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Case No:BV19D16832

IN THE FAMILY COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 5 November 2021
Revised and corrected 9 November 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

A

App

- and -

M

Respo

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- -

Simon Webster QC (instructed by Charles Russell Speechlys LLP) for the Applicant

Duncan Brooks (instructed by PGB Gitlin Baker) for the Respondent

Hearing dates: 18, 19, 20, 22 October 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and their parents must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn :

1.
This is my judgment on the claim by the applicant (“the wife”) against the respondent (“the husband”) for financial remedies following divorce.

The background facts [1]

2.
The husband is now 63 and the wife is 54. Both are US citizens, although the husband is of Italian origin. The wife is the daughter of extremely rich parents and is the beneficiary of valuable trust funds.

3.
The parties were married in the USA in June 1994. The wife presented her divorce petition in July 2019. Decree Nisi was pronounced in January 2020 but has not been made absolute. The parties continued to live with their children in West London until May 2021 when the husband moved into rented accommodation in Holland Park. They also spent a considerable amount of lockdown together as a family in a superb property in the Caribbean owned by one of the trusts.

4.
There are five children of the family:

i)
Child 1 (25) is undertaking legal studies and has recently started work as a paralegal;

ii)
Child 2 (23), currently working as a scientist, is planning to start a Masters or PhD in September 2022;

iii)
Child 3 (22) is a student at University in the USA;

iv)
Child 4 (20), is also a student at the same University;

v)
Child 5 (12) has started boarding at an English private school for girls.

5.
The children's primary home is in West London. This large 7 bedroom property was purchased by the couple in 2014, their first owned home in London, they having rented in Notting Hill for many years. It is agreed that the property will be sold: it is subject to a large mortgage with Barclays (£3.25m) and, whilst not secured, a loan of nearly £4m to one of the trusts. Both debts will be repaid on sale.

6.
The parties own a property in New York.This was the family home before the move to London in 2000 and has been rented out over the intervening years. The property is worth $2.5m and is subject to a mortgage debt of $537,750. The parties will also have US capital gains tax to pay on disposal. The parties are agreed that the property will be sold.

7.
The parties own a property in Italy. The husband wishes to retain the property. It has been valued at €1.36m by an Italian SJE, a value which is rather less than the amount spent on the property by the parties. The wife says that the property should be sold: she says that the location is one of the most sought after in Italy and whilst there may be issues with planning permission, it is likely that a purchaser will pay considerably more for the property than the SJE's figure, itself based upon a hybrid

assessment of agricultural and residential land values. There is no evidence at all to support the wife's personal theories. I will be taking the SJE valuation.

8.
The husband has worked in the finance sector throughout his adult life, much of that spent in private equity. For many years he was a partner with a large American private equity business. It was with that business that the husband moved to London in 2000 to head up their London office. The husband left in 2010 and worked for himself until 2015, operating essentially as a consultant on a deal-by-deal basis. His long standing ambition was to start his own fund, and this was achieved in 2015 with the creation of X Co.

The two funds

9.
X Co was founded by the husband and a business partner. A description of the nature and structure of private equity funds such as those in issue in this case is given with great clarity by Coleridge J in B v B[2013] EWHC 1232 (Fam) and does not need to be repeated here. The two funds here follow that model.

10.
For what it is worth, it is my view that carried interest ('carry') is neither exclusively a return on a capital investment (as Mr Webster QC would have it) nor an earned bonus (as contended for by Mr Brooks) but rather a hybrid resource with the characteristics of both.

11.
Fund 1 was established by the husband and his partner in October 2016. Its first close was in March 2017 and its final close was in March. €187 million has been committed by its investors of which €178 million has been invested in businesses. The term of the fund is eight years from first close with the possibility of two one-year extensions. I have assumed, based on the evidence I heard, that a single one-year extension will be taken.

12.
Fund 2 was established by the husband and his partner in October 2018. Its first close was in June 2019 and its final close was in December 2020. €323 million has been committed by its investors of which €151 million has been invested in businesses. The term of Fund 2 is stated to be 10 years from first close. However, the term of funds such as these is not set in stone. As indicated above, the term can be extended. Equally, the term can be abridged, sometimes considerably so, where investments are realised sooner than originally planned. Having regard to the evidence I heard, and given that Fund 2 is in the early phase of its existence, and in order to compare like with like, I propose to take the term of Fund 2 as nine years from its first close.

13.
The following points should be noted.

i)
During the life of the fund the fee charged by the management partnership, payable from investors' money, is initially set at 2%, reducing to 1.75% as the investment phase ends. Mr Webster QC has calculated that the mean net of tax income drawn by the husband for the three years 2018, 2019 and 2020 was £476,000. The husband says that as Fund 1 comes to fruition the fees will inevitably reduce. He predicts that the management partnership will soon be running at a loss.

ii)
The hurdle rate is set at 8% p.a. compounded. Thus over a 9 year term the compounded hurdle factor is $1.08^9 = 2$.

iii)
The husband expects to more than double the value of the investments. He told me that he had expressed the hope to the investors that a factor of 2.5 would be achieved for each fund.

iv)
If the husband and his business partner only achieve a doubling of the investments in the funds there will be no carry.

