



Neutral Citation Number: [2007] EWCA Civ 503

Case No: B4/2006/2368

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
FAMILY DIVISION
MR JUSTICE COLERIDGE
(LOWER COURT NUMBER FD04D04212)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2007

Before :

SIR MARK POTTER, THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE THORPE
and
LORD JUSTICE WILSON

Between :

JOHN ROBERT CHARMAN **Appellant**
- and -
BEVERLEY ANNE CHARMAN **Respondent**

Mr Barry Singleton QC, Mr Alan Boyle QC, Miss Deborah Eaton, Mr Deepak Nagpal and Mr Dakis Hagen (instructed by **Withers LLP**) appeared for the **Appellant**, the “husband”.

Mr Martin Pointer QC, Mr Christopher Nugee QC, Mr James Ewins and Mr Andrew Mold (instructed by **Manches LLP**) appeared for the **Respondent**, the “wife”.

Hearing dates: 6, 7 and 8 March 2007

Approved Judgment

SIR MARK POTTER, P.

1. This is the judgment of the court.

SECTION A: INTRODUCTION

2. Mr Charman, whom it will be convenient to describe as “the husband” notwithstanding pronouncement of a decree absolute of divorce, appeals against an order made on 27 July 2006 by Coleridge J. in the Family Division of the High Court upon an application for ancillary relief brought in the divorce proceedings by Mrs Charman, whom it will be convenient to describe as “the wife”. The judge found that the parties’ assets amounted to £131 million, of which, upon the agreed basis that the husband would transfer to her his interest in the matrimonial home, the wife held £8 million and the husband held £123 million. The judge’s order was that in full settlement of all her claims the husband should pay to the wife a lump sum of £40 million, thereby providing her with assets amounting to £48 million (or 36.5% of the parties’ assets) and providing him with assets amounting to £83 million (or 63.5% of them). Of the lump sum which he was ordered to pay, the husband has paid £12 million but pending determination of this appeal he has not been required to pay the balance. His contention is that the judge was wrong to award the wife a lump sum of as much as £40 million and in particular that the methodology which he deployed in arriving at such an award was flawed. The husband contends that the judge should have awarded the wife either a lump sum of £12 million, namely the sum which he has already paid and by which her assets have been increased to £20 million, or, at most, a lump sum of £20 million, in which case he would be required to pay her a further £8 million so as to increase her assets to £28 million. The wife defends the judge’s order and does not cross-appeal.
3. The judge, however, made a further order, which he described as being for a reverse contingent lump sum, namely that, if the husband was required to make specified payments to Her Majesty’s Revenue and Customs, estimated by the husband at £11 million, the wife should contribute thereto by way of repayment to him of – in simple terms – 36% of all such payments or £3.5 million, whichever was the lower. In his computation of the parties’ assets the judge made no allowance for these tax liabilities, which the husband had drawn to his attention very late; but, were they to be required to be paid, it is unlikely in view of the terms of this further order that any significant alteration would fall to be made to the percentages (as opposed to the figures) set out above.
4. Although higher lump sum orders have been made by consent, the judge’s order is believed to be the highest award ever made on determination of a contested application for ancillary relief in divorce proceedings in England and Wales.
5. While contending that she had made an important contribution to the welfare of the family to which the judge should have regard under s.25(2)(f) of the Matrimonial Causes Act 1973 (“the Act”), the wife in effect conceded below that the husband’s contribution had been of such significance as to justify his departure from the marriage with a greater proportion of the assets than should be awarded to her. We will follow the convention of describing such a contribution as “a special contribution”. By reference thereto the wife suggested a division of 55% - 45% in the husband’s favour. The wife’s concession was that the husband’s special contribution

lay in the generation by his skill and effort during the marriage of the entire fortune of £131 million for the welfare of the family. The judge endorsed the wife's concession of a special contribution but in the end, following review of numerous factors, he favoured the result which represented a division of 63.5% - 36.5% in the husband's favour. It is clear that he favoured such disparity by reference principally to the husband's special contribution, but also to what he considered to be the greater risks inherent in the assets remaining with the husband than those inherent in the assets awarded to the wife.

6. The husband's first main ground of appeal is that by his order the judge made insufficient allowance for his special contribution; and that he made insufficient allowance for it because he approached it in the wrong way. It will be seen, therefore, that the appeal primarily raises questions not as to the circumstances in which a spouse's contribution should be regarded as special but as to the manner in which, by his reasoning, a judge should make allowance for such a contribution. In this regard Mr Singleton QC, on behalf of the husband, contends first that the judge began with a hypothesis of equal division and then factored the husband's special contribution into the equation by way of a discount; and second that he was wrong to do so. Mr Singleton further contends that the proper approach should have been for the judge to allow for the husband's special contribution in the course of the exercise mandated by s.25(2) of the Act and that, had he done so, then, after conducting the necessary cross-check against the yardstick of equality (subject, however, to the agreed conclusion that the yardstick was at any rate to some extent inapt to the case), the awards would have been of £20 million or at most £28 million to the wife, inclusive of her existing assets, and (subject to the second main ground of appeal) of £111 million or £103 million to the husband. Mr Singleton's contentions require us to consider and interpret some of the guidance to the quantification of awards of ancillary relief, especially where the assets are large, given by the House of Lords in *White v. White* [2001] 1 AC 596 and, in particular, in *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618. The latter decision was given only two months prior to delivery of the judgment of Coleridge J.
7. The husband's second main ground of appeal is that the judge erred in computing the total assets at £131 million, within which the judge included £68 million held within an off-shore discretionary trust known as The Dragon Holdings Trust ("Dragon"). The husband had set up Dragon in 1987 upon an expression of wish to the trustee that during his lifetime he should be its primary beneficiary. Although it is a subsidiary contention of the husband that the assets of Dragon should have been computed at less than £68 million, the second main ground of appeal is that the judge fell into error in regarding the assets of Dragon, whatever their size, as "financial resources" of the husband for the purpose of s.25(2)(a) of the Act and thus as fit for inclusion at all in the computation of the parties' assets. Mr Boyle QC, who in this appeal appears together with Mr Singleton on behalf of the husband but did not do so below, submits that in this regard the judge failed to ask himself the necessary question, namely whether, if the husband were to request it to advance to him the whole (or part) of the assets of Dragon, its trustee would be likely to do so. Mr Boyle further submits that, had he asked himself that question, the judge could reasonably have answered it only in the negative. Put another way, his submission is that, if the judge asked himself that question and answered it in the affirmative, it was not open to him to do so. Mr Boyle therefore primarily contends that no part of the assets of Dragon should have been

included in the computation of the parties' assets. He makes, however, three fall-back suggestions, to which we will refer in paragraph 56 below.

8. Mr Nugee QC, who in this appeal appears together with Mr Pointer QC on behalf of the wife but who again did not do so below, accepts that it was necessary for the judge to ask himself the question identified by Mr Boyle. That being so, our task is to discern, in the light of the nature of the submissions below and the resulting form of the judgment, whether he did so; if he did so, whether he did so affirmatively; and, if he did so affirmatively, whether it was open to him to do so. In particular we need to place the judge's treatment of the issues in relation to Dragon in the context of the nature of the arguments put before him, particularly by Mr Singleton. Mr Nugee contends that the thrust of the husband's case as presented in this appeal is entirely different from that of his case as put before the judge; that some of Mr Boyle's arguments in this area were never articulated before the judge at all; that it is improper, or at least unsatisfactory, that they should first be raised in this court; and indeed that some are included in a proposed amendment to the grounds of appeal filed only days prior to the hearing of the appeal, for which permission has not yet been granted and should be refused.
9. There are in effect three further, subsidiary grounds of appeal. But they are of less general interest and we can address them shortly without the need for introduction here.

SECTION B: CURRENT CIRCUMSTANCES

10. The wife is aged 54. She lives in the former matrimonial home in Kent. It is worth £3 million. She has no paid employment and sits as a magistrate.
11. The husband is also aged 54. He is not ordinarily resident in the United Kingdom and mainly resides in a rented home in Bermuda, where he claims to be domiciled. He owns two further homes in the United States, which are together worth £5 million. He is President and Chief Executive Officer of Axis Capital Holdings Ltd ("Axis"), which is quoted on the New York Stock Exchange and is the holding company for a global group of specialist insurance and reinsurance companies. His salary and bonus amount to about £2 million per annum. A week prior to the substantive hearing before the judge he caused Axis to issue a press release which announced that, as a result of the proceedings brought against him by the wife, he would retire on 31 December 2008. Whatever the merit of the reason given, it is, as the judge found, not unreasonable for the husband to retire at the age of 56 in the light of the size of the wealth which he has generated and which, whatever the outcome of this appeal, will be available to him. But, whether logical or otherwise, the husband's arresting public assertion of a direct link between the wife's application for ancillary relief and his proposed retirement illustrates his indignation at the wife's prosecution of her application and its result to date. Having heard his oral evidence at length, the judge found that the husband was genuinely bemused that the wife should regard his offer that she should leave the marriage with £20 million as anything other than reasonable or, indeed, generous. The husband's indignation has an intensity which has rendered this litigation hard-fought at every turn and which, we fear, will continue to do so until whatever is properly payable to the wife under English law has been paid in full.

12. There are two children of the family, both boys, aged 24 and 20. In 1987, when he created Dragon, the husband created the J.R. Charman Children's Settlement for the two boys. It has assets now worth at least £30 million, which the judge naturally excluded from his computation of the parties' assets.

SECTION C: THE HISTORY

13. The parties met in 1970, when they were each aged about 17 and in the sixth forms of their schools in Rochester, Kent. They became engaged in 1973 and were married in 1976. In 1971 the husband, in effect unqualified, had gone to work as a junior clerk in an underwriting agency at Lloyd's of London and in 1975 he had accepted an invitation to take a more senior position in another agency at Lloyd's. The wife was working as an inspector in what is now the Department for Work and Pensions. To the marriage they brought their earning capacities but at that time they had in effect no capital assets.
14. Thereafter the wife continued to work full-time until late in her first pregnancy in 1982.
15. Until 1981 the husband's career at Lloyd's continued to flourish dramatically. Then for five years he worked instead in a senior capacity, and for very substantial reward, in a marine insurance company based in London and owned by Mr C.H. Tung of Hong Kong, whom the husband regards as his mentor. In 1986 the husband returned to Lloyd's: at a price of £700,000 he bought an underwriting agency which was in disarray and he operated it through what became Charman Underwriting Agencies Ltd ("Charman"), of which he was the chief executive. During the following ten years he turned the syndicate which Charman managed into the largest and most profitable at Lloyd's. In 1994/95, convinced of the importance of attracting corporate investment both for his agency in particular and for Lloyd's in general, the husband caused Charman's holding company to be sold to a newly created company, Tarquin PLC; and he and the trustees of Dragon and of the Children's Settlement, all of whom had substantial shareholdings in Charman, received in lieu significant amounts of cash and, in all, one third of the shares in Tarquin, for which he continued to work as he had for Charman.
16. By then Lloyd's was facing grave difficulties. The husband, who was appointed senior deputy chairman of Lloyd's, was one of a few senior figures who had the drive, ingenuity and courage to devise and implement the series of complex initiatives which saved it. He says that in 1997, after it had in effect been saved, he became disillusioned with Lloyd's because in his view it was beginning to retrench rather than continuing to pursue further radical reform. In 1998 he caused Tarquin to be sold at a record price to Ace Ltd, a global insurance company based in Bermuda with existing interests at Lloyd's; and the husband, Dragon and the Children's Settlement exchanged their shares in Tarquin for stock in Ace worth a total of U.S.\$133 million. In due course the husband's work, as a director of Ace and its senior executive outside the U.S., embraced more than its interests at Lloyd's; the dimensions of his work became international.
17. In March 2001 the husband suddenly left Ace. He had been outvoted by his co-directors and summarily dismissed, which gave rise to litigation and his negotiation of a substantial severance package and a company apology. The judge found that, at this

time of unexpected adversity, the parties grew close and the wife gave the husband considerable emotional support. The husband, Dragon and the Children's Settlement retained their shareholdings in Ace, the value of which had grown substantially since 1998, until sale of them took place in stages between February 2003 and February 2004 at a total price of £60 million. As we will explain, the husband became non-resident in the UK for tax purposes on 27 January 2003; and there were substantial advantages in delaying disposal of the shares in Ace until after he had done so.

