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"What are the golden rules of how to ring-fence private company assets when the 'heavy lifting' in building it up predated the marriage?"

PHILIP CAYFORD QC

> *"A ring-fence may be described as a virtual barrier that segregates a portion of an individual's assets from the rest.*
> *The term has its origins in the ring-fences built to keep farm animals in and predators out."*[1]

Overview

1. In exercising its powers on an application for financial remedies, the court will have regard, inter alia, to <u>all</u> the financial resources available to the parties to the marriage. Normally, <u>all</u> such assets must be disclosed within the course of proceedings, of whatever nature they may be. But <u>not</u> all those assets will necessarily be treated in the same way. In the context of this paper, to ring-fence an asset is to exclude it in part or entirely as a financial resource available for distribution.

2. In respect of a private company's *assets*, as opposed to a party's *interest in* a private company, it must be remembered that a company is an entirely separate legal entity, even if it is wholly owned by one of the parties to the marriage. Unless the court can pierce the corporate veil (see the limited circumstances envisaged by Lord Sumption in *Prest v Petrodel Resources* [2013] 2 FLR 732, SC and the decision of Munby J (as he then was) in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, FD), it is not able to make orders directly against a company's assets nor transfer them to another party under s 24 MCA 1973. The only property that can be transferred is those shares in the company which are owned by the relevant party.[2] Of course lump sum orders may be made against the paying party on the basis of that party's wealth, even if illiquid, held in the company.

Timing

3. Timing: Scenario one: From a factual or practical point of view it may be there is little golden-rule advice a matrimonial solicitor can give if presented with a set of facts at the end of a marriage, particularly a long one. In that event presentation of the case and interpretation of the authorities, i.e. playing the hand as dealt, becomes key.

[1] Plagiarised internet definition

[2] Difficulties may and frequently do arise, sometimes leading to de facto ring-fencing, when shares are held offshore, perhaps in another corporate entity that is in turn owned by another and so on along a chain. Liquidity and realisability of the shares may also be important.

4. On the other hand, Scenario two: if advice is sought at an earlier stage, preferably pre-marriage, some measure of protection may be put in place for a client, particularly (i) a pre-nuptial or post-nuptial agreement, (ii) advice as to a marital lifestyle that does not require dipping into or co-mingling the pre-marital assets with later-acquired wealth (iii) advice as to the acquisition of such wealth during the marriage that spousal needs can be more than met by a share of the marital acquest (iv) advice to marry a rich spouse or (v) not to stay married any longer than necessary or (vi) not to get married at all.

Three general propositions

5. Firstly: As to outcome under both scenario one and two, and generally, (i) as in any financial provision case, 'it all depends' – each case is fact-specific (per *Miller McFarlane* etc). Despite the thousands of reported cases on financial remedy outcomes, one golden thread that does run through the jurisprudence is that each case ultimately turns on its own facts, that there is no binding formula of outcome and that judges have a relatively wide band of discretion within which to work. Certainty of outcome in UK family courts plays second fiddle to judicial discretion and 'fairness' – a concept correctly assessed by Lord Nicholls in *White* as being measured in the eye of the beholder. In that context judicial inconsistency may also play its part (see e.g. the judicial divergence of view as to how to approach the valuation issue[3][4]].

6. As Baker LJ described his judicial task in one of the recent decisions on the point[5], "*I remind myself that ultimately the search is always for what are the requirements of fairness in the particular case. It is achieving fairness as between the parties given the particular factual matrix that their marriage took place within, that is the aim. Not fairness as viewed by the modern-day equivalent of 'the man on the Clapham omnibus' but fairness judged by the standards of this particular couple in their particular circumstances having regard to the principles contained in the MCA 1973 as explained by the House of Lords. In reaching my decisions above I have sought to apply the principles of sharing, needs and compensation on a non-discriminatory evaluation as outlined by the House of Lords in White and Miller, and have sought to apply the section 25 factors to the factual matrix as I determined it to be having regard to the guidance from the authorities I have referred to".*