The wife's claim to share in the husband's carry and co-investment in the two funds

14.
For the purposes of my decision I shall calculate the marital acquest as at the date of trial. I note that Mr Justice Coleridge did so in B v B. In my opinion this should be the general rule unless there has been needless delay in bringing the case to trial. I gave my reasons for this view in my recent decision of E v L[2021] EWFC 60 at [71] – [73], which I do not repeat here. Shortly put, it is normally the right date because the economic features of the parties' marital partnership will have remained alive and entangled up to that point. The fruits of the partnership will not have been divided and distributed. The share of one party in the partnership assets is likely to have been unilaterally traded with by the other. I accept that a different view might be taken in respect of a completely new asset brought into being during the interregnum between separation and trial. But that is not the case here. Here we are concerned with assets acquired pre-separation but worked on during the period up to trial. [2]

15.
It is my decision that for each fund the marital, and therefore shareable, element of the carry should be calculated linearly over time. The calculation will be A ÷ B = C where A is the period (measured in months) from the establishment of the fund to October 2021 (the date of trial); B is the number of months from establishment to first close plus 108 months (i.e. 9 years from first close – see para 12 above); and C is the marital fraction of the husband's carry, expressed as a percentage. The projected value of the husband's carry is then multiplied by C to give the marital carry.

16.
My primary decision is that the marital carry in each fund shall be shared equally. On the facts of this case that is the decision which resonates with fairness.

17.
I divert at this point to dismiss, briefly but emphatically, a submission by Mr Webster QC that the wife should be entitled to share in carry generated by the husband after the date of trial by virtue of her "contributions to the family" in caring for the parties' 12 year old daughter who is at boarding school. This argument crops up from time to time and is completely untenable. The concept of the sharing of the acquest is predicated on the parties being in an economic partnership. The decision of the judge at trial is to dissolve the partnership and to distribute fairly, which means normally equally, the partnership assets. The idea that a valid claim can be made to share assets which have already been divided and distributed, or to share earnings or profits which have been generated after the dissolution of the partnership, is completely unprincipled. It would be a good thing if this argument were finally to bite the dust.

18.
I revert to the two funds.

19.
Fund 1 was established in October 2016. Its first close was in March 2017. Thus A is 60; B is 5 + 108 = 113; and C is **53%**. Fund 2 was established in October 2018. Its first close was in June 2019. Thus A is 36; B is 8 + 108 = 116; and C is **31%**.

20.
I am satisfied that 53% of the husband's carry in Fund 1, and 31% of the husband's carry in Fund 2, fairly represents the marital element of each of them.

21.
I agree with the husband that if there is to be Wells sharing it should be as limited as much as possible both in its size and in its range. I recognise his great unhappiness that the wife should be a shadow carry partner in both funds. He would be much less unhappy if she were a shadow carry partner in one only. I will therefore relocate the wife's share of the husband's carry in Fund 2 in the husband's carry in Fund 1.

22.
Fund 2 is projected to yield more carry-value than Fund 1. I have calculated (using Mr Webster's excellent Excel workbook) that on the basis of a 2.5 multiplication of investment value, and a 9-year term, the husband's share of the Fund 1 carry, net of tax, will be €11,438,419. For Fund 2 it will be €15,768,430, which is 38% more than Fund 1.

23.
It would be wrong, therefore, simply to add the 36 marital months in Fund 2 to the 60 marital months in Fund 1. To reflect the 38% difference in the value of the husband's share of the carry in the two funds I consider I should add 50 marital months (1.38 x 36 = 49.68, to be exact) to those in Fund 1 giving 110 months or a mathematical percentage of 97.06% (109.68 ÷ 113 = 0.9706). Half of this, or 48.53%, is the wife's share. I am satisfied that 48.53% of the husband's share of carry in Fund 1 fairly reflects the wife's marital-partnership sharing claim to the husband's carry <u>in both funds</u>.

24.
My decision is, therefore, that the husband's net-of-tax share of the carry in Fund 1 shall be divided 48.53% to the wife and 51.47% to the husband. The wife shall have no share of the husband's entitlement to carry in Fund 2.

25.
The wife's 48.53% share of the Fund 1 carry is calculated at €11,438,419 x 48.53% = €5,551,176. This is of course an estimate and will not in any event be receivable for 4½ years (assuming, as stated, a one-year extension to the closure of the fund).

26.
I allocate the co-investments in both funds in much the same way. The present value of the husband's co-investment in Fund 1 is £2,126,700; in Fund 2 it is £1,229,774. In my judgment, these should be shared equally. The aggregate is £3,356,474; the wife's half share is £1,678,237. Again, I place her sharing entitlement exclusively in Fund 1. This is calculated as £1,678,237 ÷ £2,126,700 = 78.91%.

27.

Therefore my decision is that the wife shall receive 78.91% of the husband's net-of-tax receipt from the co-investment in Fund 1 with credit being given for the future extra commitment of €211,311 that will be paid by the husband alone. The estimated net receipt by the husband, after making that payment is €2,496,209, and the wife's 78.91% share of it computes at €1,969,826. She shall receive no share of the husband's co-investment in Fund 2.

28.
Thus, in 4½ years' time the wife should receive (if the 2.5 forecast holds good) €5,551,176 + €1,969,826 = €7,521,003 or £6,483,623. For a 58 year old woman this would generate a Duxbury income of £325,000 annually. It goes without saying that receipt of this amount would abundantly meet the wife's needs, with much to spare.

29.
The wife will receive her share of the carry and co-investment by means of contingent lump sum orders against the husband. It is unreasonable and unrealistic for her to seek to be granted a formal transfer of part of the husband's proprietary interests in the funds.

30.
On the above calculations the husband will receive, net of tax:

i)
in 4½ years' time from Fund 1, €5,887,243 as carry and €526,382 co-investment, a total of €6,413,625 or £5,528,987, and

ii)
from Fund 2 in 6½ years' time, carry calculated at €15,768,430 and co-investment, after credit is given for future commitments paid by him of €1,251,337, calculated at €3,649,380, a total of €19,417,810 or £16,739,491.

