terms *de novo*, but the better view is that the court looks for a change of circumstances.

100. Although this agreement was made in New York the wife must be taken to have embraced the English approach to variation of maintenance obligations when she decided to litigate here for financial relief against the husband.

101. Her objective has always been to implement the agreement. In his skeleton argument Mr Bishop KC stated:

> "2. The wife seeks a final order which enshrines the provision made for her under a formal Separation Agreement entered into by the parties in November 2015. …
>
> 18. Indeed, the effect of W's application, made clear from the earliest stage, to seek to uphold and implement the agreement is that the husband should show cause why it should not be upheld. …
>
> 20. She cannot escape the consequence of this Agreement. Nor should the husband be allowed to."

102. The agreement provides for the following capital payments:

    i) If the wife sells a property in Carmel, California while the husband is living, the husband is to satisfy 100% of the remaining mortgage, not to exceed $550,000. (The wife has sold the property and so that sum is due.)

    ii) The husband was to pay the wife a lump sum of £200,000. (It has been paid).

    iii) Provided that the husband predeceased the wife, his estate was to satisfy:

        a) Central Park West ('CPW') mortgage (or any mortgage on a successor Primary Residence) capped at $2.3m.

        b) Duffield Street mortgages, capped at $2.7m.

        c) Carmel mortgage (or any mortgage on a successor second home), capped at $549,570.

103. As for income the agreement provided:

i) The husband was to pay the wife $22,000 pm without indexation. This was to terminate on the later of the wife's remarriage, the wife's cohabitation, the wife’s death, or the husband’s death.

ii) Provided that the husband predeceased the wife, his estate was to pay the wife $35,000 pm until her remarriage, cohabitation or death.

iii) Under Schedule A, the husband was to pay various periodic expenses of an income nature in relation to CPW such as the mortgage repayments (capped at $6,947.92 p.m.), property taxes, co-op maintenance, cable, internet, telephone, homeowners insurance, Verzon land line and fax, electrical bill and care expenses.

iv) These income terms were stated to be non-variable, but such a restriction is, of course, void under s34 Matrimonial Causes Act 1973.

104. Other terms included:

i) Any dispute about payments under the agreement would be litigated in New York.

ii) The husband would pay all of the wife’s reasonable costs in the event that she had to litigate in New York to secure her rights under the agreement.

105. The wife calculates the value of her claims under the agreement as follows:

Arrears due and owing	$	
Carmel Property mortgage	550,000	
Maintenance arrears	1,486,500	
Schedule A arrears	1,003,799	
legal fees to enforce	1,274,957	
sub-total	4,315,256	(A)
Future payments due	pm	
Maintenance	22,000	
Schedule A sums (known values only and ignoring JF's mortgage)	29,109	
TOTAL monthly sum due:	51,109	
TOTAL annual sum due	613,311	
Duxbury if use W's life expectancy but step down to $35,000 ("Death Payments") in 2036	5,813,325	(B)
Loss on sale of Carmel Land	905,000	(C)
Future payments (if the husband predeceases the wife - to be secured by life insurance / JSA shares & options		
CPW wife Mortgage (ignored as Duxbury includes mortgage payments)	0	
Duffield Street Mortgage	2,480,000	
Discount for possibility that the wife predeceases the husband (25%)	(620,000)	
Discount for early receipt (=PV(3%,12.8,$0,-$1.86m))	(585,921)	
Mortgage receipts discounted for probability of receipt and TVM	1,274,079	(D)
Less sums received over and above NYSA		
surrender value of insurance policy	(300,000)	
50% of social security received	(52,915)	
sums to be deducted	(352,915)	(E)
Sum A + B + C + D + E	**$11,954,746**	
In GBP	**£9,339,645**	

What is notable about this calculation is that:

i) it includes a figure of $905,000 for the loss that the wife suffered on the sale of the property in California, notwithstanding that the agreement contains no such provision to this effect;

ii) it includes every last penny of arrears both of maintenance and the Schedule A payments. It does not even confine the arrears to the 12 months preceding the date of the application in line with s.32 Matrimonial Causes Act 1973;

iii) it includes the bringing forward and capitalising of all maintenance payments due after the husband's death and payable by his estate but only if the wife was alive at that point;

iv) it includes the bringing forward of the capital payments payable in the future after the husband's death by his estate but only if the wife is alive at that point; and

v) it includes the husband paying all of the wife's costs, notwithstanding that she has not complied with the agreement which required her to institute any proceedings for enforcement in New York.

