

IN THE FAMILY COURT
Sitting at THE ROYAL COURTS OF JUSTICE

Date: 24/05/2019

Before :

MR JUSTICE COHEN

Between :

FW **Applicant**
- and -

FH **Respondent**

Timothy Bishop QC and Thomas Harvey (instructed by **Wedlake Bell**) for the **Applicant**
Nicholas Cusworth QC and Rebecca Carew Pole (instructed by **Mishcon de Reya**) for the
Respondent

Hearing dates: 13th – 24th May 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Judge hereby gives leave for it to be reported once the judgment has been anonymised by removing references to the identity of the parties, addresses, business entities and other lay individuals.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to anonymise this judgment

MR. JUSTICE COHEN :

1. I am dealing with the wife's claim for financial remedy orders following the breakdown of the marriage between the wife and the husband.

2. The wife (“W”) is aged 36. The husband (“H”) is aged 45. They commenced a relationship in June 2007 and became engaged and began co-habitation in September 2009. The husband had by that time been working in a company known in shorthand as R Ltd since 1998. He owned a flat in North London. The wife too owned her own flat but is unable to recall details of it. Unlike the husband, she comes from a wealthy background and she says that her father has frequently carried out transactions in the names of her or her siblings the details of which she cannot recall.
3. W’s father was eager to help the young couple on their way. They wished to purchase a house, CP. Their mortgage capacity was limited to a little over £500,000 and W’s father therefore loaned the parties the funds to make up the balance of just over £750,000.
4. There is a discrete dispute about the terms upon which W’s father made the loan. It is clear that he took security on H’s flat by way of a charge to the extent of $\frac{2}{3}$ of its net sale proceeds when it was sold. As it transpires, when it was sold in September 2012 his share of the proceeds produced approximately £402,000, leaving a shortfall of £352,000. H says that W’s father took a commercial gamble on what the sale of H’s flat would produce and that he is not entitled to any further sum. W says that the £352,000 remains a debt which the parties between them owe to her father.
5. Her father is not a party to these proceedings although both Mr Justice Mostyn and I have at previous hearings urged him to set out his case. I have seen documents which suggest that no further sum is due and no documents which evidence that a further sum is owing to him, but that does not mean that it might not be the case. The only way that I can do justice to the parties and to W’s father so far as this dispute is concerned is to say that if further sums do become payable to W’s father they shall be paid equally by the parties. By the end of the case both parties agreed this approach which I had proposed.
6. The parties lived in CP until November 2016 apart from a short hiatus to which I will return.
7. In October 2009 W’s father lent H approximately £220,000 so that he could buy a 50% share in R Ltd. Prior to this transaction H had no stake in R Ltd and was paid from profits as each deal came to fruition. W’s father was well aware of H’s wish to acquire a stake which was repaid by H in full in September 2012 from the balance received by H from the sale of H’s flat.
8. The parties married in June 2010. They have two children, O aged 7 and S aged 5. They live primarily with their mother although spending time with their father.
9. The marriage ran into difficulties and in Summer 2014 H moved out of CP and did not return until Autumn 2015. Thereafter they remained living together under the same roof until a final separation in September 2017.
10. In March 2014 the parties purchased land for a new house to be built at PG from W’s father for £2.7M. A substantial property was then built on the land and the building works were not completed until November 2016. The purchase was in part funded by a loan from W’s father in the sum of £1,080,000. It is common ground that this sum is payable by the parties to W’s father. The balance of the purchase price and construction

costs were funded from various borrowings from Coutts Bank in the total sum of just under £4M.

11. Upon the completion of the building the parties moved into PG and remained living there until September 2017. On the breakdown of the marriage W and the children initially moved out of PG, but in November 2017 they returned upon H vacating the property and returning to live in CP which previously had been rented out. Thus it is, that W and the children remain in PG and H remains living in CP with his new partner and their young child.
12. At an early stage in these proceedings H sought to argue that the marriage broke down in 2014 upon the first separation and that his return to the matrimonial home the following year was really no more than to bring him into closer proximity to his children and that the marriage was already at an end. W characterises this as an opportunistic presentation devised to bolster an argument that the marital partnership ended in 2014/2015 and that any increase in the value of his interest in R Ltd should thus accrue from that date to his sole benefit. She cites further in support that in his Form E he gave the date of separation as September 2017 and in the Certificate of Financial Complexity signed by both parties he gave the date of August 2017.
13. It is clear to me that notwithstanding the prolonged hiccup in 2014/15 both parties were working towards the continuation of the marriage and that it did indeed endure until Autumn 2017. It is thus to be treated as a committed relationship of some 8 years. In fact, it is clear from all the expert evidence that the value of R Ltd has decreased rather than increased over the last few years and thus the point becomes of no relevance in the context of what I have to determine.
14. The Proceedings