31.
Thus the estimated net total from both funds receivable by the husband is **£22,268,479**; while the wife is estimated to receive from Fund 1 **£6,483,623**. These are not, of course, present values as some of the payments will not be received for four years and some not for six. This 77% : 23% split fairly recognises that by the end of each fund just under half of the work in Fund 1, and two-thirds of the work in Fund 2, will have been done by the husband alone after the dissolution of the marital partnership. The split divides the marital carry and the marital co-investment equally.

32.
I am satisfied on the balance of probability that the wife will receive in 4½ years' time sums of the order I have set out in para 28 above and that the husband will receive sums of the order set out in para 30 in 4½ and 6½ years' time. Obviously they will not receive those sums exactly. But I am satisfied that it is more likely than not that sums of that order will be received by them then.

33.
The basic rule of civil judging, as expressed by Lord Diplock in Mallett v McMonagle[1970] AC 166 at 176 (and reiterated by Lord Hoffmann in Re B (Children)[2009] 1 AC 11 at [2]) is that:

"In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain."

34.

This binary rule ought logically to apply equally to judicial findings about the likelihood of future events. However, in my judgment where the court is exercising the discretion under s. 25 Matrimonial Causes Act 1973 it should be entitled to take into account not only the probability of a future happening (P) but also the probability of it not happening and something else completely different happening (Q).

35.
We are told that it is unhelpful to put precise percentages on the probability of a future event: see Re B at [44] per Baroness Hale. So I will confine myself to saying that I judge the likelihood of W receiving nothing as being negligible. What Q represents is the risk that the wife receives very substantially less than £6.5 million. I will weigh this risk in my disposition below.

The wife's trust interests

36.
These are as follows. It should be noted that two of the trusts are defendants to what seems to be a speculative claim by a trustee-in-bankruptcy.

37.
The1994 Trust holds two life insurance policies on the wife's parents' lives presently worth $550,000 and with combined death benefits (on a second to die basis) of $2 million. This trust is a defendant to the civil litigation just mentioned. The trust is divided into five equal shares for the five daughters. The wife is principal beneficiary of her share. The trustees are required to pay the net income, principal or both to the principal beneficiary and her lineal descendants, with first consideration being given to the principal beneficiary's needs.

38.
The 2001 Trust owns the property in the Caribbean. The trustees attribute a value of $14.8 million to this property. The husband believes the value to be in excess of $40 million. This trust is a defendant to the civil litigation. The wife's mother is the principal beneficiary during her life. Upon the death of both of the wife's parents, the trust is divided into equal shares to provide a share for each of the wife's father's children as principal beneficiary of their share. The trustees are required to pay the net income, principal or both to the principal beneficiary and her lineal descendants, with first consideration being given to the principal beneficiary's needs.

39.
The 2003 Trust holds two "second to die" life insurance policies on the wife's parents' lives, presently worth $7 million and with combined death benefits of $28 million. This trust is not a defendant to the civil litigation. The trust is for the benefit of the wife's parents' lineal descendants, with preference to their living children.

40.
The 2016 Trust holds the benefit of the loan made to the parties to purchase the London house (now standing at c.$5.3 million) and investments of c.$8.3 million. The total is therefore $13.6m. In the past, this trust (or its predecessor trust) has given the wife's four sisters $2.2m cumulatively outright. This trust is not a defendant to the civil litigation. The wife's mother has the power to appoint shares in this trust in her Will. In default, on her death the trustees shall distribute all property in five equal shares, one each for wife and her sisters.

41.

The 2004 Trust has now been wound up. It provided funds for two of the wife's sisters to buy property outright. The wife herself received $1m in 2008. This trust loaned $950,000 to the parties to enable them to buy the London house. The benefit of the loan was assigned to the wife's father in 2018, shortly before the trust was wound up. The loan expired in July 2019 and has not been called in.

42.
The wife's parents are independently rich. Her father is 92 and her mother is 79. The wife accepted in her evidence that they have three properties in desirable parts of the USA. These are obviously of great value; the husband believes that they are worth $65 million. The wife accepted that them possessing tens of millions of dollars of savings was "not an unrealistic number". The prospects of the wife's mother needing provision from the 2016 Trust (as the trustees have speculated) is implausible in the extreme.

43.
The wife's parents have always been generous to the wife. They have loaned her £440,000 to fund her legal fees since separation and to meet other living costs. They pay the children's education costs. There is a history of regular handouts in that they made regular gifts to the wife and the children in the past. They have also recently written off a $3.4 million loan to the 2001 Trust.

44.
I have to be satisfied, on the balance of probability, that the trustees, having been apprised of all relevant facts, would respond positively to a request by the wife to make funds available to her: see Villiers v Villiers[2021] EWFC 23at [105].

45.
I am satisfied that the value of the loan presently owed to the 2016 Trust of £3.8 million which will be repaid on the sale of the London property is likely, in whole or in part, either by way of a new loan or outright, to be made available to the wife to meet her needs. The trustees have already benefited the wife's sisters outright, and there is no good reason why the wife should not be treated equivalently.

46.
I am also of the view that there is no good reason why the wife's father should not lend, or otherwise make available, to his daughter the value of the $950,000 loan presently assigned to him for the purchase of the London house, which will be repaid on the sale of that property. That said, I recognise that, unlike the trustees, the wife's father is under no legal or moral duty to benefit his daughter.

47.
Looking further ahead, I note that the wife's mother plainly has a much longer life expectancy than her father. It would be about 11 years. When the wife's mother dies the wife can expect to receive at least £6 million, subject to tax, from the trusts quite apart from whatever personal inheritance she might receive.