Decision

106. In my judgment, all the arrears of maintenance which have arisen under Article IV of the agreement should be remitted. Section 32 provides a powerful steer for confining the enforcement of arrears of maintenance only to those sums which are close in time to the proceedings for enforcement. The idea is that maintenance should be used for immediate expenditure and if it is not paid, and if the default is not enforced promptly, then the entitlement lapses, as the accumulation of arrears is not to be seen as a type of savings plan.

107. On 4 February 2022 I ordered the husband to pay the wife maintenance pending suit of $6,500 a month. That has been paid. That regime should be seen as having superseded the maintenance regime in the agreement. Given the respective financial positions of the parties I am not satisfied that it would be just for any of the arrears of maintenance under the agreement to be enforced. However, any arrears arising under my maintenance pending suit order shall certainly be enforced.

108. Even though the wife is better off than the husband, it would in my judgment be fair and just to require him to discharge the capital payments which he promised in the agreement would be made by him or by his estate. I can discern no change in the circumstances in the light of which the capital terms were made, which would make those terms manifestly unjust. On the contrary, it is my clear finding that it would be manifestly just for those capital terms to be enforced now, including those terms which provide for capital to be paid by the husband's estate upon him predeceasing the wife. This is because I have no confidence that the husband will make arrangements for his estate to discharge those obligations or that, in that event, the wife would find it easy to enforce them.

109. A discounting factor needs to be calculated by me to reflect two elements: (a) the likelihood of the wife predeceasing the husband (in which event those capital payments would lapse) and (b) that the payments will be made earlier than the agreement provided.

110. The Life Tables in At a Glance Cloud state that the husband's life expectancy is 12 years and 3 months, while the wife's life expectancy is 12 years and 11 months. I can therefore calculate that the probability or likelihood that the wife will outlive the husband is 51.3%[6]. That is the first element of the discount. The second element is the factor referable to early payment. The Duxbury real rate of return is 3.75%. Using that

[6] 12.92 ÷ (12.92 + 12.25) = 0.513

as the discounting factor over 12 years and 3 months means that any sum payable in the future has to be reduced to 63.7% of its nominal value to reflect early payment[7]. The combination of the two factors means that sums that the husband is obliged to pay in the future should be reduced to 32.7%[8] of their nominal value.

111. This leads to a calculation of the capital sum due as follows:

Capital Items	Amount due	Due now or accelerated	Capital sum payable now
Carmel mortgage	550,000	Now	550,000
CPW mortgage on death	2,300,000	accelerated	752,100
Duffield Mortgage on death	2,480,000	accelerated	810,960
Total capital sums paid now			**2,113,060**
Less			
Proceeds of life assurance policy			(300,000)
Total payable by H			1,813,060
		in £	**1,414,187**

112. The term requiring the husband to pay all of the wife's reasonable costs, irrespective of the merits, is in my judgment contrary to public policy in this jurisdiction and should not be implemented. Costs should be dealt with in accordance with our own lights. Although the wife has not succeeded in her claim for £9.4 million, or even come close to it, it would not be just having regard to the husband's conduct for her to have to bear any of his costs. On the contrary, the terms of FPR 28.3(6) require me specifically to consider the conduct of the parties. I cannot say that the wife's litigation conduct was unreasonable. In my opinion, even when she had received Mr Fink's affidavit it was not unreasonable in the light of the husband's persistent delinquency for her to carry on making further forensic investigation. I am of the clear view that the point at which the landscape became sufficiently clear for her to have to realise that her forensic investigation was running up a cul-de-sac, was when Mr Fink gave his extremely impressive evidence. By then, of course, all the costs had been incurred.

113. The husband's litigation conduct was abysmal. As I have said, he treated the entire litigation as if it was an impertinence and a joke. His initial disclosure was deliberately false, and he persisted in misrepresentation and lies up to the very end, as I have set out in detail above. It would be a travesty of justice if he were not required to pay a substantial sum as a penalty for his delinquent behaviour, notwithstanding that I have approached this case on a net-of-costs basis.

114. In my judgment the husband should pay £200,000 towards the wife's costs to reflect both his estimated liability under a clutch of interlocutory orders and the court's very strong condemnation of his delinquency. Thus, the lump sum that the husband will pay to the wife is **£1,614,000**. The effect of that payment will be that the husband's deemed net worth reduces to **£3,941,565** (or 35%) while the wife's increases to **£7,458,895** (65%). The result of this titanic litigation has been to decrease the

[7] 1 ÷ ((1.0375)^12.25) = 0.637
[8] 0.637 x 0.513 = 0.327

husband's net worth by £2,040,458. Of this, £1,804,285 has gone, or will go, to the lawyers and £236,173 will go to the wife.