7. He also said, at the start of an exceptionally lengthy judgment, "*But I venture to suggest that, in the period of seven years since that case[6] was heard, the law in this area has become even more complex, demonstrated by the significant differences of opinion amongst even specialist judges described below. In other areas of family law, it is possible to reduce the guiding principles derived from case law to a set of propositions which other judges can then apply. The fact that this has not occurred in matrimonial finance law means that there is an unacceptable level of uncertainty, to the great disadvantage of*

[3] Perhaps resolved by ***Hart*** and subsequent decisions? – see authorities cited below.
[4] See too the Family Affairs interview with Sir James Munby (Summer 2018 edition page 7)
[5] XH v XW [2017] EWFC 76
[6] Jones v Jones

parties, practitioners and judges, which continues to drive the campaign for root and branch reform in this area of the law.

8. Secondly: (ii) there will always be a duty of disclosure in respect of any assets sought to be ring-fenced; the extent of the disclosure required under that duty may vary, and depend on all the circumstances.

9. Thirdly: (iii) post *White* and *Miller* needs trump non-matrimonial asset arguments.

Specific question

10. The focus of this short paper is taken from the question posed: 'How can a spouse ring-fence his *interest in a private company* when the 'heavy lifting' in building up the value (including any assets) of that company occurred before the parties' marriage?' To that extent less attention will be focussed on other types of pre or non-marital assets e.g. inherited farms, landed estates, other liquid (or illiquid) inheritances received either before or during the marriage. Many of the principles do, however, overlap.

Matrimonial property and non-matrimonial property – the jurisprudence

11. Origins in *White v White [2000] AC* per Lord Nicholls, and subsequent decisions (in particular, *Miller*) introducing the sharing concept. Pre-White, the Court of Appeal decisions e.g. *Dart 1997* focussed on the payer (invariably the husband) providing for the payee (invariably the wife) on a 'reasonable requirements' basis. In White, Lord Nicholls said, *'"... property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.*"

12. By 2006 the jurisprudence had developed. "*Marriage, it is often said, is a partnership of equals. ... The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of* ***the assets of the partnership***[7]*, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule."*[8]

[7] Emphasis added
[8] *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, HL per Lord Nicholls at [16].

13. Matrimonial property is defined as "the property which the parties have built up by their **joint (but inevitably different) efforts** during the span of their partnership."[9]

14. Non-matrimonial property is "property received or created outside the span of the partnership, or gratuitously received within the partnership from an external source. Such property has little to do with the endeavour of the partnership."[10]

15. "Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie."[11] Therefore "the importance of the source of the assets may diminish over time."[12]

16. If the 'heavy lifting' of building up a private company predated the marriage, such that the bulk of the current value of the company has little to do with the endeavour of the marital partnership, the relevant party's interest in that company is reasonably (and certainly prima facie) thought of as being, in large part, non-matrimonial.[13]

17. In determining the extent of the 'heavy lifting' the court may well need to obtain historic valuations. These can be expensive, difficult and artificial, for instance to the extent that they ignore any springboard effect.[14] In *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313, FD Mostyn J applied an "artificial assumption of a straight-line growth up to eventual sale" as an alternative to a black letter valuation. That approach has been both approved and disapproved in subsequent decisions[15].

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[9] *JL v SL (No. 2) (Appeal: Non-Matrimonial Property)* [2015] 2 FLR 1202, FD per Mostyn J at [18].

[10] *JL v SL (No. 2)* per Mostyn J at [19].

[11] *Miller/McFarlane per Lord Nicholls* at [25].

[12] *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980, CA per Wilson LJ (as he then was) at [18] disagreeing with the formulation of Baroness Hale in *Miller/McFarlane* at [148] ("In White, it was also recognised that the importance of the source of the assets will diminish over time …"). He then sets out three situations in which the importance of the source may be said to have diminished over time (i) matrimonial property of such value has been acquired as to diminish the significance of the initial contribution; (ii) mingling has occurred where the contributor has accepted that such property should be treated as matrimonial or where identifying the current value of the non-matrimonial contribution is too difficult; and (iii) the contributor of non-matrimonial property has chosen to invest it in the matrimonial home.