In October 2017 the wife issued her Form A and divorce petition. The proceedings have followed a relatively conventional course, save in one respect, and there is no need for me to set out its history. The one aspect which does need attention is the instruction of expert accountants to value R Ltd and its associated companies. By agreement, Grant Thornton (GT) were instructed to produce a valuation which came in in October 2018. Both sides were dissatisfied with the conclusion and each applied successfully for permission to instruct their own valuer. W has accordingly instructed Jon Dodge of Walton Dodge and H instructed Faye Hall of Smith and Williamson. It is fair to say that the report of Mrs Hall is considerably closer in methodology and outcome to that of GT than is the report of Mr Dodge.
15. When the matter came before me on a pre-trial review in March 2019 H applied that I should hear oral evidence from GT in support of their report which the parties had agreed that I should read. It was plainly appropriate because of the multiple references to it made by Mrs Hall and Mr Dodge that I should read the report but I refused to allow oral evidence from GT for reasons that I gave at the time.
16. The parties have put in model practice direction documents for which I am extremely grateful, including a composite schedule of assets and liabilities for the final hearing. The principle issues which are in dispute as to their computation are as follows:

- i) Whether or not the parties owe £352,000 to W's father. I have already expressed my conclusion on that issue;
- ii) The value of H's business assets. On this the parties are some £9.5M apart, the single biggest component of the dispute being as to whether or not a terminal value attaches to R Ltd;
- iii) Whether or not a value is to be attributed to W's shareholding in various entities set up by her father and which in 2015 she transferred to the children of the family;
- iv) Whether or not a value should be attributed to her interest in various trusts established by her family.

So far as the issues of her business assets and interests in trusts are concerned, it is said on behalf of the husband that although it is conceded that these are in all respects non-matrimonial assets they are nevertheless resources that are available to the wife either in terms of capital or in terms of income production.

17. In general terms the parties agree that the assets other than those emanating from W's family should be divided equally between the parties, but they are very far apart as to how that should be achieved. Above all, there is a dispute about how W should be able to access her share of H's business interests, and how her share is valued.
18. This has been the main focus of the hearing before me for obvious reasons. H's business interests in this case comprise the vast bulk of what the parties own. As the case was opened to me, excluding only W's trust interests (iv above), W says that the total assets in the case are £27.8M of which the business represents £26.9M and the husband puts the total at £21.9M of which the business represents £17.5M. If there is removed from the figures the sum ascribed by the husband to W's interest in the family businesses transferred to the children, the business on his figures at its net value of £17.4M comprises an even larger share of the assets which would accordingly diminish to £18.7M.
19. It is W's case that I should order an immediate sale of H's business assets which I shall for convenience group together under the heading "R Ltd" although there are also a number of other small entities. She says that if his shares are not sold within a year a receiver of his interests should be appointed. She says that it is very much her second choice that I should make an order for a lump sum which she accepts that if his interest in the business is not realised would need to be payable by tranches over a period of time.
20. It is the husband's case that W should wait until H realises his interests in R Ltd over what would be at least a 5 year period so as to maximise its value. I will revert to their proposals in much more detail when I consider R Ltd later in this judgment.
21. Housing

H remains living in CP which has an agreed value of £1.25M and is subject to a mortgage of £553,000. Putting to one side the question of whether any funds will be due to W's father, there is an agreed equity of just under £660,000. H says it is a perfectly adequate home for himself, his partner and their child and for the two children of the family when they visit. He thus goes on to say that W's reasonable housing needs do not exceed £1.3M. They are no greater than his own.

22. W is extremely keen that she be entitled to retain PG for herself and the children. It has an agreed value of £5.35M but after repayment to Coutts and the loan to her father and cost of sale there is a net equity of only just over £200,000. H asks me to order a sale of the property and he points out that in an earlier presentation of her case W had put forward alternative particulars of houses to meet her reasonable housing needs in the brackets of £3.6-4.5M. This was at a time when she was arguing that PG was worth £6M and H was saying £7.5M, but as time has gone on she has changed her position and wishes to remain in PG.
23. It is a substantial property and there can be no doubt that it is significantly in excess of the needs of her and the children. That said, it is entirely up to the two lenders as to whether or not her continued occupation of the property shall continue. It is no part of my function to force a sale upon the wife of a property which has an equity of only just over £200,000 if she can make arrangements to stay there. So far as the husband is concerned it is no skin off his nose if she does, provided that he is not expected to fund the payment of a property so much in excess of her needs.
24. The parties have left a huge gap in the provision of particulars of alternative properties produced to enable me to form a view as to what the reasonable cost of W's housing should be. H's particulars go no further than properties up to a value of £1.3M, the bulk of which are in areas where W does not wish to live or which are smaller properties than those in which H lives. W has pitched her alternatives at the minimum figure of £3.6M.
25. W wants to have the use of a 5 bedroom property comprising a room each for her, the children and the house-keeper and a spare room. In the context of the comfortable standard of living which the parties have enjoyed, this does not seem to me to be unreasonable. She wants to be close to the children's school and her family and friends. Inevitably I am left having to make a stab in the dark. Doing the best that I can I assess her notional housing needs as in the region of £2M exclusive of acquisition costs. The equity in PG approximates to the stamp duty payable on purchase and cost of moving in. Thus it is that she would need borrowing notionally of about £2M. It follows that in my calculations going forward I shall work on the basis that until receipt of her lump sum from the sale of the business W will be need to be provided by H with income that will (i) permit her to pay the whole of the mortgage to Coutts until such time as she should reasonably be assumed to have arranged for a sale of the property and (ii) thereafter, sufficient to pay the mortgage repayments in a sum of one half of what is currently payable, I am told that the current repayments to Coutts are in the sum £7,500 per month.
26. Upon receipt of her share in R Ltd, she will be in a position to repay her father and Coutts. If she wishes to remain in the property, as she does it will be up to her with such support as her father gives, to persuade the lenders to wait.

