

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CICA 14 of 2010**

**BEFORE**

**The Rt Hon Sir John Chadwick, President  
The Hon Ian Forte, Justice of Appeal  
The Rt Hon Sir Anthony Campbell, Justice of Appeal**

**ON APPEAL FROM THE GRAND COURT  
Cause No D75 of 2002**

**BETWEEN**

**ROY MICHAEL McTAGGART**

**Petitioner/Appellant**

**-and-**

**MARY ELIZABETH McTAGGART**

**Respondent**

**Mr Barry Singleton QC** instructed by Mrs Karin M Thompson and Mrs G Eileen Nervik  
for the Appellant

**Mr Richard Todd QC** with **Ms Francesca Dowse** of Samson & McGrath for the  
Respondent

Hearing dates: 15, 18 and 19 April 2011

Delivered: 29 November 2011

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**JUDGMENT**

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**Sir John Chadwick, President:**

1. This is an appeal and cross-appeal from an order made on 28 June 2010 by Justice Foster QC in ancillary relief proceedings between Roy Michael McTaggart and his former wife, Mary Elizabeth McTaggart. Although the parties are no longer married to each other, it is convenient to refer to them, as did the judge, as “the Husband” and “the Wife”.

*The underlying facts*

2. The underlying facts are fully set out by the judge at paragraphs 2 to 18 of his judgment dated 30 March 2010:

“2. The Husband is almost 51 years old and the Wife is 49 years old. The Husband was born in Jamaica but raised in the Cayman Islands. The Wife came with her family from Jamaica to live in the Cayman Islands at the age of 15.

3. The parties met while at High School in Grand Cayman and then went to pursue their tertiary education together at the same university in Orlando, Florida, USA, the Husband on a scholarship from the Cayman Islands Government. Save for a couple of short breaks their relationship continued and the parties were married in Orlando on 3<sup>rd</sup> September 1982. The Husband was then 23 and the Wife 21.

4. On graduating in May 1982, the Husband then took and passed the Certified Public Accountant (CPA) exams. A year later, in May 1983, the Wife graduated with a degree in Business Administration and Management and the parties returned to Cayman to live in rented accommodation. The Husband, being committed to work for the Cayman Islands Government, went to work for the Government Treasury Department. The Wife obtained employment with Guinness Mahon Trust Company as an assistant trust officer, intending at that time to pursue a career in the financial sector. Shortly thereafter the Husband was offered and accepted employment with accountants Arthur Young & Company (now Ernst & Young). It therefore became necessary to refund his Government scholarship. The parties agreed to do this partly with a bank loan, which they repaid from their joint incomes, and partly with funds which the Wife had received from her father at the time of their marriage. The opportunities for advancement in their respective chosen careers at the time for both the Husband and the Wife as bright, university educated and committed Caymanians were clearly very good. However, like many young professional couples the started off with no significant material wealth.

5. Approximately two years later, in June 1985, the Husband moved to the Cayman office of the accountants firm which later became KPMG in the anticipation of future partnership prospects there. At about this time the parties had decided to start a family and the Wife became pregnant with the parties’ first child. She subsequently ceased employment with Guinness Mahon on maternity leave.

6. In August 1985 the parties' first child, a daughter, was born. She is now 24 years old and has graduated from university in the USA. She was until recently employed by the Wife at the equestrian centre, to which I will refer further below, but is now undertaking equestrian training in the USA for the Pan American Games, being a very accomplished rider.

7. Some 5 months after the birth the Wife returned to work. The parties agreed it would be best for their child for the Wife to be able to devote time to her rather than leaving the child all day with a helper and that the Wife should therefore work part-time. Unfortunately Guinness Mahon was unable to give her part-time work and so the Wife took a part-time job at her brother's law firm. There were no career advancement prospects for the Wife at the law firm so this was clearly a step down career-wise for her. However it was necessary for her to work as the parties needed her income.

8 In September 1986, the Husband having been advised that it would be desirable for his career advancement to gain work experience abroad, moved to work in KPMG's associated office in Orlando. This involved the family relocating and of course necessitated the Wife giving up her job. She was not legally permitted to work in the USA. The Wife was not happy about the move and did not enjoy living in Orlando where she had to spend most of her time on her own with one, and latterly two very young children, while the Husband was at work. The Wife contended, and the Husband accepted, that the move to Orlando was a 'sacrifice' by her in support of the Husband's career. After moving to Orlando the Wife became pregnant with the parties' second daughter, who is now 22 years old and in her final year at university in the USA studying accountancy.

9. After approximately 18 months living in Orlando, the parties returned to live in Grand Cayman in February 1988. At this time, with the assistance of a bank loan, a cash gift from the Wife's parents and a further loan from her brother, they purchased their first matrimonial home, a house in Lower Valley. The Husband continued with KPMG and the Wife returned to her part-time job with the same law firm and otherwise devoted her time and effort to looking after the 2 children of the marriage, the home and the domestic side of the family. 3½ years later, on 1<sup>st</sup> July 1991, the Husband became a partner at KPMG.

10. About 1 year later, the parties' third daughter was born. She is now 17 years old (she will be 18 later this year) and is at high school in Grand Cayman. It is anticipated that she too will go on to tertiary education. She usually lives with the Wife, although over the summer she lived on a full time basis with the Husband. She has a close relationship and spends her time with both parties.

11. By the early 1990's the parties were beginning to enjoy the fruits of their respective work. The Wife always had an interest in horses and is a keen rider. She acquired a horse of her own and subsequently the children were given ponies. However there was insufficient space in the yard at the house at Lower

Valley to keep horses so in about 1992/1993, in order to have somewhere suitable to keep their horses and to pursue their interest, the Wife joined with a friend to set up a small riding school on land in George Town which the Husband had inherited. A company, Equestrian Centre of Cayman Ltd (ECL) was incorporated for the purpose and the Wife took a 60% interest in ECL and her friend 40%. About 2 years later, as her earnings were no longer needed to assist in maintaining the family, the Wife ceased her part time job and devoted more of her time instead to the riding school, which gradually developed and became, and remains, a successful equestrian centre which over time acquired staff, more horses, more relevant equipment and more stabling.

12. In April 1994 the parties incorporated a local asset holding company, Tstolen Tyme Holdings Ltd (TTH Ltd), in which they have an equal interest and in which many of their assets are held. At about this time the Wife acquired the 40% interest of her partner in ECL and all the shares in ECL were then transferred to TTH Ltd. The parties accordingly became joint 100% beneficial owners of the equestrian centre through TTH Ltd.

13. After becoming a partner in KPMG over time the Husband acquired more units in the partnership thereby increasing his equity and profit share. By 1999 he had as much as 40% of the equity in the firm. His income that year was over US\$1.5m. The family's standard of living increased significantly and the parties acquired other assets and also made significant savings and investments. In 1998, with the assistance of a loan from the Wife's father, they purchased a new and larger home in Websters Estates, George Town. The following year they sold the house in Lower Valley. They also acquired 3 other parcels of real property. In 1999, the Husband who is a keen aviator, purchased his own aircraft, subsequently replaced with a newer model. In April 2001 he incorporated another holding company of which he is the sole beneficial owner, Skylane Investments Ltd (Skylane). That company owns his plane and also holds various bank accounts and deposits.

14. In June 2001 the Husband found the Wife and [Mr Gary Whittaker] in a compromising situation and it became obvious to him that the Wife was having an extra-marital affair with [Mr Whittaker]. It is not entirely clear when this commenced but the Husband began to have suspicions during 2000.

15. As a result of this the Husband immediately moved out of the matrimonial home in Websters Estates. However, thereafter the Husband was persuaded by the Wife to attempt a reconciliation and he returned to the matrimonial home some 10 or 12 weeks later. Unfortunately this attempt at reconciliation was not successful due to the Wife persisting in her relationship with [Mr Whittaker] and the Husband moved out of the matrimonial home for the second time in April 2002 and into rented accommodation.

16. On 15<sup>th</sup> May 2002 the Husband filed the petition for divorce in these proceedings on the grounds of the Wife's adultery. The grounds were not

contested by the Wife and on 10<sup>th</sup> June 2002 an order was made that the grounds of the Petition were proved and ancillary matters were adjourned into Chambers.

17. However, over the next 2 years approximately the parties made a further attempt at reconciliation and the Husband returned to reside again in the matrimonial home. Unfortunately this further attempt at reconciliation was also unsuccessful and on 8<sup>th</sup> March 2005 the Husband ceased living at the matrimonial home for good and moved back into the separate accommodation he had previously rented. The Wife continued and continues to reside in the former matrimonial home. In September 2006 the Husband purchased his own house at Canal Point where he still lives. On 19<sup>th</sup> October 2006 the Husband changed attorneys and filed a Notice of Intention to proceed with these proceedings. A year later, in October 2007, he became managing partner of KPMG.

18. Since the parties' separation the Husband has, as before, been paying for the education of their daughters and for all their maintenance costs and he agrees that he will continue to do so. He has also been paying the sum of \$14,000 per month into a bank account for the Wife's use as well as paying her credit card account, the cost of insuring and maintaining the former matrimonial home and the Wife's travel costs. The Wife has continued to operate and manage the equestrian centre."

### *Section 21 of the Matrimonial Causes Law*

3. Section 21 of the Matrimonial Causes Law provides for ancillary relief orders to be made in matrimonial proceedings:

"21. At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for –

- (a) the custody, care and control of the children of the marriage;
- (b) the disposition of matrimonial property, including the matrimonial home;
- (c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage;
- (d) varying any other settlement of matrimonial property;
- (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;
- (f) providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and
- (g) costs."

It can be seen that the section gives recognition to the concept of "matrimonial property". That concept is not defined in the Law. But it is generally understood in the sense described by Lord Nicholls of Birkenhead in *Miller v Miller, McFarlane v McFarlane*

[2006] UKHL 24, [22]; [2006] 2AC 618, 634 (“*Miller*”): that is to say, it comprises “property acquired during the marriage otherwise than by inheritance or gift”. Its distinguishing feature is that it is “the financial product of the parties’ common endeavour”.

*The lack of progress in bringing these ancillary relief proceedings to a hearing and the issues to which that has given rise.*

4. As the judge observed, these proceedings have gone on for an unfortunately long time. The petition was filed on 15 May 2002 and the grounds proved on 10 June 2002. Since then the only issue in the matrimonial proceedings has been ancillary relief. Unsurprisingly, ancillary relief was not pursued while attempts were made at reconciliation; but the proceedings were revived (for that purpose) in October 2006. By the time the issue came before the judge in February 2010 some five years had elapsed since the parties had ceased to live together. The judge expressly declined to ascribe blame for the delay in bringing the dispute to a hearing; but, as he pointed out, the effect of that delay was that “there is more in issue and the parties have inevitably become more entrenched in their respective positions”. In particular, over the five years since March 2005 substantial further income had been earned by the Husband and further assets of considerable value had accrued to or been acquired by him. There had also been a change in the basis and value of the benefits to which he was prospectively entitled on retirement from KPMG. The accumulation of post-separation assets and the change in prospective retirement benefits gave rise to questions of particular difficulty in this case.

*The agreed schedule of assets*

5. The parties, with the encouragement of the judge, were able to produce an agreed schedule of assets which identified, in separate sections, (i) “matrimonial assets” (that is to say, assets held by one or other of them at 30 September 2005) and (ii) “after acquired assets” - that is to say, assets acquired by either of them after 30 September 2005.

6. The judge explained the significance of the date chosen (30 September 2005) at paragraph 22 of his judgment. Put shortly, it was the date which had been selected, in an earlier order made by Justice Levers on 26 January 2007, as the end of the three-year period in respect of which the parties were to disclose their respective assets and income in affidavits of means. Justice Levers had, it seems, taken the view that (at the latest) the parties had finally separated in 2005; and 30 September was a convenient date in that year, being the date of KPMG's financial year-end. The judge, himself, had concluded, for reasons which he gave at paragraphs 27 to 29 of his judgment, that the date of the parties final separation was March 2005; and, on that basis and in the light of the earlier order, he found it convenient to adopt 30 September 2005 as a conventional date for the end of the marriage for the purpose of identifying matrimonial assets.
7. The schedule of assets held by the parties as at 30 September 2005 included the Husband's prospective retirement benefits under his then arrangements with KPMG. As the judge explained, at paragraph 19 of his judgment, the parties were in dispute as to whether (and, if so, to what extent), the Husband's retirement benefits should be treated as a matrimonial asset.
8. The parties were also able to ascribe values to the matrimonial assets (i) as at 2005 and (ii) as at the date of the hearing (taken to be 2009); and to the value of the after acquired assets. With some exceptions (to which I shall refer) there was agreement as to those values. Broadly, as the judge held at paragraph 21 of his judgment, the agreed value of the undisputed matrimonial assets (leaving the Husband's retirement benefits out of account) was \$9,252,567 as at 2005; and \$9,567,697 as at 2009. The value of the after acquired assets was agreed at \$7,752,561: of which \$7,684,494 had been acquired by the Husband and \$68,067 had been acquired by the Wife. On the basis of those agreed values, the aggregate value of the parties' assets (excluding the Husband's retirement benefits) as at the date of the hearing was taken at \$17,320,258.