115. Given the respective financial positions of the parties, as set out above, it would not be fair or just, in my judgment, to require the husband to make any further payments of maintenance in the future either by him while alive or by his estate once he is dead. There will be no further adjustment referable to these terms. The husband will resume receipt of his US state pension payments once the lump sum has been paid in full.

116. I stand back and have in mind all the relevant factors mentioned in s. 25 Matrimonial Causes Act 1973 and assess this to be a perfectly fair, just and reasonable result.

117. There will have to be a process of liquidation of assets by the husband in order to pay this sum and so I give him four months in which to pay it. The maintenance pending suit order will continue until the sum is paid in full. The freezing order will continue in force until the sum is paid in full but will be varied to allow the husband to liquidate assets in order to pay the sum due.

118. Once the sum has been paid in full there will be a clean break.

Concluding remarks

119. The wife's case was always going to stand or fall with the decision on the Envigo issue. The Lediba theory was always very unlikely to work. The preparation by an auditor of an accurate cash-flow statement for a business over an accounting year is hard enough, but at least that exercise is done with the benefit of comprehensive documentation, leaving nothing to subjective guesswork. In contrast, the Lediba theory uses an audit period of 14 years (although many items of data do not cover that exact term); there are for many data items an absence of any documentation; and for the larger items the figures advanced are pure subjective guesswork. The technique, the data and the process of proof are all so crude and arbitrary that I was never going to conclude, on the balance of probability, the husband had $10 million squirrelled away which derived from the activities of Lediba.

120. The wife appeared to have a good arguable case on Envigo until Mr Fink swore his affidavit with its timeline. Unfortunately for her, it became completely untenable when Mr Fink gave his evidence. In judging that evidence to be compellingly and decisively truthful I am not, of course, placing any material weight on the way he gave his evidence. His indignation at the suggestion that he was not merely wrong, but was deliberately and knowingly purveying false evidence, had all the hallmarks of being authentic and honest; but, for all I know, Mr Fink may be a very good actor. What I am placing decisive weight on, is the clarity of his account, its internal consistency, and the absence of any motive by Mr Fink to tell lies on oath. The quality of that evidence, in that sense, was very powerful, and as it progressed I could see the wife's case dissolving before my very eyes.

121. Both limbs of the non-disclosure case having failed, I am left with only limited assets to allocate between the parties. In my judgment it is not manifestly unjust to uphold and implement the capital terms of the separation agreement. But beyond that I will not go.

LATER

122. Following the distribution of this judgment in draft both Mr Bishop KC and Mr Bojarski have requested clarification of, and permission to appeal, a number of issues.

Mr Bishop KC's issues

123. My rulings on Mr Bishop's issues must be seen in the context of the outcome set out at para 114 above. The effect of my disposition is that the husband's assets (including the proprietary interests held by his partner in the two properties) will fall to **£3,941,565** (or 35%) while the wife's will become **£7,458,895** (65%). The result of the case is broadly that the wife ends up with twice the net worth of the husband. Unless the court is to adopt a modern matrimonial finance equivalent of Albion's Fatal Tree[9] there is very little, if any, scope for further adjustment in favour of the wife.

Treatment of mortgage payments on CPW

124. Mr Bishop KC refers to the fact that in the draft judgment at para 103(iii) I omitted to refer to the mortgage repayments on CPW as an income obligation. He argues that my omission was entirely correct as the obligation is properly to be treated as being of a capital nature entitling the wife to an additional $1.6 million. It was for this reason that, in the table at para 105 above (which sets out the wife's calculation of what she says is due to her under the separation agreement) she includes in the Duxbury capitalisation the sums payable under Schedule A, which in turn includes the CPW mortgage payments. Accordingly, Mr Bishop KC seeks that I "clarify" my draft judgment to include an augmentation to the lump sum of $1.6 million, and should I refuse to do so, to grant the wife permission to appeal that decision.

125. I firmly reject this submission. The omission in para 103(iii) of an explicit reference to the CPW mortgage payments in Schedule A was an oversight by me. Those mortgage payments are spelled out as an obligation in Schedule A, and the husband's obligation to make the Schedule A payments is found in Article IV which is headed "Maintenance". This obligation was therefore plainly agreed between the parties to be a constituent of the wife's maintenance. Further, the agreement stated that if the wife should sell CPW, and buy another property as her primary residence, the husband would make the payments on a new mortgage up to $2.3 million (which he would guarantee, if that were required) as well as meeting the outgoings on the new property. The agreement did not require him at any point during his lifetime to pay off the CPW mortgage. In contrast, the agreement stated that if the Carmel property were sold while the husband was still living he "shall satisfy 100% of the remaining Carmel Mortgage, not to exceed $550,000.00, upon the sale of the Carmel Property."

