ROSSI v ROSSI
[2006] EWHC 1482 (Fam)

Family Division

Nicholas Mostyn QC

26 June 2006

Financial provision – Principles of division between spouses – Relevance of delay in bringing proceedings – Dealing with third party interests

Ancillary relief – Dealing with third party interests – Whether necessary to bring separate proceedings under the Partnership Act 1980 and the Trusts of Land and Appointment of Trustees Act 1996

The spouses were Italian and married in Italy in 1964. By 1978, cohabitation between them had ceased. The wife had a son from a former marriage. The spouses ran an antiques business in Italy which fell on hard times. In 1985 the business was moved to London – it being a matter of dispute between the parties whether this was a joint venture or one undertaken on the wife's initiative alone. At all events, the business came to be run by the wife and the son. The wife and the son held legal title to two properties in London and to the business partnership. The wife divorced the husband in 1992, at which time he did not defend and signified he would not claim ancillary relief. The husband was arrested in India in 1993 and was unable to leave permanently until 2001. In 2005, however, he began to pursue claims (based, inter alia on the contention that the partnership was a troika between himself, his wife and her son) against the wife and the son for ancillary relief and orders under the Partnership Act 1890 and the Trusts of Land and Appointment of Trustees Act 1996.

Held – dismissing the husband's claims –

(1) In all ancillary relief cases now, a primary function of the court is to identify the matrimonial and non-matrimonial property (see para [10]):

(a) All assets must be valued at the date of trial (see para [24.1]).

(b) For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will apply, the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property (see para [24.2]).

(c) 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. Passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property (see para [24.3]).

(d) Where the post-separation asset is a bonus or other earned income, if it relates to a period when the parties were cohabiting, or to a period immediately following separation, it cannot be claimed as non-matrimonial. Indeed, a post-separation bonus should not be classed as non-matrimonial unless it related to a period which commenced at least 12 months after separation (see para [24.4]).

(e) The identified matrimonial property will in all likelihood be divided equally although there may be deviation if: (a) the marriage is short;

and (b) part of the matrimonial property is 'non business partnership, non-family assets' or if the matrimonial property is represented by autonomous funds accumulated by dual earners (see para [24.5]).

(f) The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and if so in what proportions. In so deciding it will have regard to the reality that the longer the marriage, the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage, non-matrimonial assets are not likely to be shared unless needs require this (see para [24.6]).

(g) In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with his or her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and, if so, in what proportions, for what period and by what means (see para [24.7]).

(2) There is a risk of injustice caused by delay. The longer the time that passes, the more likely it is that documents will disappear and memories cloud, with the result that there is a greatly enhanced risk of the court rendering imperfect justice. While no rigid rule can be expressed for the infinite variety of facts that arise in ancillary relief cases, it would be very difficult for a party to be allowed successfully to prosecute a claim initiated more than 6 years after the date of the petition for divorce unless there was a very good reason for the delay (see paras [29], [32]).

(3) The commencement by the husband of two separate sets of civil proceedings was wholly misconceived and unnecessary. All that was necessary was for him to seek within the ancillary relief proceedings declarations as to F's share in the company and the properties. F should have been joined to that application. If a limitation period or the doctrine of laches would apply were the relief to be sought in civil proceedings, then those rules will apply equally if the exercise is done by means of an application within the ancillary relief proceedings. In many cases it would be desirable to determine the rights and claims of the third party as a preliminary issue so that the size of the ancillary relief pool can be ascertained at an early stage and so that a meaningful financial dispute resolution can take place (see paras [35], [36], [38]).

(4) On reviewing the evidence, the court concluded that at no time after 1985 did the husband have a business relationship with the wife or F, and he had no beneficial interest in the business or the properties (see para [85]).

(5) The husband had acted as mentor in assisting the wife and F to establish their business, but a claim for ancillary relief based on such mentorship would be hard to establish save in the most clamant case and would require clear evidence of cause and effect (see para [91.4]).

(6) The husband's claims must in any event fail because of his delay in mounting them (see para [91.5]).

(7) In order to justify a needs-based award, identification ought to be made of a causal connection between the need and the marital relationship. No causal connection between the husband's present needs and a relationship which ended physically in 1978 and financially in 1985 had been established (see para [91.8]).

Statutory provisions considered
Partnership Act 1890
Matrimonial Causes Act 1973, ss 24, 25(2), 37
Family Law (Scotland) Act 1985, s 10(3)(b)
Trusts of Land and Appointment of Trustees Act 1996
Family Law (Scotland) Act 2006, s 16
Rules of the Supreme Court 1965 (SI 1965/1776), Ord 15, r 6(2)(b)

Cases referred to in judgment
Chambers v Chambers (1980) 1 FLR 10, FD
Chaterjee v Chaterjee (1976) Fam 199, [1976] 2 WLR 397, (1975) FLR Rep 134, [1976] 1 All ER 719, CA
Cowan v Cowan [2001] EWCA Civ 679, [2002] Fam 97, [2001] 3 WLR 684, [2001] 2 FLR 192, CA
D v W (Application for Financial Provision: Effect of Delay) [1984] Fam Law 152, FD
Foster v Foster [1977] Fam Law 112, CA
Fraser v Fraser (1982) 3 FLR 98, FD
GW v RW (Financial Provision: Departure from Equality) [2003] EWHC 611 (Fam), [2003] 2 FLR 108, FD
Latter v Latter 1990 SLT 805, Ct Sess
Lindsay Petroleum Company v Hurd (1873) 5 App Cases 221, (1874) LR 5 PC 221, (1874) 22 WR 492, PC
Lombardi v Lombardi [1973] 1 WLR 1276, [1973] 3 All ER 625, CA
M v M (Financial Relief: Substantial Earning Capacity) [2004] EWHC 688 (Fam), [2004] 2 FLR 236, FD
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, [2006] 3 All ER 1, HL
N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69, CA
P v P (Inherited Property) [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, FD
T v T and Others (Joinder of Third Parties) [1996] 2 FLR 357, FD
TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family) [2005] EWHC 2860 (Fam) [2006] 1 FLR 1263, FD
Twiname v Twiname [1992] 1 FLR 29, CA
White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL
Wilson v Wilson 1999 SLT 249, Ct Sess (OH)