27. I shall therefore order the transfer of PG into the sole name of the wife on the basis that she will indemnify the husband against any liability to Coutts and to her father in respect of their loans on the property and that she will use her best endeavours to obtain his release from such liabilities. In return, CP is to be transferred into the sole name of the husband and he likewise must take responsibility for the mortgage to NatWest on that property and seek to obtain her release from the mortgage upon it.
28. The Wife's business and trust interests
- Since the age of 18 the wife has been the recipient of various shareholdings in companies operated by her father. Her two siblings have benefited likewise. These gifts started in 2001 when she was aged 18. It is not challenged that notwithstanding these gifts, W's father has remained in total control of the operation of the various companies and save as is set out later in this judgment, W has received no benefit.
29. In late October 2015 W executed declarations of trust in respect of the four companies in which she had shares for the benefit of the two children. She says that to the best of her knowledge and belief, her brother did likewise. She said that this happened at the instance of her father and she never questioned it. It is unsurprisingly asserted by the husband that these were transactions undertaken by her so as to reduce her assets and increase her claim in these proceedings.
30. The parties had separated in July or August 2014. The wife says that the husband moved back to the family home in October 2015 although he puts it at two months later. It is thus naturally tempting to surmise that these transactions at the instance of her father were designed to safeguard the shares from any claim by H or attempt to reduce W's claim against H by reference to them.
31. In fact and quite rightly, no suggestion has been made that these assets should be the subject of sharing and I am not prepared to find that these transactions were designed to promote her claim in these proceedings. Her father is an astute and able businessman. In 2012, W's sister herself went through a divorce. If W or her father had wanted to remove these assets from the arena it is incomprehensible that they waited for over a year and until the moment that the parties were reconciling.
32. W is a beneficiary of a number of discretionary trusts set up by her parents. The first such trust was set up in 1989 when she was 6 years old. Other trusts were set up in 1998, 2010 and 2017. In each instance the beneficiaries include her siblings. In some instances, there were other beneficiaries as well. Once again, it is conceded that these assets come solely from her parents and are non-matrimonial.
33. In the schedule of assets H seeks to ascribe a capital value to each of these entities. He does not suggest that they should be subject to the sharing principle but he asks me to have regard to them and particularly to the wife's directors loan account with a company M Ltd. This company is one in which a 1998 settlement, of which W is a beneficiary, holds 24% of the shares and W's father holds the balance. W remains a director of the company. Following various property transactions W had created for her by her father a directors' loan account which now contains the sum of £1.318M.
34. W states that she has never had any control over her trust or business interests or access to them. She says that her father organises all his own business affairs regardless of

whether nominally his children should be in control. It is her understanding that her siblings are in the same position. H accepts that this is how her father operates. She says she receives no benefit from the DLA of any significance and has no access to the funds which nominally stand in her name.

35. Benefits that W receives from her business and trust interests

W receives a monthly payment of £1,000 which has been paid to her for very many years. She says that is the totality of her receipts from the entities which her father has created. In addition, the sum of £8424 p.a. is paid by M Ltd into her DLA to fund a minimal contribution to national insurance and preserve or enhance her position in respect of the state pension. She does not see that money or the £3,000 p.a. nominally paid to her by one of the family trusts. The only other payment that she can recall receiving was the one-off sum of £20,000 paid into an ISA.

36. The husband did not challenge this evidence at all. He says that if he had not been there to provide for W he has little doubt that W's father would have loosened the purse strings and provide her with extra funds, but that has not been necessary. A clear indication of her father's control can be seen from the fact that when these proceedings started W needed £5,000 for her first appointment with her solicitors. Her father organised the transfer but then stopped her monthly allowance of £1,000 for five months to re-coup what she had been advanced.

37. W owes her father £827,000. The vast bulk of this money has gone to her solicitors for legal costs although a small amount might have gone to provide additional housekeeping. There is no doubt that these monies are a loan and that her father expects them to be repaid. The suggestion was made that the obvious way of dealing with this position was by transferring £827,000 worth of value from her DLA to her father's DLA. W was not prepared to countenance this suggestion, albeit it seemed to me sensible, and she said she would not dream of suggesting it to her father.

