Neutral Citation Number: [2018] EWCA Civ 2866

Case No: B6/2017/1509

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Mostyn
High Court of Justice
Family Division
BV15D07863

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

Lord Justice Simon
Lord Justice Moylan
and
Lord Justice Coulson

- -

Between:

Janie Claire Martin	**Appellant**
- and -	
Rupert Henry James Martin	**Respondent**

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- -

Mr Martin Pointer QC, Mrs Rebecca Carew Pole and Miss Kyra Cornwall (instructed by Boodle Hatfield) for the Appellant
Mr Lewis Marks Qc and Miss Katie Cowton (instructed by **Radcliffes Le Brasseur**) for the Respondent

Hearing dates: 4th and 5th July 2018

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Approved Judgment

Lord Justice Moylan:

Introduction

1. The wife appeals and the husband cross-appeals from a final financial remedy order made by Mostyn J on 9th October 2017.

2. The judge's award was based on the application of the sharing principle and neither party questions its determinative role in this case. It is the manner in which the judge applied this principle in the particular circumstances of this case which is being challenged. The two features around which the arguments revolve are (i) that the bulk of the current wealth comprises shares in a private trading company; and (ii) that this company was founded by the husband prior to the commencement of the parties' relationship. The context, in summary, is that the company was first incorporated in 1978, some eight years before the parties began living together, and that the current value of the company represents a very significant part of the parties' wealth.

3. The wife advances three grounds of appeal:

   (a) that, when determining what part of the current value of the company was marital wealth, the judge wrongly applied a straight line apportionment from the date of its incorporation;
   (b) that, in that exercise, the judge wrongly disregarded the fact that, when the parties started living together, the husband only owned half of the company; and
   (c) that the judge was wrong not to provide a mechanism for the realisation of the shares in the company which formed part of the wife's award.

4. The husband cross-appeals. The Respondent's Notice is somewhat diffuse but, essentially, the husband advances two grounds of appeal:

   (a) that the judge wrongly treated the value he ascribed to the company as equivalent to cash and, as a result, awarded the wife an unfair proportion of the non-risk assets; and
   (b) that the judge was wrong to order £20 million of the lump sum award to be paid to the wife within two years.

   The husband, additionally, seeks to uphold some aspects of the judge's decision challenged by the wife on other grounds.

5. The issues of principle raised by the appeal and cross-appeal relate, as referred to above, to the manner in which the court applies the sharing principle. They can be summarised as follows:

   (a) What approach should the court take to the valuation of shares in a private company when determining how to divide the marital wealth; and

(b) What approach should the court take when determining what part of the parties' current wealth is properly to be defined as non-marital in circumstances where that wealth includes shares in a private company which was founded by a spouse prior to the date when the parties married or started living together.

I have defined the second issue quite narrowly because the decisions in this court of *Hart v Hart* [2018] Fam 93 and *Versteegh v Versteegh* [2018] EWCA Civ 1050 contain extensive consideration of the application of the sharing principle in the context of non-marital wealth.

6. The judge's approach to issue 5(a) was, in summary as follows.

7. He found the net capital assets held by the parties to be worth £182 million, comprising: (i) properties (substantially residential) and pension funds valued at approximately £21 million; and (ii) 100% of the shares in a private company, Dextra Group Plc ("Dextra"). This was based on his determination that the "present value" of Dextra was £221 million before tax and costs of sale. He used this as a hard figure in the sense that he did not differentiate between its value and the value of the other assets including, in particular, cash (comprising, largely, a net dividend of £49.5 million to be paid by the company). He adopted this approach because he considered that "the only difference between it (i.e. the company) and its cash proceeds is … the sound of the auctioneer's hammer". Accordingly, he calculated his award on the basis, subject to issue (b), that the wife should receive half of the net value of the assets including the value of the company.

8. The principal issue raised by this case is, therefore, whether the judge was right to take the valuation of the company as equivalent to cash.

9. The judge's approach to issue 5(b) was, in summary, as follows.

10. The judge decided that only 80% of the value of Dextra was marital property. He arrived at this percentage by applying a straight line apportionment to the value of £221 million from the date when the business was first incorporated, in its initial form (July 1978), to the date of the hearing. He did not, therefore, seek in any way to base this determination on the value given by the single joint expert for the company at the start of the parties' relationship (July 1986). The judge's approach led him to conclude that £177 million of the present value of Dextra represented marital property.

11. The second specific issue in this case is, therefore, whether the judge was right to adopt this approach when deciding which part of the value of the Dextra should be treated as marital property for the purposes of the application of the sharing principle.

12. The effect of the judge's approach was that the marital wealth totalled, net of taxes and costs of realisation, £146 million. He awarded the wife half of this. His assessment of the total wealth was in part based on Dextra declaring a dividend of £80 million gross

(£49.5 million net) of which £50 million could be paid "immediately" with the balance being "deferred".

13. Based on the above, the judge awarded the wife assets of £13.7 million (from those referred to in 7(i) above), a lump sum of £40 million (with £20 million being payable by June 2017 and £20 million by June 2019) and 17.5% of the shares in Dextra (being equal to £19.2 million). Together these totalled £72.8 million or 40% of the total wealth of £182 million. The wife's shares in Dextra would represent 26% of her assets with her non-business assets totalling £53.7 million.

14. On the above figures, the husband would have total wealth of £109 million (60% of the total), of which his shares in Dextra would represent £90.6 million, or 83% of his wealth, with other assets of £18.4 million.

15. In summary, the wife challenges the straight line apportionment used by the judge to determine the marital element of the present value of Dextra. Her case is that this determination should have been based on the expert's valuation for the company as at July 1986. It is also submitted that the judge's approach ignored the fact that the husband only owned half the company when the parties began living together.

16. In summary, the husband challenges the division effected by the order as giving the wife too much of, what are sometimes described in this field as, the "copper-bottomed" assets while leaving him with an unfair proportion of the "illiquid and risk-laden assets": see *Wells v Wells* [2002] 2 FLR 97 at [24]. This, it was submitted, derived from the judge's flawed treatment of the expert's valuation for the current value of the company. The judge should have treated this as "insecure" and the shares as a "risk" and "illiquid" asset and not as equivalent to cash or the other marital assets.

17. The husband also challenges the obligation imposed on him to pay the second sum of £20 million by June 2019. It is his case that there was no evidential foundation for the judge determining that this could be funded by Dextra paying a dividend by that date, this being the only potential source of the required funds.

18. I note, in passing, that the order is expressed as being for "non-variable lump sums". This might suggest that the order provides for two lump sums rather than one lump sum payable by instalments. However, in his written submissions Mr Pointer asserts that the order *is* for a lump sum by instalments and the judge has apparently made clear that he would entertain an application for an extension of time. Although it does not, therefore, arise in this case, I would draw attention to what Baron J said, when sitting in the Court of Appeal, in *Hamilton v Hamilton* [2014] 1 FLR 55 at [47], about the utility of including a recital in an order "in terms of a potential variation (which) would put disputes … beyond doubt".

19. Finally, by way of introduction, one issue which might arise is whether this court is able to determine what substantive award should be made or whether there would have to be a rehearing. Clearly, given the time and costs which have already been expended on this

litigation, the former is much to be preferred. Whether this can be achieved depends, of course, on whether this court is able to determine what award would be fair in the light of its conclusions on the issues referred to above. The husband, in particular, does not seek a rehearing.

Background

20. The background facts are set out in Mostyn J's judgment, *WM v HM* [2017] EWFC 25. I propose, therefore, to set out only a brief summary.

21. At the date of the hearing below the husband was aged 68 and the wife 54. They began living together in 1986, when the husband was 37 and the wife 24. They married in 1989 and separated in 2015. They have two, now adult, children.