*The parties' contentions*

9. The Husband accepted the principle of equal division in relation to the undisputed matrimonial assets; which, he contended, should be taken at 2005 values. But he submitted that each party should keep their own after acquired-property. On that basis each party would receive or retain \$4,626,283 out of the matrimonial property. And, on that basis, the overall division of the aggregate value of the parties' assets (excluding the Husband's retirement benefits) at the date of the hearing would be \$4,694,351 to the Wife and the balance, \$12,625,907, to the Husband
10. The Wife's primary position was that, in the circumstances of this case, all after-acquired assets should be treated as matrimonial property and divided equally between the parties on the basis of 2009 values. The effect would be that each would receive or retain assets to the value of \$8,660,129 (before taking account of the Husband's retirement benefits). Her secondary position was that, in any event, the Husband's after acquired assets should be taken into account and that she should receive a share in their value in order to achieve an appropriate and fair outcome overall as between the parties.
11. The Husband contended that his prospective retirement benefits should be left out of account. The Wife contended that she should have a share in the Husband's prospective retirement benefits.

*The issues before the judge*

12. The judge identified the following issues for determination:
  - (a) Should the Wife share in the Husband's after acquired assets? In particular (i) should the Husband's after acquired assets be treated as matrimonial or non-matrimonial property; and (ii), if treated as non-matrimonial property, to what extent (if at all) should the Wife share in those assets?
  - (b) Should the undisputed matrimonial property be taken into account at 2005 values or at 2009 values?
  - (c) Should the Husband's prospective retirement benefits be taken into account; and if so, how?

- (d) What provision (if any) should be made for the Wife out of, or in respect of, the Husband's continued earnings? In particular, should an order for future periodic payments be made in favour of the Wife?

13. The judge concluded (at paragraph 39 of his judgment) that section 21 of the Matrimonial Causes Law did require him to determine which assets were to be treated as matrimonial property for the purposes of paragraphs (b) and (d) of that section; although he accepted that paragraph (e) of that section plainly did enable the court to make provision for one party out of assets (belonging to the other) which were not matrimonial property. In reaching that conclusion he observed that the general practice of the courts in this jurisdiction – a practice confirmed by this Court in *Wight v Wight* (unreported 30 November 2007, CICA 6/2006) – was “to seek to categorise all of the assets in issue as either ‘matrimonial’ or ‘non-matrimonial’ and to adopt a different approach towards each of these different categories of assets, confining the application of equality to the matrimonial property”. At paragraph 41 of his judgment he said this:

“From my analysis of the authorities, the Courts here and in England have . . . as a matter of principle, usually categorised assets acquired and income earned after the date of separation as non-matrimonial property and therefore not subject to the general principle of equality applicable to matrimonial property. Furthermore, since it is, I think, generally accepted that a line has to be drawn somewhere and, although perhaps not inevitable in all circumstances, that line is usually and most conveniently drawn as at the date of separation”.

As I have said, the judge had held earlier in his judgment (at paragraph 29) that March 2005 should be taken as date of the parties' final separation. That led him to take 30 September 2005 (as a convenient date in that year) as the date for determining which assets should be treated as matrimonial property. But, nevertheless, for reasons which he explained in paragraph 45, he concluded that “the fairest approach is adopt the 2009 values for the undisputed matrimonial assets”.

14. The effect of that decision, as the judge was to explain later in his judgment (at paragraph 69(i)), was that, on an equal division of the undisputed matrimonial assets (\$9,567,697 at 2009 values), each of the Husband and the Wife would retain or receive assets to the value of \$4,783,849.

15. The judge then turned to the question: “what provision (if any) should be made for the Wife out of the Husband’s after acquired assets”. He accepted (at paragraph 46) that assets derived from income earned prior to separation or from assets which were themselves matrimonial property should, in principle, be treated as matrimonial property; but he concluded (at paragraph 49) that, while there might have been some degree of intermingling (post-separation) of matrimonial and non-matrimonial assets (which should be taken into account) it could not fairly be said (on the basis of that principle) that all of the Husband’s after acquired assets constituted matrimonial property. He considered – at length and in detail – the alternative argument advanced on behalf of the Wife: that, in the circumstances that (it was said) the ability of the Husband to acquire assets following-separation derived from and represented the product of the parties’ joint contributions throughout the marriage, those assets should be treated in the same way as undisputed matrimonial property. As he put it, at paragraph 50 of his judgment:

“It was submitted that the assets which [the Husband] has acquired since the date of the parties’ separation and, indeed, the income he has earned since then, are part of the financial continuum starting at least from the time when the parties agreed to have a family, that the Wife would forego her career and become the child-carer and home-maker to enable the Husband to focus on his career in the anticipation of partnership and financial success in the future to the financial benefit of both of them. They both worked hard to achieve this goal and they should both continue to benefit from their success. The post-separation assets accordingly constitute matrimonial assets in which, in fairness, the Wife should participate equally in the same way as she should share equally in the pre-separation assets which [are] indisputedly matrimonial property.”

But he concluded, at paragraph 52, that “the force of the argument that the Wife has contributed to the Husband’s success both past, present and future must, I think, diminish with passage of time; it cannot continue to be acknowledged, at least financially, indefinitely”.

16. The judge concluded, at paragraph 69(ii) of his judgment, that it would be appropriate and fair to deem 30% of the aggregate value of the after acquired assets specified in the Amended Agreed Schedule (\$7,752,561) to be matrimonial property; and to divide that 30% share (\$2,325,768.30) equally between the Husband and the Wife. He reached that view:

“ . . . Having regard to all of the circumstances including, but not confined to, the length of the marriage, the Wife’s contribution in the respects outlined and the equity of her continuing to share to an extent in the product of the parties’ joint endeavours, together with a degree of uncertainty on my part as to the extent to which all of such assets are properly to be considered non-matrimonial, as well as the length of time since the date of the parties’ separation, and the extent to which such assets may represent the product of the Husband’s sole efforts . . . ”

The effect of that decision was that the Wife would receive or retain after acquired assets specified in the Amended Agreed Schedule to the value of \$1,162,884.15. Taken together with her equal share in the undisputed matrimonial assets, the Wife’s share of the parties’ assets as at the date of the hearing (excluding the Husband’s retirement benefits) would be \$5,946,733. The comparable figure for the Husband’s share of the aggregate value of the parties’ assets would be \$11,373,525.

17. The judge thought the disparity between those figures was unacceptable. He went on (at paragraph 69(ii)) to say this:

“Clearly this is a significant disparity and I must consider in the exercise of my discretion, whether, having regard to the overall yardstick of equity and fairness to both parties in all the circumstances this is an appropriate result. I have endeavoured to balance on the one hand, the nature and consequences of the Wife’s contribution over a relatively lengthy marriage and the extent to which it can be fairly said that she has played a part in the Husband’s financial ability to acquire his non-matrimonial property over the past 5 years such that it should be recognized in financial terms against, on the other hand, the Husband’s own efforts since the parties’ separation in acquiring non-matrimonial property of that value, the length of time since the date of separation and the dates relative thereto on which the non-matrimonial property was acquired by the Husband, as well as the Husband’s relatively generous continuing support of the Wife to date. In my opinion on balance, it would be fair and appropriate for the Husband to make a further lump sum payment to the Wife of \$1,000,000 out of his own non-matrimonial property. I think that a payment of such an amount to the Wife by the Husband out of his own property strikes the right balance between the parties in light of all the circumstance I have outlined and discussed above.”

As the judge explained, the effect of such a payment would be that the Wife would retain or receive overall assets or property to a total value of approximately \$6,946,733 and the Husband would retain or receive overall assets or property to a total value of approximately \$10,373,525. He said that he was satisfied that that was a fair result.

18. As I have said, the judge reached that view without having taken account of the Husband's potential retirement benefits. He had described the circumstances in which the Husband would become entitled to retirement benefits at paragraphs 55 and 56 of his judgment:

“55. As was common in professional partnerships previously, until October 2006 KPMG was governed by partnership agreements providing for a buy-in/buy-out type of arrangement whereby on retirement a retiring equity partner's units in the firm (each of which represented the right to a proportion of the profits) were required to be re-purchased by the remaining partners. Equally new partners had to purchase units from existing partners, in each case at a price based upon the profitability of the firm in the year or years immediately preceding the retirement or admission to partnership. Between 1991 and 1999 the Husband purchased units in the firm from other partners. Between 1999 and 2005 the Husband sold units to incoming partners. As a result the Husband's overall equity share in the partnership ranged from his greatest share of 40% in 1999 to 25% by February 2006. Nonetheless, as a result of the overall growth in profitability of the firm his actual earnings continued to increase.

56. On 1 October 2006, some 19 months after the date of the parties' separation, the partners of the firm entered into a new partnership agreement (“the 2006 Partnership Agreement”). This provides that a partner's remuneration is to consist of a base salary together with a profit share made up of a number of different elements, not only seniority, but also performance and leadership factors. The 2006 Partnership Agreement includes a provision for payment on retirement to the 4 equity partners of the previous partnership, including the Husband. The relevant provision states:

‘On the retirement or death of . . . , the retiring partner or his estate shall be entitled to receive from the Firm four annual payments to be made in each November following the first full partnership year after his retirement or death in an amount equal to one half of his total remuneration received in the last full partnership year preceding his death or retirement’.

The judge pointed out (at paragraph 57 of his judgment) that the amount of the payments which the Husband would actually receive under the 2006 Partnership Agreement following his retirement was unknown at the date of the hearing; because it was not known when he would retire, or what his total remuneration would have been in the last full partnership year preceding his retirement.

19. After setting out the rival contentions of the parties, he concluded (at paragraph 60) that it could not fairly be said that the entirety of the Husband's retirement benefits under the 2006 Partnership Agreement were acquired or earned during the subsistence of the parties' married

life together; and so those retirements benefits (as a whole) were not to be treated as part of the matrimonial assets. But, on the other hand, the retirement benefits to which the Husband was entitled under the 2006 Partnership Agreement had their origins in the earlier partnership agreement; and so could be related back to a time when the parties were still living together. The Wife's contribution to potential retirement benefits which could be related back to that time was acknowledged. He said this:

“Overall I consider that it would be consistent, appropriate and fair to treat the Retirement Benefit generally in a similar way conceptually as the other post-separation assets, as I have concluded below, taking into account their specific factual differences, including in this instance the length of time before the Retirement Provision will probably be payable and the basis on which the amount thereof is to be calculated.”

20. In the light of that observation – and having in mind the manner in which the judge was to deal with the other post-separation assets (at paragraph 69(ii) of his judgment) - it might, perhaps, have been expected that he would place a value on the Husband's potential retirement benefits as at 2009; deem 30% of that value to be matrimonial property; and divide that 30% share equally between the Husband and the Wife. But he did not take that course. He reached the view that the Husband should assign to the Wife 20% of his retirement benefits as and when those benefits might become payable under the 2006 Partnership Agreement. He explained his conclusion at paragraph 69(iii) of his judgment:

“With regard to the Husband's Retirement Provision, this, as I have already pointed out, will not mature and the value will not be known until the time of his eventual retirement, which is likely to be at least 9 years from now, some 14 years from the date of the parties' separation, and possibly even later than that. In the further exercise of my discretion and again having regard to all of the circumstances already outlined, I consider that it would be appropriate for the Wife to have a 20% share of the eventual amount of the Retirement Provision. I also think it fair that the Wife should, like the Husband, share the risk consequent on the amount of the Retirement Provision being dependent on the future fortunes of the Husband's firm. For that reason, I do not think it appropriate to endeavour to assess the value of the Retirement Provision to the Wife if paid at this stage. In my judgment the most equitable approach is for the Husband to now grant an assignment, effective at the date of his retirement, to the Wife of 20% of the value of the Retirement Provision as provided for by and determined in accordance with the 2006 Partnership Agreement and payable to

her in proportionate installments at the same times as the Retirement Provision installments are payable to the Husband. . . .”