38. Whilst I am satisfied that W's father expects to be repaid the sum £827,000 and indeed also the £1.08M advanced by him for the purchase of PG, I am also quite satisfied that he is prepared to wait until W has the money available to repay him. I note that on at least three occasions he has provided long-term financial assistance to the parties, namely in enabling H to buy into R Ltd and for the purchase of both CP and PG. However unenthusiastic he might be, I have no reason to think that he will not provide a similar indulgence for his daughter in the current circumstances.

39. I think it probable that in due course W will receive further financial assistance from her father if she needs it, but history shows that rather than making gifts, his preference is for a form of structure that preserves wealth and leaves him with control. He is still in his early 60s. For all these reasons I do not think it either helpful or necessary to seek to apply any capital value to W's trust and business interests beyond saying that she has her DLA, the future plans for which are unknown.

40. W's earning capacity

In the course of her evidence W made it clear that she did not anticipate seeking employment. She has not worked since the marriage and she expects to continue to look after the children and the home with the assistance of her housekeeper. That said,

she has a good degree from a prestigious university and notwithstanding her relatively modest employment history as an assistant merchandiser with a department store chain I have no doubt that she could earn a modest income if so minded. It is relevant that it was not the anticipation of the parties that she would work but it is an option that is open to her when the younger child is a little older.

41. H's earnings

H receives a salary from R Ltd of £250,000 pa [£143,000 net]. He is also entitled to preferential dividends in the sums of £500,000 and £267,000 p.a. gross, £310,000 and £166,000 net. This gives a total annual income of £1.017M gross, £619,000 net of tax.

42. The payment of dividends is subject to the cashflow of the business and no unpaid dividend can be carried forward for more than 6 months. In 2018 cashflow problems created this event. 2019 is more promising and H expects to catch up with his unpaid dividends so that in June 2019 he anticipates receiving the unpaid dividend from December 2018 (£166k net) and in December 2019 the dividend due both then and that held over from June 2019 (£476k net).

43. The R Ltd group of businesses

It is unnecessary for me to go further back into its history than 2017 when on 1st January 2017 Mr S joined R Ltd as a full-time consultant, having embarked upon a detailed strategic review of the business. Mr S has a background in private equity and is a long-term friend of Mr E, the co-founder with H of R Ltd in its current form and to a lesser extent of H. At that time H and Mr E each held 50% of R Ltd.

44. Mr S found a disparate group of companies in a form that epitomised an owner-managed business. There were businesses without any proper processes or structure. The business was substantially under-capitalised and each deal was dependent on finding a high net worth individual who was prepared to fund it. The review took place through 2016-2017 and its outcome led amongst other things to Mr S being appointed the Managing Director of R Ltd. His brief, in summary, was to grow the company with a view to implementing a long-term strategy to sell or float the business.

45. In March 2017 R Ltd entered into an arrangement with K & Co, a private equity firm. This gave K & Co the option to enter into partnership with R Ltd on projects that K & Co approved. K & Co would produce the majority of the capital and R Ltd the balance.

46. In order to be able to produce their part of the funding requirement negotiations were entered into by the management team at R Ltd with a company abbreviated to A Ltd. Agreement was eventually reached that A Ltd would buy a small minority stake of the shares for an agreed sum and provide a further sum by way of loan notes which could in due course be converted into shares. Combined with the investment by K & Co, the agreement provided R Ltd with a substantial fund to invest.

47. Much debate has focussed on the importance or otherwise of the A Ltd investment. On behalf of the W it is said by her and Mr Dodge that this 2017 agreement with A Ltd is highly material and indicates that at that time the company was deemed to have a notional value of close to £100M. The husband and Mrs Hall take a different approach and say that there is no significance to the figure. The two proprietors of A Ltd were

old, almost family, friends. How much they invested was largely immaterial as they had a “put” option by which they could require the company to purchase their shares if there was no liquidity event in 2022 at market value. They also put considerable store by the fact that K & Co was ready to invest its own money.

48. Mr S said that the negotiations with A Ltd were carried out over several months. Although there was considerable due diligence there was no third-party valuation of R Ltd. He reckoned that R Ltd had done pretty well out of the transaction in obtaining such a relatively large sum of money for relinquishing a small shareholding.
49. There is available to me no detailed explanation as to how the size of the A Ltd investment was calculated by A Ltd. Mr S had put forward a range of valuations from £60-150M. Looking at the accounts, I think it probably was a transaction that was beneficial to the company rather than A Ltd but it does not take me very far as the financial climate of the business in 2019 is so different to that of 2017.
50. As time went on, an opportunity came up that K & Co were not interested in and the company thought worthwhile. In order to meet the capital requirement for that project a borrowing facility was entered into with a private bank called T Bank. Up to £18M can be borrowed. It is a project which, if successful, would produce significant reward in 2022-2023.
51. In 2017 it was the intention that there should be a liquidity event (i.e. a sale or float of the company) within 5 years, namely by August 2022, permitting the payment out of the interests of the various shareholders. That hope has vanished in the light of two disappointing years of 2018 and 2019.
52. As a result of the share purchase by A Ltd and the grant of shares to senior management, H's holding has diminished to 41%, with a further 1% being removed upon A Ltd's cash loan being converted into shares. If, as is proposed but has not yet happened, a further 4% of shares are distributed to employees H's interest will reduce to 38% (as will that of Mr E).
53. Shares in the company are subject to a first charge in favour of T Bank. Subject to those prior rights there is no inhibition in H's shares being charged for security of W's award.
54. The years 2017-18 and 2018-19 have been extremely disappointing years for R Ltd. In 2017/18 a loss was made of £6.8M and in 2018 only a small profit of £1.5M pre-tax against a much larger forecast. The adverse impact upon the value of the business is obvious. It is a matter of anxiety that there were no acquisitions in 2017-2018 because of the lack of opportunity at the right price. Two acquisitions have been made in 2018/2019 against an annual expectation of three or four, depending on their size.
55. This is reflected in the March 2019 budget for the next 4 years showing substantial profits.
56. The forecast figures should be treated with caution. They are a best estimate but, by way of example, 46% of the 2019-20 profit is dependent on the sale of one company asset alone at the estimated price. Further, the track record of the company in achieving its forecasts is not good.

