Neutral Citation Number [2025] CICA (Civ) 4

COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT FAMILY DIVISION

CICA (Civil) Appeal 13 of 2023

(Formerly Cause No FAM 18 of 2017)

YY

Appellant

and

RD

Respondent

Before:	The Rt Hon Sir John Goldring, President The Hon John Martin KC, Justice of Appeal The Rt Hon Sir Jack Beatson, Justice of Appeal
Appearances:	Mr Phillip Blatchly and Ms Lynne McDonagh of KSG for the Appellant Mr Michael Horton KC and Ms Louise Desrosiers of Travers Thorp Alberga for the Respondent
Date of Hearing	18 November 2024
Date Judgment circulated:	16 January 2025
Date Judgment Delivered:	13 February 2025

JUDGMENT

The President:

Introduction

1. This is an appeal by the wife under s. 24 of the Matrimonial Causes Act (2005 Revision). The Notice of Appeal is dated 1 August 2023 and is in respect of the Order of 19 July 2023 of the Honourable Justice Richard Williams following his judgment of 2 May 2023. Subsequent to the Order of 19 July 2023, on 1 September 2023 the judge made a 'Final Ancillary Order' which was expressed to be an 'Order arising from [the] judgment' of 19 July 2023. The appeal was effectively argued as an appeal from that final Order and revolved around the judgment of 2 May 2023 which, submitted the wife, was unclear and far from complete.

2. There are four specific grounds of appeal. First, the judge was wrong only to value those assets which he found to be matrimonial. He should have valued the whole asset base including those assets he found to be non-matrimonial. In consequence, the judge was unable to carry out any test of the fairness of the award as he was required to do. Second, he wrongly found that the husband's interests in three companies, namely R&R Expeditors (R&R), Buffa Limited (Buffa) and Rosedale Limited (Rosedale) were non-matrimonial assets. In respect of Rosedale, he should have determined when the husband undertook the development work. Although in the Grounds there was the allegation that in the light of his previous findings regarding the husband's credibility, the judge was wrong without explanation to rely on his evidence, that suggestion played no real part in the appeal. Third, the judge wrongly adopted a restrictive view of matrimonial property: treating an asset as either entirely matrimonial or entirely non-matrimonial. Moreover, he was inconsistent in applying his distinction between matrimonial and non-matrimonial property. Fourth, the judge wrongly, and without proper explanation, notionally reattributed CI$200,000 out of the repayment to the wife by her sister of a loan of CI$400,000 made by the husband and wife.

3. Although there is no cross-appeal, the Respondent, by his Notice of 5 August 2024, among other things, argues that the Order of 1 September 2023 represents a fair outcome in that, first, it meets the Appellant's needs and overall fairly allows for the extent of the Respondent's pre-marital and non-marital property, second, the court's assessment of the non-matrimonial property was 'broadly accurate and made fair overall allowance for the Respondent's contribution of significant pre-acquired property and post-separation assets,' albeit, as the Respondent also contended, the judge wrongly treated some assets as matrimonial when they were not. Finally, the Respondent contends that 'the outcome was fair in meeting the…[Appellant's] needs in circumstances where the judge's attempt (and any further attempt)

to delineate between the matrimonial and non-matrimonial property was (and would be) disproportionate and unnecessary…'

4. The wife was represented by Mr Phillip Blatchly and Ms Lynne McDonagh, the husband by Mr Michael Horton KC and Ms Louise Desrosiers.

The family background

5. The parties were married on 18 May 2004 in China. They had met online some 6 months before following the death of the husband's former wife in March 2001. The husband was 43, the wife 33.

6. At [4]-[5] of his judgment the judge set out some of the detail. He said:

> "*4. The wife states that at…[the time of the marriage] she was a Company Administration Manager for a company in China, with whom she had started as secretary thirteen years previously. She stated that her monthly salary was the equivalent of US$2,700. After the marriage, she became a housewife, but also gave some practical assistance to the husband in relation to a few of his business endeavours. She has not entered independent employment since the marriage. At the time of the marriage, the wife had little pre-marital wealth. I am satisfied that although the husband clearly took on the primary income earning role through his various endeavours, the wife's role as a home-maker freed up his time, thereby enabling him to concentrate on his work. In such circumstances, I find that both parties have equally contributed to the majority of the family wealth amassed during the marriage.*
>
> *5. The husband, having left banking, became and remains occupied as a land developer and he occupies himself in building, construction and development projects. When his former wife was ill, for one or two years, the husband commendably prioritised his care for her over work and therefore most of his income at that time came from rental properties. The husband asserts that the bulk of his wealth was accrued during his previous marriage*."

7. There are two children of the marriage who were aged 15 and 17 at the time of the judgment. Given the issues in the appeal, I need only say they live with the wife.

8. Between July 2004 and 2011 the parties lived together in the Cayman Islands. In 2005 or 2006 they bought a house in China for US$250,000 for the wife and children to live in. Because the wife is a Chinese national, the house was put in her name. In 2011 they agreed that the wife and

children should move to China. It was the wife's case the move was intended to be temporary, although there was cogent evidence that it was to be permanent: see [8] of the judgment. The wife and children returned to the Cayman Islands in August 2017, as the judge concluded, primarily to enable her properly to participate in the proceedings. She said that the husband refused to let her return to the matrimonial home. The judge found that the parties 'in effect' separated in 2017.

9. The judge concluded [9]:

> "*The parties were therefore married for around thirteen years, so it was a medium length marriage, arguably on the cusp of being a long marriage."*

The Matrimonial Causes Act (2005 Revision)

10. S. 19 of the Matrimonial Causes Act (2005 Revision) (the MCA 2005) sets out the general principles the court is to follow in ancillary matters. The Cayman provisions are not in identical terms to s. 25 of the Matrimonial Causes Act 1973 of England and Wales. The MCA 2005 states:

> "*In dealing with all ancillary matters arising under this Act, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial resources, actual and potential earning power and the deserts of the parties.*"

11. By s. 21:

> "*At the time of pronouncing a decree under this Act, the court shall, as appropriate, make orders for-*
>
> *...(b) the disposition of matrimonial property, including the matrimonial home;*
>
> *...(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
>
> ..."

The judgment

12. The first instance proceedings spanned some six years. The trial ran for 24 days between August 2021 and January 2022, in part because of COVID. The judgment runs to no less than 143 pages. The length of the trial and of the judgment is in no small part due to the parties' conduct of the litigation. On 17 September 2020 the judge, who is most experienced in dealing with disputes such as the present, sensibly made the following order:

> "*expert accountant to report on disclosure issues and potential scope of the marital estate. Parties to agree the terms of joint instruction*." (original emphasis: see [29] of the judgment)

13. On 4 March 2021, the wife indicated she no longer sought an expert assessment. She sought, unhelpfully, to rely upon a quantity of Land Registry documents which she suggested would assist in determining the value of the companies in which her husband had an interest. The husband did not press for such a forensic assessment as there was in his view no need to value the majority of the companies as they were non-matrimonial. As the judge said [30]-[31]:

> *"30….it is regrettable that the wife did not pursue the instruction of an expert.*
>
> *31…The expert may…have greatly assisted in ascertaining the sources of investment into the companies as well as the lending made by the companies. Such evidence may well have substantially reduced the length of the overly protracted hearing and helped the Court in the task of determining the value for each asset and whether it is to be regarded as matrimonial or not which has been a difficult and time consuming one for this Court to undertake*."

14. Moreover, as the judge observed at [278] of his judgment, and not for the only time, he had:

> "*…to try to grapple with the parties shifting their positions and changing their submissions…".*

15. Insofar as relevant to the appeal, the judge defined the issues in the following way [48]-[49]:

> "*48. The husband's Statement of Issues, which was provided prior to the hearing, was analysed in his Written Closing Submissions at which time he stated that the issues for the Court to consider and determine were:*
>
> *(i) What are the matrimonial assets;*
>
> *(ii) How should these assets be divided or apportioned between the parties…*
>
> *49. The wife did not file a Schedule of Issues, but it did not appear that she takes a different view as to the general issues for determination. The wife has a very different view about how those issues should be determined."*

16. One of the major criticisms the wife now makes is that the judge failed to value the non-matrimonial assets. Mr Blatchly (who did not appear below) agreed that there was nothing to suggest that the wife ever asked him to.