18. In May 2001 the husband embarked on plans to establish a new global specialist insurance business. Paradoxically the "9-11" terrorist attacks enabled him to accelerate and enlarge his plans; and in November 2001 the first Axis company was incorporated in Bermuda. Within a few weeks it had attracted investment in the U.S. of \$2.5 billion. The husband at once took his present position of President and Chief Executive. The Axis holding company was floated in 2003; and the growth of the group's capital, turnover and profit has been rapid and remarkable.
19. From autumn 2001, when Axis began to operate, the husband rented a home in Bermuda and began to spend about half each week there. He promised the wife that he would do so only for about six months, while he set up the business. But after the six months he continued to do so; indeed during 2002 he increased the amount of time spent in Bermuda and elsewhere abroad. In consequence the marriage came under strain. The wife was on any view reluctant to move from the parties' fourth and final matrimonial home in Kent offshore, whether to Bermuda or otherwise; but the judge rejected the husband's criticisms of her in this regard. Both parties were worried about their younger son, then aged 15, whose education in England was not proceeding well; the wife considered that it was important for him that she should continue to reside in England. Furthermore her elderly parents lived nearby and needed her attention. She was also reluctant to resign as a magistrate.
20. But taxation as well as business considerations were leading the husband to favour abandonment of his residence in the U.K. In particular, as a result of changes introduced in the U.K. in 1998, disposals of Ace (and other) shares not only by him but also by the two trusts of which he was the settlor would thenceforward attract Capital Gains Tax unless he were non-resident. Even as early as January 2002 he was considering abandoning his residence and indeed his domicile in the U.K. Eventually in April 2003 he notified the Inland Revenue that on 27 January 2003 he had ceased to be resident and ordinarily resident in the U.K. He did not tell the wife of his cessation of residence until May 2003; and she was then alarmed to be told that the fiscal advantages would be lost if he were to spend more than 90 days a year in the U.K. for the following five years. The judge, who generally preferred the evidence of the wife to that of the husband when in conflict, and in particular did so in relation to disputed events surrounding the end of the marriage and to their discussions about moving to Bermuda, found that in 2003 the wife became resigned to her moving to Bermuda in order to save the marriage; that in October 2003 she proposed to the husband that she should join him there for a trial period of two years; but that by then the husband, who, so the judge tentatively found, had by then already embarked on another relationship, did not accept the proposal. In November 2003 the husband told the wife that the marriage was at an end: it had endured for almost 28 years.

SECTION D: PROCEEDINGS BETWEEN THE PARTIES

21. On 28 June 2004 the wife issued a petition for divorce in England. On 14 July 2004, without prior notice, it was served on the husband in Bermuda. On 26 August 2004 he issued a petition for divorce in Bermuda and on the following day he applied for a stay of the English suit so that the divorce might proceed in Bermuda. On 24 September 2004, after he had taken steps to progress the suit in Bermuda as fast as possible, Coleridge J. ordered him not further to proceed with the suit in Bermuda until after his application for a stay of the English suit had been determined.
22. On 28 January 2005 Coleridge J. heard the husband's application for a stay and by order dated 11 February 2005 he dismissed it. In effect the husband's principal argument in support of his application related to Dragon, which by then had a Bermudian corporate trustee, namely Codan Trust Company Ltd ("Codan"), and was governed by Bermudian law. His argument was that it was inevitable that, as part of her claim for ancillary relief, the wife would apply under s.24(1)(c) of the Act for an order for variation in her favour of Dragon, which he conceded to be a post-nuptial settlement; that the law of ancillary relief in Bermuda was closely modelled on that in England and Wales and gave the Bermudian court jurisdiction to entertain such an application; that, unless (which was unclear) Codan, as trustee of Dragon, should voluntarily participate in any application for variation made to the English court, there were grave doubts as to whether any such order by that court would be enforceable against it in Bermuda; and that, by contrast, there would be no difficulty about enforcement against it of any such order made in Bermuda. The wife's response, which the judge described as unsurprising, was that her intention was not to apply for an order for variation of Dragon but, rather, to contend that its assets constituted a resource of the husband which should be brought into account in computation of the lump sum for which she had applied in the English proceedings. The wife thus cut away much of the ground from under the husband's feet in relation to the stay; and, having referred to all the other factors relevant to the choice of forum, the judge concluded that the "case is as English as Tunbridge Wells".
23. Thus the wife's suit in England proceeded to decree nisi in April 2005 and both parties sought to assemble their case in relation to her application to the English court for ancillary relief. To the wife's argument that the assets of Dragon were a resource of the husband because Codan would be likely to make them available to him if he were so to request, the husband countered with an argument that, in setting it up in 1987 and ever thereafter, he had intended that the assets of the trust should be held for the benefit of his issue yet unborn and, in short, that it was a "dynastic" trust, the assets of which should not be aggregated with his own.
24. The wife, by her advisers, took the view that the merits of the rival arguments in relation to Dragon might well be illumined by documents which were or might be in the possession of Codan and by its answers to specified questions, both relating primarily to the content of the historical dealings between the husband and Mr Clay, his English accountant, on the one hand and the successive trustees on the other. The husband, by his solicitors, alleged that, notwithstanding what he said had been his own request to it to cooperate in this regard, Codan was not prepared to do so. Thus in July 2005 the wife applied to the English court for an order for the issue of a letter of request to the Bermudian court to require Mr Anderson, a director of Codan, to produce specified documents and give oral answers under oath to specified questions

for use in the English proceedings. As the Royal Court of Jersey recently pointed out in *In the matter of the H Trust*, unreported, [2006] JRC057, at [18], the provision of information relating to a family trust by its offshore trustee to a court in England charged with adjudicating a claim for ancillary relief is in principle desirable and does not represent any submission on the part of the trustee to its jurisdiction. In the event, however, rather than supporting the wife's application, the husband strongly opposed it. Indeed, when by order dated 20 October 2005 Coleridge J. nevertheless granted the application, the husband appealed to this court. On 20 December 2005, by a constitution of this court of which two of us were members, the appeal was dismissed: see *Charman v. Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053.

25. Meanwhile the letter of request had been issued and, on an application by the wife without notice to Codan, Mr Justice Bell in the Supreme Court of Bermuda had ordered Mr Anderson to attend before an examiner in order to disclose the documents and answer the questions specified in the letter. But Codan had applied to set the order aside; and the hearing of its application was conveniently adjourned until just after the date fixed for handing down the decision of this court, namely until 22 December 2005. At that hearing Codan persuaded Mr Justice Bell to set aside the entire order for disclosure on the basis that two days previously this court had erred in holding that in proceedings for ancillary relief a letter of request could issue in order to obtain disclosure of documents of the existence of which the applicant was not already aware. Although no one had expected the Bermudian court to rubber-stamp the request in the letter (see in particular the judgment of Lloyd L.J. in this court at [62] to [66]), it has to be said that the reasoning adopted by Mr Justice Bell, which he frankly acknowledged might lead to an unsatisfactory result, was, with great respect to him, somewhat unexpected, at least by this court; the courts of the two closely related jurisdictions, which apply analogous principles to applications for ancillary relief, usually aspire to approach issues such as those in relation to the disclosure of documents held by a third party in the same way. The wife says that in effect there was no time for her to appeal against the decision of Mr Justice Bell prior to the start of the substantive hearing before Coleridge J. on 13 February 2006 and that, without disclosure of the documents, there was no point in attempting to conduct the oral examination of Mr Anderson which Mr Justice Bell had continued to permit but which, unsurprisingly, he had limited to examination-in-chief.
26. Coleridge J. conducted the substantive hearing of the wife's application over some nine days beginning on 13 February 2006. Both parties agreed with the judge that he should then delay delivery of his judgment until after the House of Lords had given its decision in the appeals, upon which it had recently heard argument, in *Miller*. On 24 May 2006 the House gave its decision and on 21 June 2006 the judge heard further argument upon its relevant effect. On 27 July 2006 he handed down his judgment.
27. Although we must closely scrutinise other parts of his judgment below, it is helpful here to record the judge's computation of the parties' assets, each component of which we round to the nearest million pounds:

MILLIONS

(a) The wife

- | | | |
|------|---|----|
| (i) | Matrimonial home (proposed 100% interest) | £3 |
| (ii) | Flat occupied by her parents | £1 |

(iii)	Bank accounts	£4
	<u>WIFE: TOTAL</u>	<u>£8</u>

(b) The husband

(i)	Real property in U.S.	£5
(ii)	Bank accounts	£1
(iii)	Investment: Bank of New York	£10
(iv)	Personal possessions	£1
(v)	Pensions	£2
(vi)	Accumulated income: Dragon	£4
(vii)	Bonus for 2005	£1
(viii)	Axis shares	£11
(ix)	Axis options	£22
(x)	Liabilities	<u>(£2)</u>
	<u>SUBTOTAL</u>	<u>£55</u>

and, in Dragon,

(xi)	Cash and investments other than in Axis	£39
(xii)	Axis shares	£29
(xiii)	Axis warrants	£12
(xiv)	Liabilities	<u>(£12)</u>
	<u>SUBTOTAL</u>	<u>£68</u>
	<u>HUSBAND: TOTAL</u>	<u>£123</u>
	<u>JOINT: TOTAL</u>	<u>£131</u>

28. Having concluded that the lump sum payable by the husband to the wife should be £40 million, the judge thereupon ordered the husband to pay £12 million (being the amount which the husband had suggested as the total proper award) to the wife by 31 August 2006 and adjourned until 23 October 2006 determination of the date for payment of the balance. In the event the husband paid only £8 million by 31 August and omitted, so the judge found at the hearing on 23 October, to give any proper explanation for his failure to have paid the remaining £4 million. The judge then ordered him to pay it by 14 November 2006, which he did pay, albeit two days' late. The judge also made an order, which we have stayed pending determination of this appeal, for the husband to pay the balance of £28 million by 1 March 2007.

SECTION E: DRAGON**(i) The background facts**

29. In an application for ancillary relief the court's computation of the parties' assets logically precedes its consideration of their fair distribution. We therefore turn first to the husband's second main ground of appeal, namely that the judge erred in regarding the assets of Dragon as part of his resources.

30. Dragon was set up by a Deed of Trust dated 16 November 1987. The husband was the settlor. A trustee company in Jersey was the trustee; and the proper law of the trust was that of Jersey. The beneficiaries were defined as the husband, the wife (who was named), their two sons, any future children and remoter issue of the husband, such charities as the trustees might identify and such other persons as the trustees might add. In effect the trust is entirely discretionary; and the trustees have a wide power to advance capital instead of, or in addition to, income to a beneficiary, save that they cannot do so if it would “prejudice any person entitled to any prior life or other vested interest in the Trust fund or any part ... thereof”.
31. By two provisions of the Deed, the husband went out of his way to empower the trustees to benefit one beneficiary at the expense of the others. By clause 5(e) he provided that, in exercising their powers in favour of one beneficiary, the trustees could “ignore entirely the interests or expectations” of any of the others; and, repetitiously, by clause 12(a), he provided that the trustees could exercise their powers for the benefit of one beneficiary “without being obliged to consider the interests of the ... others”.
32. By clause 15(e) power was conferred on the husband to replace the trustees. The purpose behind the inclusion of this power is explained in a letter to the husband dated 13 October 1987 written by Mrs Rees, his solicitor in London, who was orchestrating the creation of the trust and corresponding with solicitors in Jersey to that end. She wrote:

“I put to [the solicitors in Jersey] the question of making certain of the powers exercisable only with your consent and of giving you the power to appoint new trustees. Their response was to suggest your appointment as “protector” of the settlement who would in effect have to bless all the trustees’ decisions before they could be implemented. Neither I nor [your accountants] really like this as it could be argued that the protector was in effect a trustee and prejudice the off-shore status of the trusts. [Your accountants] are confident that the letter of wishes will not be ignored and, correctly drafted, would afford adequate protection. As a letter of wishes is morally binding only and [the proposed corporate trustee] an unknown entity, I would suggest that, at the very least, you should have power to appoint and remove the trustees and will so provide.”

33. The husband’s letter of wishes to the trustee, there foreshadowed by Mrs Rees, was signed and dated 18 November 1987 and was expressed as follows:

“THE DRAGON HOLDINGS TRUST
Dated 16th November 1987

You may find it helpful to know my wishes regarding the exercise of your powers and discretions over the funds of the above Settlement. I realise of course that these wishes cannot be binding on you.

My real intentions in establishing the Settlement are to protect and conserve certain assets for the benefit of myself and my Family.

During my lifetime it is my wish that you consult me with regard to all matters relating to the investment or administration of the Fund and thereafter you should consult my wife in like manner. If my wife survives me, it is my wish that the fund should be administered primarily for her benefit and that she should have access to capital, if necessary. If both of us are dead, my children are to be treated as the primary beneficiaries and I hope you will consult my executors and their guardians. Should anything happen to the entire family, then the funds subject to the Settlement should follow my estate.

Insofar as is consistent with the terms of the Settlement I wish to have the fullest possible access to the capital and income of the Settlement including the possibility of investing the entire Fund in business ventures undertaken by me.

If circumstances should change in any way I will write you a further letter.”

34. Although the Deed records that the initial sum placed by the husband into Dragon was £10,000, the real purpose behind setting up the trust and indeed the Children’s Settlement was that, using the cash thus placed into them, the respective trustees should subscribe for some of the shares in Charman for which the husband would otherwise have been entitled to subscribe and which he correctly anticipated might become very valuable. Of his potential entitlement, 25% was placed in his own name, 25% was placed in the Children’s Settlement and 50% was placed in Dragon. In her letter dated 13 October 1987 Mrs Rees had written to the husband in relation to Dragon:

“I think [your accountants] feel that the long term inheritance tax effects of a discretionary settlement ... can be ignored because it was understood at their first meeting with you that decisions would be taken about the ultimate destination of the fund before the expiration of the first ten year period. This does not entirely accord with my understanding in our subsequent discussions when I gathered that you might well wish to leave the settlement in place until such time as the Charman shares are sold...