57. Mr S hopes that the liquidity event will occur in 5 years' time, namely in 2024, although all the projections that I have seen are up to and include the year ending March 2023, and valuations have been done on that basis. I too shall work on the basis of the event taking place after the conclusion of the year to March 2023. Whichever year it may be, it will necessary to seek the forbearance of the owners of A Ltd for longer than they had anticipated.
58. Mr S's evidence was attacked by W on the basis that it was not "remotely impartial". I accept that he has a financial interest through his own shareholding in preserving and enhancing the value of the Company and that he appeared to understate the extent of the due diligence done by A Ltd before its share purchase. But, I accept that Mr S was doing his best to be helpful and give me reliable evidence. I accepted in particular his evidence that if, as was suggested on behalf of the wife, H should sell his shares that this would be "massively problematic" in the sense that this had not been anticipated when the articles of association were drafted and it would create significant problems for him and the rest of the management team who themselves have a financial interest in the realisation of the company if one shareholder was to start removing equity from the company.
59. Apart from the parties and Mr S, I have heard the evidence of Mr Dodge and Mrs Hall and read reports from each and schedules of agreement and disagreement. I have also read the report of Grant Thornton.
60. The parties' proposals
- i) PG: The wife proposes that the property be transferred to her and that she should take over all the expenditure upon it, the husband seeks its sale;
 - ii) CP: It is agreed that this property should be transferred to the husband and that he should meet the expenses on it;
 - iii) Debts to W's father: W proposes that she should take over sole responsibility for the PG borrowing and says that she will also repay the £827,000 borrowed by her primarily for legal expenses. H asserts that this latter debt should in the first instance be paid from her non-matrimonial DLA but accepts that in the long run should be in effect shared equally between the H and W as he has paid his own costs in a broadly similar sum from matrimonial assets.
 - iv) Lump sum: W seeks a balancing lump sum of £706,000, increased in closing to £903,154, which she claims equalises the non-business assets, while H offers £100,000.
 - v) H's business interests: W seeks that his interest in R Ltd should be sold forthwith (i.e. within 12 months) and the proceeds divided 50/50. As a fall back but very much second choice she seeks a lump sum of approximately £12.1M payable in equal tranches in 2021 and 2023, saying that this reflects one half of the value of his interest in R Ltd less a 5% discount to reflect the fact that she is receiving cash. H's proposal is that W should receive a sum equal to 50% of what he receives for his interest in the company up to a cap of £8.65M, reflecting what he says is one half of the value of the business. This will be payable in 5 years time or at such later time as a liquidity event takes place.

- vi) Spousal payments: W seeks 50% of the expected net preference dividends until receipt of her share of the proceeds of sale, which she calculates as £238,000 p.a. H offers £40,000 p.a. plus 25% of the net preference dividends.
- vii) Child periodical payments: W seeks £20,000 p.a. per child plus school fees. H offers £10,000 p.a. per child plus school fees.

61. Value of R Ltd

I have borne much in mind that I must not strive to value the un-valuable. I refer to paragraphs 134-135 of *Versteegh v Versteegh* [2018] EWCA Civ 1050,

“134. It is undoubtedly far more satisfactory for all concerned if a court can, with sufficient confidence, settle on a valuation of a business to the necessary standard of proof, that is to say the balance of probabilities. Not to do so is unsatisfactory for the applicant (still often the wife) and is often equally frustrating for the respondent (husband) particularly if the result is, as in this case, the making of a Wells order.

135. Notwithstanding the disadvantages of the present situation, considerable unfairness can be caused to either, or both, parties if the approach is to be that in a sharing case, there is an absolute requirement on the court to settle on a valuation (come what may) and that, if the variables render such a valuation to be particularly friable, the court should simply adopt a conservative figure”.

62. I refer also to paragraph 91 of *Martin v Martin* [2018] EWCA Civ 2866: “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)".