The judge's valuations

The matrimonial estate

17. The judge valued the 'personal matrimonial assets' for equal distribution at US$7,224,992 and valued the 'businesses to be treated as matrimonial assets' at US$2,505,685: see [196] and [279]. He did not value the non-matrimonial assets. In his Order of 19 July 2023, the judge ordered that those sums should be divided equally between the parties, subject to setting off, among other sums, the US$200,000 to which I have previously referred: see [1] and [2] of the Order of 19 July 2023.

Spousal maintenance

18. The judge made no specific findings as to the wife's needs. At [286] and [287] he said he was unable on the evidence before him to determine whether or not this was a clean break case. However, by the time of the Order of 1 September 2023, the judge made no order for spousal maintenance and ordered a clean break. There was no suggestion in the appeal that a clean break did not meet the wife's needs.

The relevant Cayman Islands' law

19. The judge referred to the law as it applied in the Cayman Islands: see [70]-[73].

The approach to matrimonial and non-matrimonial assets

20. At [74]-[84] the judge set out the "*approach to be taken in relation to matrimonial and non-matrimonial property.*" There is no criticism of his analysis. At [74] he said:

> "*74. In **Miller** [v Miller [2006] AC 618], Lord Nicholls indicated [at [22]] that the Court should have regard to all the circumstances of the case and that one of the circumstances is that "there is a real difference, a difference of source, between certain properties" and this means that it does not necessarily have to treat all property in the same way. With this in mind, he described matrimonial property as "property acquired during the marriage otherwise than by inheritance or gift". Its distinguishing feature is that it is "the financial product of the parties' common endeavour". He commented at paragraph 20:*
>
> > *"…the courts should be exceedingly slow to introduce, or re-introduce, a distinction between 'family' assets and 'business or investment' assets. In all cases the nature and source of the parties' property are matters to be taken into account when determining the requirements of fairness.….But 'business and investment' assets can be the financial fruits of a marriage partnership as much as 'family' assets. The equal sharing principle applies to the former as well as*

the latter. The rationale underlying the sharing principle is as much applicable to 'business and investment' assets as to 'family' assets."

I have regard to Lord Nicholls' above guidance and am satisfied that this Court may also review the husband's business assets and interests when considering division.

75. *Baroness Hale noted in **Miller** that the source of the assets may be taken into account, but its importance will diminish over time. She added that there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. I am conscious that the parties before me married in 2004 and separated about thirteen years later.*

76. *Lord Nicholls in **Miller** emphasised the need for a flexible approach when considering different types of property. He stated that:*

> *"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.…*
>
> *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.""*

21. The judge referred at [77] to the judgment of Peel J in *WC v HC* [2022] EWFC 22 and at [78] to the judgment of Mostyn J in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 in which, (at [14(iv)], in a sub-paragraph emphasised by Mr Blatchly, Mostyn J said that the fairness of an award 'should…be tested by the overall percentage technique.'

22. The judge rejected (at [80]-[81]) the more flexible approach adopted by Moylan J (as he then was) in *CC v RC* [2007] EWHC 2033 (Fam).

23. At [83]-[84] the judge said:

> "*83. The wife's efforts in the home and caring for the children have enabled the husband to concentrate on his business endeavours. In addition, although the husband has clearly been the person driving the business, the wife did assist him in an admittedly limited capacity with the running and equipping of some of the business assets. I am conscious that the circumstances in relation to the businesses in each case may be different. In this case, there are different businesses. Some were established prior to the marriage and were funded by pre-marital assets. Such businesses may arguably be treated differently when it comes to division when compared with businesses which were established during the marriage, especially if the wife's needs can be met by the equal division of the matrimonial assets. This may be viewed as amounting to a good reason for not treating certain businesses of one spouse as being subject to equal division.*
>
> *84. The wife rightly highlights that each case is to be considered on its specific set of facts to reach a decision that is fair. When determining whether a property remains separate property, this includes an exploration into the extent and length of time to which the property has been commingled with matrimonial property. As stated by Mostyn J at paragraph 9 in* ***N v F****:*
>
> > *"The reason that pre-marital property should be taken into account is, as is explained by Lord Nicholls in* **White***, because it represents a contribution made by one party unmatched by an equivalent contribution by the other. But the longer the marriage goes on the easier it is to say that by virtue of the mingling of that property with the product of the parties' marital endeavours the supplier of that property has, in effect, agreed to share it with his spouse.""*

The judge's analysis of the asset base

24. After the hearing the parties provided the judge with six schedules, setting out each asset line by line. They comprised a Personal Assets Schedule, a Sums to be Offset Against any Settlement Schedule, a Husband's Net Equity Position: Companies Schedule, a Buffa Limited

Company Value Schedule, a Grand Cayman Ltd Company Value Schedule and an R&R Ltd Company Value Schedule: see [85]. At [86] the judge said:

> "*In light of the parties' different positions, it has been necessary to try to analyse the figures and comments found in the Schedules. Due to the substantial detail in the Schedules, the most efficient approach is to set out significant parts of each Schedule in this Judgment and to then elaborate thereon.*"

25. At [208] and [209] the judge made it plain how difficult it was to value the business assets. At [208] he said:

> "*When I review each business and when it is necessary, I will seek to determine the value of the relevant matrimonial businesses from the, at time, confusing and incomplete evidence placed before me*."

26. At [209] he referred to the 'shifting sands' of the presentations he had had to face and work with since the outset of the proceedings.

27. The judge's detailed analysis of the schedules covers [87]-[279] of the judgment.

The judge's findings in respect of business assets relevant to the grounds of appeal GCL Company [211]-[235]

28. GCL was a matrimonial asset. It was owned in equal 25% shares by the husband, the wife and Mr and Mrs Nixon. It purchased the Grand Caymanian hotel in 2010. It had substantial borrowings and was under considerable financial pressure. It was at risk of 'going under' as the judge put it, something of which the wife was aware: see [214]. Its limited relevance to the appeal arises due to a dispute between the parties regarding the extent of loans made to GCL by companies which, on the husband's case, were non-matrimonial. As I understand it, it was an aspect of the wife's case that the husband was seeking to minimise the value of GCL by claiming that GCL was required to repay loans to companies which, on his case, did not form part of the matrimonial asset base.

29. The judge did not accept either party's account.

30. As to R&R (a disputed asset), the judge rejected the wife's account to the effect there were no loans. He accepted the husband's account that there were: [229].

31. As to Buffa (also a disputed asset), the judge rejected the husband's account. He said [223]:

> "*When I look at the…cross examination [of the husband] and consider it in the context of the wider evidence, it creates uncertainty and unreliability in relation to the husband's submissions concerning borrowing from Buffa. I am not satisfied that the husband has sufficiently established the existence of a [US]$650,000 loan to GCL. His evidence is confusing concerning this purported loan.*"

32. As to Rosedale (also a disputed asset), the judge rejected the husband's account. He said [230]:

> "*…There is an alleged loan of US$31,606.32 (rounded up, CI$26,339) from* ***Rosedale to GCL****. There is no satisfactory documentary evidence to corroborate this loan…I am not satisfied on the material before me that the existence of this purported loan from Rosedale to GCL has been established.*"

R&R [236]-[244]

33. R&R was established in 2002, two years before the marriage. The husband owned 50% of the company. The other 50% was owned by Julie and Renee Hislop. The business was formed to develop industrial land known as CayMarl. Phase 1 was to take two years. Phase 2 was to be undertaken following a request. A large portion of the developed land was handed over to the developer. R&R kept a portion of the developed land as payment for completion of the Rosedale project. The project was completed in late 2004/5. The husband was working on it in 2004. He showed the wife and her parents around the project in around July 2004. The work could have continued until 2005. On completion R&R would be paid by transfer of the undeveloped land. In August 2006 CayMarl transferred three parcels of land to R&R which, for stamp duty purposes, was valued at CI$706,500. The judge said [236]:

> "*…I am satisfied when the parties married R&R was only involved in a part-performed CayMarl contract which was nearing completion.*"

34. In 2009-10 R&R purchased a building for renovation with a loan from Cayman National Bank of US$1.8 million. In January 2017 the renovated building was sold. The husband said the proceeds were used to pay off the loan and other expenses. There was 'some profit' left: see [237]. The judge said [238]-[239]:

> "*238. Although the wife agrees that R &R was established prior to the marriage, she disagrees with the husband about its status as she contends that it has become a matrimonial asset due to "post-marital endeavours" and the "co-mingling of assets" and because the husband spent a great deal of time working for R&R for no salary during the marriage.*

> *239. This is a company that was established prior the marriage to develop CayMarl. The funding that came into R&R came from non-matrimonial assets. At the time of the marriage the project was reaching the end of completion, the endeavour having being [sic] performed prior to the marriage. The three remaining pieces of land owned by R&R were acquired prior to the marriage from pre-marital resources. Even having regard to the circumstances set out…above this is not a business which has been actively developed during the marriage. The primary "co-mingling" appears to be the injection of significant sums to try to preserve the parties' GCL asset. This and the 2009 property purchase funded by a loan is not sufficient to convert this non-matrimonial asset into matrimonial asset*."