It seems to emerge clearly in our discussion that a discretionary settlement is appropriate to preserve flexibility as to the ultimate disposal of the assets of that trust and that you should reserve a right to retain part of the funds; capital gains tax protection may be its only advantage but, on balance, I suggest we go ahead ...”

The capital gains tax protection of which Mrs Rees there spoke was the deferment of liability beyond the trustee's disposal of an asset for capital gain until it made a capital payment to a beneficiary.

35. In that Charman paid a substantial dividend on its shares even in 1988, its first year of operation, Dragon at once began to receive income; and since 1993, reflective of the changes into Tarquin, thence into Ace and finally into Axis, that income has been very substantial. Between 1988 and 1998 Dragon's initial corporate trustee and its successor, another Jersey trust company which replaced it in 1992, made four distributions of income to the husband totalling £800,000. At any rate the first such distribution, made in 1988 itself, was made pursuant to the husband's express written request. All four distributions seem to have been made for fiscal purposes. But even income which the successive trustees did not distribute to the husband was assigned to him, apparently without his knowledge; and they accumulated it for him in a bespoke account. In 2004, after it had been replaced by Codan, the second Jersey trust company wrote:

“throughout the whole of our trusteeship of the Trust, we held the income of the Trust for [the husband] absolutely and regarded the Trust as an interest-in-possession trust.”

Apart from the four payments of income to the husband, there has been no distribution out of Dragon to any of the beneficiaries. Irrespective of the trustee's partial distribution and residual accumulation of the income to and for him, the husband, as a U.K. resident settlor retaining a potential interest under the trust, was liable to pay U.K. tax referable to its worldwide income. Until 1998, and irrespective of the precise fiscal purposes behind them, the distributions appear in effect to have indemnified him in that regard.

36. It was agreed before the judge that the wealth of Dragon had been built by its investment, in accordance with the husband's requests, in his successive business ventures. It was therefore his requests which led the trustee to subscribe for the shares in Charman; to exchange the shares in Charman for shares in Tarquin and cash; to exchange the shares in Tarquin for shares in Ace; to buy shares and warrants in Axis with heavy borrowings; to sell its shares in Ace for £37 million in eight tranches during the nine months in 2003 which immediately followed his cessation of residence in the U.K.; and to use the investment management services of the Bank of New York. In 1990 the trustee had also acceded to his request to put up the assets of the trust as security for a bank guarantee necessary for his membership as a Name at Lloyd's.
37. By 2002 the husband had resolved to move Dragon, as well as the Children's Settlement, to Bermuda. In December 2002 he approached Conyers Dill and Pearman, the well-known firm of barristers and attorneys in Bermuda, who offered him the services of their trust company, namely Codan. The husband thus caused the second Jersey trust company to resign as trustee of Dragon in favour of Codan with effect from 4 April 2003; and Codan thereupon exercised its power to change the proper law of the trust from that of Jersey to that of Bermuda.
38. Meanwhile Mr Clay had sought to advise the husband to take steps to ensure that the move of Dragon to Bermuda did not lead to any loss of control over Dragon on his

part. At a meeting between them on 7 March 2003, in the words of a memorandum of it made by Mr Clay,

“[Mr Clay] raised his concerns at the possible central control that may be exercised by the new Bermudan Trustees and that it was firstly critical for [the husband] to draft a Letter of Wishes as soon as the transfer from Jersey to Bermuda had taken place. Secondly, in the event of [the husband’s] death, [Mr Clay] raised concerns that too much control would be in the hands of the Bermudan Trustees and that [the husband] needed to reflect on whether further protection should be arranged to ensure that his wishes were actually carried out.

[The husband] ... had met recently with [Mr] Anderson to review the management arrangements for the two trusts and he was quite comfortable with [Mr] Anderson’s approach. However, it was agreed that [Mr Clay] should remind [the husband] to draft a Letter of Wishes for each Trust.”

At that time Mr Clay seems to have been under the impression that the husband’s non-residence in the U.K. might not endure beyond the requisite five years. At a further meeting with the husband on 25 March 2003 Mr Clay, according to the latter’s memorandum, suggested that Dragon should be “collapsed” while the husband was non-resident; and in a memorandum dated June 2003, which he prepared for the use of Codan, Mr Clay suggested that it “should consider whether it is appropriate ‘to bust’ [Dragon] prior to [the husband’s] returning to the U.K.”.

39. On 19 April 2004 Codan passed a written resolution in respect of Dragon. After noting that its predecessor had held its income on behalf of the husband and, albeit informally, had regarded it as an interest-in-possession trust, Codan formally resolved to regard it likewise and confirmed that it was exercising its power to appoint the income of the trust to the husband for life with effect from 4 April 2003 and so would accumulate it for him and periodically distribute it to him.
40. By letter addressed to Codan dated 13 May 2004, i.e. after the breakdown of the marriage but prior to the issue of divorce proceedings, the husband wrote a fresh letter of wishes in relation to Dragon. The main change was that he excised the request made in 1987 that, following his death, the trust should be administered primarily for the benefit of the wife. He wrote:

“During my lifetime, I would like you to treat me as the primary beneficiary, although I expect that you will consider the interests of the other immediate family beneficiaries as appropriate from time to time. I acknowledge that you have appointed the annual income to myself as a life interest disposition, as had the previous trustees.

After my death, and if they survive me, I would wish you to treat my children as primary equal beneficiaries per stirpes.

I would like my children to receive income only up to the age of 30, unless otherwise agreed by the Trustee. I would like you to consider making half the capital of the presumptive share of each of my children available to them at the age of 30. At the age of 40, I would like you to consider making the whole of the capital of their share available to them.”

41. On a date ostensibly in June 2004 the husband wrote to Codan in connection with its recent appointment to him of the income of Dragon. Subject to a direction for defrayment out of the income of an apparently small recurring expense referable to the management of his personal investment company, the husband instructed Codan to add back into Dragon all the accumulated income held for him and, subject to any contrary instruction, all future income otherwise to be held for him. The accumulated fund which the husband thereby – after the end of the marriage – chose to resettle into Dragon was £4 million and, as can be seen in paragraph 27 above, the judge notionally deducted it from the assets of Dragon and restored it into the list of the husband’s personal assets. A subsidiary ground of appeal is that the judge was wrong to conduct that notional exercise. In the event however that, upon the second main ground of appeal, we were to determine that the judge was entitled to regard the assets of Dragon as part of the husband’s resources, we would not address this ground because the precise place in the list for inclusion of the £4 million would be irrelevant.
42. On 27 August 2004, being the day after he had filed his petition in Bermuda, the husband, by his English solicitors, made a proposal to settle the wife’s financial claims; and, in order that her solicitors could advise her upon it, his solicitors sent to them what in their covering letter they described as “a summary schedule of his worldwide resources”. The schedule was itself headed “Schedule of Matrimonial Assets” and on four pages it set out first the husband’s assets totalling £27 million, then jointly owned assets totalling £4 million and finally trust assets, being the assets of Dragon, totalling £52 million, i.e. together totalling £83 million. A note was appended that the summary did not include the Children’s Settlement because neither party had a financial interest in it. The schedule had been prepared by Mr Clay; and the husband did not see it prior to his solicitors’ despatch of it to the wife’s solicitors. He asserts that it was an entirely inappropriate, confused and unauthorised treatment of the assets of Dragon as part of the “matrimonial assets” and of “his worldwide resources” on the part of Mr Clay and his solicitors.

(ii) The argument before the judge

43. The husband’s primary argument before the judge in relation to Dragon was very different from the primary argument which he now seeks to advance in this appeal. In shorthand, as endorsed on the Schedule of Assets furnished on his behalf to the judge, his case was “Trust dynastic and should not be taken into account”. Or, as Mr Singleton QC wrote in his opening submissions to the judge,

“The most important features of the trust are

1. H’s case is that this trust was set up to provide for the future generations of H’s family.

2. H has made it clear that he has no wish to benefit from the trust.
3. H has had minimal communication with the trustees, which tends to support his case as to intention.
4. There have been few actual distributions to H, and none at all for the last 7 years.”

We hasten to add that Mr Singleton did also submit that the court could not conclude that the trustees (in the words of his opening submissions) “will do what H says or asks as regards distribution, rather than investment” or (in the words of his closing submissions) “will simply accede to any request made by H that they should advance a huge chunk of the fund”. But this submission was rolled up as part of Mr Singleton’s fundamental argument: the thrust of it was that, *because the husband had created Dragon in order to put assets aside there for the benefit of his issue yet unborn rather than himself (or the wife)*, it would not be reasonable to expect him to request the trustees to advance capital to him nor, were he to do so, to expect the trustees to accede to the request. Ironically it was Mr Pointer who, in his written closing submissions to the judge, teased the two issues apart more clearly:

“In the end, the fundamental issue ... in respect of the Dragon Holdings Trust is whether or not H has demonstrated to the satisfaction of the court that it is a dynastic trust, having a different quality from an ordinary offshore trust, such that the court’s approach should therefore be divergent from the norm.

A secondary issue may be said to arise in the circumstances of this case, namely whether, were H to invite the trustees to distribute some or all of the funds within the Dragon Holdings Trust to him absolutely, they would comply with that invitation.”

44. Both parties gave written and oral evidence to the judge in relation to “the fundamental issue”, namely the dynastic issue. The husband averred that he had always intended Dragon to be a legacy for future generations of his family. The wife averred by contrast that she had always understood that Dragon was a family trust in which the husband, she and the boys had a continuing interest and that its assets were never beyond his control in that, were he to need them or want access to them, arrangements would be made accordingly.
45. In the event the judge preferred the case of the wife to that of the husband in relation to the dynastic issue. In particular the judge found that:
 - (a) the husband’s letters of wishes both in 1987 and in 2004 were inconsistent with an intention to create a dynastic trust;
 - (b) there was no evidence, in particular no documentary evidence, corroborative of the husband’s own evidence in support of his case;

- (c) the husband had conducted a “herculean struggle” to prevent Codan from giving evidence in circumstances in which, had Dragon been dynastic, it would be likely to have been able to produce evidence from its files to that effect; and
- (d) the wife, whose recollection was good, had known nothing of any dynastic intention on the part of the husband.

46. Then the judge proceeded as follows:

“78. But even if I had been persuaded of the existence of this as a settled, even documented, intention I am doubtful in the circumstances of this case whether, of itself, it would have been very influential in the result.

79. The test is whether the assets in the trust should be regarded by the Court as a “resource”. That is a very broad definition. These assets are held in a discretionary trust in conventional form. I will not repeat the very helpful descriptive analysis of such a trust in the Jersey High Court adopted by Potter P. in his judgment dismissing the husband’s appeal against my order relating to letters of request. (See *Re Esteem Settlement [2004] WTLR 1*). It is a very useful description of general application in cases like this. And as Lloyd LJ on the same occasion pointed out the assets in the trust “could be available to him on demand without being his money”, as Mr Singleton was constrained to agree.

80. So even if the husband had got home on the facts, for the Court simply to have ignored the assets would have been, I consider, wrong and, in my experience, entirely novel.

...

82. [I]n the end I am persuaded by Mr Pointer’s arguments and all the assets in the Dragon Trust will remain well and truly on the main schedule.”

(iii) The argument before us

47. Mr Singleton tells us that, notwithstanding what he acknowledges to be great difficulty in his way, he aspires to persuade us to set aside the judge’s finding that Dragon is not a dynastic trust. The point is not clearly raised in the grounds of appeal even as now proposed to be amended. Mr Singleton’s only point is that, had he reminded himself of the absence of distributions out of Codan since 1998, the judge would have been compelled to make the contrary finding. But since then the husband has had no need for distributions and has not asked for them; indeed until 2003 distributions of capital were, from a fiscal perspective, firmly to be avoided. We consider that the judge’s rejection of the husband’s dynastic argument was inevitable. The obvious fiscal purpose behind Dragon; indeed its status, in Mr Singleton’s own words in this appeal, as a “key component in [the husband’s] overall financial and tax planning”; the husband’s unusual inclusion of himself in the Deed as a named

beneficiary; the terms of the letter of Mrs Rees dated 13 October 1987; the content of each of his letters of wishes; Mr Clay's suggestion in 2003 that the husband should collapse the trust; the first presentation of Dragon on the husband's behalf in the proceedings as being part of his resources; the absence of any documentary evidence to support his argument; the inference to be drawn from his attempts to prevent the wife's access to documents on Codan's file; and her own convincing, contrary evidence. All these in effect compelled the judge's conclusion.