- 63 I am comforted by the fact that the 3 valuers have produced values within a narrow range barring only their doctrinal difference as to the applicability of a terminal value. I am satisfied that I can value the company with sufficient confidence to make it a fair exercise.
64. Grant Thornton, Mrs Hall and Mr Dodge all have valued the company on the same basis namely by reference to the Business as Usual (BAU) forecast case. Each has taken a five year period and discounted the net cashflow. The result of these calculations was that GT arrived at a figure of £40.1M, Mr Dodge at £36.4M and Mrs Hall at £37.0M. The latter two did their reports at a later period of time than Grant Thornton and with slightly different information. The relevance of Grant Thornton is now no more than the fact that it is within the same broad bracket as the more recent valuations. Mr Dodge

and Mrs Hall are content that I should take a midpoint between their two BAU valuations. The issue is the next steps in the calculations.

65. This degree of compromise has been extended to all the differences between them except for two major ones upon which I must rule.

66. Terminal value

By far the biggest difference between them relates to whether or not a terminal value should be added, put by Mr Dodge at £18.8M and at zero by Mrs Hall (and also by GT). Mr Dodge argues as follows: the company will continue after the five year period at the end of which it will be sold or floated. It will not be wound up. Taking a terminal value allows one to build in the value of the likely future cashflow after 2023, as when the company is sold it will have an infrastructure in place and projects in progress that will not yet have flowed into the profit stream but nevertheless will be of significant value to the purchaser.

67. Mr Dodge arrives at his figure by reference to page D479. He calculated a maintainable EBITDA of £14.1M using a 4 year average and applied a multiplier of 5.45 and discounted by 50% to reflect the inherent uncertainty. When aggregated with his BAU valuation uplifted by reference to the Best Case (BC) forecasts, he reached a total value for R Ltd of £73.7M.

68. He then cross checked his total value of the company by reference to EBITDA calculations and the sum paid by A Ltd.

69. Mrs Hall refutes the concept of a terminal value in this case. She says that it is already included in the capitalisation of the BAU forecast because the forecast projections to 2023 include many ongoing projects which are not even identified, let alone commenced, and are therefore totally uncertain. Mrs Hall did not discount these projects for their uncertainty as she says she would have done if she was to allow a terminal value. Thus, she says, she has already built in a terminal value. Further, she says that there is no basis upon which the profitability of unidentified projects can be assessed beyond 2023. The history of this business does not allow for an assumption of the stable and sure profit stream to come which is essential for a notional purchaser to be willing to pay a terminal value.

70. She therefore did not carry out EBITDA projections, as she regarded them as unnecessary, when arriving at her valuation figure.

71. A schedule has been produced which makes it clear that in this case EBITDA is an uncertain tool. The figures that it throws up vary massively depending on the length of time taken over which to average profits and the level of multiplier applied to it. Further variation of substantial size arises dependent on whether the outliers of various comparables are used and the projected date of completion of projects. It is possible to arrive at legitimate calculations which at their extremes would show either Mr Dodge to be over-conservative or Mrs Hall over-optimistic. For the purposes of the argument in Court Mrs Hall carried out an EBITDA calculation using an 8 year period so as to produce a multiplicand of £6.42M and applied a multiplier of 4.71 so as to produce a subtotal of £30.272 to which she added back the net assets so as to total £40.186m. This contrasts with Mr Dodge's EBITDA cross-check which I have set out at paragraph 67.

72. I have borne in mind what was said in *Versteegh* by Lewison LJ at paragraph 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)”.

73. Mr Dodge fortified his conclusion by reference to the A Ltd transaction. Mrs Hall regarded it as irrelevant. I conclude that I cannot put reliance upon it. Business conditions and the Company performance has changed so much in the last two years that it is not of assistance.

74. I have reached the clear conclusion that I should adopt the figures of Mrs Hall. Not only do I find her arguments persuasive in themselves; the volatility of the business simply does not permit any accurate basis upon which a terminal value can be assumed. I accept that if a terminal value was to be applied there would have to be a greater discount of the forecast cash flow of the unidentified and/or uncommenced projects than for those which are identified/begun and this has not been done.

75. It would also be arguable that to bring into the value of the business a sum representing projects, all of which are unidentified, and which would commence in the year 21/22 or later (as projects before then are already identified) permits the wife to feed in to profits accruing or being created years after the end of the matrimonial partnership. This would not be proper. Mr Bishop QC’s response to this point is that H would be trading with W’s share of his business assets. This is only a partial answer because W will on my award receive her funds in 2023 and only a limited part of the terminal period will have passed by then.

76. Best case scenario

In March 2018 R Ltd produced not only their BAU forecast but also a Best Case (BC) forecast. Both valuers had regard to the BC scenario and did the same discounted cashflow calculations to that forecast as they had done to the BAU forecast. This produced substantially higher figures (Mr Dodge’s £36.4M increased to £49.1M and Mrs Hall’s £37.0M increased to £52.6M), the difference being the use by them of different valuation dates. Each then applied a weighting to the BE which in Mr Dodge’s case was 50% reducing his forecast down to £42.8M and in Mrs Hall’s case 10% reducing her figure down to 38.6M. The figures are set out in more detail at page D522.