21. The remaining issue for the judge was what provision (if any) should be made for the Wife out of, or in respect of, the Husband’s continued earnings. And, if provision should be made to compensate her for the fact that, with the end of the marriage, she would no longer share in the fruits of the Husbands’ very substantial earning power, should that provision take the form of a capital payment; or should an order be made for periodic payments (as she contended). At paragraph 62 of his judgment the judge acknowledged the force in the submission, advanced on behalf of the Wife, that “it is not consistent with equity and fairness that [she] should have to have recourse to her share of the capital in order to maintain her standard of living whereas the Husband, in light of his very substantial continued earnings, would not need to do so”. He referred to the observations of Baroness Hale of Richmond in *Miller (supra)*, [154]; 665), and to passages in the judgment of Mr Justice Bodey (in the High Court of England and Wales) in *CR v CR* [2007] EWHC 3334 (Fam), [21(iii)], [95]; [2008] 1 FLR 323. At paragraph 65 he examined the earnings of the Husband; and the respective needs and expenditure of both parties:

“In the present case the Husband’s average earnings over the past 2 years have been US\$3,044,028 per annum. He gave evidence, which I accept, that this figure is likely to decrease by as much as 30% this year and probably next year too due to a reduction in the firm’s profits consequent upon a slowdown in business and an increase in the cost of doing business. The consequence of a 30% decrease in his earnings would be to lower his average annual income to around US\$2,130,800. This is nevertheless clearly considerably more than necessary to meet his own needs, which at one point in his evidence he assessed at approximately \$150,000 per annum, (although he subsequently revised that figure upwards to a considerable extent), not including the costs which he incurs in respect of the support of the 2 younger daughters and the costs he has been incurring to date in respect of the Wife. On the assumption that on divorce the Wife would assume responsibility herself for the costs which the Husband is currently meeting she assessed her likely expenditure at approximately \$22,000 per month. . . .”

At paragraph 66 he rejected the submission, advanced on behalf of the Husband, that the Wife received (or could receive) a significant income from the equestrian centre which she ran as a business. He said that he was prepared to accept that the Wife made little or no money for herself from the equestrian centre and that it was run, as she said, on a “break

even” basis. He was prepared to accept, also, that it would not be reasonable to expect her to become a significant income earner herself to any material extent, whether through expansion of the equestrian centre or through other employment.

22. The judge expressed his conclusion on this remaining issue at paragraph 69(iv) of his judgment:

“With regard to the Husband’s future earnings and the Wife’s application for a periodic payment of \$22,000 per month, there is, as I have already discussed, clearly a very wide disparity between the parties’ respective actual and potential earning power. The Wife earns little or nothing and, should in my view be treated as having no significant actual or potential earning power at any time in the foreseeable future. Even on the basis of the reduction in his profit share which the Husband anticipates, he will probably continue to earn in the region of US\$2m (\$1,690,000) per annum or approximately \$136,000 per month. Although in light of my decisions above with regard to the pre-separation and post-separation matrimonial property the Wife will retain or receive substantial capital, the Husband will retain and receive substantially more than her and in addition he will continue to have a considerable income. I remain sympathetic to the argument that there is an inherent unfairness, following a marriage like this and in financial circumstances such as these, about a situation in which the Wife, having no earnings of her own, would have to live off her share of capital, whereas the Husband, having the significant future earning power which he has, would not have to do so. In my opinion, the most appropriate and fairest way to address this would be for the Husband to make monthly payments to the Wife by way of income to her so as to enable her to live more or less in the manner to which she has been accustomed for some time without the need for recourse to her share of the capital. In view of the level of the Husband’s income a reasonable periodic payment would not materially affect his own ability to live to the standard to which he too has become accustomed. I have assumed that the Husband will continue to pay for the education and maintenance of the 2 younger daughters as he has agreed, although the level of that obligation will reduce over time and eventually expire, possibly within the next 5 years or so. I also assume that on divorce the Husband will cease to make the direct payments in respect of the Wife’s credit cards and travel expenses and in respect of the insurance and maintenance of the former matrimonial home. On that basis it seems to me that a monthly payment to the Wife of \$18,000 per month (\$216,000 per annum) would be an appropriate sum to enable the Wife to live to the standard which she has and does, without having to depend to an unfair extent on her share of capital to meet her living costs. Such a monthly payment seems to me equitable in light of the disparity between the parties’ respective earning power. Subject to any material change in the parties’ circumstances such periodic payments should continue for an indefinite period. . . .”

23. In reaching that conclusion the judge acknowledged that it did not allow for a clean break (financially) between the parties; but, as he said, neither did his conclusion in relation the Husband's retirement benefits. He explained that:

“ . . . weighing all the factors I nonetheless consider that this is the most appropriate solution and fairest to both parties. I do not think that an attempt to compensate the Wife with respect to an inability to participate in the Husband's future earnings by way of an additional lump sum or by way of a limited periodic payment is the most appropriate approach in this case.”

*The order of 28 June 2010*

24. The judge gave effect to his conclusions by the order which he made on 28 June 2010. Paragraph 1 of that order provided for each party to retain or transfer all of his or her respective ownership of or interest in the assets and liabilities specified in, and in accordance with the terms of, the schedule annexed thereto. Paragraph 5 required the Husband to pay to the Wife \$3,912,789; paragraph 6 required him to pay to her \$18,000 on the first day of each month; and paragraph 7 required the execution of a deed assigning 20% of the Husband's future benefits under the 2006 Partnership Agreement (or any successor agreement). It can be seen from the schedule annexed to the order that the amount to be paid by the Husband under paragraph 5 of the order (\$3,912,789) represents the difference between the value of those assets which the Wife was to retain (or which were to be transferred to her in accordance with the schedule) and the aggregate sum (\$6,946,733) which, as a result of the judge's decisions, she was to receive or retain out of the undisputed matrimonial assets and the after acquired assets.

*The Husband's appeal*

25. The Husband appeals to this Court from the order of 28 June 2010. He relies upon the grounds of appeal contained in a document filed on 16 August 2010. Those grounds are extensive and elaborate; but it is, I think, sufficient to summarise them follows:

- (1) Having decided that the date of final separation was March 2005, the judge erred in taking the matrimonial property into account at its 2009 values.
- (2) The judge erred in treating a proportion of the value of the assets acquired by the Husband after 2005 (“the Husband's post-separation assets”) as matrimonial property.

- (3) The judge erred in treating the whole amount of the Husband's undrawn KPMG profits in 2009 as matrimonial property.
- (4) The judge erred in holding that the Wife could not be expected to earn any income from the company Equestrian Centre Limited.
- (5) The judge erred in failing to give effect to the need, in principle, to achieve a clean financial break between the parties, in circumstances in which there were ample assets available to achieve that.
- (6) The judge erred in making an order for periodic payments.
- (7) In the alternative, the amount of the periodic payments ordered was excessive.
- (8) The judge erred in awarding the Wife an additional \$1 million from the Husband's post-separation assets.
- (9) The judge erred in awarding the Wife a proportionate share of the Husband's future retirement benefits (as and when those became payable under the 2006 Partnership Agreement).
- (10) The judge erred in failing to give credit to the Husband for the \$82,000 which he had already paid on account of the Wife's legal costs.

26. By his notice of appeal the Husband sought an order which set aside paragraphs 6 and 7 of the order of 28 June 2010; reduced from \$3,912,789 to \$1,651,334 the amount to be paid by the Husband under paragraph 5 of that order; and varied paragraph 9 so as to require the Wife to give credit for the \$82,000 already paid by the Husband on account of her legal costs. In addition, the Husband would pay to the Wife \$1,177,429 in satisfaction of whatever interest she might otherwise be awarded in respect of his potential retirement benefits. It is said that the intended effect of the order sought by the Husband on his appeal would be that the Wife would receive or retain out of the matrimonial property assets to the value of \$6.5 million (less \$82,000); that she would receive the further sum of \$1,177,429 in respect of his benefits; and that there would be a financial clean break. On those figures the aggregate award would be \$7,595,429.

27. Those figures are put forward in the skeleton argument lodged on behalf of the Husband (at paragraph 21); although the figure mentioned at paragraph 138 (\$7,535,429) is \$60,000

less. [The difference is attributable to taking the Wife's interest in the Husband's prospective retirement benefits at \$1,117,429 instead of \$1,177,429]. Following oral argument the Husband's proposals were revised: the revised aggregate figure was \$7,174,298. The basis for that figure appears in an "Appellant's supplement to skeleton" which was provided to the Court in the course of counsel's closing submissions. The elements in that (revised) figure are (i) "one half of all the matrimonial property to 2005, plus passive growth to 2009" (estimated at \$4,982,522); (ii) a "run-off" of \$1,014,347; and (iii) 50% of the value of the Husband's retirement benefits as at 2005 (\$1,177,429).

28. In broad terms, therefore, the Husband seeks to be relieved both from the order for periodic payments and from the need to assign a proportion of his future retirement benefits; and, in return, accepts that the Wife should have a larger (but, on the revised proposals, not much larger) share of the combined assets. I shall need to consider in some detail the reasoning which underlies the Husband's proposals in the course of this judgment; but the underlying premise is stated, succinctly, at paragraph 39 of the Husband's skeleton argument. It is said there that:

"The overarching defect in the Judge's approach to the case was his failure to appreciate this was clearly a clean break case (Ground 5). He made various other errors with which we deal below but this failure undermines the whole structure of his Judgment and Order."

#### *The Wife's cross-appeal*

29. By Notice of Cross-Appeal the Wife challenges the order of 28 June 2010 in two respects. First, it is said that the judge should have directed the parties (under paragraph 7 of that order) to execute a deed assigning 50% (rather than 20%) of the Husband's retirement benefits under the 2006 Partnership Agreement (or any successor agreement). Second, it is said that the judge should have ordered the Husband to pay the whole of the Wife's costs of the proceedings. In her grounds of appeal, dated and filed on 11 August 2010, the Wife contends, in relation to the first of those challenges, that the judge "failed to give sufficient weight to the fact that the rights under the KPMG agreement had accrued during the currency of the marriage, they represented part of the marital acquest and therefore should not have departed from the principle of equal sharing." In relation to costs, it is contended

that the judge failed to give sufficient weight to the parties' competing *Calderbank* proposals.

*The applicable principles*

30. As I have said, the power of the court to order ancillary relief (in the form of financial provision) is conferred, in this jurisdiction, by section 21 of the Matrimonial Causes Law; and, in particular, by paragraphs (b) to (f) of that section:

- “ . . . the Court shall, as appropriate make orders for –
- (a) . . . ;
  - (b) the disposition of matrimonial property, including the matrimonial home;
  - (c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage;
  - (d) varying any other settlement of the matrimonial property;
  - (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;
  - (f) providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and
  - (g) . . . ”

The power conferred by section 21 of the Law must be read in conjunction with the direction in section 19 of the Law that:

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

Those statutory provisions must, of course, provide the starting point for an examination of the principles applicable in this jurisdiction.

31. There has been no suggestion in the present case that the best interests of the children require that the proposals made by one party for the division of the available assets should be preferred to the proposals made by the other; nor that there is, or was, a need for the court to make any order providing for periodic payments to be made by either party for the benefit of the children. In this case (as in others where there are children of the marriage) the best interests of the children are paramount – section 19 of the Law so provides – but, in this case, that is not a factor which assists the Court in the determination of this appeal.