48.
In the circumstances set out above, it is my clear and unambiguous finding that the trustees would unquestionably provide bridging finance to the wife, if she asked for it, for the period until she received her share of the marital carry.

49.
But it is possible to imagine a perfect storm arising where the Q event happened and Investment II (see below) ended with a liability for the wife of around £900,000. I regard the likelihood of the

occurrence of this combination as negligible. Further, it is my clear finding that even if the perfect storm occurred the trustees would ensure that the wife's needs were met.

Investment II

50.
Investment II is a private equity fund initiated by the husband and the wife's sister's husband, the latter investing through a vehicle known as L Ltd. The husband invested c.$2.5m which he borrowed from L in 2011. That debt remains outstanding and has accrued interest. The husband's most recent estimate is that €3.132m is outstanding. H continues to receive board fees of c. £30,000 p.a. He claims that the investment has not fared well. He considers that the exit value may be around 50-75% of the value invested. On these footings the loss to the parties (for they agree they must share equally in this) is potentially around £1.8m. The evidence is not such as to enable me to make any reasoned estimate of the probability of this loss eventuating.

51.
I have recorded above my conviction that if the perfect storm happened – i.e. this full loss came home to roost, and the wife received no share of the husband's carry or co-investment in either fund – then the trustees would ensure that the wife's needs were met. The husband is highly skilled and I have no doubt that in that event he would devise a solution so that his own needs were met.

The wife's claim for periodical payments

52.
The wife seeks indefinite periodical payments of £225,000 annually. This sum does not include the cost of renting a home, albeit she told me that she has no wish to purchase one. This claim for periodical payments is wholly unrealistic and unprincipled. The wife is backed by very large sums of discretionary trust money, as I have explained. Her trustees have indicated that they will help her by only lending her money, although I consider that there is a degree of forensic defensiveness in that stance. For the reasons given above, I cannot see any good reason why monies should not be made available outright to the wife to cover her needs until she receives her share of the monies from the funds.

53.
I have found that it is more likely than not that the wife will receive in four years' time sums of the order I have set out in para 28 above, but that there is a not negligible chance that she will not. Until 2025 I consider she should meet her needs from her divided share of the realisable assets or from her non-marital trust resources. It is an elementary principle that a claimant of periodical payments must meet her needs first from her own resources, including her non-marital resources, before a call is made on her ex-husband's resources. It scarcely needs to be stated that her ex-husband's resources will by then be non-marital either because they represent his share of marital assets already divided or because they are post-divorce earnings.

54.
If the wife borrowed £1m from her trustees in order to spend £250,000 per annum she would have left over, after repaying that loan, around £5.5 million from her share of the funds in four years' time. That sum would generate an annual Duxbury income of £279,000. Alternatively, she could use £1 million from her share of the division of the realisable assets as a bridging fund over the next four years.

55.

Either way, the wife's needs over the next four years would be amply met.

56.
Should the court leave a nominal order for periodical payments in place as an insurance policy in case the Q event happened?

57.
If the Q event happened and the wife received, say, only £3 million then that would still yield a Duxbury annual income of £160,000.

58.
In my judgment, the practice of leaving a nominal order in place as an insurance policy is contrary to the parliamentary instruction in s. 25A Matrimonial Causes Act 1973. Under s. 25A the court is required to exercise its discretion so as bring about a termination of financial dependence unless it is satisfied that to do so would lead to the claimant suffering undue hardship. To leave a nominal order in place because events may happen which might lead to the claimant suffering hardship is not consistent with the terms of s. 25A. The court has to do its familiar work of peering into the future and making factual findings. If it is satisfied it is more likely than not that the claimant will not suffer undue hardship if her claim for periodical payments were dismissed, then the court should have the courage of its convictions and dismiss the claim with a s. 25A(3) direction. It is contrary to principle to make an order requiring the respondent to act as a potential insurer in respect of remote risks which might eventuate years after the ending of the marriage.

59.
In AJC v PJP[2021] EWFC B25 Deputy District Judge Hodson considered an application to enlarge a nominal periodical payments order made 9 years earlier. In a judgment of conspicuous clarity he dismissed the application. He declined to discharge the nominal order holding at [45]:

"I am asked to dismiss the spousal maintenance order altogether. I am close to doing so but ultimately have held back. Within a matter of months, the elder child will be 18 and either this summer or next would have left secondary education. Within four years so will the daughter. As I've indicated, it's rare to find nominal spousal maintenance outside the child dependency context. Unless something very substantial occurs soon, I cannot see any basis upon which the former wife would be able to convert the nominal maintenance order. Another reason for my preparing a written judgement was so that this is available for the future. I don't think I should dismiss but I would be very surprised if circumstances justified bringing back to court and they would have to be very significant."

60.
I personally would have discharged the nominal order. To my knowledge there has never been a reported case where a nominal order has been successfully enlarged. It is never more than a symbolic irritant.

61.
In this case, I have judged the probability of the occurrence of the perfect storm to be minimal. Even if the wife did not have the trusts behind her I would not make a nominal order and force the husband to act as the wife's insurer against that risk. It must not be forgotten that after the end of a marriage there is no legal duty on one ex-spouse to support the other.

62.

But in this case the wife has the trusts behind her. As I have said above at para 49, I am very strongly satisfied that if the perfect storm struck the trustees would ensure that the wife's needs were amply met.

63.
Therefore, I dismiss the wife's claim for periodical payments with a direction under s. 25A(3) Matrimonial Causes Act 1973 that the wife is not entitled to make any further application in relation to this marriage for an order under section 23(1)(a) or (b). I am satisfied that the dismissal of her maintenance claim will not lead to her suffering any hardship, let alone undue hardship.