77. However, it only emerged during the hearing that the 2018 BC forecast was something that the company had not done before and was a one-off exercise that has not been

repeated. This was not known to either valuer. It was pointed out that in the last two years i.e. the years ending 2018 and 2019 the company, far from reaching towards its BC forecast had not even achieved its BAU forecast. No doubt this was one of the reasons that the exercise of producing a BC forecast was not repeated in 2019. And, as Mr Cusworth QC for the husband rightly pointed out there could just as easily have been a worst case scenario presented as well, which would have been closer to the actuality than the BC forecast.

78. Mr Dodge was not asked whether his figures were the subject of review in the light of this new information, but Mrs Hall said she would now withdraw from any addition to her BAU forecast case and that she would totally disregard the BC forecast. In my judgement, for the reasons she gave, she is right. The BC forecast proved to be much more unreliable than the BAU forecast and should be disregarded in the valuation exercise.

79. Having ruled on these two aspects, the accountants do not demur from my taking a midpoint figure on the other areas on which they are in dispute. Adding in the small value of the other associated companies, I therefore arrive at a value of the R Ltd and associated companies at £52.69M as contrasted with Mr Dodge's figure of £77.3M and Mrs Hall's of £48.9M. My detailed calculations are to be seen on the attached schedule.

80. Minority discounts

The valuers agreed between them that if H is to realise his business interest at the time of the liquidity event there should be no discount applied. However, the wife asks that I should order a sale of H's business interests at a significantly earlier time. Both accountants agree that in those circumstances there would need to be a discount applied. Mr Dodge says that if the husband was to sell his 40% interest the discount would be 20-25% whilst if he were ordered to sell only half his shares the discount would be correspondingly higher in the 25-35% bracket. Mrs Hall says a 30% discount for a sale of 40% of the shareholding and "north of 50%" for a sale of half his holding.

81. The valuers agree that the discounting factors relate to the absence or reduction of control, the extent of the likely market and the ability to influence the direction of the company. These are plainly relevant factors. However, neither valuer had the benefit of hearing the evidence of Mr S. He made the distaste of the SMT to any outside intervention very plain. Notwithstanding the ability of the husband to sell his shares on the open market if Mr E or A Ltd do not exercise their rights of pre-emption, I consider that any purchaser would be influenced by the lack of welcome that his arrival would bring and while he would be comforted by the fact that there is an exit plan in place, his inability to control or enforce it would also weigh in his decision.

82. If there was to be a forced sale now I agree with Mr Bishop QC that fairness could only be done between the parties if I ordered the sale of all H's shares. If the buyer was other than Mr E (and I have been given no information which enables me even to speculate whether he might be) I accept that the discount would be 30%. In reaching this view, I accept that Mr Dodge has expertise of commercial deal-making which Mrs Hall lacks but in my judgement her advice was the more realistic.

83. A sale of shares now

W's primary case is that I should order a sale now. I have reached the clear conclusion that I should not do so.

- i. This is not a propitious time to sell. The company has just recorded its two worst years.
- ii. The discount which H would have to bear on the value of his shares is substantial. I recognise W's desire to obtain her independence and certainty and for the early imposition of a clean break but it would be at the cost of significant financial loss to each party.
- iii. She proposes that if H has not sold them within 12 months a receiver should be appointed. I understand the logic of this suggestion but it is hardly likely to bolster the price achieved or enhance the management of the business in the intervening period.
- iv. The relatively limited and anecdotal history of court ordered sales does not give one confidence of a successful outcome.
- v. For all these reasons it seems to me, in circumstances where in my judgement W is not in immediate need of funds, it would be in the interests of both parties for the sale to be deferred.

84. Liquidity

W's fallback position is that I should order the payment of the sum that she is to receive in two equal tranches, the latter being upon the occurrence of the liquidity event. I have considerable sympathy with this argument and I agree with W that I should reject H's proposal that W should simply receive 50% of whatever he ends up with whenever the liquidity event takes place, with a maximum cap being set at half its current value. The effect of the proposal would be that W shares equally in any downside but does not share in any upside; nor would she have any fixed date by which she would receive her share. It is inherently unfair to her. True it is, as the husband points out that he has no certainty either, but he remains engaged in a business which he wishes to retain and which has the prospect of bringing him significant reward. In my judgement it is more helpful for the parties to know exactly what it is that H should be paying W and when it is due.

85. However, I cannot assume liquidity when it is simply not apparent that it exists. I bear in mind paragraph 140 of Martin

“Short of selling his shareholding I cannot see any logical basis upon which I can find that liquidity will or can be made available to H before the liquidity event save in the payment of the very substantial dividends to which he is entitled. It is entirely proper that W should feed into these dividends and into H's salary to a far greater extent than he proposes but beyond that she will have to wait for the receipt of her funds until such time as H's interest is realised”.

86. I recognise this will not enable W to meet her liabilities to her father in full in the short term other than by the expedient of setting off her personal loan against her DLA. I can see no way round this problem.