32. Nor has there been any suggestion, in the present case, that the parties entered into any nuptial or pre-nuptial settlement which should be varied under the power conferred by paragraph (c) of section 21; or that there is any other settlement of matrimonial property in relation to which the power conferred by paragraph (d) could be exercised. For the purposes of this appeal, the Court can proceed on the basis that the powers which the judge could exercise in this case were those conferred by paragraphs (b), (e) and (f) of the section. In the exercise of those powers he could make an order for the disposition of matrimonial property: he could make an order for financial provision out of the property of one party (on the facts in this case, out of the property of the Husband) for the benefit of the other (the Wife); and he could make an order that periodic payments be made by one party (again, on the facts in this case, the Husband) for the benefit of the other.
33. It is, I think, important to keep in mind – when considering observations made by judges in England and Wales in the numerous cases to which reference is invariably (and properly) made when what are commonly described as “big money cases” come before the courts in this jurisdiction – that the underlying statutory provisions here, although similar to, are not the same as, those in England and Wales. Section 23(1) of the Matrimonial Causes Act 1973 provides that, on granting a degree of divorce or at any time thereafter, the court may make (so far as material in the present context): “(a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order; (b) . . . ; (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified”. Section 24(1) provides that the court may make a property adjustment order, that is to say (*inter alia*): “(a) an order that a party to the marriage shall transfer to the other party . . . property to which the first-mentioned party is entitled . . . ;”.
34. The 1973 Act does not (in terms) require the court to give separate consideration to the question: “what order (if any) should be made for the disposition of matrimonial property?”: although, in practice, the court will usually do so. Section 21 of the Matrimonial Causes Law, on the other hand, plainly does require the court to give separate consideration to that question. The court must do so in order to decide what order (if any) it is appropriate to make under paragraph (b) of the section. The judge was correct, in my view, to reach the

conclusion (at paragraph 39 of his judgment) that he did need to determine which of the parties' assets were to be treated as matrimonial property for the purposes of section 21 of the Law and which were not.

35. The need to determine which of the parties' assets are to be treated as matrimonial property invites the question: as at what date is that determination to be made? As I have said, "matrimonial property" is not a concept which is defined in the Law. But, it is, I think, generally accepted that – as Lord Nicholls observed in *Miller* – its distinguishing feature is that it is "the financial product of the parties' common endeavour". On that basis, it may be expected that a line can be drawn at the date of final separation: property acquired prior to that date (at least if acquired during the course of the marriage) is likely to be the product of common endeavour: property acquired after that date (unless the fruits of pre-existing property) is unlikely to be the product of common endeavour.
36. It is, of course, self-evident that an order under paragraph (b) of section 21 of the Law can be made only in relation to property which exists – and which is in the ownership or under the control of one or other (or both) of the parties – at the date when the order is made. It is necessary, therefore, first to identify those assets ("the available assets") which are in the ownership or under the control of the parties at the date of the hearing; and then to identify which of those available assets are matrimonial property and so capable of being the subject of an order under section 21(b). There may be cases (of which, as I shall explain, the present provides an example in relation to the Husband's potential retirement benefits) where an asset which did exist at the date of final separation does not exist – or does not exist in the same form – at the date of the hearing. In such cases it will be necessary to consider whether the former asset can be traced into an after acquired asset which can itself be treated (in whole or in part) as matrimonial property; and, if not, whether some other order (say, under paragraph (e) of section 21) should be made to reflect the fact that the former asset has ceased to exist.
37. The power conferred under paragraph (b) of section 21 of the Law is a power "to make an order for the disposition of matrimonial property". There is no requirement under the Law that the disposition should give effect to an equal division of the matrimonial property as

between the parties; and there is no invariable rule that the power should be exercised in a manner which achieves that effect. The requirement – imposed by section 19 of the Law – is that, in exercising the power, the court shall have regard to “the responsibilities, needs, financial and other resources, actual or potential earning power and the deserts of the parties.” It is plainly open to the court – if, having regard to those factors, it thinks it appropriate to do so – to make an order which effects an unequal division of the matrimonial property as between the parties. The order made in *Wight v Wight* [2006] CLIR 1 – and upheld in this Court – provides an example of such a case. In *Miller* (*supra*, [16]; 633) Lord Nicholls observed that “The yardstick of equality is to be applied as an aid, not a rule”. But, as Lord Nicholls had pointed out in *White v White* [2001] AC 595, 605G – in a passage expressly adopted by Lord Cooke of Thorndon (*ibid*, 615F) – “As a general guide, equality should be departed from only if, and to the extent that, there is a good reason for doing so”.

38. If matrimonial property is to be divided between the parties – whether equally or in some other proportions – there will be a need (save in exceptional cases) for the assets comprising that property to be valued. The need to value invites the question: at what date should those assets be valued? The answer, as it seems to me, is that, in principle, those assets must be valued as at the date that they are allocated to one party or the other for the purposes of the order that is made under paragraph (b) of section 21. It is important to keep in mind that an order under that paragraph is an order for the disposition of matrimonial property; not an order for payment of a sum of money calculated by reference to the value of matrimonial property. Some property – for example, money on deposit, or stocks and shares – will be capable of being divided into *aliquot* shares: other property – for example, the matrimonial home, plots of land or chattels – will have to be allocated *in specie* to the share of one party or the other. If the decision is that the matrimonial property should be divided equally between the parties, then, in principle, valuations which need to be made for the purpose of achieving that equal division should be made at the time of the allocation which gives effect to that decision.

39. As I have said, section 19 of the Law requires that, in exercising the powers under section 21, the court is to have regard to “the responsibilities, needs, financial and other resources, actual

or potential earning power and the deserts of the parties”. For convenience, I will refer to those matters as “the section 19 factors”. In this context, also, the underlying statutory provisions in this jurisdiction, although similar, are not the same as those in England and Wales. Section 25(1) and (2) of the Matrimonial Causes Act 1973, as amended by the Matrimonial and Family Proceedings Act 1984, requires the court, when exercising the powers under sections 23 and 24 of that Act, to have regard to all the circumstances of the case; and, in particular, to the following matters: “(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability of either of the parties to the marriage; (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family; (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; (h) in the case of proceedings for divorce . . . , the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring”. It has not been suggested that, despite the more extensive list of matters to which the United Kingdom statute requires the court to have regard when addressing questions of ancillary relief (in the financial sense), the approach which should be adopted in this jurisdiction in having regard to the section 19 factors differs materially from that which has been adopted by the courts in England and Wales. Indeed, there are observations in this Court – in *Doak v Doak and Riley* [2002] CILR 224, [17], [21], [22]; in *Wight v Wight* (*supra*, at paragraph 62); and in *Wood v Wood* [2009] CILR 255, [12] – which support the view that the approach should be the same.

40. We were referred by the parties, both in the skeleton arguments lodged on their behalf and in the oral submissions made in the course of the hearing, to a plethora of judicial decisions in England and Wales; and to a few decisions in this jurisdiction. Observations made by experienced judges are, of course, of assistance to an understanding as to the application of the section 19 factors. But it must be kept in mind that most cases in this field are decided on their own facts; and there is a risk that extensive citation may confuse rather than illuminate. It is not, I think, necessary to look further than the decision of the House of Lords in *Miller (supra)* – and, in particular, the speeches of Lord Nicholls and Baroness Hale – in order to identify the principles. Leaving aside, in this context, the best interests of the children (which, as I have said, are paramount), there are three strands: need, compensation and sharing – (*ibid*, *per* Lord Nicholls, [10] to [16]; *per* Baroness Hale, [138] to 143)). The ultimate objective, as Baroness Hale explained (*ibid*, [144]) is to give each party an equal start on the road to independent living. She said this:

“Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. 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. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.”

41. Two of those three strands – need and sharing – require little, if any, elaboration. But it is, I think, necessary to say something of the third: compensation. Lord Nicholls explained the concept in these terms (*Miller, ibid*, [13] to [15]):

“Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often

the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.

When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176, 182 is an example where this was recognised expressly.

Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.”

Baroness Hale said this (*ibid*, [140]):

“A second rationale, which is closely related to need, is *compensation for relationship-generated disadvantage*. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage.”

42. In this jurisdiction a court will need to consider whether – having proper regard to the section 19 factors – an order under paragraph (b) of section 21 of the Law for the disposition of the matrimonial property will make appropriate provision for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under paragraph (e) of section 21: that is to say, an order making financial provision for that party out of the property of the other party.
43. It seems to me reasonably clear (and I would so hold) that, if satisfied that an order under paragraph (b) of section 21 of the Law (or the combination of orders under paragraphs (b) and (e) of that section) would make appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing), the court should not (without good reason) make an order for periodic payments under paragraph (f) of that section. To make an order for periodic payments – in circumstances where such an order is unnecessary because

appropriate provision can be made by the disposition of matrimonial property (under paragraph (b)) or by a capital adjustment from the separate property of the other party (under paragraph (e)) – would be inconsistent with the principle of “clean break” to which Lord Scarman referred in *Minton v Minton* [1979] AC 593, 608:

“There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other – of equal importance – is the principle of ‘the clean break’. The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not over-shadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order . . .”.

44. The principle of the “clean break” was given statutory recognition in England and Wales when, some five years after the decision in *Minton*, section 25A was introduced into the Matrimonial Causes Act 1973 by the Matrimonial and Family and Proceedings Act 1984. Section 25A(1) of the 1973 Act provides that, where on or after the grant of a decree of divorce the court decides to exercise its powers under sections 23(1)(a), (b) or (c) or 24 of that Act in favour of a party to the marriage, the court must consider whether it would be appropriate “so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable”. As Baroness Hale observed (*ibid*, [135]) that:

“Section 25(A) is a powerful encouragement towards securing the court's objective by way of lump sum and capital adjustment (which now include pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world evident between formerly married people. It is also an illogical consequence of the retreat from the principle of life long obligations. Independent finances and self-sufficiency are the aims.”

She emphasised (*ibid*, [134]) that a clean break was not to be achieved at the expense of a fair result; but went on to say (*ibid*, [144]) that the ultimate objective was to give each party an equal start on the road to independent living. At [154] she said this:

“If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision.”

45. There is no provision in the Matrimonial Causes Law in terms similar to those of section 25A(1) of the United Kingdom Act. But it must be kept in mind that the principle of the “clean break” in the law of England and Wales pre-dates the introduction of section 25A. In *Miller (supra, [35])* Lord Nicholls referred to the observations of Lord Scarman in *Minton* as “the modern approach”; and to the “undesirability of . . . continuing ties” as being self-evident.

*Wight v Wight*

46. The leading authority in this jurisdiction as to the approach to be adopted to ancillary relief in what are commonly described as “big money” cases is the decision of this Court in *Wight v Wight* (unreported 30 November 2007, CICA 6/2006). The underlying facts in that case were, in many respects, similar to those in the present case. The parties were of much the same age as the Husband and the Wife; they had been married for some 22 years; the wife gave up paid employment to bring up a family of four children; the husband was successful in his profession (by the time of the separation he, also, was the managing partner in the Cayman Islands of a leading international accountancy firm); and the family enjoyed the fruits of that success. The aggregate value of the parties’ assets (listed by the judge (Justice Levers) at paragraphs 61 to 70 of her judgment, reported at [2006] CILR, 1, 27-30) was US\$21,129,547; out of which assets to the value of US\$17,107,097 were held to be matrimonial property. The judge had awarded the wife a lump sum in full settlement of all her claims in an amount which represented 45% of the value of the matrimonial property.

47. On appeal to this Court the wife contended (i) that the judge had erred in failing to treat certain of the available assets as matrimonial property; (ii) that the judge ought to have divided the matrimonial property equally between the parties; (iii) that the judge erred in finding that the husband had made a special contribution (which she took into account in dividing the matrimonial property in unequal shares); (iv) that the judge ought to have considered the husband’s substantial earnings in reaching her conclusion as to what would be

the appropriate share of available assets to award to the wife; and (v) that a portion of the husband's substantial post-separation earnings should be regarded as matrimonial property.

48. The principal judgment (with which the other members of the Court, Justice Forte, Justice of Appeal, and Justice Mottley, Justice of Appeal, agreed) was delivered by the President, Justice Zacca. At paragraph 13 of his judgment he drew attention to sections 19 and 21 of the Matrimonial Causes Law. He drew attention, also, to the rather different terms in which the powers of the Courts of England and Wales are conferred by section 25(1) and (2) of the Matrimonial Causes Act 1973 (as amended in 1984). At paragraph 15 of his judgment he set out the passage in her judgment in which the judge had addressed what she saw as the importance, in this jurisdiction, of identifying the matrimonial property. She had defined that concept in these terms ([2006] CILR 1, [55]):

“Property that was acquired during the marriage or if it was before the marriage put into the melting pot of the marriage and all other assets directly traceable to the income earned during the marriage.”

And she had then gone on to say this (*ibid*, [57]):

“Unless the claiming spouse can trace the assets after the marriage directly to the earning during the marriage in my judgment it is unfair to say that she has an equal claim to that property as the partner acquired that property from income earned after the marriage. In this jurisdiction there is authority to say that the date of separation is the cut off point.”