22. In 1978 the husband and a friend started a business which ultimately became Dextra. They were equal partners until April 1989 when the husband bought the friend's shares. According to Mr Pointer QC's Skeleton for this appeal for the wife, the husband was able to acquire these shares "by raising funds within (Dextra), partly by declaring a dividend … and partly by increasing company debt". In the course of his oral submissions he added that the directors' loan account was also written off. Following this purchase, the husband owned 99% and the wife 1% of the shares.

Expert Valuation Evidence

23. The court directed that a single joint expert should value Dextra as at July 1986 and should give its current market value on an assumed sale to a third party. The first report is dated 15th May 2016. An updating report as to the latter value is dated 13th February 2017. The expert also gave oral evidence.

24. In the first report, applying an "earnings basis methodology", the expert gave a value of between £188,000 and £414,000 for the company as at July 1986. He described this as "an assessment of the approximate value". This was based on his calculation of an "adjusted weighted average maintainable" EBITDA (earnings before interest, tax, depreciation and amortisation) and a multiple of between 4 and 6, giving a total of between £453,000 and £679,000. He then "added back cash and deducted overdrafts, bank loans, shareholder loans, pension scheme loans and directors current account liability to arrive at an equity value" of between £188,000 and £414,000. As can be seen this was an entirely prospective valuation.

25. The expert also provided his opinion of the "appropriate index which would fairly reflect the passive growth of Dextra from 1986 to date". He recommended that "passive growth should be based on a relevant stock market sector or index that includes many companies and therefore aggregates out the impact of management decisions, regardless of whether they are poor decisions or good decisions". He identified the "Electronics and Electronic Equipment Sector" as the most appropriate. This sector had increased by 540% between 1986 and 2016.

26. As to the current market value, the expert gave, what he described as, an "indicative valuation" of the company as the date of his report of between £130.3million and £166.4 million. This was on the basis that the husband would remain "within the business". If the husband left, the value would be between £112 million and £148 million. These values were based, again, on "an appropriate adjusted maintainable" EBITDA and a multiple.

27. As to EBITDA, the expert took the reported EBITDA for the years 2013 to 2016, inclusive, the last being based largely on forecasted trading. He then made a number (up to 16) of adjustments (such as foreign exchange gains or losses) to arrive at an adjusted EBITDA for these years which he considered to be "the most relevant indicator of future profits". A weighting was then applied of 10% to 2013, 20% to 2014, 50% to 2015 and 20% to 2016. The resultant figure was £18.1 million.

28. As for the multiple, the expert arrived at a "multiple range" of 6 to 8. He first took what he considered to be listed comparable companies. He excluded two "outliers" at the top and the bottom of the range and took the average for the balance of six companies of 9. He then applied a marketability discount of between 30% and 50% to reflect a variety of factors including the absence of a market-set price before adding a control premium of 30% (the range for such premiums being between 10% and 50%) giving the range of 6 to 8. This gave a bracket for the value of the Company of £108 to £145 million.

29. A number of further adjustments were then made to arrive at the equity value. The end result was, as set out above, that the equity value was between £130.3 million and £166.4 million on the basis that the husband continued in the business.

30. Costs of sale were estimated at £3.6 million. Based on a sale at £148 million, the total capital gains tax payable by the parties would be £27.8 million, giving a total net value of £116.6 million.

31. In the second report dated 13th February 2017 the value for the Company was calculated to be between £185 million and £227 million. This was on the basis that the husband would continue "within the business". If the husband left, the value would be between £164 million and £206 million. These values were, again, based on "an appropriate adjusted maintainable" EBITDA and a multiple.

32. The same path was followed as before. The expert took the reported EBITDA and then made (up to 18) adjustments to arrive at an adjusted EBITDA for the years 2013 to 2017 inclusive. He then applied a weighting to the years that he considered the "most relevant indicator of future profits". This resulted in the years 2013 and 2014 being deleted (by being given a weighting of 0%) with 30% being applied to 2015 and 2017 and 40% to 2016. He explained his reasons for this including that the most recent year (2016) was the "best indicator of future maintainable earnings" although it appeared to be an "excellent year" compared to the recent past and remained unaudited (as well as being in part projected). He took the 2017 forecast into account because he considered that a

buyer "would also consider the forecasts of the Group and this may form part of the acquisition process". The resultant figure was £21.2 million.

33. As for the multiple, the expert arrived at a "multiple range" of 7 to 9. This time he excluded the three "outliers" at the top of the range and took the average for the balance of six companies of 10. He again applied a marketability discount of between 30% and 50% before adding a control premium of 30%.

34. Applying the multiple of 7 to 9 to the adjusted weighted average maintainable EBITDA of £21.2 million, the expert gave an enterprise value range of £148.6 million to £191 million.

35. A number of further adjustments were then made, as before, to arrive at the equity value. These included adding back cash (at assumed exchange rates) of £37 million and deducting a further sum for "provisions" being a sum for "potential payments" as a result of the EU waste/recycling directive and for warranty provisions. The end result was, as set out above, that the equity value was between £185.1 million and £227.5 million on the basis that the husband continued in the business. If he was no longer part of the business the range would be £163.9 million to £206.3 million.

36. It can be seen, as relied on by Mr Marks QC for the husband, that over the course of under a year the expert's assessment of the current market value for Dextra changed from £130/£166 million to £185/£227 million. This is not to criticise the expert because the changes resulted from changes in the figures used in his methodology, both in the Dextra figures and in the multiples, the latter because of changes in the stock market. However, it certainly raises in my mind an immediate question as to whether this very significant fluctuation has broader implications. Even expressed cautiously, a spread of £130 to £227 million in such a short space of time would seem to support the conclusion, at the very least, that careful consideration would need to be given to the weight which could properly be placed on this evidence when determining how fairly to divide the wealth in this case between the parties.

37. I next refer to some aspects of the oral evidence given by the expert. When being asked about the multiple, the expert accepted that the process involved "subjectivity", with him "taking a view". He also "totally" agreed with the judge when he said: "you have just got to be very cautious about what they mean. They are just tools are they not? They are not rules". In respect of the impact of Brexit, the expert said that this was "an unknown", adding that "I think we have to be cautious". He further pointed out that if a real sale was being effected, the parties would each have a "view", based probably on a "mix of techniques", and there would then be a negotiation. I would also note that, to be fair to the expert, his indicative value was given on the basis of a raft of assumptions.

38. The judge asked the expert to be a "prophet" and say whether a sale would be "at the top, middle or bottom of" the bracket. In response the expert said: "I think it is going to be in between – in the upper half. Middle to upper end". This was because of the way in

which the business was growing "at the moment and has developed" and "despite the possible negatives on the horizon".

39. At the outset of the hearing of this appeal Mr Marks applied for permission to adduce fresh evidence, being a statement from Dextra's CEO. This related to developments in the business which, it was submitted, "bolsters or amplifies" the point made by the husband that this is a risk asset.

40. Mr Pointer QC for the wife objected to the introduction of this evidence submitting, in particular, that it would create the risk of "rolling litigation".

41. We refused permission at the hearing. My reasons for doing so are as follows. First the proposed evidence did not fall within *Ladd v Marshall* [1954] 1 WLR 1489. Secondly, it is, in effect, seeking to re-open the hearing below on the basis of new evidence which would result, as Mr Pointer submitted, in rolling litigation. Thirdly, this court is not able to test or evaluate the evidence for the purposes of deciding what weight should be put on it for the purposes of the appeal. This appeal is based on the evidence produced at the hearing and there is no reason to permit later evidence to be admitted.

Hearing Below

42. In order to understand the parties' submissions on this appeal, it is necessary to summarise aspects of their cases as advanced at the trial. The parties' respective positions at the start of the hearing below, in respect of how the value of Dextra should be distributed between them, were as follows.