Andrew Tidbury for the applicant
Michael Glaser for the first defendant
Dominic Brazil for the second defendant

Cur adv vult

NICHOLAS MOSTYN QC:
[1] In this case Renzo Rossi (H) has commenced proceedings against Anna Maria Rossi (W) for ancillary relief. He has also commenced actions against W and his stepson Fabio Rossi (Fabio) under the Partnership Act 1890 and the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).
[2] In this case, H says that the shares of a company, Rossi and Rossi Ltd, which are legally held 50/50 between W and Fabio, are partnership assets. He says that the partnership is a troika between himself, W and Fabio. He says that two apartments at 37B and 39D Randolph Avenue, London W9, which are legally held equally by W and Fabio are beneficially held 50/50 for him

and W, and that Fabio is therefore no more than a bare trustee. Fabio and W say that the beneficial interest in these assets follows the legal title and that H has no interest in them.

[3] In the proceedings under the Partnership Act 1890 and TOLATA, H seeks declarations of beneficial interest and an account. H's separate actions were commenced in the Principal Registry and have been consolidated with his claim for ancillary relief. Extensive case management directions have been given, and the consolidated claims were listed for trial before me for 7 days.

[4] In addition H has issued an application under s 37 of the Matrimonial Causes Act 1973 to set aside the transfer in July 2003, by W to Fabio, of a loan owed to W by Rossi & Rossi Ltd, in the sum of £255,000.

[5] I will set out the facts in detail later on. At this stage I would only remark on some of the more extraordinary features of this case. H and W are both Italian. They began cohabitation in 1964 and were married in Italy in 1968. Fabio is W's son by a prior union. H is aged 71, W is aged 74 and Fabio is aged 44. By 1978 the physical relationship between H and W had come to an end. H says however that he and W remained in a joint business of importation of Asiatic, particularly Himalayan, antiquities. H says that he and W relocated the business to London in 1985. W says that she alone came to London and that the business that was started here was hers alone, to which she later introduced her son. W says that the apartments purchased in 1989 and 1991 were funded by her and Fabio and H had nothing to do with them. In 1992, W started divorce proceedings alleging 5 years' separation. H did not defend and signified that he would not make a claim for ancillary relief. He said that it would have been unnecessary as up to that point he and W were continuing to operate harmoniously in partnership. He says he was the primary 'sourcer' of objects for the business which W would sell in London. All this abruptly came to an end when he was arrested in India in 1993 for allegedly stealing a sacred object from a temple. Indian justice grinds exceedingly slowly, he says, and that it was not until 2001 that he was able to clear his name. During that time, H says he was unable to leave India apart from on two occasions, first, to see his mother when she was gravely ill, and subsequently to bury her. It took H from 2001 to 2004 to assemble his case, obtain legal aid, and make his ancillary relief claim. He initiated his civil claims in 2005.

[6] The result is that I have to examine events that took place between 1964 and 1993, a period which ended 13 years ago, and which began more than 40 years ago. For that period the happenings are largely undocumented. I have heard important evidence in Italian and Spanish through interpreters. I have taken the evidence of one witness by video-link from Peking, whose English was just about good enough for me to avoid having to take it through a Tibetan interpreter.

[7] To say that all this has presented difficulties would be an understatement.

Post-separation accrual

[8] It is clear that a number of issues arising from the opinions of the Law Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186 (*Miller*) will have to be worked out in future cases. For example, the question of whether compensation will be widely

awarded (and if so for what compensable losses) or whether it will be confined to the exceptional case (as a number of comments appear to indicate) will, no doubt, be an early candidate for judicial interpretation. Equally demanding of early guidance will be the question of the application of the yardstick of equality to what Baroness Hale of Richmond and Lord Mance have characterised as 'non-business partnership, non-family assets', and whether or not departure therefrom in relation to such assets is confined to short marriage cases.

[9] In this case there has been a very substantial passage of time between the separation of the parties and the hearing of H's claim for ancillary relief. Quite apart from the independent question of whether delay per se is a relevant factor in the exercise of the statutory discretion there is the critical question of whether money or property that has been acquired after separation forms part of the matrimonial property (or marital acquest).

[10] In all cases now a primary function of the court is to identify the matrimonial and non-matrimonial property. In relation to property owned before the marriage, or acquired during the marriage by inheritance or gift, there is little difficulty in characterising such property as non-matrimonial (provided it is not the former matrimonial home). The non-matrimonial property represents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party: see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, *Miller* (paras [21]–[25], [148]).

[11] But what of money or property acquired by one party after the separation? This gives rise to a number of conceptual problems which I have to say have not been altogether resolved by the opinions in *Miller*. Before I turn to those opinions I propose to examine the law, such as it was, before the House of Lords gave its views.