35. As I have said, the judge found that R&R loaned GCL US$2,210,000: see [229].

36. Although 'for completeness' sake' the judge set out the valuation issues between the parties regarding R&R, he reached no conclusions about them: see [240]-[244].

Buffa [245]-[250]

37. Buffa was established in 2010. The husband owns 50% of the company and Renee Hislop the other 50%. It was set up to buy, develop and sell, after subdivision, a large piece of land. Buffa was established with the proceeds of a US$2.5 million loan from R&R. In 2013 Buffa purchased a parcel of land. The cost of the land and development cost amounted to about US$11 million. Between 2015 and 2019 Buffa sold 39 lots. The sales realised about US$14.5 million gross, US$13.1 million net. Although the husband claimed that Buffa loaned GCL US$1 million, the judge found that he had failed to satisfy him of such a loan: see [223].

38. The judge said the husband worked on the project 'hands-on' for extended periods of time. The husband disputed this.

39. At [246]-[247] the judge said:

> *"246. The husband contends that his share in Buffa is a non-matrimonial asset as the venture was funded by non-matrimonial assets. The company received an almost $2.5M loan from R&R, which I have found to be non-matrimonial. The wife disagrees that this company, which was established in 2010, is non-matrimonial and states that the largest element of the*

funding came from a matrimonial asset, a Butterfield Bank account. She contends that, in any event, if money was lent to Buffa from a non-matrimonial asset which has to be repaid or which has been repaid does not convert the matrimonial asset into a non-matrimonial asset. It has already been set out that the R&R still retains the three pieces of land that it received as payment for its CayMarl project and the wife, therefore, argues that the if R&R did lend the money then it must have been generated during the marriage by marital endeavour. However, in relation to these submissions made by the wife, I have found herein that R&R is not a matrimonial asset generated by matrimonial endeavour.

247. Although Buffa was established during the marriage, I am satisfied that its funding came from a non-matrimonial source and I regard it as being a non- matrimonial asset. Having made this finding I, need not, and do not intend to go on and make a finding about the valuation figure for Buffa. However, I below briefly set out each party's contention about the valuation figure as a part of the review of what the parties state are their global financial circumstances."

40. As he had with R&R, the judge then summarised (at [248]-[250]) the valuation issues between the parties regarding Buffa without reaching any conclusion.

41. As I have said, the judge rejected the husband's contention that Buffa had loaned GCL US$650,000.

Rosedale [251]-[256]

42. Rosedale was established around 2001-2 by the husband and Rene Hislop in order to complete the development of the Rosedale apartments. The project was completed in 2002. There was an issue between the parties as to how Rosedale was paid for the development work. At [251]-[254] the judge said:

"*251…The initial agreement was that payment for Rosedale Expeditors' involvement was 50% of the remaining undeveloped land adjacent to the completed apartments. This was changed to another piece of land in a second development agreement, and that land is the CayMarl land (industrial area). The husband states that in 2003 he, Rene Hislop and Billy Culbert developed warehouses on that land, and this was completed before the marriage.*

> *252. The wife states that Rosedale purchased Parcels 19A 44 and 45 from CayMarl for CI$160,024 and CI$160,576 in May 2005. These figures were accepted by the Department of Lands and Survey for stamp duty purposes and the wife says that it would be wrong to treat them as being transfers at an undervalue to represent the value of Rosedale's involvement with the development of CayMarl's land. She said that Rosedale then combined Parcels 44 and 45 into Parcel 19A 50 during the marriage in September 2005 and that the warehouses were built on this parcel. She, unlike the husband, argues that the value of Rosedale should be considered as being a matrimonial asset,*
>
> *253. The husband states that the warehouses were sold in 2019 to cover debts (including Smith Road which was developed by Rosedale and Hudson Ltd), which negatively affected the balance sheet because the assets went down. Mr. Culbert stated that there were 12 warehouses and that four of them were sold for $160,000 each, and that the remaining eight were sold on 18 December 2019 for a total of CI$1,600,000. Mr. Culbert said that he sold his four units in the 18 December sale, and that he realised $800,000. He said that the husband and Mr. Hislop each sold units in the first sale and another two each in the 18 December sale. He also said that the owners received $4,200 per month as a dividend share from rent, once the loan was paid off."*

43. At [256] the judge said:

> "*I am satisfied that Rosedale was established pre-marriage and that its primary project was completed pre-marriage and that it should be treated as being a non-matrimonial asset."*

The judge's findings relevant to the Respondent's Notice.

Slate Drive land and apartments [132] and [153]-[154]

44. At [132] the judge said:

> "*In relation to **Slate Drive land**...the land for this property was acquired just over three years prior to the marriage. However, apartments were built on the land during the marriage with the first phase 2006 and the second being around 2013 to 2015. The apartments generated income that was utilised to meet family expenses and financial obligations. The wife also helped with the running of the apartments such as paying utility bills and acquiring furnishings.*

The tenants in their apartments were employees of the Bank of China and I am satisfied that the wife played an important role in acquiring these tenants. I am satisfied that, although the land was acquired pre-marriage, due to the family's approach to and usage of the land throughout the marriage, the property should be treated as being a matrimonial asset."

45. With respect to the apartments, the judge said [153]-[154]:

*"The **Slate Drive Apartments**...are made up of two blocks, each containing four units. There is an agreed valuation due to the Valuation Report dated 24 April 2020. The land was purchased by the husband prior to the marriage in 2000 with pre-marital savings, but the buildings on it were constructed during the marriage, and the wife argues that this activity during the marriage converted a potentially non-matrimonial asset into a matrimonial one.*

...The husband states that the properties built on the land were also funded by non-matrimonial funds. The wife disagrees with the husband's contention that this property is non-matrimonial. She says this is because loans were taken out during the marriage for the construction and because rental income coming in during the marriage was used to pay debts and support the family, which in turn makes the property a matrimonial asset. The wife also relies upon the fact that the land was used as security to fund lending for the matrimonial asset, GCL. The wife stated that she played a hands-on maintenance role in relation to the property, for example by paying the utility bills and by travelling with the husband to buy and choose the furniture in the US. I accept the wife's evidence that it was her efforts that bought the Bank of China to enter long term tenancy agreements for its employees at the property as she was the one who reached out to the management at the Bank. Accordingly, I take a similar view to the expressed when considering Slate Drive at paragraph 132 above, and I am satisfied that the land and properties on it are all to be regarded as being matrimonial assets."

Crewe Road [134]

46. With respect to Crewe Road, the judge said [134]:

"*In relation to **Crewe Road (Prospect) Land**..., the husband states that this was acquired with Mr. Hislop and Mr. Culbert in 2006 using funds which he says were accrued before the marriage. In his Affidavit sworn on 15 April 2021, the husband states that the property was purchased with an advance from R&R Expediters and that:*

"None of the fruits of the marriage went into purchasing the parcel."

I have not been able to locate any reliable evidence to support his contention about this advance. The husband states that the acquisition was "shortly after the marriage". However, the parties were married at least two years earlier. I would not characterise the property as being one acquired shortly after the marriage and I am satisfied that the husband's share in this asset obtained during the marriage should still be regarded as being a matrimonial asset."