43. The wife contended for an equal division of the assets; the husband sought an unequal division of 60/40% in his favour. In order to achieve these respective divisions, the wife proposed that Dextra should be sold while the husband proposed that, as part of her share, the wife should receive approximately 40% of the shares in the company. These respective positions led the husband's written opening submissions to state that on "either party's proposals the figure to be ascribed to the value of Dextra is almost immaterial". They went on to state that if either party were to "be arguing for a cash-out, the valuation would be central and potentially controversial".

44. This issue was, very briefly, addressed at the start of the hearing below when Mr Pointer was opening the case. He pointed to the fact that Mr Marks had suggested that no-one was seeking a cash payment to the wife but went on to say that the "final outcome … obviously is for your Lordship to decide" and would depend on the judge's "view … as to what the outcome should be". Mr Pointer then, very fairly, said that the "lesser the provision" made for the wife "the easier it is to see how that might be funded". He also pointed to the company being "cash generative" and to the recent growth in "surplus cash".

45. In his closing submissions to the judge, Mr Marks proposed that the parties should have, broadly, equal resources outside Dextra achieved in part by a dividend being paid by the

company. The balance of the wife's award would comprise shares in Dextra. However, in addition Mr Marks went through potential outcomes contained in a spreadsheet. At, it appears, the request of the judge, one of these, based on Dextra being given a gross value of £206 million and the wife being awarded roughly 40% of the total wealth, would result in the wife receiving a lump sum (or sums) of approximately £40 million and 15% of Dextra. This would be funded by total dividends of, it appears, £75 million with the husband proposing that the wife could receive £20 million (net) within a few months and £20 million (net) to come out of future profits spread over 4 years. When asked by the judge, Mr Marks responded that the husband "could live with this".

The Judgment

46. The judge's overarching approach to the determination of the wife's award is to be found in paragraph 11 of his judgment in which he quotes from an earlier unreported decision of his:

> "I am firmly of the view that the correct approach to give effect to the sharing principle is to try and calculate the scale of the matrimonial property and then normally to share that equally leaving the non-matrimonial property untouched."

47. I note, first, that the judge rejected the husband's case that he had made a special contribution (paragraph 28). His decision on this issue is, rightly in my view, not the subject of appeal.

48. The judge determined that the current value of Dextra was £221 million (paragraph 8). As referred to above, he decided that 20% of the value of Dextra was not marital property (paragraphs 17 to 22). He also found that the company could declare a dividend of £80 million (paragraph 27 Note 4). As referred to above, this led to the net marital wealth totalling £146 million of which he awarded the wife half, namely £73 million. The wife's award, as set out in paragraph 13 above, comprised non-business assets of £53.7 million (including the two sums of £20 million) and shares in Dextra valued at £19.2 million. The husband retained non-business assets of £18.4 million and shares in Dextra valued at £90.6 million.

49. I set out, in full, the judge's determination as to the value of Dextra as at January 2017.

> "8. The single joint expert, Mr Simpson of Saffery Champness, has valued the business as lying between £185 million and £227.5 million, on the basis that the husband would participate in a reasonable period of hand-over to the purchaser (which the husband in oral evidence accepted he would do). Mr Simpson's methodology was not controversial. Unsurprisingly, Mr Pointer QC argues that the top figure should be taken while Mr Marks QC argues for the bottom figure. Mr Pointer QC made some good points in cross-examination, and in argument, as to why a figure, if not at the very top of the

> bracket, then certainly in its upper reaches, should be taken. Mr Simpson accepted that the price that would be paid by the notional or hypothetical purchaser would be in the "middle to upper end" of the bracket. Having considered the matter carefully, bearing in mind that a lot of value hangs on my decision, I have concluded that the price that would now be paid by the notional or hypothetical purchaser would be at the 85th centile of the bracket. I therefore conclude that the round figure to be taken for the present value of the company is £221 million (£221,125,000 to be numerically exact)."

50. When determining what share to award the wife it is clear that the judge treated this value as equivalent to the values ascribed to the other assets and, importantly, to the cash being paid, principally to the wife, from the dividend to be declared by Dextra. His reasons for doing so are set out in paragraph 29:

> "I am aware that in *Chai v Peng & Ors* Bodey J divided the "kitty" 60:40 in favour of the husband because the wife's award would be largely cash or easily realisable assets: see para 140. I do not adopt that approach. A valuation of an asset is the estimate of what it will sell for now. If it is perceived as being hard to realise then its value will be discounted to reflect that difficulty. It does seem to me to use discounted figures and then to move away from equality is to take into account realisation difficulties twice. Whatever the asset the only difference between it and its cash proceeds is, as Thorpe LJ once memorably said, the sound of the auctioneer's hammer."

Accordingly, the judge simply determined the share which the wife should receive by adding the values of all the assets, including the marital proportion of Dextra.

51. For the purposes of determining what part of the value of Dextra was marital property, the judge referred to the approach taken in a number of authorities. These did not in his view mandate that a particular approach had to be adopted. It was an evaluative exercise which was "not confined to a strict, black-letter accountancy exercise. It involves a holistic, necessarily retrospective, appraisal of all the facts and then the application of a subjective conception of fairness, overlaid by a legal analysis" (paragraph 14). The target was to identify what "begins to reflect fairly the true present value of what the husband brought into the marriage through Dextra" (paragraph 18).

52. The judge decided that a linear time apportionment "much more fairly and realistically reflects the true potential of this company at the start of the marriage" (paragraph 18). He then said:

> "20. The linear approach is the evaluation which I make in this case. It resonates with fairness. It reflects my opinion of the true latency of the business at the time that the marital partnership was formed, and that, intrinsically, value is (at least) as much a function

> of time as it is of work or market forces. In argument, I asked "how could it be said that a day's work in 1980 in creating this company was less valuable than a day's work last week?" In my judgment, the answer is that it could not."

The result was that 20% of the current value of Dextra was non-marital and not to be shared. The judge also saw other advantages with this approach, namely that "it seems to me to provide a useful heuristic basis for analysing the issue, which if commonly adopted would have the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage" (paragraph 16).

53. Following receipt of the draft judgment the wife's counsel questioned whether the approach taken by the judge had taken into account the fact that the husband had only owned 50% of the business until April 1989. The judge responded as follows:

> "21 … That fact does not alter, in the slightest, my evaluative assessment of what element of the present value of the business should be treated as existing at the time the relationship started and which is therefore certainly to be characterised as non-matrimonial. The wife's arguments have made me ponder whether a further element, to reflect the co-ownership between April 1986 and April 1989, should also be designated as non-matrimonial property. The linear approach would suggest that the business was worth £61.5m in April 1989. So, it may be argued that £8.5m, being half of the difference between that figure and £44.5m, should also be treated as non-matrimonial. I do not take that step, but it does show that you should be careful what you wish for."

54. At the end of the judgment the judge stated that an award of 40% to the wife was "a perfectly fair proportion for the wife to receive on the facts of this case".

55. The final part of the judgment, to which I need refer, is when the judge addressed how the cash element of the wife's award should be paid. He decided that the wife should receive £20 million "more or less immediately" and that the balance of £20 million should be paid over 2 years rather than the 4 years proposed by the husband. The judgment simply states that "the husband should have two years … to pay the deferred sum of £20 million" (paragraph 31).

56. During the hearing we were taken to parts of the transcript of the hearing below when the issue of the company's ability to fund dividends in the future was being addressed. The judge indicated that he did not need to hear evidence about the company's ability to borrow because he did not consider it relevant. It appears that this was, substantially, because he considered this issue was a matter for submissions and that the structure was: "I decide and then they have to decide how they are going to raise it".