64.
It might be regarded as odd that I should dismiss the wife's claim for periodical payments in circumstances where the husband's offer was to pay £100,000 a year in periodical payments for four years. But his offer was predicated on the wife receiving no carry at all from either fund, a position which I regard as just as unreasonable and unprincipled as the wife's claim for maintenance.

65.
I have no doubt at all that the husband will be able to resolve any cash flow difficulties in meeting his own needs pending receipt of his money from Funds 1 and more particularly Fund 2. Indeed he conceded this in his evidence.

The realisable assets

66.
These I tabulate as follows:

Properties			
London		(1,202,486)	Note1
New York		941,615	Note 2
Italy		1,102,069	Note 3
Spain		92,328	Note 4
		933,526	
H cash			
Funds		2,161,660	
Unpaid costs		(157,710)	Note 5
US tax		(18,314)	
credit cards		(6,009)	
		1,979,627	
W cash			
Funds		87,576	
Debts		(147,231)	Note 6
Unpaid costs		(181,744)	
Loans from parents		(439,956)	
add back re costs		150,000	Note 7
		(531,355)	
Joint cash			

Joint funds		504,485	
Loan from 2004 trust		(693,431)	Note 8
Caribbean rent 2020		(26,266)	
		(215,212)	
TOTAL		**2,166,586**	

Note 1: The figure is calculated after deduction of costs of sale, the mortgage in favour of Barclays and the unsecured debt of £3,869,486 to the 2016 Trust.

Note 2: The figure is calculated after deduction of costs of sale, a secured debt to Cenlar and the tax payable by each party on disposal.

Note 3: The figure is calculated using the SJE valuation and allowing for costs of sale.

Note 4: The figure is calculated after allowing for repayment of a secured debt and costs of sale.

Note 5: This figure captures the costs which are either unpaid or not reckoned on the joint schedule.

Note 6: This figure excludes unpaid costs and loans from parents.

Note 7: See paras 67 - 72 below.

Note 8: It is agreed that this loan shall be repaid.

Costs

67.
The wife's Form H1 states that she has incurred costs of £474,220. By contrast, the husband has incurred costs of £273,000, about £200,000 less than the amount of costs incurred by the wife. The husband points out that the wife's figure is likely to be understated. He has seen on joint bank statements numerous payments made by the wife to a forensic accountant, Jeffrey Nedas, amounting to around £45,000. The joint asset schedule records a further £34,800 owing to Mr Nedas. Thus it would appear that the wife has run up a total of approximately £80,000 in such costs. Yet her Form H1 records total disbursements of only £8,262. Presumably these are her share of the fees of joint experts. It would appear therefore that her Form H1 does not include the fees of Mr Nedas. If correct, this is unacceptable. For reasons that are obvious, it is of paramount importance that Form H1 is fully and accurately completed in every case. The statement of truth on it is there for a good reason.

68.
It would therefore appear that the wife's costs are of the order of £554,000, while the husband's at £273,000 are about half that amount (49.3% to be exact). An eye-watering total of £827,000.

69.
The husband's figure is high but perhaps not exceptional. The wife's figure is exorbitant, and completely disproportionate to the issues. The case is not especially complex. The sums involved are not especially large. There must be a more efficient, and a more economic, way of doing these cases.

70.
The disparity between the parties' costs is striking. Obviously, it is unrealistic to expect that the costs will be approximately the same. Inevitably, there will be a deficit of knowledge on the wife's side which will require many chargeable hours to fill. Experience shows that costs of an applicant wife will always be somewhat more than those of the respondent husband, as the applicant wife has to spend

much time in working out what information to ask for and then in analysis of what is received. But, a difference of £281,000 is completely unacceptable. Spending £80,000 on a forensic accountant is inexplicable; the information in this case was always capable of being understood by experienced legal practitioners in this field, as the presentation before me by counsel has demonstrated. Each counsel has been completely on top of the figures and their written and numeric work has been of the highest quality. I make no complaint about the figure of £87,000 for counsel's fees recorded on the wife's Form H1, or about the figure of £90,770 on the husband's.

71.
The realisable assets are calculated with the full amount of the wife's costs having been taken into account either as already paid (and thus reflected in lower bank balances), or inasmuch as they have not been paid, as debts. Those realisable assets will be divided equally. Therefore, unless I make an adjustment, the husband will be paying half of a figure which I have found to be excessive.

72.
Therefore I add back as a notional asset of the wife the figure of £150,000 which I regard as excessively incurred costs. I am therefore taking the wife's reasonable costs figure at £404,000. This is still £131,000 more than the costs incurred by the husband, but that difference is a reflection of the factors I have referred to above. It is at the limit of what is acceptable.

Allocation

73.
I turn to the allocation of the realisable assets. The following table spells out what will happen:

Pre-allocation		**H**	**W**
London, NY, Spain		(84,272)	(84,272)
Italy		551,035	551,035
Joint funds		(107,606)	(107,606)
W cash			(531,355)
H cash		1,979,627	
Position before transfer/payment	2,338,784	(172,198)	
Allocation			
Transfer Italy W to H		551,035	(551,035)
payment H to W		(1,806,526)	1,806,526
		1,083,293	1,083,293

74.
As can be seen, my decision is that the realisable assets should be divided equally. The properties in London, New York and Spain should be sold and the proceeds divided equally after repayment of the mortgages and other loans. For the avoidance of any doubt, the parties will share equally in any variation, up or down, from the agreed valuations.

75.
The joint funds and joint debts will be divided equally.

76.
The property in Italy should be transferred to the husband. This is his highly personal project, where he intends to spend a great part of his retirement tending to the olive trees planted over 10 hectares.