The Rosedale Rental property

47. As to the Rosedale Rental property, the judge said [157]:

*"The **Rosedale Rental property**…is a single level, two-bedroom apartment which the husband purchased in 2003, around the time that he says he was completing the Rosedale project. The wife does not agree with the husband that it is non-matrimonial property. She contends that it is matrimonial because the rental income was used to support the family and because she again was involved in the management and rent collection for the property. In support of her contention that the property is a matrimonial asset, the wife also relies on the fact that the property was used as security for a loan with Butterfield Bank in 2013 and varied in 2014 for the benefit of GCL, being matrimonial property. I see force in the wife's submissions and I am satisfied that this property acquired very shortly before the marriage has been used and maintained by the parties in a manner consistent with it being regarded as a matrimonial asset. Accordingly, this property will be treated as being a matrimonial asset with a value of US$451,220 pre-5% costs of sale in my calculations."*

The Windsor Park Apartments [158]-[159]

48. In respect of the Windsor Park Apartments, the judge said [158]-[159]:

"*The **Windsor Park Apartments**…were built on land owned by Christian Brothers Ltd since 1995. The apartments are made up of twelve units constructed after the parties were married. Although Windsor Park has been marked on the updated schedule as valuation not agreed, it appears to be agreed. The husband gives his net income in 2019 from the Windsor Park apartments rentals as being $33,979 in the Net Personal Income Schedule. This figure is arrived at with reliance being placed on the Windsor Park US Net Income Sheets provided to the Court. The wife states that there are 12 units rented as CI$600/month and she gives the figure as being CI$86,400 gross which could be reduced to CI$60,480 (US$72,000) to take into account 30%*

for maintenance costs. Having looked at the Net Income Sheets and considered the supporting evidence, I conclude that the net income for the apartments is $33,979.

The wife states that the property is a matrimonial asset. I am satisfied that, although the land was acquired pre-marriage, due to the family's approach to and usage of the land and apartments throughout the marriage, the husband's interest should be treated as being a matrimonial asset."

Manna Holdings [262]-[263]

49. Manna Holdings was a business asset. The judge said this about it [262]-[263]:

"*Manna Holdings was established in 1992 to deal with Pine Lake Apartments and it holds one asset. The husband states that it is a "pretty inactive" company. The husband contends its net equity position is valued at $103,660 and that figure is reached by adding the annual net rental income generated to the property value. The husband says that it was agreed that this was a non-matrimonial property and that the Court was not asked to make any determination about the asset at the hearing. However, the wife argues that it is matrimonial as the husband, during cross examination, conceded rental income from the properties owned by Manna Holdings was used to support the family and that the wife helped with the collection of the rent.*

...Although this asset was established well before the marriage, I am satisfied that this should be treated as a matrimonial asset. The wife has actively assisted with the running of this business by assisting with the collection of the rent and the income from the property has been directly used to support the family. It has a value of US$103,660 which is subject to equal division in the calculations."

Christian Brothers Limited [263]-[267]

50. Christian Brothers Ltd was established in 1995. The husband owns 50% of Christian Brothers. The company owns 50% of the land on which the Windsor Park apartments and three other apartments are located. In 2004 some temporary structures were built on the land. The husband accepts they are matrimonial assets. The husband did not accept that the later building of the structures meant that the company became a matrimonial asset. The income from the business was CI$20,400 a year, in respect of which the husband received half (US$12,142.86). There was some US$185,000 in the bank. At [266] and [267] the judge said:

"*The wife, like with Manna Holdings, argues that it is matrimonial as the husband, during cross-examination, conceded rental income from the*

properties owned by this company was used to support the family and that the wife helped with the collection of the rent. She says that her evidence that she collected the rent and took care of utilities and other property management tasks in relation to the properties owned by Christian Brothers Ltd was not challenged.

I treat the husband's interest in the only asset held by Christian Brothers Ltd, namely Windsor Park, as being matrimonial. I view the husband's interest in this property in the same way that I view Manna Holdings."

The US$400,000 loan

51. In 2015 the wife's sister repaid to the wife a loan of US$400,000 which the husband and wife had previously loaned her. The wife said that that sum was used up in living expenses, legal fees, insurance for the children and investment into an endowment property. It was her case that that sum should not be treated as an existing asset.

52. At [298] the judge itemised offsets sought by the husband, namely US$177,121.24 and US$25,000. At [301]-[302] the judge rejected any offset for those sums. However, as to the loan, he said [189]:

> "*[The wife] …said that she did not keep a running account, so it is difficult for the Court to determine if and how she may have used the funds. I am satisfied this is a matrimonial asset which the wife has already retained. I do not treat this sum as maintenance pending suit and US$200,000 should be set off in the final calculations."*

53. At [303] he said:

> "*…I feel that there should be set off US$200,000 for 50% of the returned $400,000 lent to the wife's sister from matrimonial accounts. Therefore the husband is entitled to set off $200,000…"*

The argument

The failure to value the non-matrimonial assets

54. Mr Blatchly submitted that having correctly summarised the applicable law, the judge failed to apply it to the facts of the case. He was wrong not to value the non-matrimonial assets. He was therefore not in the position to assess the overall fairness of his award, as he had appeared to accept at [78] of his judgment he was obliged to. Such a cross-check was an essential check of

the fairness of the outcome submitted Mr Blatchly: see for example [95] of *Hart v Hart* [2017] EWCA Civ 1306 (to which I refer below).

55. Mr Blatchly said he had not found a reported case in which the judge had chosen not to carry out this exercise.

56. The fundamental point Mr Blatchly made was that just because the husband came to the marriage with pre-acquired assets and just because the order under appeal might meet the wife's needs, that does not necessarily mean the order is fair. The wife is entitled to the higher of her sharing and her need claim. In the absence of the judge carrying out the overall cross-check for fairness, it is impossible now to say what he would have found to be fair, submitted Mr Blatchly. He rejected Mr Horton's submission to the effect that the judge must have made the required assessment.

57. Mr Horton accepted that the judge should have set out his valuation or range of values for the total asset base, and have made clear that in his view the outcome met the wife's needs and amounted to a fair share of the total assets. However, submitted Mr Horton, although the judge did not give a separate judgment before making his Order of 1 September 2023, it is inconceivable that having carried out an exhaustive analysis of the assets and the parties' contentions regarding them, this very experienced judge did not consider that the Order represented a fair outcome. Moreover, submitted Mr Horton, the judge knew the respective contentions of the parties. He knew the effective parameters of the total asset base. While Mr Blatchly accepted it was improbable the judge would go outside the parties' respective contentions in terms of valuation, he submitted that in the total absence of any expressed assessment by the judge, it is impossible to make the sort of assumptions advocated by Mr Horton.

58. Mr Horton also argued that in the difficult circumstances confronting him, for which the wife was primarily responsible, the judge should have approached the case in the flexible manner adopted by Moylan J in *CC v RC*, and subsequently endorsed by him in the Court of Appeal in *Hart v Hart*. Had he done so, the outcome would broadly have been that reflected in the Order of 1 September 2023.

Matrimonial endeavour and matrimonialisation

59. Work which is undertaken by either party during the marriage is the clearest example of matrimonial endeavour, submitted Mr Blatchly. He submitted that in respect of R&R, Buffa and Rosedale the judge largely ignored matrimonial endeavour, focussing exclusively, on the

date businesses were established and how they were funded. The husband, he argued was a property developer by occupation. The various business enterprises reflected the development work he was undertaking during the marriage. Sometimes the wife helped him. Sometimes she was at home with their children and, as the judge found, was enabling him to pursue his work. To the extent there was active development work during the marriage, this work and its spoils were subject to the sharing principle and plainly matrimonial, submitted Mr Blatchly, irrespective as to when the company was established.

60. Furthermore, argued Mr Blatchly, the judge entirely failed to consider whether any, or any part of the assets may have been 'matrimonialised:' see *K v L* [2011] EWCA Civ550.

61. Mr Horton submitted that using income from a pre-acquired asset to meet the domestic economy of the family during the marriage did not turn that pre-acquired asset from non-matrimonial to matrimonial. Neither did profit realised from an asset during the marriage from work substantially done before the marriage make that asset matrimonial. Profit from work done during the marriage from a pre-acquired asset represented no more than the churn of a property portfolio. Such profits were merely the "*fruits of a pre-relationship project*:" see *E v L* [2021] EWFC 60 (Fam). Moreover, some degree of marital endeavour will not render a pre-acquired asset matrimonial, either entirely or at all submitted Mr Horton. There must be a threshold. It only becomes fair to treat something which was non-matrimonial as matrimonial if there was some transformative activity changing the character of the asset, he submitted.

62. Mr Horton also submitted that the judge cannot be criticised for taking a binary approach to the matrimonial assets. That approach reflected the parties' submissions. If the judge did err to the husband's benefit in some respects, he equally did so to the wife's benefit in other respects, as the Respondent's Notice sets out. At the hearing Mr Horton put it in a rather more vernacular way: if the judge did make some errors to the husband's benefit in that 'bits' are matrimonial, he made greater or similar errors in other areas to the benefit of the wife. In the result, the outcome was fair.