126. Accordingly, I reject Mr Bishop KC's argument that the husband's *inter vivos* obligations in respect of the CPW mortgage are to be seen as of a capital nature. If that were so, the parties would not have included the obligation as a maintenance obligation under Article IV of, and Schedule A to, the agreement, but would presumably have included it under Article III: Division of Property and Equitable Distribution.

[9] E.P. Thompson and others (1976 – reprinted 2011, Verso) who described how in the eighteenth century a criminal code of unexampled savagery struggled to maintain stability.

Back-dated variation of maintenance pending suit award

127. Mr Bishop KC seeks a back-dated adjustment to the maintenance pending suit award of an additional $6,423 per month for the five months April – August 2023 inclusive and a future equivalent adjustment for the four months I have given the husband to pay the lump sum. Under this head he seeks an augmentation to the lump sum of $57,827.

128. Mr Bishop KC relies on the terms of my judgment when refusing a variation to the maintenance pending suit award on 27 February 2023. That judgment was, by its nature, founded on a provisional assessment of likely assets, liabilities and outcome. At that point I perceived the wife as having a good arguable case that the husband had a large sum of undisclosed assets, and that therefore the husband would struggle to resist the variation at trial. In the event, my findings are far more conservative than I anticipated then. In such circumstances I decline to award any variation of the maintenance pending suit award. I note that at trial I received no argument or oral evidence about this issue and that the sum of $57,827 is not included as a constituent of the lump sum claimed by the wife in her table which I have reproduced at para 105 above.

Remittance / non-enforcement of arrears

129. Mr Bishop KC implicitly seeks clarification as to whether my draft judgment is to be taken to remit arrears under the maintenance pending suit award for June – August 2023 inclusive amounting to $19,500 or £15,333. I confirm that those arrears are not remitted. That figure of £15,333 will be added to the lump sum.

130. Mr Bishop KC seeks permission to appeal my decision not to enforce all other arrears arising under the separation agreement. He argues:

> "In this case, during the period from June 2020 (a year before her application in June 2021) H paid nothing for W's maintenance / Schedule A costs and only four months of the CPW mortgage (until October 2020). Why should W not have recompense even for this period, during which her resources were significantly depleted due to H's default? Further, the February 2022 maintenance pending suit award was not backdated.
>
> W made determined efforts to seek H's compliance from 2017 to 2021 with a view reasonably to seek to avoid contested court proceedings, about which she was not challenged in cross examination. She suffered significantly as a result of H's withdrawal of support as she explains in her statements (again not challenged in cross examination). H's conduct during this period was reprehensible. In all these circumstances to allow H to walk away from all of his maintenance obligations Scot-free is unjustified. We submit that it is reasonable for this aspect of

> the determination to be considered by the Court of Appeal as well."

131. I affirm my decision not to enforce the arrears of maintenance which have arisen under the separation agreement for the reasons given at paras 106 and 107 above. I refuse permission to appeal this decision as I do not consider that there is a real prospect of the wife successfully appealing it.

Costs

132. As to costs, I agree that the husband must be responsible for 50% of Dr Rogers's fees, in the sum of £4,462 and the lump sum will be further augmented by that amount. The total lump sum is therefore £1,614,000 + £15,333 + £4,462 = **£1,633,795**.

133. Otherwise I affirm my award of costs which is intended to cover all actual and potential liabilities, including any costs reserved. Specifically the award covers the following costs orders already made against the husband:

   i) The order of DDJ Watson made on 6 August 2021 (sum not assessed)

   ii) The order of HHJ Evans-Gordon made on 21 September 2021 (sum not assessed)

   iii) The order of Sir Jonathan Cohen on 18 January 2022 (summarily assessed by me on 4 February 2022 at £15,500)

   iv) Order made by me on 4 February 2022 (summarily assessed by me also at £15,500)

   v) Order made by me on 25 July 2022 (sum not assessed)

   Overall, I consider that the value of these orders, assessed on the standard basis, is in the region of £50,000.

134. Mr Bishop KC argues:

> "[The wife's] total costs in the financial remedy proceedings were in the order of £1.377m and so the £200,000 represents a very small proportion of her costs (even making allowance for other interlocutory costs awards). There is no evident pathway as to the reason why £200,000 is the correct costs figure to be found in the Judgment. …
>
> We submit that a costs award of merely £200,000 fails to reflect the extent of H's turpitude nor the extent to which it has caused W to have to incur costs. Therefore, we submit that it is fair for this aspect of the award to be considered by the Court of Appeal."