[12] A long time ago in *Lombardi v Lombardi* [1973] 1 WLR 1276 the Court of Appeal held that it was legitimate for the court to reflect in its award the fact that assets had been accumulated since separation by one party alone. Cairns LJ stated, at 1281:

> 'Another way in which the judgment is criticised is that it is said that the judge was wrong to take into account that the husband's fortune had accrued to him since the parting. Again, I think that that is a proper circumstance to pay regard to. It was never suggested in this case, as it was in *Jones v Jones* [1971] 3 All ER 1201, that the position crystallised at the time of the parting and that thereafter any change in the husband's means was irrelevant. The increase in the husband's means is plainly relevant; but it is also, in my view, relevant to remember that it is something which has happened since the parting. And what is of much more importance here is that it is not merely something which has happened since the parting: it is something which has been brought about by the husband in co-operation and partnership with Miss Capozzi, who has indeed played a direct part in the business in which he has been engaged and which in the past has been the main

source of his income which has provided the capital which has enabled substantial assets to accrue to the husband and Miss Capozzi in the shape of premises which they are now able to let at a quite comfortable rent.'

[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.

[14] In *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69, Coleridge J stated, at 77:

'Mr Raynor also urges me to take into account the huge increase in turnover of the X group since the separation. He says that the real increase in the value of X has only occurred since that date and so in relation to any share the wife notionally would have in that asset it should be discounted. He says from a half to a third to reflect the fact that she made no contribution to it after separation.

Again, I think there is intrinsically some merit in this argument in this particular case but it needs to be approached with very great caution. There is no doubt that a glance at the figures reveals a very significant increase in the turnover of the businesses from 1997–2001 and this reflects directly on the value of the companies. Indeed, in relation to Z as it has been pointed out, it was not even in existence at the time of the separation. There is indeed a four-fold increase in turnover overall since the date of the separation and that is attributable to more than just natural price inflation.

Mr Mostyn urges me to reject this argument completely because, as he rightly points out, traditionally these applications have always been approached on the basis of the values existing at the date when the hearing takes place.

I am quite sure that even now in most cases that is the correct date when valuation should be applied. But I think the court must have an eye to the valuation at the date of separation where there has been a very significant change accounted for by more than just inflation or deflation; natural inflationary pressures on particular assets, for instance, the value of a house moving up or down in the housing market.

In this case the increase in value is attributable to extra investment of time, effort and money by the husband since separation and I do take into account the exceptionally steep increase in the turnover figures since the date of the separation. However, having done so it must be put in the context of the wife's continuing contribution too which similarly did not cease at the date of separation. She too has continued to play the valuable part that she had done throughout the marriage, in looking after the home and the children.

Mr Mostyn asked the hypothetical question: what would the position be if the value had similarly declined significantly since the date of the

> separation? In my judgment that too, in an appropriate case, could be a factor to be taken into account, particularly perhaps where the decline was as a result of action or inaction by the paying party. But that is not the situation in this case and I am not making a statement of general application or anything of that kind.'

[15] But what of the position where a party has taken matrimonial property that existed at separation and traded with it and achieved a significant profit? Two points of view arise here. On the one hand it can legitimately be argued that the party in question has traded with the other party's undivided share and so should share with that party the profit that has been generated. On the other hand it can equally convincingly be said that the second party has not contributed to the industry or endeavour that gave rise to the profit or growth and so it is unfair that the second party should share to the same extent in that profit as the first who made all the effort. Similar controversy arises in relation to bonuses earned in the period of separation. The earner of such bonuses can validly argue that he did his work outside married life and without the support of his spouse. But the other party can equally validly argue that the ability to earn was generated during the marriage; that she was maintaining the family infrastructure pending dissolution of the marital partnership and division of the assets; and that during the period of separation the parties were financially linked.

[16] In *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FLR 192 a significant period of separation had occurred before the determination of the wife's claim for ancillary relief. In that period Mr Cowan had significantly increased the value of the assets. He argued that this post-separation accrual should be marked by a substantial departure from equality. Thorpe LJ stated, at 122 and 217 respectively:

> '[70] All the above considerations are capable of inclusion in a review of the respective needs, responsibilities and/or contributions of the parties. They cover three of Mr Pointer's four submissions summarised in para [21], above. The third, namely that much of the husband's fortune was generated in the 6 years post-separation, receives no reflection because in my opinion it is inherently fallacious. The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in Baco. The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit. If this factor has any relevance it is within the evaluation of the husband's exceptional contribution.'

Mance LJ (as he then was) stated, at 139 and 234 respectively:

> '(b) The relevant date at which to consider the parties' assets

[131] Mr Pointer submits that the court should look at the nature and extent of the assets in 1994 when the parties finally separated, or should at least take account of that separation and of the substantial subsequent increase in assets due, in particular, to the take-over of HD by Baco in 1997 and Baco's subsequent disposal in 2000. This increase was also, he submits, a result of Mr Cowan's business acuity. He further submits that at trial it was irrelevant and unnecessary to go into this aspect; Mr Cowan and his advisers were, on the then state of the law, justified in assuming that Mrs Cowan's claim could be effectively restricted by reference to her (reasonable) requirements. Only since *White* has the relevance of extra assets emerged, and the court should allow investigation of the time at which and reasons for which they emerged, by directing a further hearing.

[132] I start with Mr Pointer's basic submission that the date of separation represents a cut-off date. I am unable to agree with it. I note that s 25(2)(a) itself requires the court, when exercising its power to make among other things a property adjustment order, to have regard to, inter alia:

> "… 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 …' (emphasis added)."

