Case No: FD13D2476

IN THE CENTRAL FAMILY COURT

42-49 High Holborn
London
WC1V 6NP

13th February 2015

B E F O R E:

HIS HONOUR JUDGE EVERALL QC

P	Applicant
v	
P	Respondent

Judgment

Applicant wife represented by Mr Justin Warshaw
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1. **His Honour Judge Everall QC:** This is an application for financial remedy brought by a wife. They began their relationship in 1989 and began to live together in that year. They married in June 2004. There are two children, C, born in 1992, now 22, and at university in the United States; A, born 1997, now 17, at public school in the U.K. and it is the expectation of the parties that A will too go on to university.

2. The parties separated in September 2012. On 16th May 2013 the wife issued her petition to dissolve the marriage. It proceeded undefended and the District Judge, on 5th January 2015, gave the certificate of entitlement to a decree and, from what I have been told this afternoon, it would appear that the decree has not yet been pronounced. So I suggest that among the orders I make is an order that the decree is listed before a District Judge for pronouncement.

3. On 7th June 2013, the wife issued her form A seeking financial remedies. Both before the relationship began and during the relationship, the wife has received substantial sums from her family by way of gift or inheritance. Thus most of the assets in this case belong to the wife. The sums have been received by the wife from Hong Kong. While some of these assets have been transferred to the United Kingdom, most have remained in Hong Kong. The orders which each of the parties seeks involve transfers of assets from wife to husband.

4. The asset schedule is agreed between counsel, subject to two points. In the circumstances of this case, I will also need to consider the asset schedule in order to identify what is or is not matrimonial property.

5. The FDR did not lead to resolution and on 10th February 2014, Mr Recorder Francis QC listed the matter for final hearing. He also gave directions; among the directions given was a direction that the wife was to set out the UK tax liabilities she asserts are latent in the Hong Kong assets and the basis of that assertion. It was, in addition, ordered that in the event that the husband did not agree that assertion, the parties were to consider what, if any, joint expert evidence was required. The wife obtained the advice of her accountants, Calder & Co, which was provided in its up to date form on 29th October 2014. No further expert evidence was called about the latent tax liabilities.

6. The final hearing took place before me, between 12th and 14th January 2015. I heard the oral evidence of the wife and of the husband; I heard submissions on 14th January 2015; I reserved judgment.

7. The open proposals of the parties are set out in their respective documents; that of the wife dated 22nd December 2014; that of the husband dated 2nd January 2015.

<u>The background</u>

8. I now turn to the background. This is the background as I find it, or as is agreed unless I indicate otherwise. The wife was born in 1961 in Hong Kong; she is 53. She came to study in England in 1969, when she was eight. She left school in 1980 and went to art school in London and obtained a BA in graphic design. In

1982 the wife married her first husband. They set up a graphics company, the wife was the creative director. The wife earned about £10,000 to £15,000 per annum. In 1989, the wife and her first husband divorced. The wife moved to London and took employment as a graphic designer, although her role moved to being one of system manager by the end of 1989 when she was earning £24,000 per annum. The wife contacted the respondent husband, who she knew had lodgers at his house at "D" Road in London. She moved in as a lodger and a relationship began a few months later.

9. The husband was born in 1954 and is now 62. The husband is British. The husband and wife had met early in the 1980s when on holiday, but did not form a relationship at that time. In 1989 the husband was working for R. R. as a facilities manager. In 1990 the husband moved to work for L.; he was employed by L in various property management positions from July 1990 until he ceased employment in 2004. During the later years at L the husband was earning £38,364 per annum gross. In November 2004, the husband and wife set up a business, K Co. Consultants. It was originally intended to be used to manage the parties' investment properties, as to which, see below. In the event, the husband undertook consultancy work through K Co. Consultants from 2004 to December 2006. He was a consultant to L and earning fees of about £49,000 per annum in the two years ending September 2005 and September 2006. That work ceased in December 2006, when the husband was 52. Thereafter, the husband was involved in running the parties' investment properties, together with the wife. He also did some part time administrative work for the S Club, earning in the tax year 2010/11 £6,966. He has taken his L pension and that is in payment.

10. Going back to the beginning of the relationship, the parties first child, C, was born in 1992. In 1994 the husband and wife decided to buy a house together. They bought the matrimonial home in joint names. The husband sold his property "D" Road in London. After discharging the mortgage on D Road in London, he had approximately £70,000, which he contributed towards the purchase price of the matrimonial home as his share of the deposit. The wife paid £77,450 towards the matrimonial home as her contribution. The balance of the purchase price was raised by mortgage of £112,500 in joint names.

11. Since 1994, the matrimonial home has been the parties' family home until the husband moved out in 2012. Over the years, the wife paid for a number of works and improvements at the matrimonial home, which she has set out in paragraph 9 of her witness statement. Of note, £85,880 was spent in 2004 on major internal restructuring.

12. I turn to the gifts to the wife from her grandmother. In 1982, around the time of her 21st birthday, the wife's paternal grandmother, who lived in Hong Kong made a gift to the wife of 212061 HS shares and 182264 Farm shares. The grandmother had eight grandchildren, and each received a similar gift of shares. The grandmother told the wife at the time that this gift was, as the wife put it, "all she was going to get from her grandmother". The wife promised her grandmother that she would not spend the capital, but only the income during her lifetime. The wife

respected the grandmother's wishes and has sought to act accordingly. The share portfolio was managed in Hong Kong and produced an income for the wife ranging from between £10,000 to £20,000 per annum, over the years, depending on the state of the market and exchange rates.