[13] For a detailed consideration of the court's approach to the question whether an asset is non-matrimonial or not and what role such a determination plays in the s 25 exercise following *Hart v Hart* [2018] 1 FLR 1283, CA, see the schedule of recent authorities below.

[14] See *Jones v Jones* [2011] 1 FLR 1723, CA; *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313, FD; *XW v XH (Financial Remedies)* [2019] 1 FLR 481, FD; *Versteegh v Versteegh* [2018] 2 FLR 1417, CA; *IX v IY* [2018] EWHC 3053 (Fam); *Martin v Martin* [2018] EWCA Civ 2866.

[15] See the authorities cited at the end of this paper

18. However, the extent to which a pre-marital contribution will retain its non-matrimonial character over the course of a marriage will depend on the circumstances of the case, including, in the case of a private company, its nature and the role it has played in the parties' marriage. *"[P]re-marital property not uncommonly becomes part of the economic life of the spousal partnership and thus acquires a matrimonial character giving rise to a (not necessarily equal) sharing claim in relation to it.*"[16]

Needs-based claims

19. Importantly, while non-matrimonial property may be protected (or ring-fenced) from a sharing claim,[17] there is "no restriction on the source of the assets which might be deployed (ie taken into account) in order to meet needs: the distinction between 'matrimonial' and 'non-matrimonial' property has no relevance here."[18]

20. There is therefore a very limited extent to which any asset can be ring-fenced from a *needs* claim even if the parties have entered into a pre-nuptial or post-nuptial agreement).

21. However:

(i) The existence of a pre-nuptial or post-nuptial agreement may have an impact on the assessment and quantum of an applicant's needs (see *Hopkins v Hopkins* [2015] EWHC 812 (Fam); *WW v HW* [2015] EWHC 1844 (Fam); and *KA v MA* [2018] EWHC 499 (Fam)).

(ii) In *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533, FD *(paras 17-19)* Mostyn J suggested that the existence of non-matrimonial property could result in a conservative assessment of needs (but compare Roberts J in *MCJ v MAJ* [2016] EWHC 1672 (Fam) and see eg significant needs-based awards in dynastic estate cases such as *Y v Y (Financial Orders: Inherited Wealth)* [2013] 2 FLR 924, FD Baron J). See also Mostyn J more recently in *Ipekci v McConnell* [2019] EWFC 19 where, all of the wealth being in the wife's name and extra-marital, H's claim was based on needs. In assessing H's need Mostyn J did 'not take the language used by the Supreme Court in *Radmacher*, namely "predicament of real need", as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances' – which some commentators have suggested is inconsistent with his language in *N v F*. However in *Ipecki* he identified factors which did inform the assessment of H's needs as including the length of the relationship, the fact that on the basis

[16] *JL v SL (No. 2)* per Mostyn J at [19].

[17] In *Charman v Charman (No. 4)* [2007] 1 FLR 1246, CA Sir Mark Potter P said at [66] that the sharing principle applies to all the parties' property, but he added that "to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality". This is Mostyn J's 'white leopard'. In *Hart* Moylan LJ noted at [66] that he is "not aware of any case decided since *Charman* in which a spouse has been awarded a share of non-matrimonial property by application of the sharing principle".

[18] *M-D v D* [2009] 1 FLR 810, CA per Sir Mark Potter P at [35]. See also *White v White* [2001] 1 AC 596 at 610.

that the parties had arranged their affairs H had made no savings or provision for his future, the standard of living (while not determinative, it was relevant), the interests of the children (not to see H as a 'poor relation'), the fact he would not need to contribute to the children's maintenance and school fees, and that it was not necessary for H to receive all of his award outright.

© Generally, a smaller needs claim (due to a lower standard of living, a short marriage etc) is less likely to require an invasion of non-matrimonial property, as is the existence of sufficient assets in addition to the non-matrimonial property.

Advice

21. Therefore, in terms of ring-fencing the private company built up before the marriage the 'golden rule' advice to clients might (as indicated above) include the following:

22. Where relevant, enter into a pre-nuptial (or post-nuptial) agreement that acknowledges your heavy lifting, identifies the asset to be protected and makes clear that your interest in the private company is to be left out of account as far as possible.