49. Justice Zacca pointed out that Mr Mostyn QC (as he then was), counsel for the wife, had submitted that the judge was wrong to think that there was authority in this jurisdiction for the proposition that property acquired from the husband's post-separation earnings was not to be treated as matrimonial property; and so was not, *prima facie*, subject to the principle of equal division. He recorded counsel's submissions that “property acquired during separation prior to the marriage being dissolved should be regarded as matrimonial property” and that “the wife should be awarded a share of the husband's substantial earnings after separation, for a period of at least three years (until 2005) and treated as matrimonial property”. He set out the passages in the speeches of Lord Nicholls in *White* (*supra*, 610) and *Miller* (*supra*, [22] – [26]; 634-635) to which Mr Mostyn QC had drawn the Court's attention. But he found little assistance in those passages in relation to the question whether property acquired after

separation, or the husband's earnings after separation, should be regarded as matrimonial property. As he said, "Lord Nicholls specifically referred to property brought into the marriage or property acquired as a gift or inherited". Ironically, perhaps, he found more assistance, I think, in observations of Mr Mostyn QC, when sitting as a Deputy Judge of the Family Division of the High Court of England and Wales, in *Rossi v Rossi* [2006] 3 FCR 271, which he set out at paragraph 22 of his judgment:

"[13] Thus it has always been the case that, where a party has by virtue of his own industry created further assets after separation, such sole unmatched contribution should be recognised and reflected by the court in its award. On the other hand, if a matrimonial asset has simply increased in value during the period of separation as a result of passive inflationary economic growth (such as the increase in the value of a house) then it would seem obvious that such growth is an accrual to the original matrimonial property.

...

[24.3]. Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.

[24.4]. If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation."

And he observed (at paragraph 23 of his judgment) that in *H v H* [2007] EWHC 459 (Fam) Mr Justice Charles had found "that pure earnings after separation did not qualify as matrimonial property". He went on to say this (*ibid*):

“ . . . It is accepted that assets acquired after separation, but which are attributable to earnings during the marriage, are deemed matrimonial property. Levers J in fact made such an award in her assessment of what she considered to be matrimonial property. *In my view the earnings of the husband after separation are not to be regarded as matrimonial property and the wife is not entitled to a share in his future earnings.*” [emphasis added]

50. At paragraphs 24 to 30 of his judgment Justice Zacca addressed the question whether Justice Levers had been wrong to exclude certain of the available assets from her division of the matrimonial property. In the present context it is necessary only to refer to two: “the Deloitte current account” and “the Deloitte Pension”. In relation to the Deloitte current account the judge had said this ([2006] 1 CILR 1, [66]):

“ . . . This account funded the parties for some three years during separation, and it cannot be said that the monies in there now were all earned during the marriage. I therefore do not allow it as matrimonial property.”

She rejected a submission on behalf of the husband that she should exclude the capital account from the matrimonial assets. The capital account, she found, had been funded during the marriage from income earned during the marriage: and so it was to be treated as part of the matrimonial property. In this Court counsel for the wife accepted that “the money in the current account represented money earned . . . since separation but before trial.” This Court upheld the judge’s decision to exclude it from the matrimonial property. Justice Zacca said this (at paragraph 25 of his judgment):

*“Having regard to my finding that money earned after separation is not part of matrimonial property, I would hold that the Judge was not in error in not allowing the wife a share in the Deloitte current account. In other words the current account did not form part of the matrimonial property.”* [emphasis added]

51. The Deloitte Pension had been included in the list of the parties’ available assets at a value of US\$1,417,313. The judge held that it should not be treated as matrimonial property. She said this (*ibid*, [70]):

“ . . . Under normal circumstances, this court would order that the pension is matrimonial property. However Mr Singleton QC [for the husband] makes a persuasive argument, in that this particular pension is only earned 10 years prior to retirement. The husband has another six years until retirement. The date of separation was one year into the computation of the pension. The pension

depends on the future income of the husband and many other variables. It is, of course, right to say that the court needs to assess certain issues when dealing with ancillary relief, but, as this particular pension comes into being only 10 years prior to retirement and the wife would have been cohabiting with the husband for only the first year of that contribution, I hold that she is not entitled.”

In this Court the husband was represented by other counsel. It was conceded on his behalf that the Deloitte Pension was to be regarded as matrimonial property. Justice Zacca appears to have taken the view (at paragraph 26 of his judgment) that it was correct for that concession to be made. Accordingly he held that the judge was in error in not giving the wife a share “in this Pension fund”. The treatment of the Deloitte Pension Fund in *Wight v Wight*, provides limited assistance in the determination of the issues which arise, in the present case, in relation to the Husband’s potential retirement benefits. First, there is nothing before this Court to indicate the basis upon which, in *Wight*, the Deloitte Pension was valued at the figure which appeared in the list of available assets: second, there is nothing to indicate why this Court took the view (if it did) that the concession was well founded. But it can be said that, if the figure adopted (US\$1,417,313) was the value of the husband’s pension rights assessed as at the date of the order, then the conclusion that the pension, at that value, should be treated as a matrimonial asset is readily understandable.

52. As I have said, Justice Levers had awarded the wife an amount equal to 45% of the value of the assets which she had found to be matrimonial property. As Justice Zacca explained (at paragraph 31 of his judgment), she held “that there was a special contribution by the husband and this would justify a departure from equality”. He went on to record that counsel for the wife had argued, first, that “the contribution of the husband should not be regarded as a special contribution and there should have been an award favouring equality i.e. 50% to each party”; and, further, that “as a result of the husband’s future substantial earnings, there is a case for the wife to receive more than 50%”. At paragraphs 32 to 35 Justice Zacca set out the passages of their speeches in *White v White (supra)* in which Lord Nicholls and Lord Cooke had emphasised the principle that there should be no departure from equality without good reason; and the passage in the speech of Lord Nicholls in *Miller (supra)* in which he re-affirmed that principle. At paragraph 36 he referred to the decision of this Court in *Doak v*

*Doak and Riley* [2002] CILR 224, in which, applying that principle, this Court substituted equal division for the 75:25 division under the order made in the Grand Court. In particular, he referred to the observations of Justice Taylor, Justice of Appeal, in that case, where he had said (at paragraph 22) that:

“It seemed to us to be of particular importance that (i) the appellant worked and devoted her earnings to family needs, rather than acquiring assets of her own, while the respondent built up a valuable practice; (ii) the former husband now enjoys a much larger earning capacity than his former wife; and (iii) while he has a significant pension fund, she has almost none. These are factors which persuaded us that an unequal distribution of assets in favour of the former husband must, in this case be regarded as unfair.”

At paragraph 38 of his judgment Justice Zacca said this:

“In my view the Court should strive for equality. The substantial future earnings of the husband could be taken into account in arriving at equality and fairness. However the circumstances of the particular case under consideration may be such as to allow the Court to depart from equality if there is good reason to do so. Is the special contribution of one party a matter to be considered in departing from equality. The Court reaffirms its acceptance of the principles of equality as expounded in the above English cases.”

He then went on, at paragraphs 39 to 45 to consider the circumstances in which a “special contribution” by one party might justify a departure from equality. I need not examine those paragraphs in this judgment: as I have said, the Husband does not suggest, in the present case, that there is any reason to depart from the principle that the matrimonial property should be divided equally between the parties.

53. In *Wight* this Court held that a fair result could be achieved as between husband and wife by awarding each a share in the matrimonial assets. Given the need – emphasised by Justice Zacca in *Wight* – for the court to strive for equality in relation to the division of matrimonial assets, it is, I think, clear that, but for the husband’s “special contribution” in that case, this Court would have awarded equal shares. This Court was content to accept that the matrimonial assets included the Deloitte Pension at a present value which (it seems) the parties had been able to agree. This Court held that the matrimonial assets did not include assets derived from the husband’s post-separation earnings. Further, this Court held that it was not appropriate to order either (i) a payment by the husband to the wife out of (his) non-matrimonial assets (including, in particular, assets derived from his post-separation earnings)

or (ii) any payment by the husband to the wife out of his future earnings: as appears from paragraph 23 of the judgment of Justice Zacca which I have already set out.

54. Although the underlying facts in *Wight* were, in many respects, similar to those in the present case, there is a difference between the two cases which may be of importance. The aggregate value of the parties' assets as at the date of the hearing – say, CI\$17.3 million (leaving the Husband's retirement benefits out of account) in the present case and US\$21.1 million in *Wight* – was much the same; but the value of the matrimonial assets adopted by the judge in the present case – say, CI\$9.5 million (leaving the Husband's retirement benefits out of account) - was substantially less than the corresponding value adopted in the *Wight* case – say, US\$17.1 million. Conversely, the value of the husband's after acquired assets was substantially greater, both relative to the matrimonial assets and in absolute terms, in the present case than in *Wight*. It may be that that difference should lead to the conclusion that, in the present case, a fair result as between husband and wife cannot be achieved by simply awarding each an equal share in the matrimonial assets. But, that said, it is of obvious importance in this jurisdiction that those who have the misfortune to become involved in “big money” ancillary relief claims – and their advisers – should be able to rely on the courts to adopt a consistent approach.

#### *The principal issues*

55. I can now address the grounds of appeal. As I have said, those are set out, at length, in a document filed on 16 August 2010; and I have summarised them earlier in this judgment. But, at the risk of appearing discourteous, I regret that I have found that very elaborate exposition less helpful than it was plainly intended to be. I do not think that the issues on this appeal are as many, or as complex, as the grounds which have been filed would suggest. The principal issues can, I think, conveniently be addressed under four heads:

(1) Which of the parties' assets as at the date of the hearing should be treated as matrimonial property. In particular: (i) should a proportion of the Husband's after acquired assets be treated as matrimonial property; (ii) should the whole (or any part) of the Husband's undrawn KPMG profits in 2009 be treated as matrimonial property; and (iii) should the

Husband's potential retirement benefits under the 2006 Partnership Agreement (or some element thereof, and if so, what element) be treated as matrimonial property?

- (2) As at what date should those assets which are to be treated as matrimonial property be valued for the purposes of a division of the matrimonial property into shares? In particular, should the Husband's potential retirement benefits (if and to the extent that they are to be treated as matrimonial property) be valued for that purpose; or should they be the subject of assignment as and when they become payable in the future?
- (3) Will disposition of the matrimonial property to the parties in equal shares give full effect to the section 19 factors (to which the Court must have regard) and take proper account of the principles of need, compensation and sharing? If not, can full effect be given to those factors by either (i) disposition of the matrimonial property to the parties in unequal shares (and, if so, what shares) or (ii) an order for the payment by one party (the Husband) to the other (the Wife) of a capital sum out of non-matrimonial assets; and, if so, in what amount?
- (4) To the extent that full effect can be given to the section 19 factors by disposition of the matrimonial property (whether in equal or unequal shares) or by the payment of a capital sum out of non-matrimonial assets, should (nevertheless) an order be made for indefinite periodic payments? If so, in what amount should periodic payments be ordered?

Those, as it seems to me, are the principal issues. There is, of course, a further issue – raised by both appeal and cross-appeal – as to the costs of the proceedings.

#### *Identifying the matrimonial property*

56. The first task for the judge was to identify the assets which were capable of being the subject of an order under section 21(b) of the Matrimonial Causes Law. As I have explained earlier in this judgment, property acquired prior to the date of final separation (at least if acquired during the course of the marriage) is likely to be the product of common endeavour: property acquired after that date (unless it can be said to be the fruits of pre-separation property) is much less likely to be the product of common endeavour. The judge held the date of final separation to be March 2005. There is no overt challenge to that decision in the Husband's

Grounds of Appeal; and no material before this Court upon which a challenge to that decision could be sustained.