13. The wife used the income to set up her graphics company with her first husband. After the wife moved in with the respondent husband in 1989, the wife saved most of the income until she ceased employment at the time of A's birth in 1997. From 1989 to July 1997, the wife was in employment; between 1990 and 1992, she worked for a public relations company, at a starting salary of about £25,000 per annum; between 1992 and 1994, she worked for "H" Publishing as a systems manager, with a starting salary of £30,000; in 1994 the wife was made redundant. She did some freelance contract work, then in 1995 she went to work for "A" Company, initially earning £35,000 per annum, which rose to £42,000 per annum.

14. In 1997 A was born. The wife took maternity leave. The husband and wife agreed that the wife would give up employment and devote herself to caring for the two children. This agreement was on the understanding that the wife would continue to contribute financially to the family outgoings. The wife ceased employment in 1997; she did occasional IT jobs for friends; this was possible because of the further gifts, which the wife was receiving from her grandmother. I turn to those further gifts.

15. In addition to the shares gifted in 1982, from about 1995 the grandmother gave the wife further sums each year. At first the wife was receiving about £60,000 per annum. In 2006 the sums reduced slightly to about $60,000 (US) per annum. These payments ceased in 2011 on the grandmother's death.

16. When the parties first bought the matrimonial home in 1994, they set up a joint account to meet the household expenditure. The wife had contributed £1500 per month and also paid for the children's expenses from her personal account. The wife increased her contribution to the joint account in 2000 to £3,000 per month and in 2006, she increased it again to £4,000 per month. After the husband had ceased working from employment in 2004 and from consultancy in 2006, he was not in a position to contribute to the joint account.

17. I turn to Ms B. In about 2001, or early 2002, the husband had an affair with Ms B, who is the husband's current partner. She was a work colleague. The husband told the wife that she could be carrying his child. It is not necessary for me to decide the degree of the husband's belief in this being so. The wife believed that the child could be the husband's; the wife insisted on a paternity test. We know from contemporaneous correspondence that the paternity test was arranged in 2002 by Mishcon de Reya, solicitors from whom the wife had sought advice in connection with the husband's affair. The DNA test excluded the possibility that the husband was the father. The husband told me that Ms B married her husband in 2001 and in that year her first child was born.

18. In the light of the result of the paternity test and although the wife was distressed by the affair, she and the husband decided to continue their relationship. In June 2004, the parties married. In November 2004 the husband underwent a radical prostatectomy, following prostate cancer. This affected the sexual side of the parties' relationship.

19. In March or April 2012 the husband met Ms B by chance at a competition. Following this meeting, they exchanged text messages; they met by arrangement in August 2012. On 5th September 2012 the husband moved out of the matrimonial home and went to live with Ms B and her children. The husband remains living there. The husband described her as "his partner" and plans to make his future with her. She and the husband plan to remain living together.

20. The husband currently lives with Ms B and her children at her new home *(address withheld)*; the wife and the two children, when not at their places of education, remain living in the former matrimonial home.

21. I turn to the investment properties. From 1999, a number of investment properties were bought. With the exception of "H" House, they were bought using the wife's funds derived from the gift she had received in 1982 and the continuing gifts received in the years between 1995 and 2011. The properties were, "O" Close, bought in 1999; "F" Road, bought in 2000; "C" Close, bought in 2003; "H" House, bought in March 2007; "F" Court, bought in August 2007.

22. "O" Close was purchased in the wife's sole name without the need for a mortgage. The remaining four investment properties were purchased in joint names. The purchases were financed by mortgage and by substantial cash down payments.

23. "H" House was bought in March 2007, as I have said. I find that the cash payment of £56,000 to complete the purchase of "H" House came from the proceeds of sale of the property called "O" Court.

24. In 2005, the parties had received a payment of about £96,000 under a critical illness policy on their lives. It was paid in respect of the husband's illness, to which I have referred. The parties used the proceeds to purchase "O" Court in 2005. "O" Court was sold in 2006 and the proceeds of sale were paid into the K Company Consultants account. I find, on the balance of probabilities that the cash down payment for "H" Court came from the Company account.

25. I accept the wife's evidence in paragraphs 26 and 27 of her witness statement, save in respect of "H" Court. I accept the figures in respect of "H" Court, but the balancing payment came from K Company Consultants, as I have set out above.

26. The husband accepted in his oral evidence that none of the purchases could have been affordable on his earnings. I find that, save in the respect of the cash payment in respect of "H" Court, all the cash down payments and any necessary cash for refurbishment came from the wife's Hong Kong funds. I find that the

parties intended that the investment properties would be maintained out of rental income and that, in due course, the parties would leave the investment properties to their two children. But that intention was formed at a time when the wife was not expecting to receive any further gifts from her grandmother, in addition to the 1982 gift of shares and the yearly payments.