It cannot be disputed that the husband has built a domestic dwelling without authorisation. He hopes eventually to obtain planning consent. The sums that have been spent have exceeded the value of the property. That value has been conscientiously assessed by the SJE on a hybrid basis having regard to the value of agricultural property and domestic property. There is no claim for an add-back of the excess expenditure, and if there were I could not say that the husband's conduct in this regard has been wanton. That criterion of wantonness applies whenever it is said that expenditure has been wasted, save in respect of costs which is a special case for these purposes.

77.
The result of the exercise is that the husband must pay a lump sum to the wife of £1,806,526, which I round to £1,807,000. I will hear counsel as to the timing of, and other terms attaching to, this lump sum. Once that payment has been made each party will have received assets with a net overall value of just under £1.1 million.

78.
The husband has a JP Morgan IRA pension worth $690,404. This should be divided equally and the parties should agree a US QDRO to give effect to this division.

79.
The parties would have a lot more in realisable assets had they not lost their life savings in 2008. The wife is one of five daughters. Her four sisters either worked for an investment firm, or were married to husbands who did. That investment firm was the largest feeder of a fraudulent fund. The husband and wife invested their family savings with part of the group. When the fraud was exposed, the investment firm filed for bankruptcy and the parties lost their investment, which was worth $3.4 million in October 2008. Their claim for $1 million from a Victim Fund was recently rejected.

Summary of conclusions

80.
My order will provide for the following.

i)
The wife will receive 48.53% of the husband's share of carry in Fund 1 and 78.91% of the husband's co-investment in that fund, in each instance when realised. The payments to the wife will be made by way of contingent lump sums from the husband. If the terms of the contingencies cannot be agreed I will rule on any dispute.

ii)
Each party will bear 50% of any loss (or, improbably, gain) in relation to Investment II. The parties will execute indemnities to give effect to this.

iii)
The wife will transfer her share in the Italian property to the husband.

iv)
The London, New York and Spanish properties will be sold and the proceeds (or shortfalls) divided equally.

v)
The joint funds and joint debts will be divided equally.

vi)

The husband will pay to the wife a lump sum of £1,807,000.

vii)
The husband's JPMorgan IRA will be shared equally.

viii)
The husband's residual private equity and venture capital investments will be shared equally on a Wells basis, as has been agreed.

ix)
The wife will transfer to the husband her interest in the Italian property holding company and in the Italian sole trader consulting vehicle, as has been agreed.

x)
Both parties' periodical payments claims will be dismissed with a direction under s25A(3) Matrimonial Causes Act 1973.

xi)
Child maintenance will be ordered in the terms of the parties' agreement. When the child is at university the maintenance of £18,000 per annum shall be paid as to half to the child and as to half to the wife as the roofing element.

81.
I have conscientiously calculated the marital acquest and it is my judgment that an equal division of it gives a fair outcome to this case. It would not be fair or just for there to be an order for periodical payments in this case.

82.
I have carefully considered all the matters in s. 25 and s. 25A Matrimonial Causes Act 1973. So far as the parties' needs are concerned I have dealt with the wife's at paras 28, 45, 49, 51 - 55 and 62; and with the husband's at paras 51 and 65.

83.
Although I have reached my decision with the assistance of mathematics, it has at its heart a broad evaluation of fairness. I have kept at the forefront of my mind Moylan LJ's statement in Martin v Martin[2018] EWCA Civ 2866 at [127]:

"It may be too frequent a refrain in this judgment but the court is engaged on a broad analysis of fairness."

84.
I will rule on any application for an order for costs. If one is made, I will be looking very carefully at all of the open offers to see if there has been compliance with the duty to negotiate openly reasonably and responsibly, pursuant to FPR PD 28A para 4.4.

85.
The appendix below contains the underlying calculations for paras 22 – 31.

Postscript - costs

86.
Following distribution of my judgment in draft, I have received an application for costs from Mr Brooks on behalf of the husband. He seeks an order that the wife pay 75% of his costs of the final

hearing, or £57,870. He justifies this claim by reference to an open offer which he made at the PTR which he says was very close to the court's final decision. He says that the wife's open offer was a long way off target and that she failed to negotiate reasonably. Accordingly, he says that she should suffer a penalty in costs.

87.
In response I have received an application for costs from Mr Webster QC on behalf of the wife. He seeks an order that the husband pay 37.5% of the wife's costs as they stood at the PTR, or £117,500.

88.
PD 28A para 4.4 states:

"The court will take a broad view of conduct for the purposes of [rule 28.3(6) and (7)] and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs."

89.
What this rule requires is that the parties must negotiate openly, reasonably and responsibly throughout the progress of the case to try to settle it.

90.
The very first open offer made in the case was by the wife as late as 24 June 2021. She argues that she was disabled from doing so earlier because key disclosure was not made by the husband about the profits from the management company and his consequent investment made into Fund 2 until May 2021. But this did not prevent an FDR taking place in December 2020. Obviously, there was scope for an open negotiation to see if a deal in principle could be done from the moment that the FDR failed. The wife did not need to know the exact future value of the husband's carry in Fund 2 in order to make a proposal in respect of it. The proposal would be formulated as a percentage – which is exactly what she later did.

91.
The husband did not make an open proposal until 16 July 2021. There is no good reason why he did not do so earlier. His offer was completely unrealistic and unreasonable. It proposed that the wife should be cashed out of the co-investment in Fund 2 for a paltry £160,000 notwithstanding that the value of the investment was worth €1.28 million. It proposed that the wife should have no share of carry whatsoever in either fund. It further proposed that the husband should have a call option exerciseable at any time to buy the wife out of Fund 1. This was not an example of reasonable and responsible open negotiation.