[133] Further, the date of the exercise of the court's power is not only accepted to be the traditional date but is, as it seems to me, also the natural date in a case such as the present. Here the parties have lived apart, either content or obliged to wait before any divorce. The bulk of the assets was in the meantime the husband's and under his control. He could do with it as he wished. She had no opportunity to use the assets or to increase them in the meanwhile. If the husband lost the moneys, the wife would suffer. If he added to them, one might expect the wife to benefit.

[134] We were referred to reasoning of Coleridge J in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69, at 77, where he thought that there was "intrinsically some merit … in this particular case" in an argument that he should 'take into account the huge increase in the value of the X group since the separation'. But Coleridge J went on to say that he was quite sure that even now in most cases the date of the hearing was the correct date of valuation. It was only "where there has been a very significant change accounted for by more than just inflation or deflation" that he thought that "the court must have an eye to the valuation at the date of separation". The crux of his thinking appears in the next paragraph, where he said, at 78:

> "In this case the increase in value is attributable to extra investment of time, effort and money by the husband since separation and I do take into account the exceptionally steep increase in the turnover figures since the date of the separation."

[135] What Coleridge J was doing was not undertaking the whole valuation exercise at a different date from that prescribed, as I see it, by the statute as well as by tradition, but taking into account, as a

> potentially relevant factor, that it was only by virtue of the husband's extra work and money that the "huge increase" in value between separation and hearing had occurred. That links with the issue to which I have to return, to what extent, if any, is it now relevant to seek to evaluate the contribution made by either party to the overall wealth as at the date of the hearing. If this is relevant at all, then it may be that one party's special skill in accumulating assets will achieve some added weight as a factor if it occurs after separation, but before any divorce or financial hearing. This may be so, despite the countervailing consideration to which I have already adverted, which applies where such a party is in effect trading with and risking the wife's as yet unascertained part of the overall assets existing at separation.'

[17] In *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 there had been an 18 month period of separation half way through the marriage. At 112, para [7], I found that:

> 'This graph shows that approximately US$5m (in the value of money today) was accumulated during the period of estrangement. This was a period of steep accretion of capital. The amount accumulated is about 20% of the total gross assets as recorded in the final spreadsheet. Of course, H cannot claim sole credit for money accumulated in the period of separation as some of the increase will be attributable to natural capital growth of existing funds. I will deal below with how this should affect my award.'

And I went on to find that, at 125:

> '[52] I have already found that during the period of estrangement the assets grew by a not insignificant amount: it would seem to be about £2.4m of the £12m. It is impossible to gauge what proportion of this amount is referable to natural capital growth and what was derived from savings made from work done by H when the parties were separated. But certainly to some significant extent H made during this period a contribution unmatched by any comparable contribution by W.'

[18] In *M v M (Financial Relief: Substantial Earning Capacity)* [2004] EWHC 688 (Fam), [2004] 2 FLR 236 the husband argued that substantial bonuses and deferred compensation that he had earned after separation should be unequally divided. Baron J rejected this argument, at 257:

> '[62] In this case, the post-separation accrual does not arise from the trading of capital which existed at separation, rather it has accrued from the husband's own hard work post-separation, albeit that part of his bonus is referable to a scheme that was "invented" during the marriage. [63] Moreover, the bonus is also due to the husband's personal work in fulfilling ABC Co's current policy of developing its overall business. This takes up about 50% of his time albeit that it is not currently

> profitable. Such undefined part of his bonus as is referable to this aspect cannot be seen as relating to his earlier "invention".
> [64] These factors are relevant and I take them fully into account.
> …
> [81] The assets that have been built up since the parties have separated fall to be considered in this case because the litigation has not been unduly delayed and the parties have been financially linked throughout. In addition, the husband failed to make adequate interim provision.
> [82] In all the circumstances of this case, the fair outcome is an equal division of all the assets in the schedule which appears at Appendix 1.
> …'

[19] I now turn to the opinions of the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186. Although argument was addressed about this subject, Lord Nicholls of Birkenhead, Lord Hoffmann and Baroness Hale of Richmond did not write about it. Lord Hope of Craighead concentrated exclusively on deficiencies and unfairness in Scottish law. He drew attention to a recent development in Scotland in this area. By s 10(3)(b) of the Family Law (Scotland) Act 1985 the matrimonial property is to be valued on the date that the parties cease to cohabit. A number of cases showed this to be unfair. Lord Hope of Craighead stated, at 1307 and 1211 respectively:

> '[112] The sheriff who granted decree of divorce in *Wallis v Wallis* 1992 SC455 made an order for the transfer by the wife of her half share in the matrimonial home to the husband as part of the division of the matrimonial property. The Court of Session held that the effect of s 10(3)(b) of the 1985 Act was that the whole of the wife's share of the increase in its value after the date of separation which passed to the husband as a result of the sheriff's order had to be left out of account in the computation of the amount of the matrimonial property that determined how much of it was to be paid by him to the wife. Dr Eric Clive, the principal architect of the legislation and a Scottish Law Commissioner said that the decision was wrong ("Financial Provision on Divorce – A Question of Technique" 1992 SLT (News) 241). Professor Joseph Thomson, then Regius Professor of law at Glasgow University, said that it was right ("Financial Provision on Divorce – Not Technique but Statutory Interpretation" 1992 SLT (News) 245). When it came here on appeal your Lordships' House affirmed the decision of the Court of Session: *Wallis v Wallis* 1993 SC (HL) 49.'