27. I turn to the lifestyle of the parties. The 1982 gift and the annual subventions from grandmother enabled the parties to live at a higher standard of living than would otherwise have been available. The funds derived from the grandmother met the education costs of the children. They met the comfortable foreign holidays, often linked to a trip to Hong Kong to see the grandmother and other Hong Kong family members. The grandmother would pay for the flights. A number of investment properties were bought in England, as I have said. All bar one were financed by these Hong Kong funds. The income from the investment properties, together with the Hong Kong funds, enabled the husband largely to cease work after 2006 and there was no need for the wife to earn anything more than at a modest level.

28. I turn to the further gifts from the grandmother. In 1995 the wife's grandmother created a discretionary trust. The wife was appointed one of the class of discretionary beneficiaries. The wife did not learn of the existence of the trust, let alone that she might be a beneficiary, until about 2006, that is five years before the grandmother's death, when she was told by her brother. I accept the wife's evidence. The grandmother died in 2011, aged 91. The wife received no benefit from the trust until 19th April 2012, when assets worth $2,984,675 (HK) were appointed to her and she signed a Deed of Disclaimer to any further sums under the trust. In addition, on 23rd February 2012, the wife received $780,651 by way of inheritance under the grandmother's will.

29. I turn briefly to the husband's inheritance. The husband received an inheritance from his mother in about 2011 of £169,500. The husband has received £100,000 of this; he has yet to be paid the remaining £69,500. I have no evidence of what sums, if any, the wife might expect to receive on the death of her parents. In any event, it is too remote to take this into account.

30. The parties have two children, as I have said. C is now 22. C was educated privately; when C left school C went to university in the United States. C went in 2012; C was majoring in aerospace engineering; C has switched to majoring in psychology. C is due to graduate in 2017. C is thinking of doing a Masters in marketing, which would last until 2020 or 2021. A is 17; since 2011 A has been at public school. A will leave in 2016; A is doing well academically and is likely to go on to university, most probably in the United States. A wants to study architectural engineering, which is a five year course which would last from 2016 to 2021. At present, A has ambitions to go on to do a PhD.

31. Given the funds available to the wife, it was always the intention of the parties that their two children would be privately educated. The wife has always paid for

the childrens' education and it is common ground that she will continue to do so. The wife has calculated the total projected costs of completing C's education, up to 2021, to be £610,951. The total projected cost for A, up to 2021, is £567,882. The total for the two children, therefore, is £1,178,833. These are substantial sums. The cost of university in the US is high, but given the funds available, in my judgment expenditure on the children's' education in line with their ambitions and abilities, is reasonable and is affordable and is in line with the approach of the husband and wife to their children's education during the marriage.

32. From her Hong Kong funds, the wife has created a discrete portfolio of investments in a separate HSBC Hong Kong based account, which has been called "the education fund". It is in the name of the wife and C; A will be added to the account when A turns 18. In December 2014, she sold some Hong Kong investments and paid them over to the education fund. As at 18th December 2014, the education fund stood at $1,158,266 (US). In the asset schedule, the education fund is shown but the value has not been included in the totals. The exclusion of the education fund is not in dispute between the parties. Nevertheless, the existence of the education fund is a matter to which I have paid regard. Insofar as the children's education costs are met from this fund, the wife will not have to use her remaining assets to do so. But the wife will have to meet the shortfall from her other assets, which in the circumstances of this case is well within her means to do.

The Law

33. I turn to the law. The court must seek to achieve an outcome, which is fair to both parties. The court is guided by section 25 of the Matrimonial Causes Act; the court must have regard to all the circumstances of the case, the first consideration being given to the welfare of A, whilst A is still 17. The court must have particular regard to the factors in section 25(2). Having identified the assets and resources of the parties, the search for fairness is informed by the principles of need, generously interpreted, compensation and sharing, see the cases of *Miller v Miller* and *McFarlane v McFarlane* [2006] UKHL 24 and *Charman v Charman* [2007] EWCA Civ 503.

Section 25(2)

34. I turn to the section 25(2) factors. I turn first to the assets of the parties. The asset schedule is largely agreed; there are two points in issue to which I will return. In property, there is the matrimonial home, net value £1,419,837; there are the five investment properties, as set out in the asset schedule. The total of the investment properties and matrimonial home is £2,873,478, of which, in the wife's name stands £1,654,989; in the husband's name £1,218,489. The husband has net funds of £147,254; this takes into account the liability for capital gains tax in the event of the sale of properties and outstanding costs of liability. The wife has funds in the United Kingdom, but after potential liabilities, her liabilities exceed these funds by £180,569. The liabilities include capital gains tax on properties, capital gains tax on shares, tax due and outstanding costs liability.

35. Therefore, the assets of the parties in the United Kingdom are £2,840,531, of which in the wife's name is £1,474,604; in the husband's name £1,365,927. I will deal with pensions later.

36. In addition, the wife has her Hong Kong assets. The portfolio ending 001, held in US dollar assets, is valued in sterling at £1,167,828. That has been called "pot one" on the asset schedule. This was formed from the 1982 gift and now contains the residue of this gift. The funds have always been held offshore, in Hong Kong, and kept separately.

37. The portfolio ending 002 is held in US dollar assets; the sterling value is £1,781,498. This portfolio is called "pot 2". This was formed of the inheritance and the distribution from the discretionary trust in 2012.

38. The portfolio ending 003 is held in US dollar assets, it is called "pot 3"; the income from pot 2 is paid into pot 3. Pot 3 stands at £109,604.