Submissions

57. Mr Pointer mounted a robust challenge to the judge's adoption of a straight line apportionment to the current value of Dextra. Although, as before the judge, it was his case that the judge was engaged in an evaluative assessment which required him to have regard to *all* the evidence, he submitted that the judge's approach was not based on but was contrary to the evidence, in particular the expert's evidence as to the value of Dextra in 1986 and the effect of "passive growth". Mr Pointer also relied on the manner in which the company had developed over the years with an uneven performance in the period up to 1986 and the "significant growth in the value of the business" occurring in the 2000s. He submitted that, "it is quite plain from the authorities" that the value or significance of resources brought into the marriage will diminish over time.

58. Mr Pointer also submitted that the judge's approach had been rejected by this court in *Jones v Jones* [2012] Fam 1. In his submission, the judge should have applied the approach adopted by Wilson LJ (as he then was) in that case in order to determine the current value of the pre-marital asset which should be deducted from the "matrimonial estate" before effecting an equal division. This would have led the judge to determine that all but approximately 0.7% of the current value of Dextra is marital property. This was based on taking the mid-point of the expert's valuation range for the business in 1986, namely, £300,000, and applying the expert's "passive growth" percentage of 540%, giving £1,625,000 (or 0.74% of £221 million).

59. I should additionally note that, because of the co-ownership issue, the wife's case is that the proper proportion would be half of this, namely 0.37%. Again applying the same approach as adopted by the judge, this would result in the wife's award being increased by £17 million to just under £90 million, because the marital element of Dextra would have increased by the net sum of £34 million. The net effect would be an increase in the wife's shareholding in Dextra from that ordered of 17.5% to 33%.

60. Secondly, Mr Pointer submitted that, in any event, the judge's application of a straight line apportionment was flawed because he disregarded the fact that the husband had only owned 50% of Dextra until 1989. He criticised the manner in which the judge sought to deal with this issue in paragraph 21 of the judgment (as set out above). In his submission, this "purported rationalisation" was flawed because the judge appears to have suggested that the shares owned by the co-owner might "also be designated as non-matrimonial property". In fact, he argued, the proper analysis is either that the purchase was funded with the parties' then resources or that, because the purchase was funded by the company, the husband only brought his original half share into the marriage.

61. If the judge had taken this factor properly into account when applying his straight line apportionment, Mr Pointer submitted that the non-marital element of Dextra would be £22.25 million rather than the £44.5 million taken by the judge. Adopting the balance of the judge's approach, this would result in the wife's total award being increased by £8.6 million so that her shareholding in Dextra should be 25% (instead of 17.5%).

62. On the third ground of appeal, namely the absence of an "exit" for the wife from Dextra, Mr Pointer submitted that the judge should have set a date, namely 4th October 2024, by which the wife's shares would have to be realised either by the husband purchasing them or by a subsequent sale of the company.

63. In respect of the husband's cross-appeal, Mr Pointer submitted that the judge's determination of the current value of Dextra was a finding of fact and that there is no ground on which this court could properly interfere with that finding. He further submitted that whether a valuation is "fragile or solid may depend" on the facts of the individual case and is, therefore, a matter for the trial judge to determine.

64. As to the issue of risk, Mr Pointer submitted that this is a "fiction deployed by husbands to avoid paying the full amount of their liability to their wives". In the course of the hearing he submitted that cash held in a bank has the same level of risk as shares in a private company. The only question in respect of the latter is the reliability of the valuation because any risk associated with the business should be factored into the valuation process. In his submission, any significant perceived risk attaching to the business "will have a direct impact upon (a) the level of profit a company is able to generate and (b) the number of the multiplier applied to the maintainable profit figure". As it is these two elements which "drive the valuation", any risk or risks will be integrated into the value provided by the expert.

65. Accordingly, Mr Pointer submitted that the judge's analysis that the only difference between the value of Dextra and cash was "the sound of the auctioneer's hammer" was right. He also relied on the courts being "well-used to fixing a value for a business" for the purposes of s. 994 of the Companies Act 2006: *Re Sunrise Radio Ltd: Kohli v Lit and others* [2014] 1 BCLC 427 and *Wann v Birkinshaw* [2017] EWCA Civ 84.

66. In the cross-appeal, Mr Marks QC does not seek to challenge the judge's 60/40 division of the total marital wealth. He submitted that the judge was entitled to decide that 40% was a "fair proportion". It is his case that the errors made by the judge were in his approach to determining the value of Dextra and in the manner in which he used this determination when calculating the award. The emphasis is on the latter, which Mr Marks described as a substantive error of law. He relied in particular on *Versteegh v Versteegh*.

67. Mr Marks made a number of submissions about the way in which the case had developed during the hearing below in support of a submission that the husband had been "ambushed" by the valuation issue. He pointed to his opening written submissions for the final hearing in which he had said (as referred to in paragraph 43 above) that, on the parties respective proposals, "the figure to be ascribed to the value of Dextra is almost immaterial". This was because the wife was seeking a sale of the company while the husband was proposing a substantive division of the shares.

68. On the valuation, Mr Marks submitted that the judgment contains no reasoning for the judge's determination that "the present value of the company is £221 million

(£221,125,000 to be numerically exact)" especially as the judge acknowledged that "a lot of value hangs on my decision". He relied on those elements of the expert's evidence which counted against such a precise conclusion including the need for caution and the subjective nature of at least part of the valuation exercise. Having regard to those elements and the nature of this valuation, he submitted, baldly, that the judge's "professed precision is spurious".

69. As to the manner in which the judge used his determination of the value, Mr Marks submitted that the judge misunderstood the valuation process and wrongly treated the value of Dextra as equivalent to cash. Mr Marks suggested that the judge's reference to the "auctioneer's hammer" derived from, what would appear to have been, a flawed recollection of what Thorpe LJ had said in *White v White* [1999] Fam p. 304 (see further below).

70. By using the valuation in the manner in which he did to determine the amount of a largely cash award in favour of the wife, Mr Marks submitted that the judge failed adequately to take into account the difference between an "attributed value of a private company and cash in the bank". As referred to in paragraph 36 above, Mr Marks relied on the fact that, in under a year, the range of values provided by the expert had moved from £130/£166 million to £185/£227 million. Mr Marks submitted that, the failure of the judge to reflect the risk/uncertainty in this value, led him to make an award which gave the wife an unfair proportion of the liquid or non-risk assets and left the husband unfairly exposed to the volatility inherent in the Dextra shares.

71. In his submission, if the judge was proposing that the wife's award would comprise largely liquid assets, he should have taken a value for Dextra at the lower end of the range so as to reduce the level of "risk". He proposed a value of approximately £166 million. Mr Marks called this "risk free" although he accepted that no value would be entirely risk free. The principle he sought to advance was that the greater the weight the judge was proposing to place on the value of the company, when determining the amount and structure of wife's award, the greater the need for caution when determining what value to use.

72. We were provided by Mr Marks with a schedule which set out his case on how this court's determination of the issues raised by both parties would impact on the wife's award. They ranged, at the extremes, from the wife's award increasing to £90 million (if she was successful on all points) to it reducing to just under £56 million (if the husband was successful).

73. If the judge's award was upheld, Mr Marks does not challenge the judge's conclusion that the wife should receive a lump sum of £40 million funded by a net dividend from Dextra. What he challenges is that part of the judge's order which requires £20 million to be paid to the wife by June 2019. He submitted that it is unreasoned, the judge merely stating that the "husband should have two years". Mr Marks submitted that there was no evidential basis on which the judge could properly have decided that Dextra could pay this sum by that date. This was, he submitted, based on an inadequate factual foundation

as to liquidity in part because, as referred to above (paragraph 56), the judge was resistant to receiving evidence about liquidity at the hearing.