R&R

63. While Mr Blatchly accepted that R&R was established in 2002, two years before the marriage, with initial funding from non-matrimonial source, he submitted that on the judge's findings ([236]-[238]):

(1) Work on the first phase of the project could have continued until 2005;

(2) Payment for the first phase was made in August 2006;

(3) There was a second phase which took place during the marriage. The company purchased a building in 2009-10 which it renovated and sold in January 2017, leaving some profit.

64. Sufficient work was done in the first phase during the marriage to mean that that phase was carried out as part of a matrimonial endeavour submitted Mr Blatchly. The second phase, he submitted, unarguably was the product of matrimonial endeavour. It was financed and completed during the marriage as part of the husband's work as a property developer. The judge's finding that this work was not carried out as part of a matrimonial endeavour was unsustainable. Whilst it was possible for R&R to be partly matrimonialised, the evidence suggests it was wholly or largely matrimonial said Mr Blatchly.

65. Mr Horton submitted that the first phase of work was substantially completed before the marriage. It was not funded by matrimonial sources. Payment for that phase was made by the transfer of land in 2006. There is no basis for finding the work done was the product of matrimonial endeavour. Accordingly, the payment in 2006 was not payment in respect of a matrimonial endeavour. The second phase, which was financed, completed and sold during the marriage represented no more than the churn of a property portfolio, submitted Mr Horton. It was no more than 'the fruits of a pre-relationship project.' At best, only the profit referred to by the judge at [237] could be said to be matrimonial. Given the difficulties faced by the judge and the wife's lack of preparation in identifying any matrimonial element, the judge was entitled to find that the share of the current value attributable to matrimonial endeavour was nil or de minimis argued Mr Horton.

66. There was some difference in the valuations relating to R&R in the schedules submitted by the parties. The husband's valuation of R&R was US$3,364,580, the wife's, updated to reflect the judge's findings, was US$3,073,451.

Buffa

67. Mr Blatchly submitted that Buffa was plainly a matrimonial asset. It was established during the marriage. The husband worked on the development during the marriage, albeit he disputed this. The fact it was to some extent financed by R&R, which the judge had found to be non-matrimonial was irrelevant. The loan would be reflected in the balance sheet of Buffa as would any loan from whatever source. Moreover, the judge was wrong about the status of R&R, submitted Mr Blatchly.

68. Mr Horton made the point that at [245] the judge stated that the parties agreed that Buffa was established with a loan of $2.5 million from the first phase of R&R. That phase, submitted Mr Horton, was plainly completed as a non-matrimonial project. Buffa was therefore sourced from non-matrimonial assets. Mr Horton stated that the husband disputed that he had done work on the development. Although the project made a profit of $2.1 over a period of time, the profit was less than the initial non-matrimonial contribution. Buffa still owes R&R $1.8 million of the loan. Matrimonial endeavour played no part. Any change in value of Buffa from 2019, when the last lot was sold, was due to passive growth. On the basis of his findings, the judge was entitled to find that Buffa was a non-matrimonial asset submitted Mr Horton. Moreover, he added that some $1 million of the Buffa profit was credited to GCL, which was a matrimonial asset.

69. There was a substantial difference in the parties' valuations relating to Buffa. The husband's valuation of his share of Buffa was US$482,456, the wife's US$3,849,873.

Rosedale

70. This was his least strong submission, said Mr Blatchly. The wife's case depended, he submitted, upon when the development was done. He accepted that he could not go behind the judge's finding (at [256]) that the primary object of Rosedale was completed before the marriage. However, submitted Mr Blatchly, the judge should have resolved the real dispute between the parties, namely whether, as the husband submitted, Rosedale's purchase of the parcels of land in May 2005 from CayMarl was at an undervalue and represented payment for the completed Rosedale development, or, as the wife submitted, was a purchase at true value and as part of a development during the marriage. Mr Blatchly emphasised the judge's use of the word 'primary' in [256].

71. Mr Horton submitted that, as the judge found, Rosedale was established before the marriage and the apartments which it was to develop completed in 2002, again pre-marriage. The work was ultimately paid for in May 2005 by the transfer of the CayMarl land. Although the payment was after the marriage, it was, submitted Mr Horton, plainly for work done before: the resulting assets cannot therefore be matrimonial. Although warehouses were subsequently built on the site after the payment, Mr Horton submitted that the husband was not involved in that endeavour. He was merely an investor entitled to one third of any profit. Some Rosedale assets were sold at a loss, as the judgment illustrates. It is unfair, submitted Mr Horton, to pick out that part which was profitable without taking into account that Rosedale was only enabled to

trade as a result of what was brought into the marriage. As to the rent received, that was to meet the ongoing loss.

72. In the skeleton argument, it was submitted that the maximum profit was $1million. The renovation costs were unknown, as was the extent of any passive growth. In all the circumstances, the judge was entitled to consider that there was no matrimonial element in the husband's remaining share in Rosedale.

73. The valuation of Rosedale was agreed at US$466,667.

The respective total valuations of the disputed companies

74. As I understand it, the husband's total valuation, before considering the set-off arguments, was US$4,313,753, in respect of which the wife submitted she was entitled to half, namely US$2,156,876. The wife's total valuation was US$6,464,991 in respect of which she submitted she was entitled to half, namely US$3,232,495.

The Respondent's Notice

75. I now turn to the findings which Mr Horton submitted were overly favourable to the wife and the wife's response. The arguments were essentially set out in the parties' skeleton arguments.

Slate Drive and the Slate Drive apartments

76. The husband's submission was that the judge having separated the land and the apartments, there was no basis for treating the land as a matrimonial asset. The husband purchased the land before the marriage with his savings. The apartments were accordingly built on non-matrimonial land. The wife 'did not really contradict' the husband's assertion that the source of any loans taken out to finance the construction of the apartments was pre-marital. Any loans taken out during the marriage to fund the work were serviced by the income yield on the pre-acquired property loan and were non-matrimonial. The fact that the family benefited from income derived from the apartments did not make the apartments matrimonial. Such endeavour as was carried out by the wife in respect of the apartments was very limited. As it was put in the husband's skeleton argument, 'only a minimal element of the value of the apartments should be viewed as matrimonial and subject to the sharing principle and/or if the apartments are considered to be matrimonial, the wife's share should be a very low percentage.'

77. The wife disputed that the judge drew a distinction between the land and property. He merely followed the structure of the schedules the parties had submitted. The judge rightly considered

them collectively as matrimonial property. It mattered little that the land was acquired three years before the marriage given the apartments were built on it throughout the marriage and both parties worked on the project and it served as meaningful resource to the family. The nature and quality of the asset changed. This is clear matrimonialisation and justifies the full asset being included within the sharing principle.

78. The valuation of the Slate Drive land and apartments was in total US$2,612,499.

Crewe Road land

79. The husband submitted that given how close the purchase was to the beginning of the marriage and that all or nearly all of the husband's resources were derived from pre-acquired assets the overwhelming likelihood was that the source of the funds to purchase the Crewe Road land was non-matrimonial. None of the fruits of the marriage went into the purchase.

80. The wife submitted that there was no evidential basis for the judge to find that the funding for the Crewe Road land came from non-matrimonial sources. The husband was seeking to re-run the argument which failed at trial.

81. The valuation of the Crewe Road land was US$272,256.

The Rosedale rental property

82. The husband submitted that the judge's treatment of the fact rental income from a property purchased by the husband in 2003 was used to support the family as relevant to the status of the Rosedale rental property was wrong. The fact the property was used as security for a loan during the marriage did not render it matrimonial. There was no extant security at the time of the hearing, and no borrowing deducted from the value of the property in the asset schedules. As for the wife collecting the rent, that was de minimis. At best, only a very limited part of the property could be viewed as matrimonial on the facts as found by the judge.

83. The wife responded that the judge carefully justified his findings. He found that 'this property…has been used and maintained by the parties in a manner consistent with it being regarded as a matrimonial asset.' This is the essence of matrimonialisation, submitted the wife. The use of the property and industry invested by the wife in the management of it as a rental property over thirteen years justified the court concluding that the nature of the asset was mingled with matrimonial endeavour and was, thus, matrimonialised. There is a clear contrast

with inherited assets, like farming estates (as in *Robson v Robson* [2010] EWCA Civ 1171) or family companies, (as in *K v L* [2011] EWCA Civ550).