39. There is also the education fund to which I have referred. It was funded by means of transfers from pot 1 and pot 2.

40. I turn to the first issue in dispute on the asset schedule. There has been included, as a liability in the asset schedule, a number of actual or potential tax liabilities in connection with the Hong Kong assets. There is a capital gains tax in respect of pot 2 assets of £90,354. This deduction is not in issue between the parties. Whether or not the wife's non-domicile status is challenged by the UK Revenue, she, the wife, has a latent capital gains tax liability on her Hong Kong assets, which is realisable on the sale of the shares.

41. A further capital gains tax potential liability exists on pot 2 assets in the sum of £519,319. This deduction is in issue between the parties. There is also a dividend income tax potential liability on the pot 2 assets, in the sum of £218,297. This deduction is in issue between the parties.

42. The tax position is set out in the letter dated 29th October 2014, from Calder & Co, the wife's accountants, which was produced pursuant to the order of 10th February 2014. It stands as agreed evidence. The wife's position in her dealings with the HMRC and before the court was that she retained her domicile of origin in Hong Kong and considered Hong Kong to be her permanent home and intended to return to Hong Kong once her children have completed their education.

43. As to the disputed liability for £218,297, this represents income tax payable on the original dividend to create funds in pot 2. The income tax is only payable if the account were to be brought to the United Kingdom. In my judgment, it is unlikely that the wife would choose to bring these funds to the UK. The wife is unlikely to need to do so; she has assets in pot 1 of over £1 million, which can be remitted to the United Kingdom without tax charge. The wife has chosen to order her affairs so as to minimise her tax liability and it is very unlikely that she would

not continue to act in that way in the future. The same consideration applies in relation to the potential liability £519,319. It is very unlikely that the wife would choose to remit, or need to remit, to the United Kingdom, such sum or part of it. Furthermore, the wife has what her accountants call the "motive defence" to any claim for capital gains tax on remittance because of the way the funds were received from the BVI company. This has not been challenged by the Revenue so far, but the potential for challenge would arise in the event of remittance.

44. In my judgment, the sum of £737,616, made up of £218,297 plus £519,319 should be added back into the schedule, under the wife's Hong Kong funds because the occasion on which tax would arise is remote. Therefore, the wife's Hong Kong funds stand at £2,992,977 plus £737,616, a total of £3,730,593. Nevertheless, I have in mind the remote possibility that tax might arise. In any event, whether £737,616 is excluded or included in the asset table does not materially affect the fair outcome in this case.

45. The second issue on the asset schedule is whether the capital value of the husband's L pension should be included in the asset schedule. Mrs Todman on behalf of the husband submits it should not because it is a pension in payment. I prefer Mr Warshaw's submission, on behalf of the wife. The L pension has a value; the CE value is £103,517 and it should be included under the capital value of the pensions held by each party. But it should be borne in mind that it is a pension in payment and is not a capital asset, available to her husband, to deploy other than in the form of an income stream, represented by the pension in payment.

46. Therefore, as to pensions, the wife has pensions with CE value £162,016; the husband has pensions with CE value £231,225 of which £103,517 represents a pension already in payment.

47. I turn to the wife's income and earning capacity. I set out the wife's employment history. The wife continues to undertake occasional IT services; she currently works as the meet and website manager for S Club, earning net £10,000 per annum. The wife's earning capacity was not explored in oral evidence; it was not suggested that she should obtain employment. The income from her Hong Kong investments is sufficient to meet her needs. The wife has minimal income from UK based investments; her form E put the figure at £1500 to £2000 per annum. The wife has her share of the net rents from investment properties. The wife has put 100% of the net rent income on her 2013/2014 tax return and that is given as £23,202. The wife has income from her Hong Kong assets. In the twelve months 2011/2012, her form E shows Hong Kong income, not remitted to the United Kingdom, of £101,726; her tax return for 2012/2013 gives total income of £129,823; the tax return 2013/2014, shows that the wife chose to pay the non-domicile charge of £50,000, rather than declare her non-remitted Hong Kong income. In my judgment, it is appropriate to infer that the UK tax charge on her Hong Kong income would have exceeded £50,000 if remitted to the United Kingdom, if declared on the United Kingdom return. Mrs Todman said it is likely the Hong Kong income was in the region of £150,000, but Mrs Todman could not

show me her calculation to work out how she arrived at £150,000. In my judgment the income retained in Hong Kong was at least in excess of the £101,726 declared on the 2012/13 tax return.

48. I turn to the income and earning capacity of the husband. The husband has just turned 62; he is in receipt of his L pension, which amounts to £7,068 per annum. The husband has a number of private pension policies, which can come into payment on his "planned retirement date", in February 2018. Therefore, in 2018 the husband's pension income will be £7,068 L; £5,278 private pensions; total £12,336 per annum gross. He will have the state retirement pension; I have not been given any forecast. Until his retirement age, which the husband put at 65, he has only a modest earning capacity. I find he cannot go back into the field of facilities management or PFI contract management. He is retraining as a book keeper. He has applied for modest jobs, even as a shelf stacker or a car park attendant. The husband told me he hoped to be able to get a job earning approximately £10,000 per annum. I find that for the next three years, until he is 65, he has an earning capacity of no more than £10,000. I am satisfied that he could obtain employment at that level if he chose to do so. I reject Mr Warshaw's submission that the husband has an earning capacity in excess of that.