74. In Mr Marks' submission, the husband's ability to make an application to vary the date for the payment under s. 31 of the Matrimonial Causes Act 1973 is not a sufficient answer. The "bar for success … is high". It could reignite litigation and would potentially be costly and expensive.

75. In his response to the wife's appeal, Mr Marks submitted that the judge was entitled to determine the "value" of the non-marital proportion of Dextra by applying a straight line accrual. The methodology selected by the judge was "a legitimate tool" to determine the "importance" of the business at the outset of the parties' relationship when deciding how the parties' current resources should be divided between them. Mr Marks called this a "proxy figure" because, in his submission, the judge was not bound to use a figure or percentage which bore a direct arithmetical relationship to the value given by the expert as at 1986.

76. As to the co-ownership issue, Mr Marks submitted that the judge had applied a "holistic view" of the value of the husband's work in the business. The time accrual approach meant, as the judge had said during the course of the hearing, that this issue did not impact on the outcome.

77. Additionally Mr Marks sought to uphold the judge's determination on the alternative basis that "no truly marital assets were deployed in enlarging his shareholding to 100%". In his submission, the wife's appeal was based on the "mistaken premise" that the purchase by the husband of the shares in 1989 resulted in those shares becoming marital property. In fact, those shares had been purchased using the company's assets which should be treated as non-marital.

78. As to the wife's shareholding in Dextra, Mr Marks submitted that the judge's decision not to impose a date for realisation was well within the proper ambit of his discretion.

Legal Framework: Discussion

79. As referred to above, both parties accept that the sharing principle is determinative in this case. The two issues of principle (as referred to in paragraph 5 above) are, what I will call: (a) The Valuation Question; and (b) The Marital Property Question.

(i) The Valuation Question

80. I would not have thought that the concept of assets having variable degrees of risk, based on their volatility, would be controversial. However, during the hearing of this appeal Mr Pointer sought to challenge the validity of any such concept. He submitted, as referred to above, that cash in a bank and shares in a private company have the same level of risk and that the only question for the court is the reliability of the valuation of the latter.

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

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

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

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

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

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

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

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

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

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

> "… the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious".

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

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

87. In some respects, the above, in particular, Lewison LJ's observation, also addresses the issue of valuations. However, I propose to consider this in more detail, in particular because of the judge's conclusion that there was no effective difference between the valuation of Dextra and its "cash proceeds" on a sale. The judge based his conclusion on the "auctioneer's hammer" analogy and because he considered that the valuation was "the estimate of what it will sell for now" adding that, if "it is perceived as being hard to realise then its value will be discounted to reflect that difficulty" (paragraph 29).

88. I deal, first, with the judge's reference to the "auctioneer's hammer". As Mr Marks demonstrated during the hearing, the judge's reliance on what Thorpe LJ had said was misplaced and taken out of context. Thorpe LJ had not been referring to *all* assets but to a specific class of assets, namely "prime agricultural land". The case was the Court of Appeal decision in *White v White*; he said, at p. 316 D/F:

> "As to the difference between the paper value of an interest in farmland and cash in hand (for which the judge cited *P. v. P. (Financial Provision: Lump Sum) [1978] 1 W.L.R. 483* and *Preston v. Preston [1982] Fam. 17)* I would only say that the difference between a paper value of an interest in a farm partnership and cash in hand is dependent only upon the judgment of the valuer and future market fluctuations. Of course real value can only be established by signing a contract for the sale of the land and by the fall of hammer on the last lot of the farm sale. Of course there are substantial costs in turning farming assets into cash, although that factor was allowed for in the judge's calculations. But there are few assets more stable, more predictably realisable and more proof against inflation than prime agricultural land."

It can be seen that Thorpe LJ's focus was on, and only on, "prime agricultural land". He expressly identified why he considered that, whilst acknowledging that it depended on "the judgment of the valuer and future market fluctuations", the valuation of this type asset could be treated as being robust. As I have said, it was not a general observation about all assets and all valuations.

89. At one level it can be said that "valuations are often a matter of opinion on which experts differ", as referred to by Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, at [26]. However, it would be right to note that valuations will clearly fall into different categories. At one end, there might be a very active market with a number of comparables which mean that it is not difficult for an expert to provide a secure valuation: as, for example, is very likely to be the case with residential properties. There might, at the other end, be circumstances which make a valuation of a business, "like many such valuation figures, … inherently speculative", per Holman J in *Fields v Fields* [2016] 1 FLR 1186 at [41], or such that the court is "unable to reach a safe valuation", per Lewison LJ in *Versteegh* at [193].

90. Where do valuations of a private company fall in this spectrum? The first point to recognise is that this can, of course, vary depending on the facts of the case. In *Wells v Wells* and *Versteegh v Versteegh* the trial judge, respectively, had been unable to value the shares "with any reasonable precision" (Thorpe LJ at [7]) and had been "unable to reach a safe valuation" (Lewison LJ at [193]) because of the uncertainties present in those cases. It might be, in contrast, that, as suggested in *White v White*, the company can be valued by reference to its assets which are, in themselves, capable of being securely valued.

91. Subject to that introduction, how should family courts approach valuations of private companies, in particular trading companies? This general issue has very recently been considered by this court in *Versteegh v Versteegh*. The conclusion and guidance given were that such valuations need to be treated with caution. Although in my view the guidance is clear, given the arguments in the present case I propose to quote at some length from that case which in turn quoted what I had said, sitting at first instance, in *H v H* [2008] 2 FLR 2092. King LJ said:

> "[136] In *H v H [2008] 2 FLR 2092* Moylan J highlighted the fact that the vulnerability of valuations had been specifically recognised by the House of Lords in *Miller v Miller*; *McFarlane v McFarlane: [2006] UKHL 24, [2006] 1 FLR 1186*. Moylan J said:
> "[5] The experts agree that the exercise they are engaged in is an art and not a science. As Lord Nicholls said in *Miller v Miller* ; *McFarlane v McFarlane [2006] 2 AC 618* [26]: "valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed

> accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act , not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained."
>
> [137] Moylan J was referring to a business valuation, as was the Court of Appeal in *Wells v Wells*. Here the court is more specifically concerned with valuations relating to property developments. For the reasons given by Lewison LJ at [184] – [195], the same principle found in *Miller* and *H v H* applies as much to development land valuation as to conventional business valuations, perhaps even more so given the dramatic effect that even a small adjustment in a variable can make to a valuation and given the inherent unpredictability, described by Lewison LJ, in relation to property development projects."

Lewison LJ said:

> "[185] The valuation of private companies is a matter of no little difficulty. In *H v H [2008] EWHC 935 (Fam), [2008] 2 FLR 2092* Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A [2004] EWHC*

2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D [2007] EWHC 278 (Fam)* (both decisions of Charles J)."

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

93. How is this to be applied in practice? As referred to by both King LJ and Lewison LJ, the broad choices are (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie: at [134] and [195]. However, to repeat, even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.

94. I would also add that this is not, as Mostyn J suggested, to take realisation difficulties into account twice. Nor, as submitted by Mr Pointer, will perceived risk always be reflected in the valuation. The need for this approach derives from the fact that, as said by Lewison LJ, there is a "difference in quality" between a value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome.

95. It might be said, as Mr Marks referred to in his submissions, that it would be unfair to award one party all the "upside" in the event that the valuation proves to have been an under-estimate. That, however, is intrinsic in an asset being volatile. There is potential for the value to increase as well as decrease. If one party is not participating in that risk and is obtaining what Thorpe LJ referred to in *Wells v Wells* as a secure result, one aspect of achieving that result is that, because they don't have the burden of the risk of a decrease in value, they also don't have the benefit of an increase in value. As Bodey J said in *Chai v Peng*, at [140]. "It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved".