84. The valuation of Rosedale rental was US$428,659.

Windsor Park apartments

85. Albeit the development took place during the marriage, the husband submitted that the source of the funds was overwhelmingly likely to have been non-marital. The receipt of income for the family did not matrimonialise the pre-acquired property.

86. The wife submitted that this was a clear case of matrimonial endeavour, albeit the land was acquired before the marriage. The nature of the asset changed when the parties built apartments on the land, as the judge was entitled to conclude.

87. The valuation of Windsor Park apartments was US$57,000.

Manna Holdings

88. The husband made the same points regarding Manna Holdings as he did in respect of Windsor Park.

89. The wife submitted it was open to the judge to conclude that the wife's assistance in running the business, collecting the rent and the income supporting the family over the marriage meant that the judge was entitled to conclude that Manna Holdings became a matrimonial asset.

90. The valuation of Manna Holdings is US$103,660.

Christian Brothers

91. The husband accepted the temporary structures placed on the land were matrimonial. The placing of the structures did not, he submitted mean that the land became matrimonial. As to the receipt of rental income and rent collection, the husband made the same points as he did with respect to Windsor Park.

92. As with Manna Holdings, the wife submitted that she made a sufficient contribution to the enterprise to entitle the judge to find that Manna Holdings was a matrimonial asset.

93. The valuation of Christian Brothers was US$297,500.

The total value of the 'set off' assets

94. The assets which the husband submitted should be set off amounted to some US$3,771,574. On the husband's case all or most of that sum should fall outside the sharing principle, which would reduce the wife's sharing claim by some US$1.885 million.

Parkside Drive Residence

95. I shall take this briefly.

96. Parkside Close Residence was the former matrimonial home. The husband had bought it in 1997 and had lived there with his former wife. It was the matrimonial home when the parties were together. The wife said she and the children would return there when she came back to Cayman. The husband still lives there. The judge found [54] and [150] that it was a matrimonial asset. Mr Horton submitted that in all the circumstances it is strongly arguable it was not. I note that Parkside Close Residence did not feature in paragraph 37 of the Respondent's skeleton in which the 'over favourable' findings were set out. Mr Blatchly submitted the judge was plainly entitled to find this was a matrimonial asset for the reasons he gave.

The US$400,000 loan

97. The wife's submission advanced by Mr Blatchly was that the repayment of the $400,000 to the wife in 2015, and having been spent in the way she indicated, should not have been treated as an existing joint matrimonial asset for which she was required to account to the husband. The only possible justification for doing so was if the judge had concluded the wife had wantonly and recklessly misspent or dissipated the money, about which there was no evidence, let alone a finding by the judge: see *Norris v Norris* [2002] EWHC 2996 (Fam) at [77]. Given that the judge never explained the basis of his decision, it is impossible to know that he correctly applied the legal test. Moreover, submitted Mr Blatchly, the husband never suggested dissipation. It was his case the money was not spent as the wife claimed, but was hidden, something about which the judge made no finding.

98. Mr Horton disagreed. The loan had been from both the husband and wife. The wife received the entire repayment. The judge must be taken to know the test for notional attribution. The judge noted at [189] how the wife contended she had used that sum and yet found it difficult to determine 'if and how' she had done so. At [300] the judge recorded that the husband had in February 2017 said she could keep that sum. At [301]-[302] he rejected an offset for those sums, which he considered had been used as the wife as she had said. It is, submitted Mr Horton, clear that the judge, who was aware that from March 2018 the wife was in receipt of substantial

global maintenance pending suit, did not accept her account. In all the circumstances, where the wife had received substantial capital and maintenance pending suit during the proceedings, and could not account for how she had spent the spent the US$400,00, the judge was entitled to add it back, submitted Mr Horton.

The outcome

99. Finally, I shall set out what (hopefully correctly) is my broad understanding of the overall position:

(i) The judge found that the total matrimonial estate amounted to US$9,730,677. Half that sum amounted to $US4,685,339, which, subject to off-sets of $US215,345, including the US$200,000 repayment of the loan, resulted in a figure of US$4,469,992: see [1] and [2] of the Order of 19 July 2023.

(ii) The husband contended the total current value of the asset base was in the order of US$17.1 million as against the wife's contention of some US$19.3 million.

(iii) On the basis of the husband's contentions the division of the overall asset base amounted to some 74%-29% in favour of the husband, on the basis of the wife's, to some 71%-26% in his favour.

Discussion and conclusion

100. *Hart v Hart* concerned:

> "*…the approach which the court should take to non-matrimonial property when determining a financial remedy claim by application of the sharing principle…it raises both evidential and legal issues. How is such property to be assessed? What degree of assessment is required? Is the approach formulaic or does the court have a broader discretion?*" (See the judgment of Moylan LJ at [1])

101. At [2] the Lord Justice went on to say:

> "*…In White v White…Lord Nicholls used the expression "from a source wholly external to the marriage"…when referring to non-matrimonial property. He defined matrimonial property in Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186 (at paragraph 22) as "the financial product of the parties' common endeavour." Lady Hale used the expression "the fruits of the matrimonial partnership" in Miller (paragraph 141). In Charman v Charman (No 4) [2007] 1 FLR 1246 matrimonial property was described as "the property of the parties generated during the marriage otherwise than by*

external donation" (paragraph 66). Non-matrimonial property can, therefore, be broadly defined in the negative, namely as being the assets (or that part of the value of an asset) which are not the financial product of or generated by the parties' endeavours during the marriage. Examples usually given are assets owned by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse from, typically, a relative of theirs during the marriage."

102. As Moylan LJ said at [62]:

"*The classification of property as non-matrimonial or matrimonial is relevant in the application of the sharing principle because the court is seeking to establish the extent to which the current assets owned by the parties comprise or reflect the product of marital endeavour and the extent to which they do not. This arises because…the sharing principle applies with force to matrimonial property but does not apply or applies with significantly less force to non-matrimonial property.*"

103. At [70] of *Hart*, Moylan LJ cited Lady Hale's observation in *Miller* to the effect that:

"*As the family's personal and financial inter-dependence grows, it becomes harder and harder to disentangle what came from where*."

104. In his conclusions Moylan LJ was clear that a formulaic approach to the assessment of which current assets were matrimonial and which were not, was not required. He went on to say [85]-[86]:

"*85. It is, perhaps, worth reflecting that the concept of property being either matrimonial or non-matrimonial property is a legal construct. Moreover, it is a construct which is not always capable of clear identification. An asset can, of course, be entirely the former, as in many cases, or entirely the latter…However, it is also worth repeating that an asset can comprise both, in the sense that it can be partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage. I have added the word "reflective" because "reflect" was used by Lord Nicholls in Miller (paragraph 73) and "reflective" was used by Wilson LJ in Jones [[2012] Fam 1] (paragraph 33). When property is a combination, it can be artificial even to seek to identify a sharp division because the weight to be given to each type of contribution will not be*

susceptible of clear reflection in the asset's value. The exercise is more of an art than a science.

86. In my view, the guidance given by Lord Nicholls in Miller remains valid today and, indeed, bears increased weight in the light of the courts' experience since that case was decided. It can, as he said, be artificial to attempt to draw a "sharp dividing line.""

105. Moylan LJ then set out how the court should approach its application of the sharing principle when the existence of non-matrimonial property is being asserted.

106. Firstly, the judge should decide whether, and if so, what proportionate factual investigation is required. He referred to paragraph 43 of the judgment of Baroness Hale in *Sharland v Sharland [2015] 2 FLR 972* in which, at [43], she said there was "*enormous flexibility to enable the procedure to fit the case*."

107. Secondly, the court should make such factual decisions as the evidence enables it to make. It may find the non-marital contribution is not sufficiently material or bears insufficient weight to justify a finding that any property is non-matrimonial. If the evidence establishes a clear dividing line between matrimonial and non-matrimonial property, the court will apply that differentiation at the next, discretionary stage. If, however, there is a complicated continuum, it would be neither proportionate nor feasible to seek to determine a clear line. In those circumstances, 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. Where in the spectrum a case lies depends on the circumstances. Finally, the court will undertake what in the Cayman Islands is the discretionary exercise under s. 19 of the MCA 2005 and in England and Wales s. 25 of the Matrimonial Causes Act, 1973. As Moylan LJ put it [95-97]:

"95…Even if the court has made a factual determination as to the extent of the parties' wealth which is matrimonial property and that which is not, the court still has to fit this determination into the exercise of the discretion having regard to all the relevant factors in this case. This is not to suggest that, by application of the sharing principle, the court will share non-matrimonial property but the court has an obligation to determine that its proposed award is a fair outcome having regard to all the relevant section 25 factors.