49. In addition, the husband has modest income from his shares; I have not been given a figure for that income. If the husband took the investment properties, he would have a net income from them.

50. I turn to the financial needs, obligations and responsibilities of the parties. The wife produced a budget for future needs, attached to her form E, dated 30th August 2013. It totals £100,948, excluding the children's costs of £110,950. The children's costs are now largely included in the two schedules dealing with projected education costs. Given the resources available to the wife, even after she has met the order proposed by the husband, no time was spent analysing the wife's income need. I am satisfied that her projected budget could be trimmed if it needed to be. It was not suggested at the hearing that it should be.

51. Although the wife has set up the education fund, there is a shortfall between the projected "education" costs of £1,187,833 and the value of the education fund of £760,000. Therefore, the wife will need to fund the shortfall of £428,000 out of income or capital.

52. The wife needs a home for herself and the two children when they are not away at university and school. It is common ground that the wife should retain the matrimonial home; it is a substantial five bedroom, semi-detached house in London. Its gross value is £1.55 million. It meets the wife's needs; it provides a home for the children when they return for vacations from university and school. In the circumstances of this case, where the wife will be left with the bulk of her Hong Kong assets, no time was spent on exploring if the wife's housing needs could reasonably be met in a less expensive home.

53. I turn to the husband's needs. The husband set out in his witness statement his estimated future budget at £3749 per month. Excluding rent of £850 per month,

his estimated future budget is £2899 per month, which is £34,788 per annum. The husband intends to remain living with Ms B; she is 38. She has three children. The husband initially moved in with Ms B when she was living in her former matrimonial home in Kent. During 2013, Ms B bought a new three bedroom house in Kent, where the husband and Ms B and her children now live. It was bought by Ms B, with the aid of a mortgage. I am told it has little or no equity. Ms B is a newly qualified nurse, earning £14,000 per annum. She receives child support for the children from their father and has tax credits. I was not told the size of the mortgage on Ms B's new property or what her mortgage capacity is.

54. The husband in his witness statement, sworn in December 2014, said he needed at least £650,000 to buy a home for himself where the two children can stay. In fact, the relationship between the two children and their father is difficult at the moment and they see little of him. However, in my judgment, it is reasonable for the husband to have the accommodation to enable the two children to stay with him if the relationship improves and they wish to stay. In his witness statement, the husband for the first time suggested he needed a property in the countryside around Kent and, in particular, in "M". He produced particulars for a four bedroom house at £650,000; a five bedroom house at £699,000; and a five bedroom house at £749,000. He said in oral evidence that one possibility is that Ms B and he would buy a property together, as he put it they would pool their resources, namely the husband's capital and Ms B's earning capacity. I will return to my findings on the husband's needs when I state my overall conclusions.

55. Turning to the standard of living during the marriage. This was comfortable but not extravagant. There was foreign travel, which was mostly funded by the grandmother, paying for flights to the Far East in order to see her. The standard of living was possible because of the income from the grandmother. The parties had domestic help and, at times, a nanny for the children. It is to be remembered that a large part of the non-marital wealth was received in 2012, that is, at the end of the marriage.

56. Turning to the ages of the parties and duration of the marriage. As I have said, the husband is 62, the wife 53. It was a marriage of eight years, preceded by cohabitation of 15 years, a relationship of 23 years in total.

57. Turning to the physical or mental disability of the parties. Mental disability is not relevant. The wife has no relevant physical disability; the husband has no physical disability, but has had a number of medical conditions, which he sets out in paragraph 3 of his witness statement. He recovered, but is regularly checked. He is borderline diabetic and expects to need medication for diabetes in due course.

58. Contributions to the welfare of the family. The wife has made an unmatched financial contribution, by reason of the use of her "inherited" resources from her grandmother, to supplement the family's income and to meet capital expenditure. That apart, the parties have made each made a full contribution to the welfare of the family.

59. Turning to the conduct of each party, if that conduct is such that it would, in the opinion of court, be inequitable to disregard it. The wife's primary case is that she does not need to rely on the husband's conduct to persuade the court that the outcome she proposes is the fair outcome in the case. As a secondary case, she says if she has not persuaded the court of her primary case, then she does rely on the husband's conduct. Mr Warshaw, in closing submissions, realistically did not press the issue of conduct strenuously.

60. I was referred to *S v S* [2006] EWHC 2793 (Fam) where Burton J reviewed the authorities on conduct between paragraphs 37 to 39 of his judgment. Burton J, on the facts of his case, was left with what he said might be called a "gulp factor", rather than a "gasp factor" and was not satisfied that conduct was made out.

61. It is the wife's case that she was tricked by the husband, first into marrying him when he had no intention of giving up the relationship with Ms B and secondly into buying the investment properties in joint names. Mr Warshaw accepted, in closing submissions, that in order to succeed the wife needed to satisfy me that the husband never intended to cease the relationship in 2002 and never, in fact, did so. And that the meeting in 2012 was not by chance, but was linked to the receiving of two further tranches of funds from the grandmother.