57. On the basis of that decision, the judge identified the matrimonial property by reference to the agreed schedule of assets with which he had been provided by the parties. Assets owned by the parties, or by either of them, as at 30 September 2005 (in so far as those assets continued to exist and be under the control of either party as at the date of the hearing) were treated as matrimonial property capable of being the subject of an order under section 21(b) of the Matrimonial Causes Law. Again, there is no overt challenge in the Grounds of Appeal to that as a convenient starting point.
58. The assets owned by the parties, or by either of them, as at 30 September 2005 are listed in the agreed schedule of assets under nine heads: (i) real estate; (ii) bank accounts; (iii) investments; (iv) aircraft, motor vehicles and boat; (v) life assurance policies; (vi) retirement benefits; (vii) Equestrian Centre Limited; (viii) other assets (petitioner); and (ix) other assets (respondent). They comprise tangible assets (under heads (i), (iv) and, in part, (vii) and (ix)) and intangible, or fluctuating, assets (under heads (ii), (iii), (v), (vi), (viii) and, in part, (vii) and (ix)). The assets listed under head (vii) (Equestrian Centre Limited) include an item “new barn” which, it seems, did not exist in 2005. It is not clear to me why that item has been treated as matrimonial property; but no objection has been taken on behalf of the Wife (in whose interest it would have been to contend that it was her after acquired property).
59. The position in relation to the tangible assets is straightforward. In so far as those assets continued to exist and be under the control of either party as at the date of the hearing they were properly treated as matrimonial property capable of being the subject of an order under section 21(b) of the Matrimonial Causes Law.
60. The position in relation to intangible, or fluctuating, assets is less straightforward. It can be seen from the agreed schedule that they fall into four categories: (a) fluctuating current and savings accounts (including the Husband’s KPMG drawings account); (b) fixed deposits and investments (including a receivable from the sale of Genesis Trust and the debt owed by an individual); (c) the Husband’s AXA life assurance policy and CI Chamber Pension Fund;

and (d) the Husband's undrawn share of KPMG profits and his KPMG retirement benefit. The correct approach, as it seems to me, is to ask whether the relevant asset as at the date of the hearing is the same as, or can properly be regarded as derived from, the corresponding asset as at the date of final separation.

61. In that context there was a dispute between the parties as to two items under head (ix) in the schedule. That head— “other assets (petitioner)” - includes two items (“KPMG drawings account” and “Share of KPMG profits”) against each of which there is an annotation “See Note 10”. Note 10 to the schedule is in these terms: “The Husband does not consider these to be matrimonial assets as the balances at September 30, 2005 have been exhausted as previously disclosed”. Nevertheless, in paragraph 21 of his judgment, the judge described both those items as “undisputed matrimonial assets”; although, for the reasons set out at paragraph 49 of the judgment, he seems to have accepted that the balance on the KPMG drawings account as at 30 September 2005 should be left out of account on the basis that, between that date and the date of the hearing, those monies had been used for the benefit of the Wife and the children of the marriage. But he did take into account the whole of the Husband's undrawn share of KPMG profits as at 2009. It is said that he was wrong to do so: ground 3 of the Husband's Grounds of Appeal.
62. Before addressing that ground – or the challenge to the judge's treatment of the Husband's potential retirement benefits (ground 9) – it is convenient to address the Husband's challenge to the judge's decision to treat 30% of the parties' after acquired assets as matrimonial property: ground 2 of the Husband's Grounds of Appeal. It is said that the judge accepted – or, at the least, that on the basis of his finding in paragraph 49 of his judgment in relation to the Husband's KPMG drawings account he must be taken to have accepted – that the only significant source of the Husband's after acquired assets was the Husband's post-separation earnings. Given that finding, and the decision of this Court in *Wight v Wight*, it was not open to him to treat those after acquired assets (or any part of them) as matrimonial property.
63. In my view there is force in that submission. As I have explained, the judge rejected the Wife's argument that, in the circumstances that (it was said) the ability of the Husband to

acquire assets following separation derived from and represented the product of the parties' joint contributions throughout the marriage, those assets should be treated in the same way as undisputed matrimonial property. It followed that, in order to treat the Husband's after acquired assets as matrimonial property, he needed "to determine to what extent the specific post-separation assets listed on the Agreed Amended Schedule as being the Husband's derived from pre-separation matrimonial earnings, savings or interest as the Wife contended rather than wholly from income earned and savings made by the Husband through his sole efforts post-separation as the Husband contended": paragraph 48 of his judgment. He held that it was not possible to make that determination on the evidence available to him (*ibid*). Given that the judge's findings of fact did not support a conclusion that 30% (or any other proportion) of the aggregate value of the after acquired assets was derived from pre-separation earnings or assets, there was no basis – as it seems to me – on which he could "deem" that (or any other) proportion of the after acquired assets to be matrimonial property. In particular, there was no basis for holding that it would be "appropriate and fair" to do so. In my view the judge erred in principle in this respect.

64. That is not, of course, to say that the judge could not take into account the matters to which he referred at paragraph 69(ii) of his judgment when deciding whether to order provision for the Wife out of the Husband's after acquired assets under paragraph (e) of section 21 of the Law: treating those assets as non-matrimonial property. But it was not open to him to treat those assets, or any part of them, as matrimonial property for the purposes of an order under paragraph (b) of that section. In particular, he should not have included them, or any part of them, as property to which, in the absence of good reason to the contrary, the principle of equality would apply.
65. I turn, then to the challenge under ground 3 of the Husband's Grounds of Appeal. It is said that the judge erred in treating the whole amount of the Husband's undrawn KPMG profits as at the date of the hearing in 2009 as matrimonial property. In particular, it is said that: "Consistent with his own approach to post-separation accrual the Judge should (a) have divided the 2005 profit share figure equally between the parties and (b) awarded [the Wife]

only 15% of the difference between the 2005 figure and the 2009 figure, all of which represented income earned by [the Husband] since 2005”.

66. There is force in the submission that the judge’s treatment of the undrawn KPMG profit share is inconsistent with his general approach to after acquired assets. The agreed schedule of assets showed the Husband’s undrawn share of KPMG profits as at 30 September 2005 to be \$1,478,419; and, as at 2009, to be \$2,842,115. It is implicit in the Husband’s submissions – and the attention of this Court was not drawn to any evidence to the contrary – that (perhaps surprisingly) the undrawn profits as at 30 September 2005 remained undrawn as at the date of the hearing and that further undrawn profits accrued during the post-separation period. So, as it seems to me, the correct approach was to treat the asset comprising the undrawn share of KPMG profits in 2009 as matrimonial property only to the extent of \$1,478,419 (with accrued interest, if any). The balance represented an after acquired asset generated by the Husband’s post separation earnings. It should not have been treated as matrimonial property: in particular, for reasons already explained, there was no basis for treating 30% of that balance as matrimonial property or for awarding one half of that 30% to the Wife on the principle of equality..

67. I have set out, earlier in this judgment, the judge’s findings as to the change, in October 2006, to the arrangements under which the Husband would become entitled to retirement benefits on leaving KPMG. Broadly, he found that, until October 2006, the Husband had the benefit of an agreement under which, on retirement, he would be “bought out” by the continuing partners at a value based on the “units” (or equity share) which he had acquired over the years. I confess that I have not understood how that finding is consistent with the rights of the Husband under the 2002 Partnership Agreement or the pre-existing 1988 Retirement Plan; but it is not necessary to resolve that issue. Whatever the true nature of the Husband’s rights to retirement benefit under the arrangements subsisting at the date of final separation, it cannot be said that those rights were not matrimonial property: plainly, those rights had been acquired over the period of the marriage. Indeed, it is implicit in the proposals advanced by the Husband for the disposal of this appeal – and in the proposal which he put before the judge (recorded at paragraph 59 of the judgment) - that he now

recognises and accepts that. But the Husband's rights under the pre-2006 arrangements cannot, themselves, be the subject of any order under paragraph (b) of section 21 of the Law: for the reason that those rights, as such, had ceased to exist by the date of the hearing.

68. As at the date of the hearing in 2009 the Husband's rights to retirement benefits were conferred by the relevant provisions in the new KPMG partnership agreement, made in October 2006. On retirement or death he was to be entitled to four annual payments (to be made in each November following the first full partnership year after his retirement or death) each in an amount equal to one half of his total remuneration received in the last full partnership year preceding his death or retirement. The amount of his "total remuneration" in the relevant partnership year was no longer based on "units" or equity share: as the judge explained, it comprised a base salary together with a profit share made up of a number of different elements, not only seniority, but also performance and leadership factors.
69. The judge held that although it could not fairly be said that the entirety of the Husband's retirement benefits under the 2006 Partnership Agreement were acquired or earned during the subsistence of the parties' married life together - and so were not (as a whole) to be treated as matrimonial property - they had their origins in the earlier partnership agreement. His decision, in paragraph 69(iii) of his judgment, to award the Wife 20% of the Husband's retirement benefits (as and when they became payable) suggests that he took the view that the Husband's retirement benefits should be treated as matrimonial property (to which the principle of equality should be applied) to the extent of 40% of those benefits. But he did not explain why he took that as the appropriate proportion; and, for my part, I can see no reason why he should have reached that conclusion.
70. The judge was plainly correct to take the view that the Husband's rights to retirement benefits under the 2006 Partnership Agreement were derived from his rights to retirement benefits under the earlier arrangements; and, in particular, under the arrangements which had subsisted as at the date of final separation. Put in another way, the surrender of the Husband's rights under the previous partnership agreement to be "bought out" on death or retirement was an element of the "price" which he paid for the new rights conferred by the

2006 Partnership Agreement. I appreciate, of course, that the rights conferred by the 2006 Partnership Agreement went well beyond rights to retirement benefits; and that the rights under the previous partnership agreement which were surrendered in October 2006 were much more extensive than rights to retirement benefits. I accept that it is impossible to say that there is a precise correlation between the surrender of the old retirement benefits and the acquisition of the new: each was an element in a wider renegotiation of the partnership arrangements. But it seems to me likely that that renegotiation proceeded on the basis that the new arrangements would provide more or less the same level of retirement benefits as the old arrangements; that is to say, that there was no reason why the new arrangements should have been seen, at the time, as significantly more or less generous than the old. In my view, the correct approach is to treat the Husband's rights to retirement benefits under the 2006 Partnership Agreement (in their entirety) as matrimonial property; on the basis that they were (in their entirety) derived from the rights to retirement benefits which had subsisted under the earlier arrangements at the date of final separation.

*The valuation date*

71. As I have said, earlier in this judgment, if matrimonial property is to be divided between the parties – whether equally or in some other proportions – there will be a need (save in exceptional cases) for the assets comprising that property to be valued. The need to value invites the question: at what date should those assets be valued? The Husband contends that the judge erred in taking the 2009 values of the assets which he held to be matrimonial property as the basis for a division of that property into equal shares: ground 1 of the Husband's Grounds of Appeal. It is said that, having held that the date of final separation was March 2005, he should have based his division of the assets on their 2005 values. In my view that contention is not well founded. Although the assets which are capable of being matrimonial property will be identified by reference to the date of final separation, there is no reason in principle why those assets must be allocated to one party or the other for the purposes of the order that is made under paragraph (b) of section 21 of the Law on the basis of historic values; rather than on the basis of current values as at the date of allocation.

72. It follows, in my view, that the judge was correct to take the tangible assets listed under heads (i), (iv) and, in part, (ix) of the agreed schedule at 2009 values. There was agreement between the parties as to the values of most of those tangible assets as at 2009. In relation to one item (furnishings and chattels) under head (i), the judge took a 2009 value of \$29,000 (resolving a dispute between the Husband's figure of \$32,805 and the Wife's figure of \$20,000). He left out of account the proceeds of sale of a F150 Truck (\$6,500). The overall effect of taking the 2009 values was to bring the tangible assets into account at a figure (\$2,652,160) which – even with the inclusion of a new barn - was slightly lower than would have been the case if those assets had been taken at the Husband's 2005 values.
73. The judge was correct, also, to take the fixed deposits listed under head (ii) of the agreed schedule, the investment funds, the shares in Cayman National and the CIDB Bonds listed under head (iii), the Butterworth Balanced Fund listed under head (vii) and the receivables listed under head (viii) into account at 2009 values. That had the effect that the fruits of the investment (including, in particular, accrued interest) was included as matrimonial property: as principle required.
74. It is also reasonably clear that, unless (and to the extent that) the increase in the values of the Husband's AXA Equitable life assurance policy and the Husband's CI Chamber Pension Account (items listed under heads (v) and (vi) of the agreed schedule) between 2005 and 2009 were attributable to non-contractual premiums paid or contributions made by him between those dates (as to which the judge made no finding), those assets were properly taken into account at 2009 values. The reason is that, although the value of those assets appreciated, the underlying assets remained unaltered. The aggregate value, as at 2009, of the assets described in this, and the preceding, paragraph was \$3,360,383.
75. In principle, the balances on fluctuating bank accounts should have been taken as at 2005: unless the judge was satisfied (i) that the increase, or some part of the increase, (if any) in the balance on the account between 2005 and 2009 was attributable to monies derived from assets which were themselves matrimonial property or (ii) that the reduction, or some part of the reduction, (if any) in the balance on the account between 2005 and 2009 was attributable

to the use of monies for the benefit of the parties. In such cases the 2005 balance should have been adjusted to take account the increase or the reduction (as the case may be). If the judge were satisfied that the reduction was attributable to the acquisition of some other asset (for example, where a credit balance or some part of a credit balance on a savings account was invested elsewhere) then the asset so acquired should have been treated as matrimonial property.