96. Having regard to Mr Pointer's submissions on s. 994 of the Companies Act, it is relevant to repeat that the purpose of fixing a value for shares in a private company, when this

can properly be achieved, is to provide a means of determining what outcome is fair under the Matrimonial Causes Act 1973. This is a different, and broader, exercise to that being performed under s. 994. I would add, in I hope not too simplistic an observation, that it is all about weight and balance. Not placing undue weight on a valuation and seeking to achieve a fair balance of risk between the parties in the allocation of the assets.

97. I have not yet addressed one key aspect of Mr Marks' submissions, namely that a judge should adopt a conservative figure when fixing the value of shares in a private company. I am acutely aware of the importance of reducing scope for argument and "the need for clear guidance", as I mentioned in *Hart v Hart*, at [97]. However, as Lord Nicholls said in *White v White*, at p. 612 G, as "with so much else in this field, there can be no hard and fast rule". I do not consider it appropriate to seek to limit or direct where in a bracket a judge should alight. I would just observe that, if an expert has given a bracket, it might be reasonable to assume that a figure in the middle is likely to give a sufficient *indicative value*, to use the expert's expression in this case, for the purposes of a financial remedy application. As I have already said, it is the use which is made of such valuations which is of critical importance.

98. I should also add that, in making the observations above, I have not overlooked the importance of the clean break principle. They are, however, of particular relevance to *how* a clean break is effected so that it is fair to both parties. In this regard, I would repeat what King LJ said in *Versteegh v Versteegh*:

> "[151] I fully accept that the making of a *Wells* order is something that should be approached with caution by the court and against the backdrop of a full consideration by the court of its duty to consider whether it would be appropriate (per s25A MCA 1973), to make an order which would achieve a clean break between the parties. I do not accept however that *Wells* was a wholly singular case and should be regarded as such by the courts."

(ii) The Marital Property Question

99. At the outset of the hearing of this appeal, I had understood the wife's position to be that the straight line approach taken by the judge was wrong as a matter of principle. However, during the hearing, Mr Pointer accepted that this is a permissible approach contending that the judge was wrong to do so in this case because it was contrary to the evidence.

100. We were referred to a number of cases for the purposes of analysing the principled approach to the determination of whether property is or is not marital property. These included *White v White; Miller v Miller, McFarlane v McFarlane*; *Jones v Jones*; *Robertson v Robertson* [2017] 1 FLR 1174; *Scatliffe v Scatliffe* [2017] AC 93; *Hart v Hart*; and *Versteegh v Versteegh*.

101. In *Miller; McFarlane* Lord Nicholls, in a passage which was also quoted by King LJ in *Versteegh*, identified the reasons why the court need not adopt a restrictive or even prescriptive approach:

> "[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day. Similarly the 'equal sharing' principle might suggest that each of the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate. The case of Mr and Mrs Miller illustrates this only too well.
>
> [27] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case."

102. The focus in *Jones v Jones* was on a company which the husband had founded some 10 years before the marriage and had sold by the date of the hearing. For the purposes of determining what part of the proceeds of sale was marital property Wilson LJ sought to ascribe a value to the company at the date of the marriage "which is both realistic and apt to the context in which it is required", at [37]. For this purpose he started with the agreed expert valuation of £2 million but then doubled it to £4 million to reflect "latent potential" or "springboard", at [39]. He acknowledged that this could be described as "arbitrary" but considered it necessary to reflect the judge's finding. This sum was then increased to £8.7 million to reflect "passive growth" by reference to a FTSE index, at [50]. Wilson LJ then tested the figure produced by this method to ensure that the resultant award corresponded with the percentage of the total assets which seemed "to make fair overall allowance for the husband's introduction of his company into the marriage", at [34] and [52].

103. In the same case, Arden LJ (as she then was), in a minority judgment, "In parenthesis", rejected the husband's case that a "straight-line growth" should be assumed because this did not reflect "reality", at [60]. Neither Wilson LJ nor Sir Nicholas Wall P made any reference to this argument.

104. I do not, therefore, consider that the approach adopted by Mostyn J is precluded by this authority. Further, there is no suggestion in Wilson LJ's judgment that the approach he adopted was intended to be prescriptive and used in other cases especially as he considered that, because of "the question-mark to be set against" his method of calculation, it was necessary to "test its suggested award" by reference to his "view of overall fairness", at [52]. Indeed, I consider that the true essence of the guidance from this case is to be found in Wilson LJ's observation, which I repeat, namely that the court's award must "make fair overall allowance for the husband's introduction of his company into the marriage".

105. In *Robertson v Robertson* Holman J was also faced with determining what part of the parties' wealth, represented by shares in a publicly quoted company of which the husband was a co-founder, was non-marital property. The value of the shares was known because they were traded. As a general observation, about the "analytical distinction between matrimonial and non-matrimonial property", Holman J said:

> "[28] While the analytical distinction is clear, it may be far from easy to decide whether an asset should properly be characterised as matrimonial or non-matrimonial, or indeed as somewhat hybrid; and, in truth, it is around that difficulty that a lot of the argument in this case has really centred."

106. After considering the decision in *Jones v Jones*, he accepted counsel's submission that Wilson LJ's methodology had "frequently been adopted and applied in subsequent cases at first instance", at [33]. However, he then went on to say, rightly in my view:

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

107. In that case the specific business, ASOS, had been started by the husband two years before the parties started living together in 2002 but the judge found that it was "an evolutionary stream" from a business started in 1996. The hearing was in 2016. The application of the *Jones* methodology (using a valuation as at 2002) would have resulted in only 2% (£4.8 million) of the current value of the business being characterised as non-marital property. Holman J decided that "instinctively (this) seems to me to be so unfair to the husband on the facts and in the circumstances of this case, and so over-generous to the wife, that I propose, not merely by way of cross-check but in the substantive exercise of my statutory duty" to consider all s. 25 factors.

108. His conclusions on this issue are set out at [59] to [63]. He first identified what he considered to be the relevant question:

> "[59] As well as having particular regard to the matters listed in s 25(2), the court is required by s 25(1) of the MCA 1973 to have regard to all the circumstances of the case. In my view, it is one of the circumstances of this case that the husband already owned the ASOS shares before the cohabitation and marriage; that they already had value then; but that they greatly increased in value during the period of the cohabitation and marriage. The question for the discretion of the court is: how fairly to reflect those considerations in making its overall exercise of discretion?"

After referring to features of the business' development, Holman J continued:

> "[61] In my view, it does not fairly reflect these considerations to carve out from the current value of the shares a mere £4.8m, as Mr Bishop and Mr Bradley, basing themselves on Mr Lane's report, contend. Much greater allowance must, in fairness to the husband, be made for the history in order, to borrow words from Lord Nicholls in *Miller* quoted in para [38] above, to 'reflect the amount of work done by the husband on this business project before the marriage'."

109. His decision was as follows:

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

110. I have set out the above at some length because it provides an example of a very experienced Family Division judge adopting an approach which would run contrary to Mr Pointer's submissions in this appeal. Further, in my view Holman J's approach mirrors, and provides an example of the application of, what I have described as the essential guidance from *Jones v Jones*.

111. In *Versteegh v Versteegh* King LJ dealt with the issue of "Non-Matrimonial Assets" at [84] to [102]. In the course of this she said:

> "[96] Mr Bishop rightly does not seek to say that the judge was wrong to adopt the impressionistic/discretionary approach, rather his complaint is that the judge failed properly to exercise his discretion

> in this respect and should have adopted the division proposed by him on behalf of the wife in relation to the totality of the assets. Such a division should, he submitted, have been calculated by reference to a computation of all the assets to include a conservative figure in relation to valuation of the development land.