62. The wife is very angry at the husband leaving the marriage and moving to live with Ms B. This is clear from paragraph 30 of her witness statement and from her oral evidence. Nevertheless, I am not satisfied that the wife has proved that the husband never intended to cease the relationship in 2002 or that the relationship did not cease in 2002. I find that the meeting at the competition was by chance and was not planned by either husband or Ms B. Thereafter, their relationship, which had ceased in 2002, was rekindled, leading to the husband leaving the wife in September 2012. I accept the evidence of the husband that he gave up his L phone in 2004, when he ceased employment with them. He was bought an iPhone by the wife; that evidence is consistent with the overall impression I have formed of the parties' relationship. The wife was the more powerful personality.

63. I am not satisfied that the wife has proved that there is conduct here which it would be inequitable to disregard.

<u>Overall conclusion</u>

64. I turn to my overall conclusion. It is submitted on behalf of the husband that the husband transfer his interest in the matrimonial home to the wife, subject to mortgage; that the wife transfer her interest to the husband, in the four investment properties in joint names. It is submitted on the husband's behalf that he will use his best endeavours to obtain the release of the wife from the mortgages, but if he cannot it is his case that she should remain on the mortgage and he would give the wife an indemnity. It is the husband's case that the wife should pay the husband a lump sum of £700,000 to enable him to purchase a property at £650,000, plus costs of purchase and moving in. The husband submits that his income needs can be met by his pension and the net rental income after mortgage, on the four transferred investment properties.

65. The wife's case is that the matrimonial home should be transferred to the wife's name solely; the four joint investment properties be transferred to the husband's name solely. But it is the wife's case that if the wife cannot be removed from the mortgages, the four investment properties be sold and the net proceeds be paid to the husband.

66. So far as the other assets of either husband or wife, they are to remain with husband or wife, respectively. The wife's case is that she should pay the husband a lump sum of £300,000.

67. It is common ground first that the husband takes the four investment properties in joint names. They amount to £1,017,141, being the total of £298,120 and £247,236 and £172,284 and £299,501. In addition, he will have his own funds of £147,254. He will have half the joint funds of £184. Excluding pensions, he will therefore have £1,164,579.

68. Secondly, it is common ground that each retain their own pensions.

69. The primary issue in dispute between the parties is the size of the lump sum to be paid by the wife to the husband, to add to the assets, which he takes by agreement.

70. On the question of how non-matrimonial property should be treated I was referred to *K v L* [2011] EWCA Civ 550, a decision of the Court of Appeal. The leading judgment was given by Wilson LJ, as he then was, and in paragraph 2 of his judgment he said:

> "The facts of the case, which are extreme, raise an issue about the application to non-matrimonial property of the sharing principle in the modern law of ancillary relief following divorce. We know that non-matrimonial property belonging to one spouse can be awarded to the other to the extent that the other needs it. In the present case, the judge found that the wife's assets, which were entirely non-matrimonial, had a value of almost £57 million and his order for payment out of them to the husband of £5 million was very largely based on his assessment of the husband's needs …"

71. At paragraph 17, Wilson LJ said this:

> "The answer to the question, or at any rate, Lord Nicholls' answer to the question, is made clear in his speech in *Miller v McFarlane* cited above at paragraph 25, as follows:
> 'Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as years pass, the weight fairly to be attributed to this contribution will diminish. Sometimes it will not. After many years of marriage, the continuing weight to be attributed to modest savings, introduced by one party at the outset of the

marriage, may well be different from the weight attributable to a valuable heirloom intended to be retained *in specie*.'"

72. Paragraph 18:

> "Thus with respect to Baroness Hale of Richmond, I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind: (a) over time, matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property; (b) over time, the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which for the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult; (c) the contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home, which although vested in his or her sole name has, as in most cases, one would expect, come over time to be treated by the parties as a central item of matrimonial property. The situations described in (a) and (b) above, were both present in *White.* By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that as long as a marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring fenced by share certificates in the wife's sole name which, to a large extent, were just kept safely and left to reproduce themselves and grow in value."

73. At paragraph 21, Wilson LJ continued:

> "… by contrast, although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the two other principles of need and compensation are likely to be very different. The ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often, so it would appear, to one hundred per cent, to nought. Although, Mr Pointer recognises the difference between the 'special contribution' which this court addressed in *Charman* and the contribution in non-matrimonial property, exemplified by the present case … his attempt to represent the difference as immaterial is entirely unconvincing."

74. At the end of paragraph 22, Wilson LJ said:

> "… what was much more interesting was the moment during the hearing when we asked Mr Pointer to show us a reported decision in which the assets were entirely non-matrimonial and which, by reference to the sharing principle, the applicant secured an award in excess of her or his needs. He confessed to be unable to do so. Such a decision will no doubt be made, but not in this court today."

75. Here, Mr Warshaw submits that it is justified to find that there is a very substantial departure from equality and that the husband's sharing claim is reduced to nil.

76. I was referred by Mrs Todman, to the case of *AR v AR* [2011] EWHC 2717 (Fam) a decision of Moylan J, reached after the decision of *K v L*, in the Court of Appeal. Moylan J cited extensively from *K v L*. In paragraph 77, the learned judge said:

> "In my judgment, Ms Stone's submissions seek unduly to fetter the exercise by the court of its discretionary powers. Her submissions cover the broad canvas as to the approach which the court should adopt in cases where the wealth is non- matrimonial. She submits, it seems to me as a matter of principle, that matrimonial assets were only to be 'invaded' to the extent justified to meet the wife's needs, unless one of the exceptions identified by Wilson LJ in *K v L* applies. In my view, this submission seeks to impose too rigid a framework."