48. The primary argument now put before us on behalf of the husband is that the judge failed to resolve the "secondary issue" which Mr Pointer on behalf of the wife had purported to identify for him, namely the issue as to the likelihood of advancement. On any view the argument lacks forensic integrity because it was never separately identified on behalf of the husband. Strictly, there was no separate "issue" for the judge to resolve. Nevertheless we agree with both counsel that, before he attributed all the assets of Dragon to the husband, the judge had to be satisfied that, if so requested by the husband, Codan would be likely to advance them to him: in the judgments in this court on the husband's appeal against the order for issue of the letter of request, in particular at [12], such had been confirmed as the central question generally arising in such cases.
49. The first question is therefore whether the judge made a finding that, if requested, Codan would be likely to advance all the assets of Dragon to the husband. Mr Boyle submits that the judge never even addressed that question. The second question, which arises if, contrary to Mr Boyle's submission, the judge made such a finding, is whether it was open to him to do so.
50. The answer to the first question is to be found in the paragraphs of the judge's judgment set out at paragraph 46 above. We analyse them as follows:
 - (a) The judge asked himself whether the assets in Dragon were a "resource". Mr Boyle's submission that such was not the test is misconceived: it is the overarching test because the word "resources" is the portmanteau word used in s.25(2)(a) of the Act.
 - (b) Then the judge turned to consider the matter in the context of discretionary trusts. First he referred to the decision of the Royal Court of Jersey in *Re the Esteem Settlement* [2004] WTLR 1 as containing a very helpful descriptive analysis of such a trust. Part of that court's analysis is as follows, at [166]:

"... one would expect to find that in the majority of trusts, there had not been a refusal by the trustees of a request by a settlor. This would no doubt be because, in the majority of cases, a settlor would be acting reasonably in the interests of himself and his family. This would particularly be so where there was a small close-knit family and where the settlor could be expected to be fully aware of what was in the interests of his family."

Then the judge referred to the observation of Lloyd LJ in the course of argument upon the husband's previous appeal to this court that the assets in Dragon "could be available to [the husband] on demand without being his money".

- (c) Ultimately the judge declared himself persuaded by Mr Pointer's arguments, to which he had earlier referred albeit in part only by cross-reference to Mr Pointer's written submissions, and concluded that all the assets in Dragon should be attributed to the husband. Mr Pointer had articulated one additional argument, which we consider in paragraph 55 below, specifically in relation to the likelihood of advancement. But, just as Mr Singleton's argument in relation to the likelihood of advancement was rolled up as part of his argument in relation to the dynastic issue, so were all Mr Pointer's arguments in response save for that one addition: they related to features of the evidence which, because, according to Mr Pointer, they suggested that its capital would be likely to be advanced to the husband, demonstrated that Dragon was not dynastic. In accepting those arguments the judge accepted their premises as well as their conclusions.
- (d) Indeed the judge indicated that, had it been necessary, he would have considered going further than Mr Pointer had asked him to go. For he observed that, even had he found that Dragon was dynastic, it was doubtful whether he would have declined to attribute its assets to the husband. It was only an aside: but the construction which we place upon it is that the judge considered that, whatever the husband's historical intentions in relation to Dragon, it would be likely that, in the changed circumstances of his need to discharge obligations following divorce, its trustee would advance its capital to him.
51. The judge would certainly have obviated energetic argument upon this appeal if he had expressly found that Codan would be likely to advance all the capital of Dragon to the husband upon request. But for the reasons set out at paragraph 50 above it is obvious that the need to address such a question was in the forefront of his mind. We are quite clear that he effectively made such a finding; nor, in the light of the way in which Mr Singleton had presented his case, do we significantly criticise the judge for omitting to spell it out.
52. We turn to the second question, namely whether it was open to the judge to find a likelihood of advancement. Mr Boyle's brief in this regard has proved scarcely arguable. He describes as his "keynote" point the absence of a track record of advancement; but we have explained in paragraph 47 above why we do not regard such absence as significant. Mr Boyle needs to confront in particular the following facts:
- (a) the husband was the settlor of Dragon;
- (b) its wealth represents the fruits of investment at his request in companies which, substantially as a result of his talents, became very successful;
- (c) until after the breakdown of the marriage the operative letter of wishes was that he should "have the fullest possible access to the capital and income of the Settlement"; and
- (d) even today, following despatch of the fresh letter, his expressed wish is to be treated as the primary beneficiary.
53. Mr Boyle's response to his difficulties is in part disarmingly frank. He accepts that the judge was required to look at the reality of the situation and that trustees of such trusts

can generally be expected to respond favourably to reasonable requests made of them by settlors and to comply with any expression of wishes on their part. Mr Boyle even concedes that, if disaster struck the husband's business and he fell into real financial difficulty, Codan could properly make available to him a large sum of capital. But, so Mr Boyle contends, such a hypothesis is inapt because the husband has had no "need" for any capital out of Dragon. Our reaction to that contention is two-fold. First, it is in law a perfectly adequate foundation for the aggregation of trust assets with a party's personal assets for the purposes of s.25(2)(a) of the Act that they should be likely to be advanced to him or her in the event only of "need". Second, the contention is inconsistent with another area of the husband's argument, which is to the effect that, although his personal assets computed by the judge at £55 million exceed the lump sum award of £40 million, the judge must have expected him to have recourse, directly or indirectly, to the assets of Dragon, particularly its cash and investments other than in Axis, for the purposes of satisfying the order and that indeed the order can only reasonably be satisfied in that way. If so, why then does the husband not have a "need" for capital out of Dragon in order to assist him to discharge his legal obligations? Mr Boyle is driven to respond with the suggestion that, because the moment at which the judge considered whether to attribute the assets of Dragon to him was prior to the making of any order against the husband, the husband had had no need for them at that critical moment. This is chop-logic of the most specious kind, as all those who have discharged their liabilities to ex-spouses without court orders will readily understand.

54. His back to the wall, Mr Boyle seeks to raise questions as to how Codan would respond to a request by the husband for advancement and suggests that they remain unanswered. In circumstances in which the judge made a finding, unchallenged in this appeal, that the husband had put up "a herculean struggle" in order to prevent Codan from giving evidence in the proceedings, it was inevitable that there would be no express presentation to the court of its likely response. At first, for example, Mr Boyle submitted that in the event of such a request Codan would be "bound" to consider the interests of the other beneficiaries. As he now accepts, the submission is incorrect: see the provisions of the Deed referred to in paragraph 31 above. That Codan would however *wish* to consider the interests of the other beneficiaries, albeit probably only briefly, we have no doubt. Mr Boyle also refers to the prohibition in the Deed of Trust against any such exercise of the power of advancement as would prejudice any person entitled to a prior life interest in the fund. He refers to the resolution in 2004 by which the husband's life interest was formally confirmed and suggests, in our view casuistically, that an advancement of capital to him would prejudice him *qua* life tenant. More broadly Mr Boyle argues that, faced with a request for advancement, Codan would be likely to apply for directions to the Bermudian court or seek the advice of Bermudian counsel; and the argument is prelude to a long presentation on his part, including references for example to Bermudian statute and to cases determined in the Royal Court of Jersey, of the terms in which the Bermudian court might respond to any such application or counsel might advise. In the light of the strength of the wife's case on the likelihood of advancement to the husband of the assets in Dragon for the reasons mainly set out in paragraph 52 above, as well as of Mr Boyle's own concessions in that regard set out in paragraph 53 above, it would be difficult for the husband at any stage of the proceedings convincingly to have raised a spectre that, even if approached, the Bermudian court or Bermudian counsel would find reason to frustrate a proposed advancement to him. But there is another reason

why we should draw a line across this argument: it was never raised before the judge; the evidence of foreign law was never placed before him; he made no reference to the argument; it does not figure in the pleaded grounds upon which the husband has secured permission to appeal nor even in the skeleton argument in support of them; and it was first raised in a supplementary skeleton argument dated eleven working days prior to the hearing of the appeal. In short the argument is brought too late in any event.

55. (a) We advert briefly to Mr Pointer's additional argument to the judge in favour of the likelihood of advancement, to which we referred in paragraph 50(c) above. The argument was that, given the husband's express power to replace the trustees of Dragon, he could replace a trustee who declined to accede to a request for advancement with one who would accede to it. This was not one of the arguments of Mr Pointer which the judge expressly articulated and accepted. But it was one of the arguments which, in paragraph 82 of his judgment (set out in paragraph 46 above), the judge accepted by reference.
- (b) It was hardly surprising that Mr Pointer should argue – and that the judge should accept – that the husband's power to replace the trustees was indicative of the likelihood of advancement. The power had been inserted at the suggestion of Mrs Rees expressly in order to make it even more likely that the trust would be administered in accordance with the husband's letters of wishes.
- (c) The submission of Mr Boyle, however, is that, as established in *In re Skeats' Settlement* (1889) 42 Ch. 522, the power to replace trustees is fiduciary and that therefore the husband cannot lawfully exercise it by way of response to a refusal by a trustee to accede to his request for advancement. Mr Nugee, for his part, accepts that it was held in *Skeats' Settlement* that the power is fiduciary and, for the purposes of this appeal, he accepts that we should treat the case as having been correctly decided.
- (d) Again, Mr Boyle's point was never made to the judge; and thus *Skeats' Settlement* was not drawn to his attention. Indeed the point was introduced into the argument on this appeal only on the first day of the hearing. Had it been made to the judge, he might well have elected not to adopt Mr Pointer's additional argument even by reference. There is a wealth of other material which justifies the judge's finding as to the likelihood of advancement. But the judge might alternatively have held, as Mr Nugee has in passing invited us to hold, that it may be simplistic to conclude that, just because it is fiduciary, the power is irrelevant to the likelihood of advancement.
- (e) In this respect Mr Nugee invites us to be realistic; and it is an invitation which, in exercising its jurisdiction in relation to ancillary relief, it is in principle particularly appropriate for the court to accept. Mr Nugee submits that, realistically, a settlor with a power to replace trustees will be unlikely to allow a point to be reached at which his exercise of it would become unlawful as being in breach of his duty to act in good faith. In proposing inclusion of the power as an extra safeguard for the husband Mrs Rees, for example, would not have been contemplating its unlawful exercise. It is well settled that lack of harmony between a beneficiary and a trustee can be a lawful ground for the latter's replacement: see *Letterstedt v. Broers* (1884) 9 App. Cas. 371 at 386, cited in *Re*

the Esteem Settlement, at [165]. A settlor with a power to replace trustees, says Mr Nugee, will be wise to ask himself from time to time, and well in advance of any actual request for advancement, whether, in the light of his continuing dealings with the trustee, he is or remains – to adopt the word used in the memorandum of the husband’s meeting with Mr Clay on 7 March 2003 – “comfortable” with the trustee. If the two of them do not see eye to eye, then it is likely to be in the interests of the beneficiaries of the trust of which he is the settlor, and therefore to be lawful, for him to replace the trustee by virtue of the principle in *Letterstedt*.

- (f) There is no need for us to decide this peripheral issue. It has arisen very late and has not been fully argued on either side. We consider that exploration of the difficult interface between the likely exercise of powers in the real world and what must for the court be the dominant requirements of the law is better left to another occasion.

56. From the foot of his argument that it was not open to the judge to make a finding as to the likelihood of advancement to the husband of all Dragon’s assets, Mr Boyle has proceeded to suggest how the judge should properly have treated its assets. Although in the event this section of his argument is academic, it is nonetheless helpful for us to notice it. Without prejudice to the husband’s basic contention that none of the assets of Dragon should have been attributed to him, Mr Boyle makes three alternative fall-back suggestions:

- (a) The court should have attributed to the husband the capitalised value of the interest in the future income of the trust which in 2004 Codan formally appointed to him for life. No doubt if it had been inappropriate to attribute all the trust assets to him, it would have been appropriate to conduct that exercise and also somehow to weigh the value of Codan’s power to advance capital to him. Before the judge, as part of a fall-back position of his own, Mr Pointer sought to conduct just such an exercise and produced capitalised figures of £15 million or £34 million. At that time, however, the unqualified response of Mr Singleton was that the exercise was inappropriate; and in the event the judge had no need to address the issue. We consider that Mr Boyle’s commendation of the exercise, first articulated eleven days prior to the hearing of this appeal, is another example of the husband’s cynical deployment at different stages of these proceedings of contradictory arguments, dictated only by whether they seem to suit his book at that stage. Even if it had been open to him to present his current argument to this court at so late a stage, the husband must realise that contradictory arguments cannot both be valid and that a litigant who advances them forfeits a degree of forensic credibility.
- (b) Alternatively such component of the court’s award to the wife as was referable to the assets in Dragon should have been the capitalised value of the life interest which (so the argument runs) would probably have been granted to her in some of those assets in the event that she had applied to the English court for an order for variation in her favour of Dragon as a post-nuptial settlement. This argument is specifically set out in the late proposed amendment to the grounds of appeal for which the husband seeks our permission; and for six reasons we find the argument extraordinary. First, there is a fundamental conceptual confusion in linking the court’s duty in every application for ancillary relief to enquire into the extent of a party’s resources with its power to redistribute assets which are not the resources of only one party but are susceptible to redistribution because they are held in a

settlement which is nuptial. Second, although Mr Boyle now argues that, in cases in which there is no track record of distributions of capital out of a settlement, an application to vary it should be strongly encouraged, it was the husband's principal argument on his application for a stay of the English suit that the doubts about the enforceability in Bermuda of an English order for variation of settlement were such that the wife could not sensibly apply for it in England. Third, because the husband never asked the judge to assess the outcome of a hypothetical application to vary, he never did so. Fourth, it is impossible to discern the size of the fund which would have been taken out of Dragon for the wife by way of variation, interrelated, as it would be, with the outcome of a second hypothetical exercise, namely assessment of the size of the award to the wife out of the husband's personal assets by way of a lump sum. Fifth, we see no reason to accept that, just because after the breakdown of the marriage Codan formally assigned to the husband a life interest in Dragon, the result of an application to vary it would have been provision for the wife only of a life interest, albeit presumably subject to a power in her trustees to advance capital to her; our instinct, on the contrary, is that on the facts of this case outright provision would have been more likely. Sixth, this argument, too, was first raised eleven days before the hearing of the appeal. In all these circumstances we refuse permission to amend the grounds of appeal so as to include it. [We have already considered the other, more general, proposed amendments, including the suggestion, which we regard as inherent in the issue as to the likelihood of advancement upon request, that the judge's order placed undue pressure on Codan; the convenient course is to grant permission to amend in these other respects.]