She went on to observe that, in that case, "the judge was entitled, and really had no option, but to give weight to the non-matrimonial assets in a more general way as part of the totality of his discretionary exercise", at [101].

112. In *Hart v Hart* I concluded that there is no single route to determining what assets are marital: see [93] to [96]. That conclusion is, in my view, supported by the other cases referred to above.

113. In conclusion, a judge has an obligation to ensure that the method he or she selects to determine this issue leads to an award which, to quote Lord Nicholls in *Miller; McFarlane*, at [27], the judge considers gives "to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case". This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about "fair overall allowance", at [34]. This was why Holman J was entitled in *Robertson v Robertson* to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion", at [59]. Both of the latter cases concerned the development of trading companies and, in my view, these observations apply with particular force in such circumstances.

114. I make this last observation because it is clear that in many cases the exercise will require little evaluation because all the wealth is clearly from "a source wholly external to the marriage", Lord Nicholls in *White v White* at p. 610 E/F. This will establish the "clear dividing line" to which I referred in *Hart v Hart* at [93]. Further as King LJ said in *Versteegh*:

> "[99] In the majority of cases, the court will be able to value the assets, both matrimonial and non-matrimonial, and therefore, if appropriate, make orders by reference to a percentage of the total assets. That is not going to be the case in those less common cases such as the present one, where the court has been unable to place a value on certain of the assets."

I agree, and this includes being able to ascribe a value to a private company, in the manner referred to above, for the purposes of the determining what part is marital and what part not.

115. Finally, on this question, I mention briefly that the manner in which the court determines whether property is or is not matrimonial can probably be described as partly evaluative and partly discretionary. Although it is not necessary to determine this point, the exercise

is clearly at least in part evaluative because it is based on the court's assessment of the evidence as to whether the relevant asset is from a source external to the marriage or the product in part or in whole of marital endeavour. But I also consider that it can be partly discretionary for the reasons set out in paragraph 113 above.

Determination

116. I now turn to my determination of the appeal and cross-appeal by, largely, the application of the above principles.

117. I start with a general comment that although, as submitted by Mr Pointer, some passages in *Miller; McFarlane* might suggest that the importance of the source of the assets "*will* diminish over time" (Baroness Hale at [152]: my emphasis), I do not consider that this was meant to apply in every case. It is clear that the House of Lords was not intending to depart from the guidance given in *White v White*, on which Baroness Hale was specifically relying. As set out in Lord Nicholls' speech in *Miller; McFarlane*, at [25], it is a question of the weight to be attributed to non-marital property: "Sometimes, as the years pass, the weight to be fairly attributed to this contribution will diminish, sometimes it will not". It is not difficult to think of examples in which the fact that assets derive from a source external to the marriage remains significant, regardless of the length of the marriage, because there are no assets which could properly be described as marital to which the sharing principle could apply. Additionally, as summarised in *Scatliffe v Scatliffe*, at [25(x)], the "ordinary" application of the sharing principle will result in an equal division of the marital property alone.

118. It is also relevant to note that it is not unusual for parties in cases involving substantial wealth to agree how it should be divided in percentage terms. However, even when there is such an agreement, this will often mask or can even obscure a substantive disagreement as to how such a division is to be fairly effected. There might be substantive disagreement as to values but there can also be disagreement about how the individual assets are to be allocated so that each party has a fair share of the wealth in terms of comparability. In my view, parties should be aware of this and of the scope for developments during the hearing consequent on the exploration of these issues.

119. Further, parties will obviously be aware that a judge is not bound to adopt a result which falls within the parameters of the parties' respective cases. Of course, a hearing must be fair. But, I would suggest that, if a case develops in a way which one party considers would result in an unfair hearing, the response should be to raise this with the judge so that the judge can address any alleged unfairness and, if persuaded of the need to do so, seek to resolve it.

120. These observations relate to the husband's submission that he was, in effect, "ambushed" by the developing importance of the current value of Dextra. Whilst I see the force in Mr Marks' submissions, I do not accept them. The value of Dextra might have assumed greater importance as the hearing developed but this was, in my view, something that might have been expected. In his opening written submissions Mr Pointer made plain

on behalf of the wife that she was seeking her "share in the business within a reasonably short timeframe". He also referred to the "thorny question of liquidity". Further, in the course of his opening to the judge Mr Pointer, quite rightly, made clear (as referred to above) that, although the wife had argued for a sale and the husband for a share transfer, the judge was not bound by these submissions when determining the final outcome and that these were not the only solutions to the case.

121. Although, logically, they might usually be expected to be determined the other way round, I propose first to deal with (b) The Marital Property Question and, then, (a) The Valuation Question.

(b) The Marital Property Question

122. Although, as I have said, it is not necessary to determine whether the answer to this issue is an evaluative or a discretionary exercise or a combination of the two, it is worth repeating that the concept of marital property is a legal construct which has been crafted to assist the court in achieving a fair outcome when exercising its discretionary powers: *Hart*, at [85]. The question is, where in the course of the journey does the discretionary nature of the exercise impact on the court's determination? Is it, as Lord Wilson appears to suggest in *Scatliffe v Scatliffe*, after the court has applied "the sharing principle to the matrimonial property", at [25(x)], or is it, as Holman J decided in *Robertson*, when the court is deciding how to "treat the … pre-existing shares", at [63]?

123. The answer, as so often in this field, is that it depends. As Holman J said in *Robertson*, the methodology adopted by the court "is a tool and not a rule", at [34]. In many cases the identification of what property is marital will be a simple factual determination: see *Hart* at [91] and [93]. However, there may be a more "complicated continuum"; in such a situation, at [94]:

> "the court will undertake a broad evidential assessment and leave the specific determination of how the parties' wealth should be divided to the next stage."

124. Was the judge wrong to take a straight line apportionment?

125. Although accepted by Mr Pointer as a permissible approach, I should make clear that, for the reasons given above, the judge was entitled to adopt this approach when determining what part of the current value of Dextra should be characterised as non-marital property. As set out above, the exercise on which the court is engaged is not restricted to a single route to determining how the wealth is to be characterised for the purposes of the application of the sharing principle. The judge was not bound to adopt the approach adopted in *Jones* just as he was not bound to adopt the approach taken in *Robertson*.

126. The judge adopted the straight line approach for the clear reasons expressed in his judgment. As he said in paragraph 14: "the evidence is certainly not confined to a strict

black-letter accountancy exercise. It involves a holistic, necessarily retrospective, appraisal of all the facts and then the application of a subjective conception of fairness, overlaid by a legal analysis". I would also agree, as did Mr Pointer, with Mostyn J's analysis of the exercise in which he was engaged, at paragraph 21, which, in my view, mirrors the "fair overall allowance" test referred to in *Jones v Jones*:

> "… my evaluative assessment of what element of the present value of the business should be treated as existing at the time the relationship started and which is therefore certainly to be characterised as non-matrimonial."

This approach seems to me to be entirely consistent with the principles I have referred to above.

127. Whilst it would be an improper fetter on a judge's discretionary powers to elevate this approach above others, I agree with Mostyn J's general observation about "the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage". I also agree that, as he said, it "resonates with fairness" because it takes an overarching view of the weight to be attributed to the husband's contributions to the business throughout its existence. I would add that it is also an approach which would be consistent with the overriding objective not least because it would save expense by limiting the scope for expensive and time consuming investigations of the development of a business. It may be too frequent a refrain in this judgment but the court is engaged on a broad analysis of fairness.