92.
The wife responded on 27 August 2021 with a revised offer. It was equally unreasonable. It proposed that she should receive 50% of the husband's share of carry in Fund 1 and 40% in Fund 2. In effect she was arguing that 100% of the husband's carry in Fund 1 and 80% of the carry in Fund 2 formed part of the marital acquest, notwithstanding that the lives of those funds stretched respectively for 4½ and 6½ years into the post-divorce future. It demanded that the Italian property should be sold. And, extraordinarily, given the scale of trust money behind her it proposed that the husband should pay her £235,000 per annum in spousal maintenance indefinitely. The claim was exorbitant in all its main aspects.

93.

At the PTR on 23 September 2021 the husband made an improved open offer. For the first time he offered the wife a share of the carry. Now that he had, to use Mr Webster's metaphor, crossed the Rubicon, it was surely time for the wife to have engaged with this proposal; but she did not and appears to have dismissed it out of hand. She made no open counter-proposal then or at any point before the trial. Instead she ran up with her lawyers a further £161,000 of costs.

94.
This is not a reasonable way of conducting proceedings.

95.
In the following table I set out the main elements of the parties' final open offers and the judgment of the court:

	H offer 23/9/21	W offer 27/8/21	Judgment
Fund 1 carry to W	25%	50%	26.5%
Fund 1 co-invest to W	equal	equal	equal
Fund 2 carry to W	10%	40%	15.5%*
Fund 2 coinvest to W	160k now	equal	equal *
Costs add back	no	no	150k
Italy	transfer	sale	transfer
Spousal pps	100k for four years	235k joint lives	no
* rolled into Fund 1			

96.
Although the husband's offer in respect of the Fund 2 co-invest was about £455,000 less than the present value of the wife's half-share, that shortfall is more than matched by his spousal maintenance offer, and by not seeking a costs add-back. These two items represent a transfer of value from the husband to the wife of £475,000. The husband plainly succeeded on the controversy about the Italian property. Although his offer in relation to carry was less than the court awarded he was, at last, certainly firing at the right part of the target.

97.
In my judgment the stance of both parties up to the PTR was equally unreasonable. There should be no order for costs referable to that phase of the proceedings.

98.
However, the husband at the PTR made a reasonable offer which the wife appears to have intransigently rejected. At that point there was plainly an opportunity for a deal to have been done, but the wife's refusal to negotiate propelled the parties to the expense, both emotional and financial, of a trial. In my judgment this amounts to conduct for the purposes of rule 28.3(6) and (7) and PD 28A para 4.4.

99.
In my judgment, this misconduct must be marked by a significant costs penalty. The wife shall pay half of the husband's costs from the PTR to the conclusion of the trial, which I assess at £38,580. This figure will be deducted from the lump sum of £1,807,000 that the husband must pay to the wife.

100.

Litigants have to understand that they must negotiate openly, reasonably and responsibly. This means they must pitch their claims in the area the court might award, and they must engage with bona fide open attempts to settle - especially in the run up to trial. If they do not, then they will suffer a penalty in costs.

Anonymisation

101.
Both parties have requested that this judgment be anonymised before it is placed on Bailii.

102.
In my judgment in BT v CU[2021] EWFC 87 I said this at [113]:

“However, it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.”

In that case I acceded to a request for anonymisation because the parties had a reasonable expectation that the hearing would preserve their anonymity. I agreed that it would have been unfair to have sprung such a change of practice on the parties without forewarning. So here. I accept that the parties approached the hearing in the confident expectation that journalists would not attend and that the judgment would be anonymised.

103.
I therefore grant the request for anonymisation. I ask counsel to agree an anonymised version of this judgment to be placed on the Bailii website

104.
In step with the modern recognition of the vital public importance of transparency, my default position for the future will be to publish my financial remedy judgments in full without anonymisation, save as to the identity of children. Derogations from that default position will have to be distinctly justified.

105.
There seems to have been a certain amount of surprise caused by my decision in BT v CU to abandon anonymisation of my future financial remedy judgments. Views have been expressed that I have snatched away an established right to anonymity in such judgments. This is not so. I do not believe that there is any such right. My personal research tells me that before the 1939 – 1945 War, and indeed until much more recently, there was no anonymity in the Probate Divorce and Admiralty Division (‘PDA’), children and nullity cases apart, and even then only sometimes. For example, there is no example after 1858 of a first instance judgment in a variation of settlement case being published anonymously until as late as 2005 when N v N and F Trust[2005] EWHC 2908 (Fam), [2006] 1 FLR 856 was reported in that form. Even in nullity cases a general rule that they should be heard in camera was unlawful: Scott v Scott[1913] AC 417, HL. That case, far from being a paean to PDA exceptionality, is, in truth, precisely the contrary. It is a clear statement (to adopt modern metaphors) that the PDA was neither Alsatia nor a desert island: see Earl Loreburn at 447, where he succinctly stated:

“… the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception.”

See also, to the same effect, Viscount Haldane LC at 434, 436; Earl of Halsbury at 443; Lord Atkinson at 462–463; and Lord Shaw of Dunfermline at 469, 475 and 478–480.