77. Paragraph 78:

> "In *Charman v Charman*, the Court of Appeal makes it clear that the sharing principle applies to all the parties' property. To repeat what Ward LJ said in *Robson:* 'No formula, no resort to percentages, would provide the right answer. Weighing the various factors and striking the balance of fairness is, after all, an art not a science.' In addition to that quote, Hughes LJ, as he then was, said at paragraph 95 that: 'The origin of assets is a relevant factor in no sense means that the approach to inherited assets is always to be the same. What is fair will depend on all the circumstances, those cannot be exhaustively stated, but will offer and include the nature of the assets, the time of the inheritance, the use made of them by the parties and the needs of the parties at the time of trial.'"

78. Paragraph 79:

> 'In *N v F*, Mostyn J said: 'The treatment of pre-marital wealth is highly fact specific and very discretionary …'"

79. On the question of needs, I was referred to the case of *N v F [2011] EWHC 586 (Fam),* a decision of Mostyn J. The approach to non-matrimonial property stated in that case has since been overtaken by the case of *K v L* in the Court of Appeal. Mostyn J, however, also considered needs. I was referred, in particular, to paragraphs 16, 17, 18 and 19 of Mostyn J's judgment, to which I have had regard, but I will not take time to read out.

80. I was also reminded that Moylan J dealt with need in *AR v AR* and I was reminded of the way he approached need, in that case. In particular at paragraphs 70, 71 and 72. Again, I will not take time to read out those passages.

81. Turning then to the outcome, which is fair to each party in this case. The large part of the assets in this case is non-matrimonial. The principle which best guides the court in the circumstances of this case is need. A fair outcome may require that some of the non-matrimonial assets are invaded to meet need.

82. Mr Warshaw identified what he said were the marital and the non-marital assets. He said that the marital assets were the two properties to which both the parties contributed, namely the matrimonial home, value £1,149,837 and "H" House, £299,501. That is a total of £1,719338. An equal sharing of those marital assets would produce £859,699 to each party.

83. There are, in addition, three jointly owned investment properties; "F" Road, "C" Close and "F" Court. If they are added to the matrimonial home and to "H" House, the total assets are £2,436,978. Equal sharing of which produces £1,218,489 to each party.

84. If "O" Close were to be added, on the basis that although it is in the wife's name, the fund to purchase it was brought onshore and it was one of the portfolio of investment properties, the total would be £2,873,478, half of which is £1,436,739.

85. I have not included the husband's funds or the wife's funds in this analysis of the marital and non-marital assets. The husband's funds are net £147,254, but I have in mind that the husband received of his inheritance £100,000. The wife's funds are a negative figure of £180,569.

86. The wife's open proposal in this case leaves the husband with £1,695,804. Mr Warshaw accepts that there should be some invasion of a non-matrimonial property, because this is dictated by the needs principle. Mrs Todman does not seek to invade the non-marital property beyond that which is required by the application of the need principle.

87. In the circumstances of this case, the guiding principle is the need principle. On the question of need, I have regard to the resources available to the parties and to the standard of living during the marriage and the duration of the relationship. Also relevant is that during the marriage the parties only invaded non-matrimonial assets, namely the Hong Kong assets, to meet their expenditure, either capital expenditure or income expenditure where needed. It is also relevant to have regard to the source of the assets with which the parties met their expenditure.

88. I turn to the husband's housing need. I find that the husband's housing need can be met with a housing fund of £700,000; I find it is likely that the husband and Ms B will purchase a property together; I find that the properties in the "M" area, produced by husband, are examples of a suitable property. They range in price from £650,000 to £749,000. This would enable the husband, with his capital and Ms B's earning capacity to purchase a suitable house. I do not know Ms B's earning capacity, but she was able to borrow sufficient to purchase a three bedroom property in 2013.

89. The husband intends to continue to live with Ms B; however, if he were to live separately, which I find is not the case, or if the relationship with Ms B broke down, he would need a three bedroom property. I have not been given evidence of what a three bedroom property in "M" would cost. I have evidence of the cost relating to three, four bedroom houses and one six bedroom house in Kent, ranging between £525,000 and £650,000. The husband told me that if the relationship with Ms B broke down, he would move back to the area of the matrimonial home. I accept that evidence.

90. The wife produced particulars of three bedroom properties in the matrimonial home area, between £700,000 and £725,000. The husband produced particulars of three bedroom properties ranging between £650,000 and £725,000. In *AR v AR* Moylan J found on the facts of that case that the wife was entitled to housing of an equivalent standard to that provided by the former matrimonial home. In the circumstances of this case, I find the husband is entitled to housing of an equivalent standard, but not size, to that provided by the former matrimonial home. On the evidence before the court, that can be met by a housing fund of £700,000; namely £650,000 to buy, plus £50,000 for costs of purchase and general moving in and fitting out.