128. Was the judge's decision to apply this approach at variance with or contrary to the evidence as submitted by Mr Pointer? In my view, the answer is clearly no. Contrary to Mr Pointer's submission, the judge did "use" the evidence. His decision was based on the current value of Dextra as determined by him and the apportionment of that value by reference to the duration of the company's existence. These were both aspects of the evidence on which the judge was entitled to base his determination of what "reflect(s) fairly the true present value of what the husband brought into the marriage through Dextra" (paragraph 18).

129. Further, during the course of the hearing, in answer to a question from Simon LJ, Mr Pointer agreed that he was criticising the amount of the "latency" of the business, as referred to by the judge in paragraph 20, because, in his submission, it conflicted with the evidence. I again disagree. As I have said, in my view the judge's conclusions were firmly based on the evidence, just not in the manner advocated on behalf of the wife. Indeed, as Mr Pointer submitted during the hearing, a "critical part" of the judge's task was to assess the overall fairness of his proposed award as undertaken by Wilson LJ in *Jones*, at [52]. This is clearly what the judge was undertaking in paragraphs 18 to 21 of his judgment.

130. Indeed, I do not find it at all surprising that the judge rejected the approach being advanced on behalf of the wife when that would have resulted in less than 1% of the current value of Dextra being treated as non-marital property. The judge did not base his decision on the 1986 value given by the expert (increased by reference to a FTSE sector) nor on the turnover/profits graph produced on behalf of the wife. He did not do so because he did not consider that those approaches "fairly and realistically" reflected the true potential of the company. They did not, therefore, provide a fair assessment of that part of the current value of Dextra which should be characterised as non-marital.

131. In summary, in my view, the judge's determination was based on the evidence and nothing Mr Pointer has said has persuaded me that the judge was wrong to adopt the straight line approach.

132. I have found the judge's approach to the co-ownership issue less satisfactory. I have puzzled over his reference, during the course of the hearing, to this issue being irrelevant if he applied a "time accrual". I have also puzzled over his reference, in paragraph 21, to the possibility that a "further element" should be designated non-marital property to reflect this issue as well over his stating that this "fact does not alter … my evaluative assessment". The latter observation might suggest that the judge had overlooked this when previously undertaking this assessment. This would, however, seem unlikely as the judge referred to the co-ownership in paragraph 6.

133. I have ultimately decided that the judge must have taken all the relevant circumstances into account, including the issue of co-ownership, when making his "evaluative assessment of what element of the present value of the business should be treated as existing at the time the relationship started and which is therefore certainly to be characterised as non-matrimonial" (paragraph 21). I agree with Mr Pointer that the judge had to have regard to *all* the relevant evidence when undertaking this exercise. In my view, he did or, to put it more cautiously, Mr Pointer has not persuaded me that the judge disregarded any material factor including the co-ownership issue. This conclusion is supported by the judge's final assessment that an allocation of 40% of the wealth to the wife was a "fair proportion". The judge was plainly entitled to decide, to adopt again what Wilson LJ said in *Jones v Jones* ", that this would "make fair overall allowance for the husband's introduction" of Dextra.

134. Accordingly, I reject the wife's appeal against the judge's application of a straight line approach from the commencement of the business. I should add that, despite Mr Pointer's arguments about the funding of any debt repayment, I see considerable force in Mr Marks' subsidiary submission that the purchase of the co-owner's shares was funded with resources that were, or should be treated as, non-marital. However, it is not necessary for me to consider this further having regard to my conclusion as set out above.

(a) <u>The Valuation Question</u>

135. The first element to this question is whether Mr Marks can successfully challenge the judge's decision that Dextra had a gross value of £221 million.

136. It has to be said that the judge's reasons for determining this issue were sparse especially given his acknowledgement that "a lot of value hangs on my decision". He referred to the "good points" made by Mr Pointer in cross-examination, without elaboration, and to the expert accepting that the price would be in the middle to upper end of his bracket. The judge does not appear to reflect the other aspects of the evidence, including the expert's reference to the need to be cautious nor the dramatic shift in the valuation range between May 2016 and February 2017.

137. However, I have decided, after some reflection, that Mr Marks has not established that this factual determination was wrong. A more balanced, explicit assessment would have made clear that the judge had taken all the relevant evidence into account but I have not been persuaded that any of the grounds on which a factual determination can be set aside have been demonstrated. Further, I am not persuaded that, as submitted by Mr Marks, the judge should have adopted a value of £166 million to reflect the need for caution and to enable greater weight to be placed on that figure for the purposes of determining the wife's award.

138. However, for the reasons set out above, the judge was wrong when he said that the "only difference between (Dextra) and its cash proceeds is … the sound of the auctioneer's hammer". Mr Marks has demonstrated that this reference was inapt to the circumstances of this case. Further, for the reasons given by Lewison LJ in *Versteegh v Versteegh*, at [185], there was a difference of substance between the value ascribed to Dextra and the other assets, including the cash to be extracted from the company by way of a dividend. Also, as a result of the judge's conclusion, he failed to consider whether his proposed award "achieved … a fair division of both the copper-bottomed assets and the illiquid and risk laden assets", adopting what Thorpe LJ said in *Wells v Wells*.

139. Additionally, I consider that the judge's determination that the husband should pay the wife £20 million by June 2019 was flawed. I acknowledge that the judge effectively stopped *both* parties from exploring the issue of liquidity during the hearing. However, I accept Mr Marks' submission that the result was that there was no evidence on which the judge could conclude that £20 million could be paid by June 2019.

140. It is clear that this arose from the judge's view, as he said during the course of the hearing, that: "I decide and then they have to decide how they are going to raise it" (paragraph 56 above). Whilst this might be acceptable when the court is dealing with the realisation of assets, this was not an acceptable approach to the extraction from Dextra of a sum as large as £20 million. Liquidity in such circumstances can often be a complex issue of considerable importance which requires specific analysis and determination. We were not referred to any authorities and, indeed, none is required. However I would simply note in passing that Baron J in *P v P (Financial Relief: Illiquid Assets)* [2005] 1 FLR 548 referred to evidence on "what sums … could be withdrawn from the business" as a "vital piece of work", at [113].

141. Having identified the errors in the judge's approach, the more difficult question is how those errors should impact on the determination of this appeal. As I have said above, I do not accept Mr Marks' proposal that we should simply adopt a value of £166 million. That is too simplistic a response to the errors which principally relate to the weight the judge put on his value of £221 million and the manner in which the assets were divided between the parties.

142. After some considerable hesitation, I have decided that the fair way of dealing with the errors in the judge's approach is to substitute for the payment of a lump sum of £20 million by June 2019, four annual instalments of £5 million as was originally proposed by the husband to Mostyn J. I appreciate, as I have said, that both parties were effectively stopped from investigating this issue during the course of the hearing. However, in my view, it is now too late for this issue to be re-litigated before Mostyn J. That would not be consistent with the overriding objective.

143. Further, this is an outcome which I consider sufficiently addresses the flaws in the judge's approach to arrive at an outcome which is, broadly, fair to both parties. In coming to this conclusion, I acknowledge that I have been influenced by Mr Marks response to the judge, as referred to in paragraph 45 above, albeit on slightly different figures, that the husband "could live with this" outcome. Of course, the husband is not bound by that response on this appeal, including because circumstances might have changed, but it provides support for the conclusion that my proposed adjustment would provide a fair solution without the need for a rehearing.

144. The final issue raised by the wife is whether the judge should have provided a mechanism for the realisation of the shares in Dextra awarded to her. In my view, the judge's decision was one which he was well placed to make and which was well within the ambit of his discretion. None of the matters advanced by Mr Pointer undermine this part of the judge's award.

145. Accordingly, I propose that the wife's appeal should be dismissed and that the husband's appeal should be allowed to the extent referred to in paragraph 142 above.

LORD JUSTICE COULSON:

146. I agree.

LORD JUSTICE SIMON:

147. I also agree.