23. Restrict the involvement of your spouse in the company to as close to zero as possible. Discussing the business around the kitchen table and/or socialising with the company's clients / directors / partners can often constitute a stick with which to beat the heavy-lifter in subsequent proceedings.

24. Keep your finances separate if at all possible and restrict (to nil if possible) the extent to which your lifestyle as a couple depends on the value of the private company. As Baroness Hale observed in *Miller* at paragraph 153, "*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"*) and see the subsequent cases where the court has considered how prima facie non-matrimonial property has been used within the marriage and the effect this has had on its treatment by the courts: *MCJ v MAJ [2016 EWHC 1672 (Roberts J); J v J [2009] EWHC 2064 (Charles J); AR v AR [2012] 2 FLR 1, FD (Mostyn J); K v L [2011] EWCA 550; S v AG (Financial Orders: Lottery Prize) [2012] 1 FLR 651, FD; and JL v SL (No. 1) (Appeal: Non-Matrimonial Property) [2015] 2 FLR 1193, FD)* – together with the cases referred to at the end of this paper.

25. Where relevant, and insofar as is practical, emphasise the advice given in paragraph 4 of this note (above).

26. Assuming the case is headed for trial, establish the non-matrimonial origin and ongoing status of the bulk of the value of the private company.

27. Establish as far as possible the value of the pre-existing company at the time of marriage, emphasising as far as possible its latent potential, the passive growth and springboard effect of the passage of time – isolating that growth from any aspect of the marriage. Check the straight-line valuation figure for reference. Bear in mind the comments of the Court of

Appeal as to the fragility of private company valuations as discussed in the cases referred to below.

28. Note also the scope to ring-fence post-marital acquisition. Look carefully at any post-separation growth with that object in mind.

29. Consider whether, in exceptionally rare cases, any element of special contribution may be worth running[19].

30. Be aware that a first instance court may be more or less inclined one way or the other as regards the arithmetic / artistic approach. Compare the recent decisions referred to below to ascertain whether your factual matrix chimes with any of those in which a significant departure from equality has been ordered.

Recent decisions

31. In ***Hart v Hart*** **[2018] 1 FLR 1283, CA** (August 2017) Moylan LJ, having reviewed the previous authorities, set out a three-stage approach to be applied where the existence of non-matrimonial property is being asserted:

32. Firstly, *a case management decision*[20] - whether, and if so what, proportionate factual investigation is required. It may be that (i) the external contribution can immediately be seen to be sufficiently insignificant in the context of the case that it warrants no further inquiry; or (ii) there is no matrimonial property so that there is also no need to undertake any further factual investigation. In other words:

    (i) if there is a 'sharp dividing line' the court will use that line for the purposes of determining what award to make;

    (ii) if the inquiry would require an account to be undertaken of the marriage and/or some other expensive investigation and/or would be of 'doubtful utility', the court could be expected to decide that such an inquiry was neither proportionate nor required to enable the court to achieve a fair outcome; and
    (iii) if some further inquiry is warranted, the court will have to determine what 'degree of particularity or generality' is required.

33. Secondly, the court will need to make *such factual decisions* as the evidence enables it to make[21] - the court may decide that:

[19] See Cowan, Sorrell, Cooper-Hone, Charman, XW v XH; c.f. Robertson
[20] *Hart* at [89]-[90].

[21] *Hart* at [91]-[94].

(i) the non-marital contribution is not sufficiently material or bears insufficient weight to justify a finding that any property is non-matrimonial;
(ii) the evidence establishes a clear dividing line between matrimonial and non-matrimonial property. If so, the court will apply that differentiation at the next, discretionary stage; or
(iii) there is a complicated continuum and 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;

34. Thirdly, the s25 discretionary exercise[22] - where:

(i) 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 the case to ensure that its proposed award is a fair outcome having regard to all the relevant s25 factors; and

(ii) 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 also have to fit this determination into the s25 discretionary exercise.