96. If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-

matrimonial property, the court will have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in Jones, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness." This accords with what Lord Nicholls said in Miller and, in my view, with the decision in Jones.

97. Finally, I would repeat that fairness has a broad horizon. I recognise, of course, the need for clear guidance and principles when the court is given a discretion as wide as that contained in section 25... Such clarity not only assists judges when determining financial claims but also enables those seeking to resolve the consequences of their separation and divorce [to] bargain in the shadow of the law..."However, this should not lead to the imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome."

108. The facts in *K v L* [2011] EWCA Civ 550 were that the wife owned shares inherited over ten years before the parties began cohabiting and were worth some £57 million at the date of the substantive first instance hearing. During the marriage neither party worked: dividends and the occasional proceeds from sales of shares provided more than enough for the parties' needs. The husband unsuccessfully argued the shares should be subject to the sharing principle. He relied on what Lady Hale said in *Miller* to the effect that the importance of the source of the assets will diminish over time. Wilson LJ said [18]:

"*...with respect to Lady Hale, I believe that the true proposition is that the importance of the source of the assets <u>may</u> [original emphasis] diminish over time. Three situations come to mind: (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property. (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult. (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a*

matrimonial home which, although vested in his or her sole name, has- as in most cases one would expect- come over time to be treated by the parties as a central item of matrimonial property. The situations described in (a) and (b) were both present in White v White. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ringfenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to grow in value."

109. In *Standish v Standish* [2024] EWCA Civ 567, in a judgment with which King LJ and Phillips LJ agreed (and in which leave to appeal to the Supreme Court has been granted), Moylan LJ once again dealt with the topic of matrimonialisation. As he put it at [109]:

"*The issue at the heart of this appeal is the classification of property for the purposes of the application of the sharing principle; in particular, how and when property can change or move from being non-matrimonial to which it does not apply and become matrimonial property to which it does apply.*"

110. In the course of his detailed and lengthy judgment, the Lord Justice referred to the burgeoning number of cases relevant to the topic. At [160] of *Standish* Moylan LJ said:

"*I now turn to the issue of matrimonialisation. As submitted by Mr Bishop, the underlying principle is that fairness may require or justify treating property, which was not purely the product of the parties' joint endeavours, as matrimonial property and, therefore, within the scope of the sharing principle. I should make clear that this is not to depart from what was said in Hart and other cases about the court's approach to determining whether the parties' assets include assets which might be said to comprise or reflect the product of non-matrimonial endeavour. It is about when an asset or assets which were at one stage non-marital property might be included within the sharing principle…*"

111. The Lord Justice dealt briefly with whether the whole concept should no longer be applied and rejected it. At [162]-[166] he said:

"*162…I consider that it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when…fairness justifies this.*

However, because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage.

163. *In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly. This is not a hard and fast line but remains a question of fairness, reflecting, as Wilson LJ said in K v L at [18] that "the importance of the [non-marital] source of [an asset or assets] may diminish over time." With some diffidence, I would propose the slight reformation of the situations to which Wilson LJ referred in K v L, having regard to the developments that have taken place since that decision as follows: (a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify evidential investigation; and/or an other than equal division of the wealth; (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.*

164. *In the first example, the sharing principle would apply in conventional form. In (c), the court will typically conclude that the former matrimonial home should be shared equally…*

165. *The example in (b) requires a more nuanced approach similar to that referred to in Hart at [96], when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property. As Mostyn J said in JL v SL (No 1) at [18], the underlying question is whether the asset or assets "should have the same character as those assets built up by their joint endeavours during the marriage with the consequence they should be shared … on divorce." I have deleted the word equally because that was simply a reference to what the District Judge had done in that case. Does fairness require or justify the asset being included in the sharing principle?*

166. *The conclusion that it does, however, does not mean that it must be shared equally. The submission…that, once an asset is matrimonialised and treated*

> *as matrimonial property, it must be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome. This is because, again as Mostyn J said in JL v SL (No 1) at [19], it may be that the "non-matrimonial source of the moneys in question" remains "a relevant consideration." In its evaluation of all the relevant factors in the situation described in (b) above, it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an other than equal division. Another way of putting it, repeating what I said in Hart at [86]:*
>
> > *"The court will have to decide, adopting Wilson LJ's formulation of the broad approach in Jones, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour."*"

Some broad observations

112. Before turning to the decision in this case, it may be helpful to make a number of observations.

113. First, neither party argued that in this area the law in the Cayman Islands materially differed from that in England and Wales. The court's objective in exercising its discretionary powers under s. 19 of the MCA 2005 is to achieve a fair outcome having regard to the underlying principles articulated in *Miller*, namely need, sharing and compensation. The court's award is the higher of that reached by the application of the sharing principle and the need principle.

114. Second, the court has to determine, in its application of the sharing principle, what part of the parties' current asset base is matrimonial and accordingly subject to that principle. The demarcation between matrimonial and non-matrimonial property is not necessarily precise. An asset which was not originally matrimonial may become matrimonial and subject to the sharing principle. If that is so, fairness does not necessarily require that it be shared equally.

115. Third, as the authorities illustrate, in this area of the law the first instance judge is called upon to exercise a broad discretion. As in any other area of the law, this court will not readily interfere with the exercise of that discretion.

116. Fourth, it is of the highest importance that the court applies the overriding objective in the management of these cases. Active case management is essential. It is throughout necessary for

the judge to have well in mind the proportionality of any investigation, for it is easy, particularly when the parties and, as sometimes happens, their legal advisors, lose sight of the objective of the exercise, for a case and its costs to run out of control.

117. Fifth, while I accept, as Mr Blatchly argued, that in the final analysis the judge (and this court) will have to be satisfied that the proposed award is fair, a judge is normally entitled to conclude, particularly where the parties are represented, and copious legal argument has been placed before him or her, that that argument defines the parameters of the issues to be resolved in order to arrive at a fair determination.

The decision

118. I now turn to the decision in this case.

119. While in all the circumstances one cannot but sympathise with the judge, it does seem to me a number of things went wrong.

120. First, without forensic accountancy evidence the endeavour of unravelling and valuing this complex web of companies became an inordinately difficult, time consuming and as became apparent, disproportionate task. The wife was primarily to blame for this. The husband, however, is not without blame. The parties' conduct of their cases exacerbated the position.

121. Second, and consequentially, while I can well understand the judge's decision not to follow the more flexible approach adopted by Moylan J in *CC v RC*, and approved in *Hart v Hart*, given the state of the evidence presented to him, it does seem to me that a more flexible approach would have been more proportionate than the detailed and necessarily unsatisfactory line by line investigation which was carried out. In saying that, I acknowledge that no approach would have been without difficulty. However, what in the event took place was the sort of prolonged and disproportionate factual investigation which is to be avoided.

122. Third, as both parties accept, the judge should have valued the non-matrimonial assets. It seems neither party asked him to. Indeed, as the judge indicated at [48] and [49], they appear to have been content that he should not. Having valued the whole asset base, the judge should have determined that his proposed award represented a fair outcome.

R&R, Buffa, Rosedale and the Respondent's Notice

123. I turn now to the argument concerning R&R, Buffa, Rosedale and the Respondent's Notice.

124. As I have already indicated, I accept, as Mr Blatchly submitted, that the wife was entitled to the higher of her sharing and need claim. Her need claim is not an issue in this appeal.

125. This was a marriage of some 13 years, 'arguably on the cusp of being a long marriage:' see [8] of the judgment. The husband was by occupation a land developer. He occupied himself in building, construction and development projects. Although he 'clearly took on the primary income earning role…the wife's role as home-maker freed up his time, thereby enabling him to concentrate on his work. In such circumstances…both parties have equally contributed to the majority of the family wealth amassed during the marriage:' see [4] and [5] of the judgment.

126. These various business enterprises were, in other words, the vehicles through which the husband carried out his work as a property developer. He was able to do so during the marriage by the fact his wife was at home and caring for their children. Moreover, on occasion, the wife made a direct contribution in respect of a particular company or project. It does not seem to me the analogy Mr Horton drew to the disputed companies being effectively little more than investment companies with the projects taking place during the marriage being no more than 'churn' reflects the reality.