91. As to income need, Mrs Todman submitted that the husband had an income need in the region of £4,000 per month; namely £48,000 per annum. She submitted that this was more in line with the parties' expenditure during the marriage. I do not accept that the husband's income need is as high as £48,000 per annum. In his witness statement, signed in December 2014, the husband gave his future expenditure as £3,749 per month, which, excluding rent, is £2,899 per month, which is £34,788 per annum. The husband's proposal for outcome involves his income needs being met by first, net rental income on the four investment properties; namely £23,433 per annum, paragraph 24 of his witness statement. Secondly, his pension, £7,000 per annum. So that is a total of £30,000 per annum, which increases to £34,242 when his remaining pension comes into payment in February 2018. The husband, in his oral evidence, said his budget was "his best guess".

92. I find that a budget of £34,788, say £35,000 per annum, would meet his regular annual income needs. In my judgment, he is entitled to the cost of some additional items, which do not regularly appear in his annual budget. See the approach in *A v R* at paragraph 71. The relationship between husband and wife was a long relationship and the parties' standard of living was higher than that reflected solely in an income need of £35,000 per annum, annual expenditure. In the light of the order, which I will make, the husband will be well able to meet the cost of additional items.

93. In my judgment, the fair outcome is that the wife should pay the husband a lump sum of £300,000 as is proposed by the wife. I also find that it is not appropriate to require the wife to remain on the mortgage of the four transferred investment properties. After transfer of the four investment properties, plus the retention of

his own funds, and the retention of half joint funds, the husband will have capital, as I have said, of £1,164,579. The husband needs a housing fund of £700,000, therefore he would have remaining from his capital £464,579. He would receive a lump sum of £300,000, meaning he would have remaining capital of £764,579.

94. In my judgment, this sum will enable his needs to be met. He has a housing fund of £700,000. He can meet his income needs. If £764,579 were deployed as a Duxbury fund, it would produce income of over £50,000 per annum. See At a Glance, where a Duxbury fund for a 62 aged male requires a fund of £736,000 producing £50,000 per annum. In addition, the husband has a pension now of £7,000 per annum, rising to £11,242 in 2018. Mr Warshaw pointed out in his submissions that at £57,000 per annum, this would represent more than the husband ever earned in the marriage. In my judgment, the income available from the capital which the husband will have amply meets his income needs. This permits additional discretionary spending. This means that if he deployed capital as a Duxbury fund to produce income together with a pension of £7,000, of £35,000, per annum the Duxbury fund would have to produce £28,000 per annum. £28,000 plus his pension fund of £7,000, making a total of £35,000 per annum.

95. A Duxbury fund of £399,000 produces an income of £30,000 per annum and therefore the annual budget of £35,000 is met. The husband would have remaining £365,579 of his capital. The order, which I propose, means that the husband leaves the marriage with £1,164,579, plus £300,000 lump sum, £1,464,579, plus his pensions.

96. The net effect so far as the wife is concerned is that she leaves the marriage with £5,406,535. She has capital assets of £4,830,945, less her pension with CE value of £162,016, which is £4,668,929. If the two disputed tax liabilities are added back (£737,616) this gives a total of £5,406,535. From this, she has to pay £300,000 lump sum, reducing it to £5,106,535. There is, as I have stated, a remote possibility that she may have to pay tax, because some assets may be remitted. I record, however, that the immediate capital needs of the wife, namely to pay the lump sum and discharge the mortgage on the matrimonial home can be met from the net proceeds of "O" close. In addition, she has, as I have stated, over £1 million in Hong Kong, which can be remitted without tax charge.

97. The outcome represents, nevertheless, a large departure from equality of total assets. Of the total pool the husband has 28.68%, the wife has 71.32%. In my judgment, this departure is amply justified because of large financial contribution made by the wife from the gifts and inheritance received by the wife and which is unmatched by the husband. I have already indicated how the husband receives more than 50% of the truly matrimonial property in the case.

98. In conclusion, therefore, the fair order in this case, should provide as follows, adopting the structure of the wife's open proposals. First as paragraph 1; secondly as paragraph 2. Turning to paragraph 3, I accept what is proposed there. The husband wished to retain the four investment properties and not to have to sell;

the husband wishes the wife to remain on the mortgage and he will offer an indemnity. In the circumstances of this case, it is not fair that the wife should have to remain on the mortgage. There should be a clean break; there remains a high level of bitterness between the parties. The husband submitted that he wished to be able to pass assets to the children and not to have to deplete his assets to meet his expenditure. However, the plan of the parties to leave investment properties to the children was formed on the basis of a far smaller Hong Kong fund, ie before the wife knew of a large inheritance and receipts that would come her way in 2011/2012. There are substantial funds in Hong Kong, which can be passed to the children in due course. I find it is likely that the wife will act according to her family tradition and that she will pass the assets down the generations. There is no need for the husband to be concerned for the childrens' financial future.

99. I accept paragraph 4 of the proposal; I accept paragraph 5; I accept paragraph 6. As to paragraph 7, I heard no submissions about this and, in my judgment, the K Company, if any funds remain, the funds should be divided equally.

100. So far as paragraph 8, I accept that paragraph. I accept paragraph 9. As to paragraph 10, it is common ground that it was agreed that the husband would make certain the children received their inheritance from their paternal grandmother. I accept paragraph 11 and I accept paragraph 12.

101. I will invite Mr Warshaw, together with Mrs Todman to draft an order to give effect to what I have concluded.

End of judgment

We hereby certify that this judgment has been approved by His Honour Judge Everall QC.
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