(iii) If the court decides that non-matrimonial property should be reflected at all (because duration and mingling do not dictate otherwise), the court can choose between:

- the *formulaic/arithmetical/scientific approach*—which involves attempting to value the non-matrimonial assets and (if appropriate) thereafter excluding them from the equal sharing principle; and

- the *impressionistic/broad-brush/artistic approach*—which involves taking a broad evidential view of the non-matrimonial assets including consideration of their nature and quality and then making an assessment of what departure from equality fairly takes into account the non-matrimonial source of the assets.

(iv) The choice between the two approaches hinges on the ease with which matrimonial property and non-matrimonial property can be separated.

35. In *Hart* Moylan LJ said at [87] that the two approaches are not different schools of thought but rather "examples of the same principle being applied, but applied in a different manner

[22] *Hart* at [95]-[96].

depending on the circumstances of the case … The outcome will be the same, namely, when justified, an unequal division of the parties' property."[23]

36. Mostyn J has consistently taken a different line, describing the broad-brush approach as a "lawless science" in *JL v SL (No 2)* at [24], as having "insufficient logical rigour" and that "it runs the risk of palm-tree justice being applied" in *FZ v SZ and Others (Ancillary Relief: Conduct: Valuations)* [2011] 1 FLR 64, FD at [143], and an approach which "plucks a random percentage out of the air" in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313, FD at [11].

37. This difference in judicial opinion, which has run through the authorities for nearly a decade, was illustrated back in 2014 in *S v S (Financial Orders: Matrimonial Property)* [2014] EWHC 4732 (Fam) by Bodey J at [73]: *I propose here to follow the approach used in Jones and N v F (the arithmetical approach)….I have not always done so in taking such decisions and I am still of the view that there are cases where, on the facts, the exercise of a simple broad discretion under Section 25 will be more appropriate, that is will be necessary and/or proportionate and fair. The decision as to the better approach is itself discretionary. It will depend on the particular circumstances of the case and on the available evidence; but I accept that there is generally force in Mostyn J's concern in FZ v SZ about 'insufficient logical rigour' being brought to bear if a discretionary percentage is just selected out of the air. If 33% is 'right', why is 36% 'wrong'? Yet, the difference in this case would be £800,000.*

38. While the Hart / Versteegh approach is gaining ground, Mostyn J is not for turning. *"The dispute continues, and I remain unrepentant. It is, I emphasise, only a minor dispute and probably does not lead to much difference in terms of outcome. It is not to be regarded as the family law equivalent of the dispute between the blue and green street- gang factions that wracked Byzantium during the reign of Justinian in the 6th century. You will recall that, bafflingly, the dispute was mainly about theology with the greens supporting monophysitism; the blues, orthodoxy. So violent became the dispute that swathes of Constantinople, including Hagia Sophia, were utterly laid waste. However, in terms of Christian dogma, orthodoxy prevailed and monophysitism, denounced as heretical, faded into history. I would like to think that the arithmetical approach is wearing a blue tunic."*[24]

39. An illustration of the fact-specific application of the Hart-approved approach came in ***AB v AC* [2018] EWHC 1319 (Fam)** (Nicholas Cusworth QC sitting as a Deputy High Court Judge (in Feb 2018)

[23] A similar observation was made in *JB v MB* [2015] EWHC 1846 (Fam) at [20] per Nicholas Cusworth QC (sitting as a Deputy High Court Judge) where he said that "… I doubt very much whether, in this case as in many others, the route which the court takes to get to a fair outcome will radically affect the ultimate destination which it reaches." However, that said, much here hinges on the meaning of the word *"outcome"* as the fact that there is an unequal division on the application of either approach does not mean that the specific outcome is the same because the extent to which the division is unequal may vary depending on the approach adopted.

[24] See Mostyn J's speech to the Hong Kong Family Law Association on 25 April 2019

Overview:

W was in her 50s and H was in his 70s.

21-year marriage, with one then adult child.

The assets were c. £14m (net of H's estimated tax liabilities of c. £7m). Some of the assets were investments (c. £6m) due to be paid out in the coming years and there was the possibility that additional funds would fall in in excess of the c. £14m.