[20] This resulted in the Scottish Parliament passing an amendment to the valuation date rule. As Lord Hope of Craighead explained:

> '[113] The effect of the amendment made by s 16 of the Family Law (Scotland) Act 2006 is that property transferred to one of the spouses by order is now to be valued, unless otherwise agreed, at the date of the making of the property transfer order, or, in exceptional circumstances, such date as the court shall determine: see Joe Thomson's general note on this section in *Current Law Statutes*. But this amendment leaves

untouched another problem which was mentioned in *Wilson v Wilson*, 1999 SLT 249. At p 253C-D Lord Marnoch drew attention, as he had done previously in *Latter v Latter*, 1990 SLT 805, to the fact that the definition of matrimonial property was capable in other ways, on occasion, of producing very real injustice. He thought it had done so in that case, where much of the wealth created during the marriage was vested in a farming company and the husband's shareholding in the company was excluded from the matrimonial property because it had been either held by him prior to the marriage or inherited by him from his father.'

[21] It seems tolerably clear that Lord Hope of Craighead was approving of the amendment and felt that a general rule of valuation of matrimonial property *as at the date of the hearing* (with the discretion to depart therefrom) was likely to lead to justice in the majority of cases.

[22] Lord Mance stated, at 1327 and 1230 respectively:

'[174] Sixthly, if account is taken of the increase in the value of the parties' assets during the marriage (the matrimonial *acquest*), a question may arise about the date up to which one should measure it. Should this be up to date when the parties ceased effectively to live as married partners (here April 2003), as Mr Mostyn considered in his judicial capacity in *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 at para 34? Or should it be up to a later date such as the date of trial, or even, in a case where an appellate court thinks it right to re-exercise the discretion, up to the date of the appellate decision? Reference was made by Mr Mostyn to my remarks in *Cowan v Cowan* [2002] Fam 97, [2001] 2 FLR 192, paras 130–135. The matters to which the court must have regard under s 25 include several which exist or appear likely as at the date the court has regard to them (cf s 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look back at the past (eg s 25(2)(c), (f) and (g)). To the extent that the focus is on the matrimonial *acquest*, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance. The present may be viewed as a case (paralleling the then unreported decision of Coleridge J in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 to which I referred in *Cowan v Cowan*) where the increase in value of the New Star shares between separation in April 2003 and trial in October 2004 or judgment in April 2005 was contributed to by the husband's further investment of time and effort, independently on its face of any contribution by the wife. Further, Mrs Miller had here no right to, and could not have been given, any part of Mr Miller's New Star shareholding in relation to which Mr Miller carried the risk. Mrs Miller has at all times been living in the house, which has now been formally transferred to her. Her only further claim was to a sum of money, assessed by the judge at £2.7m (which Mr Miller paid in two instalments in May and June 2005). Mr Miller cannot easily be said in this case to have been holding on to any asset which should have been Mrs Miller's, or to owe anything other than money. Assuming that the

focus is on assets acquired during the marriage, rather than on the husband's overall means, it seems to me therefore natural in this case to look at the period until separation.'

[23] I would be surprised if Lord Mance in this paragraph was disavowing and disagreeing with what he had earlier written in *Cowan*. Indeed the drawing by him of a parallel between Mr Miller's work at New Star after separation and Mr N's post separation work seems to me to be an explicit approval of what he had earlier written in para [135] of *Cowan*. It seems to me that Lord Mance was approbating emphatically the principle that independent endeavour after separation which is productive of money or property should be reflected in the division of the assets.

[24] Doing the best I can to draw the various threads together I think that the following principles can be deduced:

24.1 The statute requires all the assets to be valued at the date of trial.

24.2 For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will 'forcefully' apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-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.

24.5 By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division: (a) if the marriage is short; and (b) part of the matrimonial property is

'non-business partnership, non-family assets' (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).

24.6 The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and, if so, in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.

24.7 In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means.

Delay

[25] In some cases delay will receive at least some reflection by the characterisation of assets acquired after separation as non-matrimonial. But as I have tried to explain above, this is by no means an invariable consequence. The question is whether delay per se should be reflected in the exercise of the discretion.

[26] In Jackson's *Matrimonial Finance and Taxation* (Butterworths, 7th edn, 2002), at para 5.7, it is stated:

> 'Whatever the length of the marriage, a claim may fail if it is left dormant for too long, in which case one factor may be that the husband's assets have been built up with another woman. It has been said that after a long lapse of time a party to a marriage should be entitled to take the view that there would be no revival or initiation of financial claims against him; the longer the lapse of time the more secure he should feel in the rearrangement of his financial affairs and the less should any claim be encouraged or entertained.'

[27] The authorities for these propositions are all very old: *Foster v Foster* [1977] Fam Law 112, *Chambers v Chambers* (1980) 1 FLR 10 and *Fraser v Fraser* (1982) 3 FLR 98. I consider them to have equal validity in the post-*White* era.

[28] These propositions were foreshadowed in the even earlier case of *Chaterjee v Chaterjee* [1976] Fam 199, (1975) FLR Rep 134 where Ormrod LJ stated, at 208 and 139 respectively:

> 'Delay, if it really is delay in the sense of prejudicing the other party, may have an important influence on the justice of the case. So may conduct which can be described as "lulling" the other party into the belief that all claims have already been dealt with. Similarly it may be unjust to interfere with property rights after a lapse of a reasonable and proper manner in the belief that the financial consequences of the divorce have been settled.'