(c) Alternatively the court should attribute one third of the assets of Dragon to the husband. Mr Boyle first raised this argument on the second day of the hearing and at the conclusion of his oral submissions. The one third fraction is, so Mr Boyle suggests, a fair but necessarily conservative reflection of all the features relative to the nexus between the husband and Dragon. We can discern no logical path to the fraction; and the argument would have found no favour with us at all.

57. For reasons of policy we are pleased to find ourselves able to uphold the judge's attribution to the husband of all the assets in Dragon. Although the list of matters to which, upon an application for ancillary relief, the court must have regard pursuant to s.25(2) of the Act presently remains unchanged, the decision in *White* alters the necessary extent of the focus upon some of those matters in cases of substantial wealth. The needs of the parties remain to be considered, but in many cases focus upon them has waned as a result of an early conclusion that they will on any view be met as part of the outcome of other aspects of the requisite exercise. As a result of the advent of reference to proportions, the focus has largely shifted to computation of resources. Prior to the decision in *White*, the elaborate enquiry in the present case as to the attributability of the assets in a trust to a party as part of his or her resources would probably have been unnecessary. But, whenever it is necessary to conduct such an enquiry, it is essential for the court to bring to it a judicious mixture of worldly realism and of respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts. In the circumstances of the present case it would have been a shameful emasculation of the court's duty to be fair if the assets which the husband built up in Dragon during the marriage had not been attributed to him.

58. Mr Boyle submits that, if this court were to dismiss the part of the appeal referable to Dragon, it would send a message to the off-shore world that, in family cases, trusts do not matter. It will by now be clear that we send no such message. He draws our attention to the decision of the Royal Court of Jersey in *In re Fountain Trust* [2005] JLR 359, in which it observed, at [18], that an assumption of jurisdiction by a judge of the Family Division in England to declare a Jersey trust to be a “sham”, such as had there occurred, would generally be exorbitant. We agree with the Royal Court’s observation. Mr Boyle also draws our attention to the decision of the same court in *In the matter of the B Trust*, as yet unreported, [2006] JRC 185. There, at [32], an important suggestion was made, namely that, when a party applied to it for variation of an off-shore settlement, the English court should give serious consideration to declining to exercise its jurisdiction on the basis that, after conducting the substantive enquiry, it should instead invite the off-shore court, provided of course that the latter is invested with the appropriate jurisdiction, to act as an auxiliary to it in regard to any proposed variation. But the wife in the present case has been, relatively speaking, in a fortunate position. She cannot and does not allege that Dragon is a sham. She does not, and does not need to, apply for variation of Dragon. For she has the evidence with which to identify the assets of Dragon as part of the husband’s resources. Nor do we read the decision of Mr Justice Bell in Bermuda on 22 December 2005 as any indication that the courts of Bermuda will not be disposed to help to ensure, within the parameters of its laws, that whatever may ultimately be awarded to the wife in these proceedings will be duly paid.

SECTION F: SPECIAL CONTRIBUTION

(i) The structure of the judge’s judgment

59. After introducing the case and setting out background matters, the judge entitled a section of his judgment “**The Statutory ‘Balancing Exercise’**” and in it said:

“Matrimonial Causes Act 1973 s.25 rules the day. And, despite the endless judicial gloss which is applied to it year in and year out at every level, it is always best to start and end in that familiar section.

...

The obvious starting point for all these applications is the financial position of the parties now.”

60. Thereupon there were sections of the judgment in which the judge addressed:
- (a) The parties’ **resources** in the form of their assets and liabilities and, in the case of the husband, his earning capacity.
 - (b) The parties’ **needs** and **standard of living** during the marriage. This section, however, comprised only one paragraph, as follows:

“These two factors call for only scant attention in this case for quite obvious reasons. Even on the basis of the husband’s open offer the wife’s “needs” could be met at the standard of living which she has become used to ... The remaining fortune in the husband’s hands even on his own

figures and ignoring Dragon would be much more than that. It is not suggested that either spouse should want for anything financially. They each spend at an enormous rate. And why not given their resources? ... [I]n the end, the result is not really going to be determined by reference to these two factors. Other factors elbow them aside.”

- (c) The husband’s contention (or what the judge held to be the true nature of the husband’s contention) that, in two respects including that to which we will refer in paragraph 95 below, the wife had been guilty of **conduct** which it would be inequitable to disregard. The judge rejected that contention.
- (d) The **contributions** of the parties. The judge began his analysis as follows:

“For the past nearly five years, since *White*, courts at every level have been wrestling with the question of whether or not in departing from equality and striving for fairness it is proper to take into account and give weight to exceptional wealth creation by one spouse.”

Then he cited passages in the speeches of Lord Nicholls and Baroness Hale in *Miller*; noted the conclusion in *Miller* that the criteria by which the court decided whether to take conduct and special contribution into account were identical; addressed the suggestion that special contribution was a species of conduct; and continued as follows:

“So, in the end, is a departure from equality applicable in this case? Or, as Mr Singleton QC would have it, are the husband’s extraordinary talent and the nature/value of the assets so generated, factors which, adopting his incremental approach, lead to a figure which happens to be much less than one half? In the end I doubt whether the differing approaches lead to a different result.

Whichever way it is approached it seems to me this factor must, exceptionally and in fairness, be taken into account in this case. Whether the husband’s remarkable abilities ..., his energy and wealth creation ... are “conduct” or a “contribution to the welfare of the family” in the broadest sense their product is wholly exceptional, “gross and obvious ...”

[O]ne way or another this factor weighs and departure from equality is fair. So far so good.

...[T]he House of Lords has pronounced some of the principles which underlie the “special contribution” issue. They are silent on how to apply them. For those of us ... trying to translate these principles into figures, this final stage is the more difficult part of the exercise.

Mr Pointer QC concedes the small reduction to which I have made reference but urges great caution in moving away from 50% in case discrimination starts creeping in. Mr Singleton QC rebuts wholly the simple departure from equality approach [and] says *‘the proper approach is ... to consider all the factors in s.25 and determine a fair outcome. The court must cross-check its provisional award against the yardstick of equality to ensure that in the event of an unequal division there are good reasons to justify the difference. The quantification of the provisional award is both a cumulative/incremental approach ... What the court cannot do is to assume that the parties (in a long marriage where the resources exceed their needs) are each going to receive 50% and then determine if there is any reason why they should not’ ...*

I can find little hard ground once the self-justifying fairness of 50/50 is departed from ...

If adjustment is appropriate, especially in these huge money cases, I think it should be meaningful and significant and not a token one ...”

61. Then followed a section entitled **“Conclusions”**. The judge said:

“This was a long marriage where the parties started with nothing and all the wealth was effectively created ... during its subsistence. Both played their full part in the marriage. However this is a case, in that very small category, where, wholly exceptionally, the wealth created is of extraordinary proportions from extraordinary talent and energy. Taking everything properly into account, I have decided, after much deliberation ..., to transfer the husband’s interest in [the home] to the wife and additionally order him to pay her a lump sum of £40 million (in addition to her present assets). She will exit the marriage with a total of about £48 million including the assets already in her name. In percentage terms that is just under 37% of the total. The husband will accordingly retain just over 63%. I fully intend the difference, which also reflects the fact that the wife is getting cash (if she wants it) and the husband will continue to operate and have a significant stake in one of the most risky fields; high risk insurance.”

62. To his judgment the judge added a postscript in which he recognised the current uncertainty of outcome in this type of case and raised the possibility that, by way of guidance which would not erode the width of the discretion invested in trial courts by s.25 of the Act, the court might suggest, by way of departure from 50-50, a tariff of percentages related to the size of such wealth as might qualify as a special contribution.

(ii) The statutory exercise expounded in *Miller*

63. The best way for us to address Mr Singleton’s attack on the judge’s treatment of the husband’s special contribution is to do so by reference to our interpretation of what is now the proper approach to a case of alleged special contribution, first considering the general nature of the statutory exercise. Two objectives will govern what we say. The first is to be loyal to what we understand to be the spirit as well as the letter of such guidance on the topic as has been given by the House of Lords in *White* and *Miller*, whether or not it is part of the reasoning behind those actual decisions. We say so because there is no doubt that, under that guidance, the House has left much for the courts to develop. The second is to express ourselves as clearly and simply as the subject allows.
64. “The yardstick of equality of division”, first identified by Lord Nicholls in *White* at p. 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of “reasonable requirements”. The origins of the yardstick lay in s.25(2) of the Act, specifically in s.25(2)(f), which refers to the parties’ contributions: see the preceding argument of Lord Nicholls at p. 605D-E. The yardstick reflected a modern, non-discriminatory conclusion that the proper evaluation under s.25(2)(f) of the parties’ different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.
65. Although in *White* the majority of the House agreed with the speech of Lord Nicholls and thus with his description of equality as a “yardstick” against which tentative views should be “checked”, Lord Cooke, at p. 615D, doubted whether use of the words “yardstick” or “check” would produce a result different from that of the words “guideline” or “starting point”. In *Miller* the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls, at [20] and [29], referred to the “equal sharing principle” and to the “sharing entitlement”; those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt when, referring to remarks by Lord Nicholls at [29], she said, at [144],

“I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance.”

It is clear that the court’s consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take the “the sharing principle” to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not *from* the principle but takes place *within* the principle.

66. To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in paragraph 68 below. Such an answer might better have reflected the origins of the principle in the parties’ contributions to the welfare of

the family; and it would have been more consonant with the references of Baroness Hale in *Miller* at [141] and [143] to “sharing ... the fruits of the matrimonial partnership” and to “the approach of roughly equal sharing of partnership assets”. We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties’ property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at p.605 F-G and in *Miller* at [24] and [26] Lord Nicholls approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale, that in *White* the House had set too widely the general application of what was then a yardstick.

67. Even if, however, a court elects to adopt the sharing principle as its “starting point”, it is important to put that phrase in context. For it cannot, strictly, be its starting point at all. As Coleridge J. himself stated in the passage cited in paragraph 59 above, the starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in s.25(2) other than in the order there set out, a court should first consider, with whatever degree of detail is apt to the case, the matters set out in s.25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future. Irrespective of whether the assets are substantial, likely future income must always be appraised for, even in a clean break case, such appraisal may well be relevant to the division of property which best achieves the fair overall outcome. We appreciate that remarks of Baroness Hale in *Miller*, at [154], are also said to permit argument that a party’s earning capacity is itself an asset to which the other has contributed and which might to some extent be subject to the sharing principle; this seems to us an area of complexity and potential confusion which in this case it is unnecessary for us to visit.
68. In *Miller* the House unanimously identified three main principles which together inform the second stage of the enquiry, namely that of distribution: “need (generously interpreted), compensation, and sharing”, per Baroness Hale at [144]; and see, similarly, Lord Nicholls at [10] to [16]. The three principles must be applied in the light of the size and nature of all the computed resources, which are usually heavily circumscribing factors.
69. It is worthy of note that, although two of them are not expressly mentioned, each of the three distributive principles can be collected from s.25(2), or at any rate from s.25(1) and (2), of the Act and that each of the matters set out in (b) to (h) of s.25(2) can conveniently be assigned to one or another of the three of them.
70. Thus the principle of **need** requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e)).
71. The principle of **compensation** relates to prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit

of the family during the marriage, for example in sacrificing or not pursuing a career: per Lord Nicholls in *Miller* at [13], Lord Hope at [117] and Baroness Hale at [140]. But the principle goes wider than that. As long ago as 1976 this court decided that, where the marriage was short, it was relevant to consider whether a party had suffered financial disadvantage arising out of entry into it: see *S v. S* [1977] Fam 127 at 134C, albeit that the consideration was there directed to restriction rather than augmentation of the award. Equally, in respect of disadvantage arising out of exit from the marriage, s.25(2)(h) requires the court to consider any loss of possible pension rights consequent upon its dissolution. Even disadvantage of the type to which reference was made in the speeches in *Miller*, i.e. that stemming from decisions taken during the marriage, had been held in this court to be relevant before it became the driver for a principle of compensation: per Hale J (as she then was) in *SRJ v. DWJ (Financial Provision)* [1999] 2 FLR 176 at 182E and per Thorpe LJ in *Lambert v. Lambert* [2003] Fam 103 at 122G. In cases in which it arises, application of the principle of compensation is an appropriate contribution to the fair result.