Outcome:

a. H had made a pre-marital contribution (including (i) a capital account built up in part during the marriage which was used to establish a company that was the basis for the wealth amassed during the marriage; and (ii) the proceeds of sale of a pre-marital property).

b. The court felt unable to determine the exact financial extent of H's pre-marital contribution ([31] – [33]) but having set out the relevant passaged of *Hart* referred to above the judge said that whilst he could not determine the extent of H's pre-marital contribution he must "bear [it] in mind when it comes to the discretionary exercise discussed by Moylan LJ in the passages from *Hart* cited" ([33]).

c. Weighing the contribution involved considering the "significant mingling of funds that took place; including the placing of significant amounts into a trust structure of which [W and the parties' child] were beneficiaries, during the marriage; and the fact that this is a partnership now of over 20 years, in which, unlike in a case such as *K v L*, the significance of the premarital contribution should fairly diminish to some extent over time, although not here to the point of being extinguished" ([34]).

d. The court concluded "[*t]his is a case ... where the court is left in the position envisaged at paragraph 96 of the judgment in Hart, to the effect that: '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 also have to fit this determination into the section 25 discretionary exercise'"* ([34]).

e. H received c. 52% of the c. £14m and the additional future funds would be split 75/25% in H's favour as and when received. The slight departure from equality in H's favour reflected (i) his retention of a non-matrimonial foreign pension; and (ii) his

retention of a small illiquid investment fund. Save for that small departure from equality in H's favour, the c. £14m was shared equally despite H's pre-marital contribution.

40. ***XW v XH [2017] EWFC 76 Baker J***

41. In a very lengthy judgment, Baker J endorsed the approach that had been taken by Moylan LJ in *Hart*.

42. Baker J disagreed with the 'straight-line' approach to valuation that had been adopted in *WM v HM* by Mostyn J, when looking at the growth and value of the business pre-marriage and during the marriage

43. Baker J also discussed the dichotomy between what he described as the "formulaic" approach and the "broader" approach, which he said was '*gaining favour*' post *Hart.*

44. "*As Arden LJ notes in Jones, the Court must try to look as far as it can at the reality of what actually happened rather than proceed on an artificial assumption of a straight-line growth from the date of foundation of the business up to the eventual sale."*

45. "*In this case… I conclude that the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property and it is neither proportionate nor feasible to seek to determine a clear line. Instead, I propose to undertake a broad evidential assessment before deciding how the wealth should be divided. My assessment is that there was a significant, though quantifiable, latent potential in the company at the date of the marriage, which is not reflected in the formal valuation. The fact that there was such a latent potential in the company must, therefore, be taken into account when determining the extent to which there should be a departure from the sharing principle."*

46. In ***C v C [2018] EWHC 3186*** Roberts J considered *Hart* and *Waggott* in the context of a husband's claim to ring-fence his post-marital earnings and accumulated savings. She said that there was now a three stage approach, (i) a factual determination as to the presence of non-marital property, whether pre or post marriage, but that it was open to the court not to make any such finding if weight or materiality of the evidence did not justify it (ii) if there was no clear dividing line between marital and non-marital property the court must undertake a broad assessment of the extent of any non-marital element and (iii) the court must then make a holistic assessment of the fairness of the award, taking into account all the s25 factors.

47. H was seeking to ring-fence an unmatched contribution (post-marital) of £8.7m, while W relied upon her contributions during the marriage and her post-separation contribution to the children in a claim for equality of division. Roberts J held that an earning capacity did not represent matrimonial property, and that W's care for the children similarly did not reflect an ongoing matrimonial partnership. She did not accept W's claim that ongoing

contributions to the welfare of the family matched those of H's contributions and/or gave rise to any entitlement to an equal share in H's post-separation earnings.