[29] A vivid example of the vice of delay is the decision of Booth J in *D v W (Application for Financial Provision: Effect of Delay)* [1984] Fam Law 152. There the delay was 6 years and the parties were found equally responsible for it. That aside, the applicant wife had a meritful claim. She was seeking to recover the value of her half-share of the former matrimonial home. That half-share was worth £14,000. On that basis she would waive the £2,000 unpaid periodical payments that H owed her. Booth J stated:

> 'There are certain detrimental consequences of delay. The first is that delay engenders bitterness and hostility between the parties which is detrimental to the whole fairly and, in particular, to any children of the family. The husband in this case is aggrieved at the attack that is now made upon the home in which he has been living for the past 10 years. The wife, on the other hand, feels deprived of her money and the right to live there. The delay inevitably increases costs. It leads to a multiplicity of affidavits which are filed in order to deal with the ever-changing position of each of the parties. Inevitably, it lead to an exchange of correspondence over a protracted period between solicitors and, no doubt, also leads to attendance of the parties upon the solicitors. And all those matters adds up in costs.
>
> Further, with the change in property values and with inflation as it is in our present economic situation, as well as with the changes in the parties' own situation and the commitments they take upon themselves, the whole case can be materially altered, and the ability of the parties to cope with any orders that the court might otherwise properly have made upon the merits of a case may be put in jeopardy. Indeed, delay can put the court in the simple position of not being able to do justice between the parties according to the merits of each case. Unless it can be clearly shown that one party bears the greater responsibility for the delay that does the other, the court may be left with no alternative but to make an order which does not reflect the merits of the case.'

In the result, Booth J felt that all she could do was to award the wife a mere £2,500 (inclusive of the arrears of maintenance). I would emphasise the risk of injustice that is caused by delay. The longer the time that passes the more likely it is that documents will disappear and memories cloud with the result that there is a greatly enhanced risk of the court rendering imperfect justice.

[30] Almost every other field of civil litigation has statutory anti-delay measures in the form of limitation periods. Even where limitation periods do not exist the equitable of doctrine of laches may apply to debar a delayed claim. Limitation periods and the doctrine of laches embody the public policy consideration expressed by Wood J in *Chambers*, namely that the longer the

lapse of time the more confident a party should be that no claim will be initiated against him, and the more secure he should feel that his financial structures will not be disturbed. It seems to me that there is no substantive difference between the dicta in *Chaterjee* and *Chambers* and the oft-quoted formulation of the doctrine of laches by Sir Barnes Peacock (later Lord Selborne) in *Lindsay Petroleum Company v Hurd* (1873) 5 App Cases 221, at 239:

> 'Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.'

[31] Of course there can be no question of implying an actual limitation period into the law of ancillary relief (*Twiname v Twiname* [1992] 1 FLR 29). It is simply a question of how delay should be treated in the exercise of the statutory discretion.

[32] While of course no rigid rule can be expressed for the infinite variety of facts that arise in ancillary relief cases, I would have thought, generally speaking, that it would be very difficult for a party to be allowed successfully to prosecute an ancillary relief claim initiated more than 6 years after the date of the petition for divorce, unless there was a very good reason for the delay. I agree whole-heartedly with the statement of Wood J in *Chambers*, at 13, that:

> Where a marriage is irretrievably broken down, the parties are to be encouraged to deal with all outstanding issues as reasonably expeditiously and succinctly as possible.

Third party rights

[33] In my decision of *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2005] EWHC 2860 (Fam) [2006] 1 FLR 1263, at 1268, I stated:

> '[33] It is well established that a dispute between a spouse and a third party as to the beneficial ownership of property can be adjudicated in ancillary relief proceedings: see *Tebbutt v Haynes* [1981] 2 All ER 238, per Lord Denning MR:

> "It seems to me that, under s 24 of the 1973 Act, if an intervenor comes in making a claim for the property, then it is within the jurisdiction of the judge to decide on the validity of the intervenor's claim. The judge ought to decide what are the rights and interest of all the parties, not only of the intervenor, but of the husband and wife respectively in the property. He can only make an order for transfer to the wife, of property which is the husband's property. He cannot make an order for the transfer to the wife of someone else's interest."
>
> [34] It is to be emphasised, however, that the task of the judge determining a dispute as to ownership between a spouse and a third party is of course completely different in nature to the familiar discretionary exercise between spouses. A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division.'

[34] I went on to suggest at para [36] that where the entitlement of a third party had to be decided in ancillary relief proceedings, the third party should be joined to the proceedings and the issue of the third party's entitlement should be properly pleaded and case managed. In the New Law Journal (vol 156, no 7224 p 793) David Burrows has suggested that the power to join a party to ancillary relief proceedings to determine his asserted proprietary interest is procedurally doubtful. I entirely disagree. If, as is plainly the case, there is substantive power within ancillary relief proceedings to determine a third party's interests then it has to follow that the determination must be binding on him for which purpose he has to be a party. Even if the Rules did not expressly provide for the power to join (which they do) then in order to give effect to the substantive power that procedural power would have to be implied. But RSC Ord 15 r 6(2)(b) (which still applies to family proceedings) plainly gives the power to join. This empowers the court to join any person:

> '(i) … whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
> (ii) … between whom and any party to the cause or matter there may exist a question or issue arising out of or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just an convenient to determine as between him and that party as well as between the parties to the cause or matter.'

The decision of *T v T and Others (Joinder of Third Parties)* [1996] 2 FLR 357, which held that it was appropriate to join trustees of a post nuptial settlement, is not a compendium of all the circumstances where joinder can be ordered in ancillary relief proceedings. It is an example of a set of circumstances where joinder may be ordered. If a third party claims that property which is said by the applicant for ancillary relief to comprise part of the pool over which the court's dispositive powers range then it is obvious that under one or other limb that third party can and should be joined in order that his claim may be adjudicated.