76. The judge made no findings on those matters. But, in the present case, the effect of taking the balances on the fluctuating bank accounts at the 2009 values rather than at the 2005 values can be ignored. The aggregate of the balances on the current and savings accounts listed under heads (ii), (vii) and (ix) moved from \$598,276 in 2005 to \$566,053 in 2009. Whether or not the judge's decision to take the 2009 balances into account as matrimonial property (rather than the 2005 balances) reflected a principled approach, there is no reason, on the figures, for the Husband to complain; and the Wife does not do so. I would not disturb the judge's finding in relation to the aggregate value at which the current and savings accounts listed under heads (ii), (vii) and (ix) should be taken into account.
77. The judge made no finding in relation to the balance on the Charles Schwab broker account listed under head (iii), which increased from \$474,751 in 2005 to \$579,959 in 2009: that is to say, by some 22% over four years. I have found nothing in the evidence which provides an explanation for that increase. But, as it seems to me, the judge would have been entitled to take the view that some \$475,000 would not have been left in a non-interest bearing account for several years; and that it was probable that the increase in value (or a substantial part of that increase) represented accrued interest. The judge treated the 2009 balance as matrimonial property. It may be that he was satisfied that the broker account was in joint names - a finding that would be consistent with the fact that it is not treated in the agreed schedule either as an asset of the Husband (under head (viii)) or of the Wife (under head (ix)) - and so, *prima facie*, an asset which the parties had continued to treat as matrimonial property after the date of final separation. I am not persuaded that he would have been wrong to take that view: or that there is sufficient reason to hold that he was wrong to take the balance into account at the 2009 figure.

78. As I have said, the judge took the balance on the Husband's KPMG drawings account at the 2009 figure (\$21,635), for the reasons which he explained in paragraph 49 of his judgment. I think he was correct to do so. He took the Husband's undrawn share of KPMG profits at the 2009 figure of \$2,842,115. In my view he was wrong to do so. That item should have been taken at the 2005 figure (\$1,478,419) with interest, for reasons which I have explained.
79. The items which I have addressed so far do not include the Husband's potential retirement benefits under the 2006 KPMG Partnership Agreement. But, as I have said, those benefits should be treated as matrimonial property. And, if treated as matrimonial property, the principle of equality should apply to them.
80. The judge took the view (at paragraph 69(iii) of his judgment) that it was not appropriate to endeavour to assess the value to the Wife of Husband's potential retirement benefits "if paid at this stage". By that phrase he meant, I think, "if a capital sum in satisfaction of her interest in those potential benefits were to be paid to the Wife at this stage [that is to say, at the date of his order]". There would be no inherent difficulty in assessing the value to the Wife of retirement benefits which would be paid to the Husband if he were treated as having actually retired as at the date of the order. The reason which the judge gave for that view was that the amount which the Husband would actually receive on retirement would not be known "until the time of his eventual retirement, which is likely to be at least 9 years from now, some 14 years from the date of the parties' separation, and possibly even later than that." He gave, as a further reason, that it was fair "that the Wife should, like the Husband, share in the risk consequent on the amount of the Retirement Provision being dependent on the future fortunes of the Husband's firm".
81. In my view those were not sufficient reasons to support a decision which is plainly inconsistent with the "clean break" principle to which I have referred earlier in this judgment. The assessment of the value of future benefits, of uncertain amount, is an exercise which courts are frequently required to undertake in the context of assessing damages. I can see no good reason why it should be unwilling to do so in the context of determining an ancillary relief claim. In particular, such a valuation exercise will, in principle, take account

of the risk “consequent upon the amount of the Retirement Provision being dependent on the future fortunes of the Husband’s firm”.

82. It is submitted on behalf of the Husband that the value of his potential retirement benefits should be taken to be \$2,354,857. That figure, as the judge pointed out in the last sentence of paragraph 57 of his judgment, is the value of the benefits which the Husband would have received if he had retired pursuant to the provisions of the 2006 Partnership Agreement at the date of the parties’ final separation in 2005. It can be compared with the slightly higher figure (\$2,871,777) advanced in the letter of 5 January 2010 from Mr Bullimore (a former managing partner of the firm) which is part of exhibit RM31 to the Husband’s affidavit of 6 January 2010.
83. If it were appropriate to value the Husband’s potential retirement benefits as at 2005 – which, for the reasons which I shall explain, I do not think that it would be - I can see no basis for making the assumption (contrary to fact) that the benefits which the Husband would have received if he had retired in 2005 would have been the benefits for which the 2006 Partnership Agreement provided. The 2006 Partnership Agreement was not then in force: the relevant provisions were those of the earlier partnership agreement (read with the 1988 KPMG Partner Retirement Plan Provisions). In that context, I should observe, in passing, that it is by no means clear from the terms of his letter of 10 January 2010 that Mr Bullimore has, in fact, adopted the provisions of the earlier partnership agreements rather than those of the 2006 Partnership Agreement in reaching his conclusions. But it is unnecessary to pursue those issues. The appropriate date for the valuation of the Husband’s potential retirement benefits is, as it seems to me, the date of the hearing: or, adopting the basis on which the agreed schedule of assets was prepared, 2009.
84. I have explained, earlier in this judgment, why I take the view that the Husband’s potential retirement benefits under the 2006 Partnership Agreement are properly to be treated as matrimonial property. The potential retirement benefits, as at 2009, are not after acquired property; in the sense that they are benefits acquired by the expenditure of post-separation earnings. The benefits comprise contractual rights conferred under the 2006 Agreement in

substitution for the contractual benefits conferred under earlier arrangements. The nature of the benefits did not change between 2006 and 2009: what changed, from year to year, was the “total remuneration” of the Husband by reference to which the amount which the Husband would have received (if he had died or retired in any of those years) would be calculated. The task is to assess the value of those contractual benefits as at the time when the matrimonial property is divided between the parties: that is to say, as at 2009.

85. The starting point for such an assessment, as it seems to me, is to ask what the value of the Husband’s retirement benefits would have been under the 2006 Partnership Agreement if he had retired (or died) immediately following the date of the order. The answer to that question is provided by applying the provisions of the Partnership Agreement to the facts as they were at that time. The evidence (in exhibit RM31 to the Husband’s affidavit of 6 January 2010) was that his total remuneration in the last full partnership year (2008/2009) preceding retirement was US\$3,042,115. The judge found (at paragraph 57 of his judgment) that, if the Husband had retired at the end of 2009, he would have received, pursuant to the provisions of the 2006 Partnership Agreement, four annual payments of US\$1,525,057 (*sic*), being a total over four years of US\$6,084,230 (say CI\$4,867,384). But, the first of those payments would not have been received until November 2011; and the last would not have been received until November 2015. The Husband put forward a discounted present value (as at 2009) in respect of those future payments of CI\$4,422,746. That figure was not challenged; and I am content to accept it.
86. The question which must then be addressed is whether that figure (\$4,422,746) should be adjusted to reflect (i) the fact that (as appears from the earnings summary in exhibit RM31) the Husband’s total remuneration in the years 2007/2008 and 2008/2009 was very substantially higher – that is to say, almost double – what it had been in each of the preceding five years, (ii) the Husband’s evidence (which the judge accepted, at paragraph 65 of his judgment) that his total remuneration was likely to decrease by some 30% in the years 2009/2010 and 2010/2011 due to a reduction in the firm’s profits consequent upon a slowdown in business and an increase in the cost of doing business and (iii) that the Husband

had not, in fact, retired in 2009 (or by the date of the hearing) and (as the judge noted at paragraph 57 of his judgment) had said in evidence that he had no plans for early retirement.

87. Taking those factors into account, I am satisfied that it would be unfair to the Husband to assess the value of his potential retirement benefits as at 2009 by reference only to his total remuneration in the year 2008/2009. A fairer approach would be to assess the value of his potential retirement benefits as at 2009 by reference to his likely total remuneration, year by year in the years immediately following the year 2008/2009. The judge accepted that his average annual income during those years would be likely to be around US\$2,130,800. Making that adjustment would reduce the figure of CI\$4,422,746 to CI\$3,095,893.
88. A further question to be addressed is whether the figure should be further adjusted to reflect the fact that the Husband may well choose not to retire until 2019 (when he will reach the retirement age of sixty years) or even thereafter (as the judge pointed out in paragraph 57 of his judgment). So the benefits which he will actually receive on retirement may depend, as the judge appreciated, on the fortunes of the firm (and the level of his own contribution within the firm) for a number of years yet. In my view there is no safe basis for making a further adjustment to reflect that. The actual level of benefits which the Husband will receive on retirement may be more, or less, than that which he would be likely to receive if he retired within the next couple of years: but the present value of those future receipts will not be greater than the figure based on retirement within the next couple of years unless his total remuneration increases, year on year, by a percentage which is greater than the appropriate discount rate. Leaving aside the remarkable increase in the firm's profits in the year 2007/2008 (which must, I think, be attributable to some special factor) the earnings summary in exhibit RM31 does not support a conclusion that that is likely to be the case.
89. For those reasons I am satisfied that it would be fair to assess the value of the Husband's potential retirement benefits at a figure close to \$3,095,893; and, as I have said, to treat those retirement benefits as matrimonial property having that value.

*Will disposition of the matrimonial property to the parties in equal shares give full effect to the section 19 factors?*

90. The Schedule of Assets annexed to the judge’s order of 7 July 2010 did not, in fact, allocate the assets which the judge had identified as matrimonial property to the parties in equal shares. Out of the judge’s “total of matrimonial assets” (\$9,561,197), assets to the value of \$6,595,320 were allocated to the Husband and assets to the value of \$2,965,877 were allocated to the Wife. The judge gave effect to the principle of equality by a balancing payment (from the Husband to the Wife) of \$1,814,722. It was for the Husband to decide whether that balancing payment should be made from the cash assets and investments allocate to him out of the matrimonial property, or from his after acquired assets.

91. The Schedule of Assets annexed to the judge’s order would require some adjustment in order to give effect to the conclusions that I have reached so far. Ignoring matters which are of little significance – the treatment of the fluctuating bank accounts and the Charles Schwab broker account and the inclusion (as matrimonial property) of the new barn at the Equestrian Centre – there are two changes which should be made to the items listed as “Matrimonial Assets” under the head “Other Assets (Petitioner)”:

- (1) The item “Share of KPMG profits” should be taken into account at the 2005 figure (\$1,478,419) instead of at the 2009 figure (\$2,8422,115); and
- (2) There should be an additional item “Husband’s Retirement Benefit”, which should be taken into account at \$3,095,893.

On the basis that, for good practical reasons, both of those items should be allocated to the Husband’s share of the Matrimonial Assets, the corresponding adjustments under the heading “Total of Matrimonial Assets” should be:

	Findings	W receives	H receives
TOTAL OF MATRIMONIAL ASSETS	11,293,394	2,965,877	8,327,517
50% of TOTAL	5,646,697		
Balancing Payment to W in respect of matrimonial assets		2,680,820	

So the balancing payment should be increased from \$1,814,722 to \$2,680,820. The *quid pro quo*, of course, is that paragraph 7 of the order – which provides for the assignment of the

Husband's future retirement benefits under the 2006 Partnership Agreement – should be set aside.

92. The assets allocated to the Wife under the schedule to the order included the former matrimonial home and its contents; but few assets that could be regarded as income-generating. They did include two parcels of land - Block 14D, Parcels 239 and 240 - a one third share of which had been brought into the marriage by the Husband, valued at \$850,000.00 on which the Wife carried on her equestrian enterprise; and they did include the company, ECL, valued at approximately \$144,933.00. The judge accepted, at paragraph 66 of his judgment, that the Wife made “no or very little money herself from the equestrian centre and that it is run, as she said, on a ‘break even’ basis. He took the view (*ibid*) that it would not be fair or reasonable to expect the Wife to become a significant income earner herself to any material extent, “whether through expansion of the equestrian centre or through other employment.” Nevertheless, it is said on behalf of the Husband that the judge was wrong to hold that the Wife should not be expected to generate an income from the land and assets used in connection with the equestrian business. I would reject that submission. It seems to me that the judge was correct to take the view that he did.