87. Wells discount?

The parties' positions are slightly contrary in this respect. H says that no discount should be applied but that is against the background of his contention that W's award should be capped by reference to current value and that she should not feed further into what he might achieve. W says that there should be a discount but limited to 5%. I bear in mind particularly that this is a business which it is expected to be sold and that it is at H's instance that the delay is occurring and I shall not therefore allow a discount.

88. Needs

This has not formed a significant focus of this case. Both parties have inevitably haemorrhaged capital in the build up to these proceedings. H has in effect paid all his costs of £880,000 from his accrued capital whilst W's remain outstanding. Henceforth H will be able to apply his income to the support of the family. Both parties have put forward budgets in the usual way H puts his budget at £177,000 exclusive of sums that he pays towards W's household but inclusive of £19,800 by way of school fees and extra tuition for the children to which he agrees to go on paying.

89. W's budget comes in at just over £420,000 but of that £90,000 is the payment of the mortgage, a further £80,000 plus are payments for other housing costs, and £22,000 is her figure for the school fees, which H will pay. There is significant scope for W to reduce her expenditure, not least by cutting staff or moving home if she so wishes.

90. H has to date been paying the mortgage on PG and the other household expenses. In my judgement he should go on doing so until 1st August 2019 when W should assume responsibility. I have chosen this period because by then W should be in a financial position to take over having received her share of the June 2019 bonus/dividend.

91. Outcome

1. Business assets: H shall pay W a lump sum of £8,948,930 being one half of the value of the net business assets on a 40% shareholding. In the event that his shareholding is diminished by a share grant to employees by no later than 30 April 2023 to a minimum figure of 38%, the lump sum shall be reduced pro rata. This will be payable by 1 August 2023, namely 4 months after the year end. Upon payment in full there will be a clean break.

The sum will become interest bearing from the date it is payable. I do not make interest payable before then because W will be feeding in to any success of the company through the level of dividend payment that she will receive.

2. The personal assets shall be equalised by a payment on account of £300,000 by 1 October 2019. I envisage that this will be likely to come by way of a remortgage of CP. This extra borrowing will still leave headroom of a little over 30% of value. The balance of £250,000 will bear interest from 1 October 2019 and shall be paid by 1 January 2021, probably out of dividend income.
3. PG shall be transferred to the wife and CP to the husband with each indemnifying the other and seeking release from current liabilities.

4. H shall pay W periodical payments until payment of the lump sums due (a) from 1 August 2019 in the sum £50,000 pa, which represents about 35% of his salary, plus (b) from the date hereof 35% of his net bonus/dividend receipts.
5. H shall pay child maintenance at the rate of £15,000 pa per child and school fees and existing tuition costs.

The effect of these income awards is that in a year with two preferential dividend payments, as anticipated, W will receive £166,600 plus £50,000 plus her income of £12,000 plus child maintenance of £30,000 = £258,000 and H will be left with the balance of his salary and dividends = £373,000 less school fees of ca £20,000.

92. H has made security proposals to which W has not yet responded. I will deal with this issue if terms cannot be agreed.
93. I am satisfied that this produces a fair outcome and one that meets the needs of each party. I have had regard to all the factors set out in s.25 Matrimonial Causes Act 1973. I regret that it is not possible to produce a clean break sooner rather than later but liquidity does not permit it.
94. I attach to this judgment the schedules which explain the parties' asset base.

FW v FH

Simplified Asset Schedule - Ultimate ownership

		Wife	Husband	
LIQUID ASSETS				
FMH: PG	5,350,000			Wife to bear liabilities
Coutts Mortgage	-3,900,000			
Loans to W's father	-1,080,000			
Cos	-160,500	209,786		
CP	1,250,000			Husband to bear liabilities
NatWest mortgage	-553,611			Any liability to W's father to be shared equally
Cos	-37,500		658,889	
H Funds			-131,500	
Wife's funds		-779,041		
Pensions			2,432	
CC				Net value 237k but non-matrimonial and occupied by H's mother
		-569,255	529,821	

Joint Coutts account to be shared equally

Sum required to equalise 549,523 = 550,000

FW v FH - Business Assets

	Wife	Husband	Notes
W's DLA [non-matrimonial]	1,313,823		
H's Business Assets			
BAU midpoint		36,767,238	
Balance sheet net asset midpoint		9,709,942	
Subsidiary 1 equity at midpoint		645,624	
Subsidiary 2 at midpoint		1,636,643	
Associated entities at midpoint		1,931,693	
A Ltd loan		2,000,000	
TOTAL		52,691,140	
of which			
(i) R Ltd		50,759,447	
x 40%		20,303,778	
CGT 10% at £10M		-1,000,000	
20% on 9,979,322		-1,995,864	
NET		17,307,914	If undiluted
(ii) CZ Ltd		1,069,800	
x 25%		267,450	
CGT on 267,375		-53,505	
		213,945	
(iii) Partnership		160,000	
x 50%			
(iv) Additional assets		216,000	
TOTAL		17,897,859	Undiluted