72. The enquiry required by the principle of **sharing** is, as we have shown, dictated by reference to the contributions of each party to the welfare of the family (s.25(2)(f)); and, as we make clear in paragraph 85 below, the duration of the marriage (the other half of s.25(2)(d)) here falls to be considered. Also conveniently assigned to the sharing principle, no doubt dictating departure from equality, is the conduct of a party in the exceptional case in which it would be inequitable to disregard it (s.25(2)(g)). Mr Singleton argued to the judge that the husband's generation of substantial wealth was not only a special contribution on his part to the welfare of the family but conduct which it would be inequitable to disregard. We think, however, that it is as unnecessarily confusing to present a case of contribution as a positive type of conduct as it is to present a case of conduct as a negative or nil type of contribution: see *W v. W* (2001) 31 Family Law 656.
73. Then arises a difficult question: how does the court resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another? Often conflict can be reconciled by recourse to an order for periodical payments: as for example in *McFarlane*, per Baroness Hale at [154]. Ultimately, however, in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in *Miller* at [142] and [144]. At least in applying the needs principle the court will have focussed upon the needs of both parties; analogous focus on the respondent is not present in the compensation principle and we leave for another occasion the proper treatment of irreconcilable conflict between that principle and one of the others. It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail: per Lord Nicholls in *Miller* at [28] and [29] and Baroness Hale at [139].

(iii) Criticisms of the judge's approach to the exercise.

74. As we have seen, Mr Singleton suggested to the judge that his approach to identification of the award to the wife should be "incremental"; and before us his general complaint is that the judgment is flawed because its approach was not "incremental". Instead of progressively building up the total award by reference to the

factors in s.25(2), the judge, says Mr Singleton, wrongly used a “top-down” approach, took equality as his starting-point and sought to identify the discount appropriate to the husband’s special contribution.

75. In oral argument Mr Singleton has been constrained to concede that the word “incremental” is inapt. In context it implies that the court adds to the proposed award by reference to the different factors in s.25(2); such is an unhelpful, indeed unworkable, mischaracterisation of the statutory exercise. We understand Mr Singleton’s real complaint to be that the judge’s approach was not what one might call “serial”: namely that the judge failed to work through s.25(2) line by line; to arrive, by reference in particular to the husband’s special contribution, at a provisional quantified award to the wife; and then to cross-check it against the yardstick of equality.
76. There are three answers to Mr Singleton’s general complaint.
 - (a) In our view the judge adopted the very approach which Mr Singleton complains that he failed to adopt. After observing that s.25 “rules the day”, the judge serially considered all the factors there set out insofar as they were relevant, including in particular the husband’s special contribution; concluded that the wife’s assets should be increased to £48 million; noted that such amounted to just under 37% of the total assets; and concluded that such departure from equality was justified.
 - (b) Such was indeed a valid approach for the judge to adopt. But in *Miller* sharing became a principle: see paragraph 65 above. The judge would have been entitled to consider percentages other than at the tail-end of his reasoning. There are cases in which, whatever the effect to be given in a rare case to a special contribution, the result of applying the sharing principle will subsume the result of applying the principles of need and (if engaged) of compensation. In cases of very substantial matrimonial property such a result may be as immediately apparent as it is from here in these courts that the dome of St Paul’s rises higher than the steeple of St Bride’s. In such circumstances, of which this case is an example, a judge might well first consider distribution by reference to the sharing principle and then shortly refer to the other principles. In *Miller* Lord Nicholls suggested, at [29], that, in cases in which the assets were substantial, it would be “generally a convenient course” to consider sharing before needs in that the latter would be likely to be subsumed in the former. Even prior to *Miller* it often became difficult in substantial cases for the court sensibly to maintain that it should not consider percentages until it had provisionally quantified an award by reference to other processes of reasoning. For it seemed pointless to undertake an elaborate process of provisional quantification if such then had to be abandoned by reference to percentages. But, to the extent that the yardstick constrained it to approach the matter in that way, *Miller* has released the court from the constraint.
 - (c) We do not accept Mr Singleton’s argument that consideration of a “discount” from equality should play no part in the distributive exercise. Both when it was a yardstick and now that it is a principle, the concept was and is that property should be shared equally in the absence of good reason for departure from equality. A discount is nothing other than a departure from it.

77. (a) Mr Singleton levels an alternative complaint about the methodology of the judge's judgment. The judge, he says, should have proceeded as follows:-
- (i) calculate the wife's needs, say at £20 million;
 - (ii) calculate the husband's needs, say at £29 million;
 - (iii) deduct the joint needs of say £49 million from the total assets (wrongly) computed by the judge at £131 million and reach a surplus of £82 million;
 - (iv) distribute the surplus fairly between the parties, say 10%, or £8 million, to the wife and the balance to the husband; and
 - (v) thus award the wife £28 million (inclusive of her existing assets).
- (b) Mr Singleton justifies this approach, which in this court he has to establish as being the only approach properly open to the judge, by reference largely to the judgment of Mance LJ in this court in *Cowan v. Cowan* [2002] Fam 97. Mance LJ there concurred in allowing a wife's appeal by increasing her award to £4.4 million inclusive of her existing assets. In the view of two of the members of the court the proper approach was to survey the factors in s.25(2), to cross-check the result against the yardstick of equality, to note that the result instead represented a division of 38% to 62% and to conclude that in the unusual circumstances such was a proper departure from equality. Mance LJ, however, observed, at [169], that the wife's needs had been assessed at £3 million; that, if allowance for the husband's needs was made in an equivalent sum, there was a surplus of £5 million; that the proposed award gave the wife 25% of the surplus; and that such seemed fair. We note that, in his speech in *Miller*, Lord Mance did not refer to this approach.
- (c) With respect to Lord Mance, we do not agree with the suggested approach. Although there are isolated references in *Miller* to sharing "the residue" (per Lord Nicholls at [29]) and "the balance" (per Baroness Hale at [144]), we consider that, had it wished to endorse the approach suggested by Mance LJ in *Cowan*, the House would have made its view very much clearer. On the contrary the thrust of the decisions in *White* and certainly in *Miller* itself is that the court should apply the sharing principle not just to part but to all of the property; and thus that in these large cases it is probable that the sharing, whether equal or occasionally unequal, will cater automatically for needs. But we also have a grave practical objection: from the point of view of the proportionate despatch of these large cases, whether by negotiation or adjudication, a system which invited not only, as now, expensive concentration upon the value of assets but also elaborate presentations of needs – the height of one budget no doubt being said to be entirely reasonable and the height of the other entirely unreasonable – would be the worst of both worlds.

(iv) Special contribution

78. Coleridge J. postponed delivery of his judgment until after publication of the determination of the House of Lords of the appeal in *Miller*. He did so not least because the wife's concession that the husband had made a special contribution which

should lead to a departure, albeit modest, from equal division of the property was expressed to be conditional upon the ‘survival’ in *Miller* of the possibility of a special contribution for the purposes of the exercise required by s.25 of the Act.

79. It was inevitable, so it seems to us, that the notion of a special contribution should have ‘survived’ the decision in *Miller*. The statutory requirement in every case to consider the contributions which each party has made to the welfare of the family, as well as those which each is likely to make to it, would be inconsistent with a blanket rule that their past contributions to its welfare must be afforded equal weight. Nevertheless the difficulty attendant upon a comparison of their different contributions and the danger of its infection by discrimination against the home-maker led the House in *Miller* heavily to circumscribe the situations in which it would be appropriate to find that one party had made a special contribution, in the sense of a contribution by one unmatched by the other, which, for the purpose of the sharing principle, should lead to departure from equality. In this regard the House was unanimous. First it approved, at [67], [68] and [146], the decision of this court in *Lambert*, in which Thorpe LJ had ventured, at [46], “a cautious acknowledgment that special contribution remains a legitimate possibility but only in exceptional circumstances”. Then it reached for the criterion by which the court determines whether a party’s conduct is relevant to the enquiry and suggested that it should also be applied to identification of the linked and in effect obverse feature, namely the special contribution. When, by s.3 of the Matrimonial and Family Proceedings Act 1984, Parliament had recast the reference to conduct in s.25 of the Act of 1973, it had provided in s.25(2)(g) that conduct should be taken into account if it was “such that it would in the opinion of the court be inequitable to disregard it”. On one view that criterion is of fair width. In practice, however, its meaning has largely been interpreted in line with the narrow criterion for determination of the relevance of conduct set by this court prior to 1984, in particular in *Wachtel v. Wachtel* [1973] Fam 72, in which, at 90C, it approved the trial judge’s suggestion that conduct was relevant only if it was “obvious and gross”: indeed see the current re-affirmation of this criterion by Baroness Hale in *Miller* itself at [145]. It is therefore in the light of the very limited ability of a party to establish a case of conduct under s.25(2)(g) that we must have regard to the statements in *Miller* both of Baroness Hale, at [146], that contributions should be approached in much the same way as conduct; and of Lord Mance, at [164], as follows:

“[S]ection 25(2)(g) recognises the difficulty and undesirability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions – conduct and contributions are in large measure opposite sides of a coin.”

In saying that he “now” recognised the same difficulty, Lord Mance no doubt had in mind the wider room for special contributions which, as a member of this court, he had identified in *Cowan*, at [160] and [161].

80. The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident

reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue. In such cases can the amount of the wealth alone make the contribution special? Or must the focus always be upon the manner of its generation? In *Lambert Thorpe* LJ said, at [52]:

“There may be cases where the product alone justifies a conclusion of a special contribution but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish.”

In such cases, therefore, the court will no doubt have regard to the amount of the wealth; and in some cases, perhaps including the present, its amount will be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment. Often, however, he or she will need independently to establish such a quality, whether by genius in business or in some other field. Sometimes, by contrast, it will immediately be obvious that substantial wealth generated during the marriage is a windfall – the proceeds, for example, of an unanticipated sale of land for development or of an embattled take-over of a party's ailing company – which is not the product of a special contribution.

81. In *Miller* Baroness Hale said, at [146],

“Section 25(2)(f) of the 1973 Act does *not* refer to the contributions which each has made to the parties' *accumulated wealth*, but to the contributions they have made (and will continue to make) to the *welfare of the family*. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it should this be taken into account in determining their shares.”

These words have provoked lively debate upon this appeal. Like the introduction of property into a marriage at its inception (being property helpfully described by Burton J. in *FS v. JS* [2006] EWHC 2793, at [28], as “pre-matrimonial”) or the introduction into it of property received during it by inheritance or gift (being property there described by Burton J. as “extra-matrimonial”), the generation of wealth during a marriage has conventionally been taken as one obvious form of contribution to the welfare of the family. Here, however, Baroness Hale articulated a refinement, namely that the generation of wealth should not always qualify as a contribution to the welfare of the family and in particular perhaps that in excess of a certain level its generation should not so qualify. The dividing-line is no doubt elusive. But, if the present case were to be one in which, in excess of a certain level, the husband's wealth were not to qualify as the product of a contribution to the welfare of the family, how should the court treat the excess? Mr Singleton submits, albeit with diffidence, that the excess would not be susceptible of redistribution and so should all lie in the hands into which it has fallen, namely those of the husband. We reject that submission: a party's property would not fall outside the court's redistributive powers in s.s.23-25 of the Act just because it was not the product of a contribution within the

meaning of s.25(2)(f). With equal diffidence Mr Pointer submits, by contrast, that, because it is only a special contribution to the welfare of the family which justifies unequal division, the excess, not being the product of a special contribution, should fall for equal division. Such a result would in our view be almost absurd. The facts are that, before the judge, the case was accepted on both sides to be one in which, apart from £1 million which is the subject of the third subsidiary ground of appeal, all the property, notwithstanding its size, was the product of the husband's special contribution to the welfare of the family within the meaning of s.25(2)(f); and that Mr Singleton, followed reactively by Mr Pointer, now uses this difficult passage in the speech of Baroness Hale as a bandwagon on to which to jump. In our view the size of the property in the present case should not compel departure from the usual conclusion that wealth generated by a party during a marriage is the product of a contribution on his or her part to the welfare of the family.