127. While I accept, as Mr Blatchly submitted, that in broad terms work undertaken by either party in respect of the company in question during the marriage is the clearest evidence of matrimonial endeavour, it is a matter of judgment in each case as to whether the extent of the wife's contribution was sufficient to mean that the husband's non-matrimonial interest in the company in question became matrimonial, or partly matrimonial, and should in fairness be subject to the sharing principle. It requires, as it seems to me, consideration of the evidence in the round. For example, receipt by the family of a financial benefit from the company is material but not necessarily decisive. Profit realised during the marriage from work done before it is unlikely to change the company's status. Profit realised from work done during the marriage, particularly if the project was substantially financed from loans taken out during the marriage, is more likely to change a company's status.

R&R

128. This work was done in two phases. Albeit some work on the first phase was done during the marriage, with the payment for that phase also being made during the marriage, it is unsurprising that the judge concluded that phase did not change the status of R&R. However, it does seem to me that different considerations apply to the second phase. The work was carried out some five years into the marriage. This was at a time when the wife was working as a

homemaker and enabling her husband to work. Finance was provided during the marriage by a loan from Cayman National Bank. It is difficult to see how in the circumstances the second phase was not to some extent the product of matrimonial endeavour. If there is to be a fair outcome, that would in my judgment mean that to some extent at least the husband's interest in R&R became a matrimonial asset. Understandably perhaps, given that no submissions were made to him to that effect, the judge (at [247]) did not consider whether the wife's share of the husband's interest in R&R might be less than 50% and, if so, what it should be. It would in my judgment be disproportionate and not in accordance with the overriding objective, now to remit this aspect of the case to the judge for him to reconsider it. I am conscious that, as Moylan LJ said at [85] of *Hart v Hart*, this may be more art than science. I bear in mind that it seems likely that a significant proportion of the current value of the husband's interest in R&R arises from the second phase. In all the circumstances, I have come to the conclusion that this is one of those instances where the wife's interest should be less than 50%. Doing the best I can, I would assess it at 25%.

129. In the result, it seems to me the judge's decision cannot be sustained. The husband's share of R&R should have been subject to the sharing principle to the extent I have indicated. Working on the wife's valuation, that would mean she was entitled to US$768,362.

Buffa

130. I confess I find it difficult to understand the judge's conclusion in respect of Buffa. The company was established during the marriage. The husband, as the judge found, worked 'hands-on' on the project for extended periods of time. The profit was earned from work done during the marriage. In my view, what was done by Buffa was the product of matrimonial endeavour. Even if the work was to some extent funded by R&R, which in the view of the judge was a non-matrimonial source, that does not seem to me to affect the status of Buffa as matrimonial. As Mr Blatchly submitted, the loan would be reflected in the balance sheet of Buffa as would any loan from any source. (Although I have concluded that R&R was partly matrimonial, it would seem that its loan to Buffa came before R&R became matrimonialised).

131. In the result, the wife was entitled to 50% of the husband's interest in Buffa.

132. As I have indicated, there was a substantial difference between the husband's and the wife's valuation of his share of Buffa. He submitted it was worth US$482,456 as against her valuation of US$3,849,873. The judge's findings do not enable this dispute to be resolved.

Rosedale

133. As I have said, Mr Blatchly accepted this was his least strong submission: the wife's case depended upon when the development was done. He conceded that he could not go behind the judge's finding that the primary object of Rosedale, namely the completion of warehouses, was completed before the marriage. While I agree, as Mr Blatchly also submitted, the judge should have resolved the dispute as to whether Rosedale's purchase of the parcels of land in May 2005 was at an undervalue and represented payment for the completed Rosedale project, it does seem to me that the judge was entitled to conclude that Rosedale was established pre-marriage, its primary project was completed pre-marriage and that any subsequent payment was in respect of that. In short, I have concluded that the judge was entitled to reach the decision he did.

The Respondent's Notice

134. I shall not go into as much detail in respect of these properties. For in my view the judge was entitled to reach the conclusions he did for the reasons he gave.

135. As to Slate Drive and Slate Drive apartments, the judge was entitled to consider them collectively and to conclude they amounted to a meaningful resource for the family. As far as the Crewe Road land is concerned, I agree with the wife that the husband is seeking to re-run an argument which failed at trial. As to the Rosedale rental property, the judge's finding that the property was used and maintained by the parties in a manner consistent with it being regarded as a matrimonial asset is in my view fatal to the husband's attack on the judge's findings. As to the Windsor Park apartments, the judge was entitled to conclude the nature of the asset changed when apartments were built on the land. As to Manna Holdings and Christian Brothers, the judge was entitled to find that the wife made a sufficient contribution to the enterprises as to mean the husband's interest became matrimonial and make the order he did. Finally, the judge was entitled to regard the former matrimonial home at Parkside Drive as matrimonial for the reasons he gave.

The US$400,000 loan repayment

136. Although I accept, as Mr Blatchly submitted, that the judge should more clearly have explained the basis of his decision regarding the wife's receipt of this money, when one reads his observations as a whole, it seems to me he found the wife's account as to what had happened to this substantial sum of money inadequate. He did not, in other words, accept it. In my view it is most unlikely he would have made the order he did were that not the case. In short, the judge was entitled to treat the loan repayment in the way he did.

My conclusion on this aspect

137. In the result I have concluded that the wife is entitled to a further US$768,362 to reflect her interest in the husband's share of R&R and a further sum to reflect her share of his interest in Buffa, a topic to which I shall shortly return.

The judge's failure to carry out the fairness cross-check

138. I cannot accept, as Mr Horton submitted, that the judge, having failed to value the non-matrimonial assets, must necessarily, and without saying anything to that effect, have carried out the required cross-check in respect of the overall fairness of the outcome, and reached the conclusion it was fair. However, I do accept that had there been any valuation of the non-matrimonial assets it would probably have fallen within the parameters of the parties' respective submissions. Indeed, the judge's summaries of those submissions when dealing with R&R, Buffa and Rosedale suggest as much.

139. As I have indicated, on the basis of the husband's contentions the division of the overall asset base amounted to some 71%-29% in favour of the husband, on the basis of the wife's, to some 74%-26% in his favour. Given my conclusions, and the uncertainty of any valuation of Buffa, while the wife's proportion will increase, it will be less than 29%, although measurably more than 26%. Given that the wife's percentage, whatever precisely it may turn out to be, is a product of the sharing principle, and makes a fair allowance for that part of the parties' wealth which is the product of non-matrimonial endeavour, it seems to me most unlikely that a cross-check of the fairness of the outcome would have a material effect on the outcome. Indeed, as Martin JA observed, and counsel accepted, there appears to be no authority in which such a cross-check has resulted in a reconsideration of an outcome. In the circumstances, I see no purpose in remitting the case to the judge for the cross-check of fairness to be carried out.

What should now happen

140. This case has already taken disproportionately long and incurred substantial costs. I have considered whether it would be possible to avoid remitting the case to the judge in order to value the wife's share of the husband's interest in Buffa. Regretfully, in the absence of any agreement between the parties, I have concluded it would not. However, I would remit the case to the judge with the indication that it would be appropriate and proportionate that:

(i) He values the husband's interest in Buffa solely on the basis of the evidence previously before him: that in other words, neither party be permitted to submit any fresh evidence.

(ii) There be no oral argument: the argument before the judge be limited to a skeleton argument of no more than 12 pages from each party, font size 12.

(iii) The judge thereafter issues a further order reflecting the decision of this court, to the effect that:

(a) The value of the matrimonial business assets be increased by the value of the husband's interest in R&R, namely US$3,364,259, in respect of which the wife be awarded 25%, namely, US$768,362; and

(b) Having determined the value of the husband's interest in Buffa, the matrimonial business assets be increased by that sum, in respect of which the wife be awarded 50%.

(iv) Following the judge's decision, the question of the costs of the remission to the judge be remitted by him to this court for consideration as part of the costs of the appeal.

Costs

141. This court will consider the costs of the appeal on the basis of written submissions of no more than 10 pages, font size 12, to be submitted within 21 days of the judge's decision in accordance with [140] above.

Conclusion

142. To the extent and for the reasons set out, I would allow this appeal and remit the case to the judge on the limited basis indicated.

Beatson JA:

143. I agree.

Martin JA:

144. I also agree.