93. Nevertheless, it must be kept in mind that the Wife's assets are not limited to those allocated to her under the schedule to the order. They include a modest amount of her own after acquired property – which, in my view, can properly be left out of account – and the balancing payment which must be made to her by the Husband (\$2,680,820) in order to give effect to the equality principle in respect of the sharing of matrimonial property. Taken with those income generating assets which have been allocated to her under the schedule to the order – in particular, the Butterfield US\$ fixed deposit (\$382,299), and her one half share of the Charles Schwab broker account (\$289,980) – she will have in excess of \$3,350,000 of capital available for investment. If invested to produce a return of 3.75% per annum – a rate suggested by the Husband and not challenged – she could derive an income from that capital of some \$125,625 per annum.

94. In assessing the Wife's needs the judge took the view (at paragraph 69(iii) of his judgment) that an income of \$216,000 per annum or thereabouts would "enable [her] to live to the standard that she has and does". The Husband challenges that figure: it is said that, on a proper understanding, the Wife's expenses do not exceed \$200,000 per annum. I am not persuaded that the judge was wrong to adopt the figure that he did.

95. The judge thought that that income should be provided by way of monthly periodic payments; because that would enable the Wife to avoid "having to depend to an unfair extent on her share of capital to meet her living costs." That latter observation reflected his view, expressed earlier in the same paragraph, that:

"Although in the light of my decisions . . . with regard to the pre-separation and post separation matrimonial property the Wife will retain or receive substantial capital, the Husband will retain and receive substantially more than her and in addition he will continue to have a considerable income. I remain sympathetic to the argument that there is an inherent unfairness, following a marriage like this and in financial circumstances such as these, about a situation in which a Wife, having no earnings of her own, would have to live off her share of the capital, whereas the husband, having the significant future earning power which he has, would not have to do so."

96. In expressing that view the judge plainly had in mind the observations of Mr Justice Bodey, in *CR v CR* [2008] 1 FLR 323 (to which he had referred at paragraph 64 of his judgment). In a section of his judgment headed "Whether the wife should be 'compensated' for her perceived lost career prospects and/or for her inability to share in the 'powerful resource' which is the husband's earning capacity?" Mr Justice Bodey had said this:

"My conclusion is that it would not be fair to ignore the big income imbalance. Some recognition is required of the fact that the wife's half share of the overall resources is 'all' she will have to provide for her reasonable needs in the context of the overall resources; whereas the husband will have the same share of the assets *plus* the likelihood of a very large ongoing income much greater than his generously assessed reasonable requirements."

Nevertheless, it is important to keep in mind, in this context, the cautionary words of Sir Mark Potter, President, in *VB v JP* [2008] EWHC 112, [52]; [2008] 1 FLR 742:

"I would endorse the warning sounded by the judge (in *RP v RP* [2006] EWHC 3409, [2007] 1 FLR 215) against the introduction of an approach which seeks to separate out and quantify the element of compensation,

rather than treating it as one of the strands in the overall requirement of fairness in the assessment of the parties' joint contribution to the marriage, where the wife, as a result of joint marital decision has sacrificed her own earning capacity in the interests of the bringing up the family. Attempts under the rubric of Compensation to isolate and quantify the level of income or earning capacity sacrificed by a wife years after the event for the purpose of calculating a premium element on the award, constitutes a search for precision which is to be discouraged both on the grounds of policy and practicality, and which goes beyond what is required or generally appropriate in the exercise required of the court under s.25.”

97. There is force in judge's view that, in the present case, it would be unfair to make an order which had the effect that the Wife, having no earnings of her own and having given up her prospects of a career in order to support the Husband and the family, would have to live off her share of the capital - in the sense of having to draw on, or amortise, capital in order to meet her income needs - in circumstances where the Husband, having the significant future earning power which he has, would not have to do so. A proper recognition of the need to compensate the Wife for “her perceived lost career prospects and/or for her inability to share in the ‘powerful resource’ which is the husband's earning capacity” – to adopt the language used by Mr Justice Bodey in *CR v CR (supra)* requires, as it seems to me, that the order made should enable the Wife to meet her expenses (generously interpreted) without having to draw on her capital. But I am not persuaded that it is necessary or appropriate to go further than that; and to make an order – as the judge did – which has the effect that the Wife does not even need to use the income of that part of her capital which is plainly available for investment to meet her expenses.

98. In *CR v CR* Mr Justice Bodey had awarded the wife an additional lump sum (of £1 million) – on top of an equal share (of some £8 million) in the matrimonial assets– in recognition of the income imbalance to which he had referred: see paragraphs 96 to 102 of his judgment. In the present case the judge did not follow the lead of Mr Justice Bodey in seeking to quantify, as a capital sum, what provision should be made for the income needs of the Wife. If he had done so, he would have reached the conclusion that, as I have said, a return of 3.75% on that part of her capital available for investment would provide her with income of some \$125,625 per annum. He should then have asked himself what further capital sum was sum required in

order to provide an income which would make up the difference (\$90,375 – but, say \$100,000) between what she needed to cover her expenses and what the return on her capital would provide.

99. The capital sum required in order to provide an income of \$100,000 per annum (assuming it were invested to return 3.75%) would be some \$2.67 million. But that would assume, of course, that the whole of that additional capital sum were preserved intact; and not drawn upon to meet income needs. On the basis that the additional capital sum should be amortised – because it is being provided to meet income needs during the life of the Wife, not to provide additional capital which will form part of her estate – the figure would be substantially less. Adopting (and adjusting) the figures in the Husband’s skeleton argument (at paragraphs 106 and 138), which have not been challenged, the additional sum (on a *Duxbury* basis) would be \$2 million (assuming 3.75% real growth).

100. I conclude, therefore: (i) that disposition of the matrimonial property in equal shares – or an equivalent order which gives effect to the principle of equal division of the matrimonial property by incorporating a balancing payment – will not give full effect to the section 19 factors in the present case (because it will not take proper account of the principles of need and compensation); and (ii) that full effect can be given to those factors by the payment by the Husband to the Wife of an additional capital sum out of his non-matrimonial assets (which are more than sufficient for that purpose).

*Should, nevertheless, an order be made for periodic payments?*

101. Given that full effect can be given to the section 19 factors in this case by the disposition of the matrimonial property in equal shares – or an equivalent order incorporating a balancing payment – and the payment by the Husband to the Wife of an additional capital sum out of his non-matrimonial assets, there is no need for an order for periodic payments. To make such an order in those circumstances is inconsistent with the “clean break” principle; and a wrong exercise of the court’s powers under section 21 of the Law.

*Costs in the Grand Court*

102. The order of 7 July 2010 provides (at paragraph 9) that there shall be “No order in respect of the costs of and incidental to these ancillary proceedings”; and, in particular that “the contribution to account of [the Wife’s] costs totalling C1\$82,000 paid by [the Husband] shall not be refunded to him and matters in relation to costs shall be left as they currently lie.”
103. In the final paragraph of his judgment (paragraph 70) the judge had said that his inclination was “to make no further order as to the costs of and incidental to this matter and to leave matters pertaining to the parties’ respective costs and contributions thereto as they currently lie.” But, he added that “if either party feels particularly strongly about that and agreement cannot be reached, I shall hear further argument on costs.” In the event, there was a further hearing as to costs at which (it seems) each party advanced arguments as to the proper approach in a “big money” case. We were told that the judge gave no reasoned judgment in response to those arguments; but the terms of his order suggests that (on the question of principle) he preferred those advanced on behalf of the Husband, who was contending for “No order”.
104. Each party appeals from paragraph 9 of the order of 7 July 2010. The Husband contends that, if the judge was minded to leave each party to bear his or her own costs, he ought to have ordered repayment of (or should otherwise have taken into account) the \$82,000 which had been advanced by the Husband on the basis (it is said) “of an express agreement between the parties that the same would be on account of [the Wife’s] matrimonial entitlement and any final award by the Court or settlement agreed between the parties subject to the Court’s ultimate discretion to award costs”.
105. It is clear from the very comprehensive analysis put before us on behalf of the parties in their respective skeleton arguments that the proper approach to costs in “big-money” cases, in this jurisdiction, is contentious; and needs to be resolved.
106. Put shortly, the position, here, is that costs in matrimonial proceedings – as in other proceedings – are governed by the Grand Court Rules; and, in particular by GCR Order 62, rule 4, which requires (at sub-rule (3)) that:

“If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

The effect of a requirement that “costs follow the event” – although not, at the time, directly applicable in matrimonial proceedings in England and Wales (see RSC Order 62 rule 3(5)) – was considered at some length by Lady Justice Butler-Sloss in *Gojkovic v Gojkovic* [1991] 3 WLR 621. She concluded that the general principle was that if, after contested proceedings, a party obtains an order which is more beneficial to him or her than an offer made by the other party under the *Calderbank* procedure, then the other party should pay the costs of the proceedings: conversely, if a party fails to obtain an order which is more beneficial than that which could have been accepted under the *Calderbank* procedure, then that party must expect to pay the costs of the offeror from the date of the offer.

107. The position in England and Wales has moved on since *Gojkovic*. The position, now, is governed by rule 28.3 of the Family Procedure Rules 2010; which, in effect, restates the amendments to rule 2.71 of the Family Procedure Rules 1991 introduced by the Family Proceedings (Amendment) Rules 2006, SI 2006/352. The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party. But there has been no corresponding change in the rules applicable in this jurisdiction. The position remains that, if the court in the exercise of its discretion sees fit to make any order as to costs in ancillary relief proceedings, it shall order costs to follow the event (save where there are some special circumstances). Nevertheless, it is said on behalf of the Husband, that the practice, here, has been to recognise that the *Gojkovic* approach is no longer apt in the light of the “seismic changes” made to ancillary relief claims in *White v White*. The wife contends, on the other hand, that, unless and until there is a change to the relevant rule in this jurisdiction, the courts here should continue to follow the guidance in *Gojkovic*.

108. As I have said, these issues will need to be resolved. But they have not been the subject of oral argument on this appeal. The parties took the view – sensibly, as it seems to me – that they would prefer to await the outcome on the substantive points before addressing questions

of costs. Accordingly those issues must be stood over for further argument if the parties are unable, after consideration of our judgments on the substantive points, to agree what the appropriate orders for costs should be, both in the Grand Court and in this Court.

109. In that context it may assist the parties if I add two observations. First, that in any further consideration of where the burden of costs should lie, this Court is likely to regard as significant (i) that, in the result, the Wife has been awarded substantially more than the Husband's second *Calderbank* offer (\$6,809,913), made on 7 January 2010, (ii) that the Husband was willing to concede, on this appeal, that an amount be awarded to the Wife which was close to what she had indicated, in her second *Calderbank* offer (\$7,631,404) made on 9 January 2010, she would have accepted before trial, and (iii) that the effect of our judgments in this Court is that we hold that the order which the judge should have made would have been slightly more favourable to the Wife than the amount that she would have accepted under her second *Calderbank* offer. Second, that the amount of the additional capital sum which should be paid to the Wife in order that she can meet her expenses without having to draw on her capital is, of course, closely linked to the amount of the capital which (following the division of the matrimonial property and the payment of the balance sum required to give effect to the principle of equality) she will have available for investment. If the burden of costs which she has to bear is such as to make serious inroads into the amount which she will have available for investment, fairness may require that the amount of the additional capital sum to be paid to her receives further consideration.

### *Conclusion*

110. For the reasons that I have set out, I would direct that the list of matrimonial assets in the Schedule of Assets to the order of 7 July 2010 be amended in the respects described in paragraph 91 of this judgment. I would set aside paragraphs 6 and 7 of that order. And, subject to further consideration in the light of the decision to be made by this Court (or agreement reached between the parties) as to costs, I would vary paragraph 5 of the order by substituting for the figure of \$3,912,789, which there appears, the figure of \$4,680,820. By way of explanation I should add (i) that the figure of \$4,680,820 is the aggregate of the balancing payment required to give effect to the principle of equality (\$2,680,820) and an

additional payment of \$2,000,000 required to meet fully the section 19 factors and (ii) that the aggregate amount of the award, after taking account of the assets to which the Wife will be entitled under the Schedule of Assets as varied and paragraphs 1 to 4 of the order (\$2,965,877), is \$7,646,697. Given the way the parties' own assessments of what the Wife's claim to ancillary relief has developed up to and following trial, it seems to me that an award of some \$7.65 million in this case is probably about right.

**Sir John Chadwick, President**

**Ian Forte, Justice of Appeal:**

I agree.

**Sir Anthony Campbell, Justice of Appeal**

I also agree.