82. Next Mr Singleton submits that, in her speech in *Miller*, Baroness Hale identified a category of cases in which property should in no way be subject to the sharing principle, notwithstanding that the principle allows in rare cases for special contributions, and that the present case falls into the category. Baroness Hale described such cases, at [150], as “non-business-partnership non-family asset cases”. In *FS v. JS* Burton J., at [29], usefully abbreviated the description to cases of “unilateral assets”. In summary Baroness Hale suggested, at [149] to [152], that within the definition of matrimonial property a distinction fell to be made between “family assets” and the fruits of a business in which both parties had substantially worked, on the one hand, and the fruits of a business in which only one party had substantially worked, i.e. unilateral assets, on the other. The suggestion was that it was property only of the former character which was subject to the sharing principle.
83. We hasten to correct a serious misapprehension at the heart of this submission. As we will show, Baroness Hale put forward the distinction between unilateral assets and other matrimonial property for use in cases in which the marriage was short. And, although *obiter* she suggested an extension of it to another situation, namely that of the dual career to which we turn in paragraph 86 below, she definitely did not commend the distinction for use in other cases. Its application in a case such as the present would be deeply discriminatory and would gravely undermine the sharing principle articulated, albeit embryonically, in *White* and emphatically developed in other parts of the speeches in *Miller* itself.
84. In *Miller* the marriage endured for less than three years. The husband had assets of about £32 million, of which £17 million was pre-matrimonial property. Ostensibly the balance of £15 million was matrimonial property; but its characterisation was complicated by the fact that it represented the value of shares in a venture which the husband joined six months after the marriage pursuant to plans made with a colleague prior to the marriage. By dismissal of the husband's appeal against dismissal of his appeal to this court, the decision of the House was to uphold the judge's award to the wife of £5 million, i.e. one third of the ostensible matrimonial property.
85. Such was the context in which the House turned to consider whether the sharing principle applied to cases in which the property had been generated during a short marriage. It was in this area that the members of the House were in substantial disagreement; and we cannot subscribe to the ingenious attempt of Burton J. in *FS v. JS*, at [30] and [31], to reconcile their differences. We suggest with respect that, while

the approach of Lord Nicholls was perhaps the more logical, the approach both of Baroness Hale, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls, at [17] to [20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in *Miller* by reference, at [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled “*The source of the assets and the length of the marriage*” Baroness Hale, at [147] to [152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at [158], her rationale for justifying departure from equality in *Miller*. Lord Mance, at [169], powerfully stressed the practical value of Baroness Hale’s approach, namely that it would often obviate the need to address the argument, sometimes called the “seed-corn” argument, raised in *Miller* itself, to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.

86. The extension of the concept of unilateral assets, suggested by Baroness Hale in *Miller*, at [153], was expressly endorsed by Lord Mance, at [170]. Although *obiter*, it clearly commands great respect. It relates to the ‘dual career’. The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined. Lord Mance offered, at [170], the following interesting rationalisation for the suggested extension:

“Once needs and compensation had been addressed, the misfortune of divorce would not of itself ... be justification for the court to disturb principles by which the parties had chosen to live their lives while married.”

Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.

87. Mindful of the postscript to the judgment of Coleridge J. to which we have referred in paragraph 62 above, we have wondered whether, in order to help courts to perceive the circumstances in which, subject to our remarks in paragraph 80 above, the generation of substantial wealth during the marriage might qualify as a special contribution, we should identify a threshold of wealth below which a court would be unlikely to conclude that it was the product of a special contribution. It is obvious that any such guideline would have to be laden with qualification so as to avoid any impermissible gloss on the court’s duty under s.25 to assess each case on its merits. Subject to that caveat, we invited counsel to make submissions upon the threshold. Both Mr Singleton and Mr Pointer were rightly tentative. Mr Singleton suggested a threshold no higher than £40 million or £50 million. Five years ago, in *Lambert*, Mr

Pointer had suggested a threshold of £10 million, in relation to which Thorpe LJ stated, at [46], that it was “futile and dangerous even to attempt to speculate on the boundaries of the exceptional”. Before us Mr Pointer suggested £30 million or £50 million.

88. Like this court in *Lambert*, we find ourselves unable to identify any figure as a guideline threshold for a special contribution of this character. It would, we consider, be dangerous for us to do so. However laden with qualification, the guideline might discourage a court from discerning special contribution in the generation of wealth below the threshold in circumstances, however rare, in which it should properly do so. The greater concern, however, is the obverse risk that it might encourage a court to discern special contribution in the generation of wealth above the threshold in circumstances in which it should not properly do so. While the law recognises the concept of a special contribution in the generation of wealth, there is no doubt that, following the decision of this court in *Lambert*, approved and developed in *Miller*, it keeps the concept in very narrow bounds. We would not wish a party’s claim to have made a special contribution to succeed by reference to something interpreted as effectively a presumption deriving from our identification of a threshold figure.
89. There has been an interesting collateral discussion as to whether, if a party makes a special contribution by the generation of wealth, as a result of which the proportions of its division with the other party under the sharing principle will be unequal, the extent to which the proportions are unequal should depend upon the size of the wealth. The greater the wealth generated by one party, submits Mr Singleton, the lower should be the proportion awarded to the other. Mr Pointer disagrees. He submits that in any event the principle will yield to the maker of the special contribution more than half of the wealth; that the greater the wealth, the greater will be the amount thus yielded; and that fairness requires no further adjustment in favour of its generator. In principle we agree with Mr Singleton. If such a contribution is special, it follows that it is unmatched; and the greater the wealth, the greater is the extent to which it is unmatched and to which it calls for an unmatched, or unequal, division under the sharing principle.
90. Although we decline to identify a threshold for the application of the principle of special contribution, we are nonetheless prepared to respond to the judge’s postscript to the extent of offering guidance on the appropriate range of percentage adjustment to be made in cases in which the court is satisfied that the principle requires departure from equality; it is necessary however to bear in mind that fair despatch of some cases may require departure even from the range which we propose. As it happens, our views on this subject are by way of endorsement and development of what in this case Coleridge J. has himself said. As we have recorded at the end of paragraph 60(d) above, the judge suggested that any adjustment for special contribution of this character should be significant as opposed to token. We agree. We find it hard to conceive that, where such a special contribution is established, the percentages of division of matrimonial property should be nearer to equality than 55% - 45%. Equally, in the course of Mr Singleton’s application to him for permission to appeal, the judge, in referring to percentages in cases of special contribution, observed “I think you need to be careful, after a very long marriage, to give a wife half of what you give the husband”. Arbitrary though it is, our instinct is the same, namely that, even in an extreme case and in the absence of some further dramatic feature unrelated

to it, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6% – 33.3%.

91. We turn to Mr Singleton's contention that the method by which the judge allowed for the husband's special contribution was flawed. It will have become apparent in paragraphs 76 and 77 above that we reject the contention. In what one might now almost call the old-fashioned way, namely in accordance with *White*, the judge considered all the factors in s.25; reached a figure; and checked it against a yardstick of percentages. In the light of *Miller* he would, as it happens, have been entitled to move at an earlier stage to consider percentages. In any event this was a rare case of special contribution by the husband's generation of wealth; and the size of the wealth which he generated and contributed to the welfare of the family compelled quite a substantial departure from equality. The judge's endorsement of a departure to 63.5% - 36.5% in part reflected his view that the award to the husband was of assets laden with greater risk. Mr Singleton's surmise is that the judge justified a discount against the wife of 3% in this respect; but the risk is not obviously demonstrated by the near seamless accretion of wealth by the husband as a result of his activities in the sphere of insurance throughout the marriage and we regard 3% as a maximum of what the judge must have had in mind. It is clear that the extent of the departure from equality very largely reflected the value placed by the judge upon the husband's special contribution. Such departure lies very near the middle of the range which we have suggested in paragraph 90 above and, in the light of the scale of his special contribution, appropriately so. Neither in its method nor in its result do we regard the judge's treatment of the husband's special contribution as vulnerable to appeal.

SECTION G: THE THREE SUBSIDIARY GROUNDS OF APPEAL

(i) Tax saved and tax payable

92. As a result of his becoming non-resident in the U.K. in January 2003 and, which is assumed, of his remaining non-resident until April 2008, the husband will save U.K. tax otherwise payable in respect both of his personal assets and of his assets in Dragon. He argued before the judge that a sum equal to the tax otherwise payable should be deducted from the amount of his personal assets and of the assets in Dragon on the basis that, in the absence of such a deduction, the wife would receive a share of assets swollen by a saving to which she had not contributed.
93. At the substantive hearing in February 2006 the husband adduced evidence from forensic accountants, namely KPMG, on various issues. KPMG put forward a calculation that the saving of tax referable to the husband's personal assets was £18 million and to the assets in Dragon was £15 million.
94. One problem was that, as a result of an oversight, KPMG's figure referable to the husband's personal assets was incorrect. The error was discovered long after the conclusion of the hearing in February 2006 and shortly after the judge's receipt of submissions on the effect of *Miller* in June 2006. By application made to the judge by telephone on 14 July 2006, namely a few days prior to the intended date for delivery of his judgment, Mr Singleton applied for permission to adduce fresh evidence from KPMG that the husband would at some stage become liable to pay U.K. tax in the sum of £11 million referable to such of his shares in Axis and in particular of his

options to purchase them as had been acquired prior to his becoming non-resident. The effect of this proposed evidence would have been both to reduce the amount of the tax saved referable to the personal assets from £18 million to £7 million and to give Mr Singleton a possibly firmer argument referable to the balance of £11 million, namely that it qualified for entry on to the balance sheet as a future liability of the husband. Mr Pointer responded that he had had no time to collect the response of the wife's forensic accountants, PricewaterhouseCoopers, to the suggested liability; and that it was too late for the evidence, including no doubt their evidence by way of response, to be adduced and debated. The judge agreed that it was too late to halt delivery of the judgment in order to enquire into the size of the liability and the time at which it might accrue; he ruled that, through the mechanism of the order for a "reverse contingent lump sum" to which we have referred in paragraph 3 above, he would require the wife to contribute to the claimed liability by repayment to the husband only following actual future payment on his part referable to it.

95. In his judgment the judge rejected the husband's argument that the tax which he had saved should be deducted from the computation of his personal assets or of those in Dragon. The argument had been based on the wife's alleged unwillingness to reside with the husband in Bermuda and thus in effect to participate with him in his non-resident status in the U.K. The judge rejected the argument on the facts: as we have explained in paragraph 20 above, he found that, acting reasonably throughout, the wife was at first reluctant to move to Bermuda, but that, by the time when she had become resigned to do so and offered to do so, the husband had decided that the marriage was at an end. Mr Singleton argues that the judge mischaracterised his case against the wife as one of conduct rather than of nil contribution. In our view his argument is not only misconceived – see paragraph 72 above – but irrelevant: for his case failed by reference to findings of fact effectively incapable of disturbance. Yet there is another reason why the appeal against the judge's treatment of the tax saved by the husband is doomed to fail: for there was of course no need for the wife to join the husband in Bermuda in order for him to save the tax. In our view it would be only if a grossly culpable refusal by the wife to take up residence in Bermuda had given rise to a tax liability that the situation would have been different.
96. The husband also appeals against the judge's treatment of his claimed liability to tax by means of the "reverse contingent lump sum". His presentation of this liability to the judge was so belated that in our view the husband is in no position to complain about the pragmatic way in which, principally in order to avoid yet further delay, the judge chose to deal with it. Indeed his preferred mechanism for causing the wife to bear part of the tax liability was arguably fairer than an immediate deduction from the balance sheet of a liability which was referable primarily to options and which would not arise until the husband's exercise of them up to eight years into the future.

(ii) Valuation of Axis instruments

97. KPMG valued the shares, options and warrants referable to Axis held by the husband personally and in Dragon in the sum of £53 million. PricewaterhouseCoopers valued them in the sum of £73 million. The judge adopted the latter sum. The husband contends that he thereby fell into error.

98. The issue between the accountants was intricate and multi-faceted; but the husband has permission to complain to this court only about a general difference in their approach.
99. The approach of KPMG was to identify the value of the instruments by reference to their “market value”, namely the likely proceeds of their immediate, orderly sale, albeit not a “fire sale”. In fact the options and the warrants were not transferable; and some of the shares were unregistered or unvested and thus also subject to inhibitions upon sale. So in that regard the exercise commended by KPMG at once became notional or, as Mr Pointer in effect submitted, doubly notional. At all events KPMG sought to calculate what a hypothetical purchaser would pay for the instruments if able to buy them subject to their existing restrictions; and they attributed to the husband and to Dragon only the sum which, at heavy discounts, such a hypothetical purchaser would pay for them.
100. The approach of PricewaterhouseCoopers, by contrast, was tailored to the profile of the husband and was said to be designed to identify the “economic value” of the instruments. They did not favour a notional marketing of non-marketable instruments. They sought to discern how, and in particular when, this husband would be likely to set about any such disposal of the instruments as in principle he had resolved to achieve. In this regard they proceeded upon an assumption that the husband had no need to realise any of the instruments immediately and that, as a rational investor, he would do so over time. They pointed for example to the shrewd retention of the shares held by the husband and by the trusts in Ace until their orderly, tax-efficient sale at his direction two and three years after his departure from it.
101. A substantial part of Mr Singleton’s challenge in this appeal to the approach of PricewaterhouseCoopers fails by virtue of the failure of his challenge to the judge’s attribution of the assets of Dragon to the husband. It is clear that, although, were the assets of Dragon not to have been attributed to the husband, the award to the wife would have been substantially smaller, it would nevertheless, even on his own proposals, have exceeded his personal liquid resources, which the judge found to amount primarily to £10 million at the Bank of New York. Thus, on the basis of his challenge to the attribution of the assets of Dragon to the husband, Mr Singleton has attacked the assumption of PricewaterhouseCoopers that, whether for the purposes of meeting the award to the wife or otherwise, the husband has had no need to realise any of the instruments in Axis immediately. In that his challenge has failed, his attack on the assumption must fail. In Dragon the husband holds £39 million in cash and in investments other than in Axis, so he has been well able to meet the judge’s award otherwise than by recourse to the sale of instruments in Axis, whether held by him personally or in Dragon.
102. In the light of the failure of a substantial part of Mr Singleton’s challenge to the approach of PricewaterhouseCoopers, we will not take long to explain why we reject the rest of it. Insofar as Mr Pointer suggests that the judge’s attribution of value to the Axis instruments was a finding of primary fact, and thus particularly hard to disturb on appeal, we disagree with him. We accept nevertheless that the question for us remains whether it was open to the judge to prefer the approach to valuation on the part of PricewaterhouseCoopers. We conclude without hesitation that it was. It contained no methodological error. On the contrary, it reflected, more than did the approach of KPMG, the need for the divorce court to adopt valuations which are

realistic and which, in particular, proceed from a premise that the present value of an asset in the hands of a party may sometimes differ both from its value in other hands and from such price as might be achieved in the event of its immediate sale.