106.
It is therefore difficult to understand how the practice arose of routinely anonymising ancillary relief judgments given in the Family Division (the successor to the PDA) or in the Family Court proceeding at High Court judge level. So far as I can tell, it is traceable back to the provisions in the Matrimonial Causes Rules ('MCR') that made the Registrar the usual first instance judge - see for example rule 77(1) of the 1973 rules which stated that "on or after the filing of a notice in Form 11 or 13 an appointment shall be fixed for the hearing of the application by the Registrar." The Registrar always sat in chambers. Rule 78(2) allowed an application to be referred to a judge, and rule 82(2) provided that the hearing of a referred matter "shall, unless otherwise directed, take place in chambers." I believe that the earlier versions of the MCR said the same. It is to this banal provision that all the secrecy that has surrounded financial remedy judgments can probably be traced, although routine anonymisation of first instance judgments does not seem to have taken hold until the 1990s. So far as I can tell, the practice of anonymising judgments given by High Court judges is explicable only by reference to the hearing having been in chambers and behind closed doors. But that of itself would not explain the adoption of the practice as a chambers judgment is not secret and is publishable whether or not anonymised: see Clibbery v Allan and Another[2001] 2 FLR 819 at [24] – [33], [74], [117] – [118] and [150]. I have not been able to discover any statement of practice made at any time before Thorpe LJ's judgment in Lykiardopulo v Lykiardopulo[2010] EWCA Civ 1315, [2011] 1 FLR 1427 (at [45] and [79]) explaining, let alone justifying, the convention (whenever it arose) of routinely anonymising almost all ancillary relief judgments given by High Court judges. That convention is very hard, if not impossible, to square with the true message of Scott v Scott which is that the Family Courts are not a desert island.

107.
That is my judgment.

APPENDIX

Para 22				
Fund 1 Carry calculation				
Fund invested			155,000,000	A1
compound rate 1.08^9			1.999	
Value compounded to investors			309,845,717	B1
catch-up for carry partners (24% of (B1-A1))		37,162,972	C1	
Anticipated value of fund at closure (2.5 x A1)		387,500,000	D1	
Available for sharing 80/20 (D1-C1-B1)		40,491,311	E1	
To carry partners (20% of E1)				F1

			8,098,262	
Total to carry partners C1+F1			45,261,234	G1
H's share of carry (35.1% of G1)			15,886,693	
less CGT at 28%			(4,448,274)	
net value to husband		€	11,438,419	H1
Fund 2 Carry calculation				
Fund invested			300,000,000	A2
compound rate 1.08^9			1.999	
Value compounded to investors			599,701,388	B2
catch-up for carry partners (24% of (B2-A2))		71,928,333	C2	
Anticipated value of fund at closure (2.5 x A2)		750,000,000	D2	
Available for sharing 80/20 (D2-C2-B2)		78,370,279	E2	
To carry partners (20% of E2)			15,674,056	F2
Total to carry partners C2+F2			87,602,389	G2
H's share of carry (25% of G2)			21,900,597	
less CGT at 28%			(6,132,167)	
net value to husband		€	15,768,430	H2
Difference in value of H's carry in funds (H2 - H1)	€	4,330,011	J	
percentage difference (J ÷ H1)			38%	K
Para 23				
Marital months in Fund 1			60	L
Marital months in Fund 2			36	M
Marital months in fund 2 adjusted for fund 1 (M x (1+K))	49.68	N		
Total marital months in fund 1(L + N)			109.68	N1
% of 113 (N1 ÷113)			97.06%	O

W's share of fund 1 (O x 2)			48.53%	P
Para 25				
W's share of fund 1 (H1 x P)		€	5,551,176	Q
receivable October 2025 (4½ years' time)				
Para 26				
PV H int CoiV fund 1			2,126,700	R
PV H int CoiV fund 2			1,229,774	S
Total			3,356,474	
50% to Wife			1,678,237	T
as a % of fund 1 (T ÷ R)			78.91%	T1
Para 27				
calculation of wife's future CoiV value in fund 1				
H's commitment			1,376,891	U1
H's interest in fund U1 ÷ A1			0.8883 %	V1
H's share of preferred return V1 x (B1 - A1)		1,375,520	W1	
H's share of balance V1 x (E1 x 80%)			287,753	X1
Total to H U1+ W1 + X1			3,040,164	Y1
less CGT at 20% on gain (W1+X1) x .2		(332,655)	Z1	
subtotal			2,707,510	ZA1
less unpaid commitment			(211,301)	ZB1
Net value to H ZA1 - ZB1			2,496,209	ZC1
W's share ZC1 x T1		€	1,969,826	ZD1
Para 28				
W receives Q + ZD1		€	**7,521,003**	ZE
		£		

			6,483,623	
Duxbury for 58 yr old female		£	325,000	ZF
Para 30				
H share of fund 1				
Carry H1 - Q			5,887,243	ZG
Co-invest ZC1 - ZD1			526,382	ZH
Total		€	6,413,625	ZH1
H share of fund 2				
Carry H2		€	15,768,430	H2
Calculation of H's future COiV in fund 2				
H's commitment			2,492,236	U2
H's interest in fund U2 ÷ A2			0.8307 %	V2
H's share of preferred return V2 x (B2 - A2)		2,489,755	W2	
H's share of balance V2 x (E2 x 80%)			520,846	X2
Total to H U2+ W2 + X2			5,502,837	Y2
less CGT at 20% on gain (W2+X2) x .2		(602,120)	Z2	
subtotal			4,900,717	ZA2
less unpaid commitment			(1,251,337)	ZB2
Net value to H ZA1 - ZB1			3,649,380	ZC2
Total to H from fund 2 ZC2 + H2		€	19,417,810	ZD2
Para 31				
Total to H from both funds ZD2 + ZH1	€	**25,831,435**	ZE	
		£	**22,268,479**	

[1] I have drawn on Mr Webster's excellent position statement when setting out the background facts.

2 I note out of interest that in the current Divorce (Financial Provision) Bill pending in the House of Lords the matrimonial property is to be calculated at the earlier of the date of decree absolute or date of trial.