48. A pre-Hart decision of interest to the question raised in this paper is **Robertson v Robertson [2016] EWHC 613** (Fam) (Holman J)

49. The case concerned a couple whose cohabitation and marriage had lasted for about eleven years. At the beginning of their relationship, the husband owned a company and his shares at that time, including passive growth, were valued at around £4.8m. At the date of the hearing, the company was worth over £2 billion and the spouses' assets totaled £219m, including investment properties purchased with funds from the sale of the business. It was contended on behalf of the wife that all the assets constituted matrimonial property and she applied for an equal division. The husband, on the other hand, argued that the total value of his shareholding should be regarded as non-matrimonial property. Holman J awarded the wife a total of just under £70 million. Referring to the concept of passive growth as defined in *Jones v Jones*, he observed (at paragraph 34):

"It needs to be stressed, however, that the methodology is a tool and not a rule. The overarching duty upon the court is to exercise its statutory duty under s.25 … and to exercise the wide discretionary powers conferred upon, and entrusted to, it by Parliament in a way which is principled and above all fair to both parties on the facts and in the circumstances of the particular case."

50. On the facts of that case, Holman J concluded that the husband had not demonstrated that he had made a "special contribution" as defined on the authorities (see below). He declined, however, to limit the non-matrimonial assets to the figure of £4.8m based on what he called "the *Jones* methodology", stating (at paragraph 42) that "instinctively" this seemed "so unfair to the husband on the facts in the circumstances of this case, and so over-generous to the wife". Instead, he concluded (at paragraph 61):

On the facts of the case "much greater allowance must, in fairness to the husband, be made for the history in order, to borrow words from Lord Nicholls in Miller … to 'reflect the amount of work done by the husband on this business project before the marriage'.

51. He added, however:

"But, in my view, the pre-existing shares cannot, in fairness to the wife, be carved out and left out of account altogether…. They were part of the backdrop of the whole matrimonial economy; and to borrow words from Baroness Hale of Richmond in Miller … they were part of 'the way the couple have run their lives' (ibid).

52. This led him to the following conclusion (at paragraph 63):

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

53. ***IX v IY [2018] EWHC 3053 (Fam)*** Williams J (October 2018)

- Total net worth of c £38.3m generated by H both pre-marriage and during the marriage through his business, working as a software engineer.
- W was a former model who no longer worked
- No children of the marriage (but both had children from previous relationships)
- The parties started cohabiting in 2007, married in 2013 and separated in 2017
- W sought 50% of the total assets on a sharing basis
- H proposed she should receive 13% on a needs basis, and that his pre-acquired assets should be ring-fenced

54. With reference to Moylan LJ's judgment in *Hart*, Williams J said (re non-matrimonial assets)

"Happily, recent decisions of the Court of Appeal in the field appear to suggest a less technical, more flexible and more common-sense approach to such issues"
"The balance of the authorities support an approach which permits the court in appropriate circumstances to identify an asset as a non-matrimonial asset, or part of an asset being identified as a non-marital asset; it seems to me that ultimately it is fact specific although the shorter the marriage, in practice, the easier it may be to identify a non-marital asset and the longer the period of the marriage and the greater to which the asset has a mingled character, the harder it may be to identify it."

55. In identifying and quantifying the extent of non-matrimonial assets, the husband argued that much of the current value of his company should be ring-fenced as being non-matrimonial because he carried out the "heavy lifting" building up the value of the business prior to the marriage. The husband also asserted that the growth in the value of the business during the marriage could be categorized as largely passive.

56. On this issue, Williams J concluded:

"*The weight of authority would support an approach which seems to identify and to take into account any latent potential that a business asset had when it was brought into the marriage by a party. The authorities would also support an allowance for passive growth*

of that latent potential during the course of the marriage. How that is to be done will depend upon the facts of the individual case."

57. ***Martin v Martin*** **[2018] EWCA 2866** (December 2018)

58. The Court of Appeal considered cross-appeals from the first instance decision of Mostyn J in which the bulk of the wealth was tied up in a company, which had been established by H prior to the relationship.

59. The total assets were found by Mostyn J to be worth £182m, of which 80% was matrimonial property.

60. Mostyn J awarded W one-half of the marital wealth, with an element of her award being made up of shares in the business.