(iii) Post-separation property

103. We turn to an argument scarcely articulated in the grounds of appeal and overlooked in Mr Singleton's substantive skeleton argument. Axis awarded a bonus of £1 million to the husband for his work during the calendar year of 2005; it was paid to him in February 2006. The judge included it in his computation of the husband's assets: see paragraph 27 above. Mr Singleton contends that the bonus was post-separation property and that therefore the judge was wrong to include it.
104. In our view the bonus was clearly to be regarded as an asset of the husband. The more difficult issue, which was not clearly isolated before the judge, is whether, because it had been generated by work done by the husband not less than 14 months after the separation and was thus probably not to be regarded as matrimonial property, the bonus was an asset which the judge should have treated differently from all the other property and of which in particular he should not have endorsed any percentage distribution to the wife, whether 36.5% or otherwise. This is a grey area which this court may need to survey upon a suitable appeal. We do not consider the present appeal suitable because, to leave its merits or demerits to one side, the issue is in any event too small to affect the outcome. In determining the amount of the lump sum to be paid to the wife, the judge elected provisionally to proceed by reference not to percentages but to a figure, namely £48 million (inclusive of her existing assets). We do not accept that, had he computed the matrimonial property to be less by £1 million than the total assets of £131 million, the judge would provisionally have awarded a different figure; nor that, in checking it against the yardstick of percentages, he would have lowered his provisional award by reference to a calculation that it represented nearer 37% than 36.5% of the matrimonial property.

SECTION H: RESULT

105. We dismiss the appeal.

POSTSCRIPT: CHANGING THE LAW

106. Section 25 of the Act was not an innovation but the consolidation of section 5 of the Matrimonial Proceedings and Property Act 1970. The 1970 Act was the companion to the Divorce Reform Act 1969. As the courts came to apply the new law, the case of *Wachtel* was seen at the time, and is still seen to be, fundamentally important. It established, amongst other things, that the acrimonious disputes as to the causes of the breakdown of marriage, which had characterised the law of divorce prior to the 1969 Act, were not to be born again in the arena of financial disputes. However the judicial decisions that were more profound and far-reaching were the subsequent decisions of this court in *O'Donnell v O'Donnell* [1976] Fam 83 and *Preston v Preston* [1982] Fam 17. They provided trial judges and practitioners with a method for the determination of those cases in which the available assets significantly exceeded the simple needs of the family. The applicant's reasonable requirements became the focus of the case, throughout its preparation and in its final determination. This method brought predictability and clarity, characteristics that were refined by a

mechanism for capitalising the applicant's future spending requirement, a mechanism inferentially sanctioned by this court in its decision in *Duxbury v Duxbury* [1987] 1 FLR 7. The emphasis on the applicant's reasonable requirements as the yardstick of the award satisfied the anxiety of judges and others that we should not be drawn into the extravagance of some American states, particularly California, where very large awards were commonplace. This judicial preference for moderation ruled essentially for a generation from the mid 1970s to the year 2000. It suited the society of its day.

107. However the amendments introduced by the Matrimonial and Family Proceedings Act 1984 did nothing to restrict the width of the judicial discretion, whilst north of the border the Family Law (Scotland) Act 1985 introduced a statutory structure for the determination of outcome that preferred clarity and certainty over the flexibility achieved by wide judicial discretion.
108. Dissatisfaction with the state of our law was augmented by extravagant interlocutory proceedings largely uncontrolled by the court. This led to the formation in 1992 of a group of specialist judges, practitioners and academics which, under the President's banner, proposed procedural reforms inspired by the Australian model with firm judicial control at all stages. The proposals had much in common with the civil justice reforms subsequently introduced by Lord Woolf.
109. In advancing its proposals the committee collaborated with government officials and the collaboration was sealed by the adoption of the committee by the Lord Chancellor. The committee thus adopted was available for consultation on issues in this specialist field. The introduction of the new rules was the subject of cautious piloting and evaluation by outside consultants before their general application to all ancillary relief applications.
110. Other issues brought to the committee concerned the enforcement of orders, routes of appeal and costs in ancillary relief. Thus the concentration of the committee was on practice and procedure rather than on primary law reform.
111. However in February 1998 the government announced an intention to reform section 25 of the Act as a high priority. The Lord Chancellor referred this major issue to the committee for consultation. Given its high priority the committee was asked to submit its recommendation by the end of July 1998. The committee was particularly invited to consider the possibility of adopting in this jurisdiction the Scottish model. Although the committee was united in rejecting the Scottish option there was a divergence of view as to the alternatives.
112. The report delivered by the committee undoubtedly influenced the proposals for reform that the government put out for public consultation in the White Paper, "Supporting Families", that autumn. The proposal was for a number of prioritised aims within an overarching objective. The government also proposed to give limited statutory force to written nuptial agreements.
113. Subsequently the government published responses to the consultation which, although few, did not discourage progress. However the enthusiasm for reform apparently died after a single season without explanation. Indeed thereafter the government showed a marked disinclination to discuss the issue and proponents of reform experienced only frustration. Legislative inertia is not unusual in the reform of family law: see Dr

Cretney, *Same Sex Relationships* O.U.P. 2006. Nevertheless he concludes that reforms are ultimately better achieved by Parliament than by the judges.

114. Was the need for reform met by the decision of the House in *White*? The decision deprived practitioners and judges of the old measure of reasonable requirements, offering instead the cross check of equality to ensure fairness and to banish discrimination.
115. Of course these innovations were well founded on profound social change, particularly in the recognition that marriage is a partnership of equals and that the role of man and woman within the marriage are commonly interchangeable. In the majority of cases the innovations resulting from *White* were timely and beneficial.
116. However a social change that was not perhaps recognised in that decision was the extent to which the origins and the volume of big money cases were shifting. Most of the big money cases pre *White* involved fortunes created by previous generations. The removal of exchange control restrictions in 1979, a policy that offered a favourable tax regime to very rich foreigners domiciled elsewhere, and a new financial era dominated by hedge-funds, private equity funds, derivative traders and sophisticated off-shore structures meant that very large fortunes were being made very quickly. These socio-economic developments coincided with a retreat from the preference of English judges for moderation. The present case well illustrates that shift. At trial Mr Pointer achieved for his client an award of £48 million. Before us he freely conceded that he could not have justified an award of more than £20 million on the application of the reasonable requirements principle. Thus, in very big money cases, the effect of the decision in *White* was to raise the aspirations of the claimant hugely. In big money cases the *White* factor has more than doubled the levels of award and it has been said by many that London has become the divorce capital of the world for aspiring wives. Whether this is a desirable result needs to be considered not only in the context of our society but also in the context of the European Union of which we are a singular Member State, in the sense that we are a common law jurisdiction amongst largely Civilian fellows and that in the determination of issues ancillary to divorce we apply the *lex fori* and decline to apply the law more applicable to the parties.
117. In the case of *Cowan* the need for legislative review in the aftermath of the case of *White* was articulated: see paragraphs 32, 41 and 58. Undoubtedly the decision in *White* did not resolve the problems faced by practitioners in advising clients or by clients in deciding upon what terms to compromise.
118. However this court adopted a cautious approach both in *Cowan* and in the later case of *Lambert*. In his submission Mr Singleton drew attention to an article by Joanna Miles in *International Journal of Law, Policy and the Family* 19 (2005) 242. He told us that he had incorporated the article in his argument for Mrs McFarlane in the House of Lords. The article criticises the earlier decision of this court in the conjoined appeals of *McFarlane* and *Parlour* [2005] Fam 171 for having declined the opportunity to identify principles underpinning the exercise of judicial discretion under the Act of 1973. The article is particularly interesting in that it demonstrates that the principles discussed in the article (needs, entitlement and compensation), were subsequently the principles identified by the House of Lords in deciding the conjoined appeals of *Miller* and *McFarlane*.

119. The discussion in the article is founded on the statutory scheme legislated in New Zealand in the Property (Relationships) Act 1976 and the Family Proceedings Act 1980, both amended in 2001. In the article's analysis of the New Zealand experience, some emphasis is placed on the difficulty of combining needs, entitlement and compensation in one scheme.
120. It remains to be seen whether the impact of the decision of *Miller* and *McFarlane* will be as great as has been the decision of *White* in very big money cases. There is no doubt but that specialist practitioners have not received the decision in *Miller* and *McFarlane* as one that introduces the benefit of predictability and improvement of the prospect of compromise: see the leader from Andrew Greensmith, National Chair of Resolution, at [2007] Fam Law 203. If this is so, it is highly unfortunate.
121. As Lord Hope pointed out in *Miller* and *McFarlane*, at [105], the report of the Law Commission on the Financial Consequences of Divorce (Law Com No. 112), in recommending flexibility over a structured statutory scheme, added "...that any future legislation dealing with the financial consequences of divorce should be subject to continuous monitoring and periodical reports to Parliament". Clearly that recommendation has not been heeded. The thrust of Lord Hope's speech is to identify the need for the reform of the Family Law (Scotland) Act 1985. Arguably the English statute, in its fundamental provisions fifteen years older, is in equal need of modernisation in the light of social and other changes as well as in the light of experience.
122. There is a limitation on the resources of even the judges of the House of Lords to conduct wide-ranging comparative studies as a prelude to establishing a new principle, or perhaps to abandoning an existing principle in what is essentially a social policy field. The Money and Property Sub-Committee of the Family Justice Council at its meeting on the 20 February 2007 agreed to approach the Law Commission with the request that the reform of section 25 be included in its future work programme and the request has since been articulated in a letter to the Chairman.
123. Should this request be acted upon, careful analysis will be required of the inter-relationship of our ancillary relief law with the law of other jurisdictions. Globalisation particularly affects the ultra-rich. They are unlikely to inhabit only one country. With a string of properties acquired for diverse purposes they are likely to be subject to the jurisdiction of at least two courts when the marriage falls apart. London is increasingly likely to be one of the jurisdictions. Now that London is regularly described in the press as the "divorce capital of the world" it is inevitable that applicants will seek to achieve a London award. If there are no international conventions applicable to the dispute there will be a *forum conveniens* battle, often at quite disproportionate cost to the parties' assets or, more importantly, the means of one of the spouses. Even if international conventions apply, expensive struggles can still escalate. Recently in this court the case of *Bentinck v Bentinck* [2007] EWCA Civ 175 demonstrated the expenditure of £330,000 in legal costs despite the fact that the jurisdictional rules of the Lugano Convention applied. Even more recently, in the case of *Moore v Moore* [2007] EWCA Civ 361, approximately £1.6 million had been expended on the wife's endeavours to achieve a London award, rather than a Marbella award, despite the application of the Regulation Brussels I.

124. Any harmonisation within the European region is particularly difficult, given that the Regulation Brussels I is restricted to claims for maintenance and the Regulation Brussels II Revised expressly excludes from its application the property consequence of divorce. In the European context this makes sense because in Civilian systems the property consequences of divorce are dealt with by marital property regimes. Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce. The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract? The White Paper, "Supporting Families", not only proposed specific reforms of section 25 but also to give statutory force to nuptial contracts. The government's subsequent abdication has not been accepted by specialist practitioners. In 2005 Resolution published a well argued report urging the government to give statutory force to nuptial contracts. The report was subsequently fully supported by the Money and Property Sub-Committee of the Family Justice Council.
125. The European Commission is also in search of progress in this difficult area. On 17 July 2006 it published its Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, including the question of jurisdiction and mutual recognition. In our jurisdiction a stakeholder group prepared a response which was subsequently considered by the North Committee but the response has been complicated by the fact that the Green Paper does not seem to fully understand our law of equitable redistribution or that we do not have a matrimonial property regime as such.
126. We would wish to lend our own weight to this call for a review of these matters by the Law Commission.