[35] In my opinion the commencement by H of two separate sets of civil proceedings under the Partnership Act 1890 and TOLATA was wholly

misconceived and unnecessary. All that was necessary was for H to seek within the ancillary relief proceedings declarations as to Fabio's share in the company and the apartments. To that application Fabio should have been joined.

[36] The object of the exercise is to determine and declare by reference to land, trust and partnership law principles what property belongs to Fabio and therefore is outwith the court's dispositive ancillary relief powers. If Fabio owes either H or W money by way of equitable accounting then that can be calculated and his share will be pro tanto reduced. It must be emphasised however that if a limitation period or the doctrine of laches would apply were the relief to be sought under the Partnership Act 1980 or TOLATA then those rules will apply equally if the exercise is done by means of an application within the ancillary relief proceedings.

[37] Once the exercise is done a pool of assets will exist which represents the assets of H and W over which the court's wide ancillary relief powers will range. Once that pool has been determined it is not relevant to consider the strict rights and claims of H against W (and vice versa) under the law of partnership, trusts or real property. As Lord Nicholls of Birkenhead said in *White*, at 611 and 995 respectively:

> 'I agree that both Thorpe and Butler-Sloss LJJ did attach considerable importance to the wife's entitlement under the partnership. There are observations, particularly in the judgment of Thorpe LJ, which, read by themselves, might suggest that in this regard the clock was being turned back to the pre-1970 position. Then courts often had to attempt to unravel years of matrimonial finances and reach firm conclusions on who owned precisely what and in what shares. The need for this type of investigation was swept away in 1970 when the new legislation gave the court its panoply of wide discretionary powers. Since then, the courts have not countenanced parties incurring costs which would be disproportionate to the assistance the expenditure would give in carrying out the s 25 exercise.
>
> All this is well established. So much so, that I cannot believe that either Thorpe LJ or Butler-Sloss LJ intended to gainsay this approach. Indeed, Butler-Sloss LJ stated expressly that what she had in mind, where parties were in business together, was a broad assessment of the financial position and not a detailed partnership account. She rightly noted that, even in such a case, the parties' proprietorial interests should not be allowed to dominate the picture: see [1998] 2 FLR 310, at 323, [1999] 2 WLR 1213, at 1227. If Thorpe LJ went further than this, he went too far.
>
> The wisdom of this approach is confirmed by the substantial body of additional evidence produced for the first time in your Lordships' House. The new material included the Whites' partnership agreement. From this evidence it emerged that, if a strict valuation of the parties' shares on a dissolution of the partnership were needed, several disputes would have to be resolved: disputes about the assets and liabilities of the partnership, a dispute about the value of the milk quota, and a dispute over the proper interpretation of the somewhat obscure retirement provisions in the partnership agreement. I do not think any of these

differences need be resolved. The House can, and should, proceed on the basis of the factual findings of Holman J.'

[38] I maintain the view I expressed in *TL v ML* that in many cases it would be desirable for the rights and claims of the third party to be determined as a preliminary issue so that the size of the ancillary relief pool can be ascertained at an early stage and so that a meaningful financial dispute resolution can take place.

The burden of proof

[39] In seeking to demonstrate that the beneficial interests do not follow the legal title Mr Tidbury accepts that there is a heavy burden of proof laid on his client. H has to prove that at the time of the incorporation of Rossi & Rossi Ltd it was the common intention of himself and W that he would have a beneficial interest in the shareholding of the company. Similarly he has to prove that at the time of the purchase of the apartments it was the common intention of himself, W and Fabio that he (H) would have a beneficial interest in the properties.

[40] It is right and proper that a heavy burden of proof is imposed on H because absent the same W and Fabio would have to prove a negative. It is sometimes said that 'you cannot prove a negative', but this is not true as an absolute proposition. Even the paradigm unprovable negative of Fermat's last theorem (which postulated that for the equation $x^n + y^n = z^n$ there is no integer solution for *n* greater than two) was proved by Professor Andrew Wiles in 1994. What the proposition means is that generally speaking it is very much more difficult to prove by evidence that an event did not occur than it did. This is particularly the case here. It is obviously much more difficult for W and Fabio to prove that there was no business or financial relationship between H and W after 1985 than it is for H to prove the positive proposition that there was.

My factual findings

[41] My task in describing the history would have been made immeasurably easier had I been supplied with a comprehensive litigation chronology. A detailed chronology both of the milestones of the marriage as well of the events of the litigation is an indispensable aid to a judge trying any case, but particularly a lengthy case such as this that involves disputed issues of fact stretching back over the years. Good practice requires that the chronology should clearly mark those events that are in dispute and should signify the respective contentions.

[42] The relevant story of H and W can be divided into three phases: (1) 1964–1985; (2) 1985–1993; and (3) 1993–the present.

1964 to 1985

[43] In 1964 H was aged 30. He lived in Turin where he worked in partnership as an antiques dealer, principally in French furniture. W was aged 33 and had a 6-year-old daughter and a 1-year-old son (Fabio) from a prior relationship. H and W formed a relationship and started cohabiting. W kept the books of the business. In 1968, H dissolved his partnership and began to travel. It was from this point that his interest in Asian and in

particular Himalayan art budded and blossomed. In 1972, H and W were married in Turin. In 1975, H and a friend opened a gallery called 'Momi' in Via Andrea Doria. This specialised in high quality Asiatic pieces. In 1976 the gallery was moved to Via Vela. This endured until 1979.

[44] H has stated that this period was one of 'considerable success and prosperity'. W said in oral evidence that when at Via Andrea Doria the gallery was 'quite unsuccessful' and that when in Via Vela it was 'not very busy' but that a decent number of important items were sold and that the venture made some profit. I think that the gallery was moderately successful at that time. Needless to say not a single document from that era survives to support the case of either party.