61. The Court of Appeal (per Moylan LJ) held that assets have a different level of risk, as established in ***Wells v Wells*** **[2002] 2 FLR 97**

- As a matter of principle, the court must take this into account when applying the sharing principle. That extends to the quality of the assets, so that liquidity and illiquidity can equally be relevant factors in their own right.
- As to business valuations, there was no reason why the Court of Appeal should depart from the conclusions in ***Versteegh v Versteegh [2018] EWCA Civ 1050*** (May 2018) that valuations of private companies can be fragile and need to be treated with caution.
- Even where the Court can fix a value, that does not mean that the value of the shares in a limited company has the same weight as the value of other assets. The court has to assess the weight which can be placed on the value of an asset, even when using a fixed valuation.
- That applied to both the amount and the structure of the award so that the overall allocation between the parties by application of the sharing principle effects a fair balance of risk and illiquidity.
- The assessment of the weight that can be placed on a valuation is not a mathematical exercise but rather it is a broad evaluative exercise to be undertaken by the judge.
- As to the issue of non-matrimonial property, a judge has an obligation to ensure that the method selected leads to an award which they consider gives "*to the contribution made by one party's non-matrimonial property the weight he considers just… with such generality or particularity as he considers appropriate in the circumstances of the case*."

62. In applying those principles, the Court of Appeal held:

(a) Mostyn J was entitled to adopt a straight-line apportionment approach when determining which element of the current value of the company should be treated as non-matrimonial. His decision to apply that approach was not at variance with or

contrary to the evidence. Accordingly, the wife's appeal against Mostyn J's application of a straight-line approach was rejected.
(b) Mostyn J was held to be wrong when he said that the "*only difference between [the company] and cash proceeds is… the sound of the auctioneer's hammer*." That was viewed as a reference inapt to the circumstances of the case.
© There was a difference of substance between the value ascribed to the company and the other assets, including the cash to be extracted from the company by way of dividend.
(d) Mostyn J had failed to consider whether his proposed award achieved a fair division of both the copper-bottomed assets and illiquid and risk-laden assets.

63. The Court (in ***Martin)*** considered and adopted ***Versteegh [2018] EWCA 1050*** in detail, including in relation to the valuation of non-matrimonial property and *Wells* sharing.

64. In relation to the assessment of non-matrimonial property, King LJ (in *Versteegh*) rehearsed the two schools of thought that have developed in respect of their treatment:

- The "arithmetical approach" as per the Court of Appeal in *Jones* and which has been preferred by Mostyn J in his decisions; and

- The "impressionistic approach" which has generally been preferred by Moylan J (and subsequently LJ) in his decisions.

65. In her view:

"where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with a degree of particularity or generality appropriate in the case."

66. King LJ recognized the problems that arise in some cases in which it is impossible to value certain assets, as occurred in *Robertson*.

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

- There was a difficulty in the present case in valuing business assets.
- Counsel for W argued that as the judge had failed to value H's shares, the judge had failed to carry out the first stage of the two-stage process set out in *Charman* i.e. the computation stage which needs to take place before the distribution stage.
- In the present case, a total of £2m had been spent on experts.
- Despite that, the trial judge was unable even to make a conservative estimate as to the value of the husband's company.

67. King LJ concluded:

> "*In my judgment, the judge cannot be criticized for concluding that he was unable to make findings as to the value of the development sites or as to future liquidity with a degree of reliability necessary in order to discharge the standard of proof. Further there can be no basis for suggesting… that the failure by this highly experienced specialist judge to reach a valuation was "his own fault.*"

- The situation was similar to that in *Wells* in which it had been impossible to place any value upon the husband's shareholding.
- In the present case, W argued against a *Wells* sharing order, i.e. where businesses cannot be valued, the only right course of action is to transfer an interest in the business to W.
- W sought to argue that, effectively, *Wells* was a one-off case.
- Although King LJ accepted that the making of a *Wells* order should be approached with caution, she did not accept that *Wells* was an unusual and singular case. Accordingly, a *Wells* sharing order was appropriate.

68. **Conclusion:**

> "*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". Valuations are a matter of opinion on which experts can differ significantly. Investigation can be "extremely expensive and of doubtful utility". The costs involved can quickly become disproportionate. Proportionality is critical both because it underpins the overriding objective and because, to quote Lord Nicholls again: "Fairness has a broad horizon".* [25]

PHILIP CAYFORD QC

29 Bedford Row

27 June 2019

[25] Hart para 86, cited with approval in Versteegh