135. My approach to the costs not covered by the orders set out above (including the costs of the freezing order application before Francis J on 2 November 2021), is to take the no-order starting point in FPR 28.3(5) and to ask whether any adjustment should be

made either way. The husband plainly can argue (at any rate theoretically) that he should receive some costs, as the wife essentially lost the main non-disclosure issue. But, against that, is to be set the husband's disgraceful litigation misconduct which I have outlined. An order of £150,000 to reflect such misconduct represents a significant sanction.

136. The fact that the wife incurred such huge costs of £1.4 million getting to the bottom of the story does not mean that she is entitled to have all, or even a large part, of those costs reimbursed. On the contrary, the main message of FPR 28.3(5) is that parties will not get their costs reimbursed, even if they are very high and are reasonably incurred.

137. Where the Court imposes a sanction to reflect misconduct by a party under FPR 28.3(6) and (7) the court will naturally have in mind the costs incurred by the other party in dealing with that misconduct. But the sanction must nonetheless be objectively reasonable, and while it may be severe in order to reflect the scale of the delinquency, it must not be unduly severe.

138. I am required by FPR 28.3(7)(f) to consider the financial effect on the parties of a costs order. I am quite sure that the figure I have alighted on is very fair to the wife, and is at the top level of severity, but I am equally sure that any further award would be unduly severe, having regard to the parties' respective outcomes as set out at para 123 above.

139. I therefore refuse the wife permission to appeal my costs decision as I do not consider that there is a real prospect of her successfully appealing it.

Mr Bojarski's issues

140. Mr Bojarski seeks permission to appeal on three grounds. First he says that it was wrong for me to treat the husband's partner's interests in Keepier Wharf and Parish's House as part of his resources when the wife had not sought to allege that the husband was the full beneficial owner and where the partner had not been given notice that the court would ignore her beneficial interests in the two properties.

141. It is surely clear that in para 95 above I was not making a *Tebbutt v Haynes* [1981] 2 All ER 238 binding formal declaration as between the husband and his partner that he has formal beneficial ownership of both properties under resulting trusts. I was merely deploying the familiar technique of looking at the scope of the husband's true resources in order to appraise the impact of the lump sum award on him. The use of that technique did not require any notice to be given to the partner, as my findings are not binding on her.

142. Second, Mr Bojarski says that I was wrong to treat the New York agreement as if it were an order to which the variation powers pursuant to s.31 of the Matrimonial Causes Act 1973 applied, rather than treating it as a factor within the s.25 exercise of discretion. He says the agreement was a factor to be weighed among all the other s.25 factors, and a factor which ought to have been given limited weight in view of the deterioration in the husband's financial position since the agreement had been entered into.

143. I agree that formally the agreement falls to be weighed as one of the circumstances of the case under s25(1) of the Matrimonial Causes Act 1973. However, having regard to the test for weighing separation agreements approved by the Supreme Court in *Radmacher v Granatino* at [64] – [65], which I have set out above, an obvious comparison, in my judgment, is an application to vary an order under s. 31. Obviously, s. 31 does not apply literally, but the way the court would approach an agreement incorporated in a consent order is, in seems to me, an obvious analogue for an agreement incorporated in a separation deed.

144. Third, Mr Bojarski says that the court failed to carry out an assessment of the respective needs and financial responsibilities of the husband and the wife, and in particular to take into account the husband's responsibilities to his two dependent sons, resulting in a division of the assets which provided an unfairly large share of the assets to the wife and an unfairly small one to the husband.

145. Although Mr Bojarski touched on the husband's needs in his opening skeleton I heard no oral evidence or argument about them. It was obvious to me that with resources of a little under £4 million the husband and his partner would not suffer undue hardship, and it would therefore not be manifestly unjust, were the capital terms of the solemnly made agreement to be enforced.

146. I therefore refuse the husband permission to appeal on each of these three grounds as I do not consider that there is a real prospect of him successfully appealing them.

Finally

147. I will extend both parties' time to file an appeal notice until 16:00 on 15 September 2023.

148. I end by applauding the skill, assiduity, and diligence of all the lawyers involved in this complex case. The written and oral work from the Bar has been of the highest quality. The attention to detail from counsel has been outstanding. Mr and Mrs Baker should understand that their interests were represented fearlessly by counsel and that no stone was left unturned in their representation. It was a pleasure to conclude my judicial career with the receipt of such skilful advocacy.