[45] In 1979 the gallery was shut. The parties advance different reasons why, which I do not find necessary to state let alone resolve. H and W moved to rented property, an old mill, in a village called Passerano about 35 km from Turin. It was at this time that the sexual relationship between the parties came to an end. W told me, and I accept, that H spent considerable periods in Turin where he had a girlfriend.

[46] In his affidavit H said of this period that 'I continued to buy worldwide, and store stock at the new house, but without the gallery my business struggled and I was heavily dependent upon a London friend who sold for me there. … [W] and I struggled on for the next five or six years'. In his oral evidence he tried to shrug off this statement saying that when he mentioned 'struggling' he was not referring to money. This was hardly convincing, especially when it is agreed that at this time W set up a small (and it appears unsuccessful) business of trading in bric-à-brac at local markets, in order to try to make ends meet. I am satisfied that during the Passerano sojourn the business did fall on hard times.

[47] H says that in this period W became determined to relocate to London. He says that they argued about what kind of business they should run there, he saying that he was determined to stick to high class antiquities whereas W wanted to run a sandwich shop. W says the decision to move to London was hers and hers alone and by 1985 she did nothing nor made any decisions with H. I am clear that W's version is correct.

1985–1993

[48] I am clear in my view that it was W alone who came to London in 1985. Even on H's case he was centred in India from this point onwards, visiting London only occasionally.

[49] The business presently owned and run by W and Fabio had modest beginnings in a basement off the Portobello Road. There is no dispute that it was in the same field that H had previously traded in Turin, namely Asiatic and, in particular, Himalayan art and artefacts. The business was sufficiently successful to sublet some space in a gallery in Jermyn Street. In 1987, W formed a company called ARCO Ltd (being an acronym of her name). It was a 100 share company of which 99 shares were in her name and 1 in Fabio's. Fabio had studied at SOAS and then worked for Spink and Sons. In 1988, he joined his mother's business. In 1989, the name of the company was changed to Rossi and Rossi Ltd. In the year ending 30 June 1992, W transferred 49 shares to Fabio so that she and he became equal shareholders. The

accounts of the business show turnover rising from £32,000 in 1988 to £360,000 in 1993, with gross profit moving from £2,000 to £64,000 in the same period.

[50] Not all the business was transacted through the company. There were sales through a gallery in Zurich, the proceeds of which were paid into an account held by W with SBS in Lugano, Switzerland. From that account US$46,000 was sent to the conveyancing solicitors dealing with the purchase of 37B Randolph Avenue. Moreover the accounts show that in 1988 W introduced £26,664 into the business; in 1989 she introduced £27,721; and in 1990 she introduced £5,702. In the year ending 30 June 1993, W introduced stock worth £294,900 into the business.

[51] W says that these moneys were made by her alone from her own business activities both here and abroad.

[52] On 1 August 1989, W and Fabio purchased in their joint names the property 39D Randolph Avenue, London W9. As between them this is regarded as Fabio's flat. It cost £90,000. With disbursements a total of £93,350 had to be found. Barclays Bank as mortgagee lent £72,000 to W and Fabio. According to W and Fabio the balance of £21,350 was provided as to £11,000 by a loan from Spink and Sons, and as to the balance from the proceeds of sale of gold coins that had been given to Fabio by his paternal grandparents over time since his birth.

[53] On 1 March 1991, W and Fabio purchased in their joint names the property 37B Randolph Avenue, London W9. As between them this is regarded as W's flat. The two flats are vertically adjacent. No 37B cost £245,000. Disbursements added a further £3,800 to the price. Coutts Bank as mortgagee lent through its Nassau branch the Japanese yen equivalent of £157,500. The balance was found as to $46,000 from W's Swiss bank account (£24,500) and £75,000 which came from SBS Zurich. These sums add up to £257,000 against money needed of £248,800. There was therefore a surplus of a little over £8,000 which was repaid to W.

[54] W says that the £75,000 which came from SBS Zurich was lent by a friend of hers from Barcelona called Señor Daltabuit, which loan was not repaid directly by her but by the means of waiver by her of commissions on sales of his goods. This was confirmed by Señor Daltabuit in his oral evidence (given via a Spanish interpreter).

[55] W's evidence was unequivocally supported by Fabio.

[56] W's version of events was confirmed by the oral and written evidence of David Salmon. He is a well known dealer in the field of Asiatic antiquities. He confirmed that so far as he was aware H had nothing to do with W's business. In his written statement he had stated that to his recollection when W came to London she had 'virtually nothing'. In his view, H gave W no support for her new business. By contrast she was helped enormously by Anthony Gardner of Spinks, a giant in this field, who died in about 1993. In answer to me, Mr Salmon stated that W came to London purely to escape an abusive relationship with H; that she operated entirely on her own, initially in very humble circumstances. Shirley Day was the lady who sublet part of her gallery space in Jermyn Street to W. She confirmed that she had never met H at the Gallery and knew nothing about him. Francesca Galloway worked for Spink and Sons from 1976 to 1992 and was in charge of the Islamic and Indian miniature department. To her knowledge, Rossi and Rossi Ltd was a

mother and son business; she had never met H and was not aware of any business or financial relationship that he had with W. As far as she was concerned he was 'a figure from the past'.

[57] In addition, W relied on a number of written statements the authors of which were not called for cross-examination by H. Their attendance was waived on the customary basis namely that in not requiring their attendance H should not be taken as necessarily accepting what they said. That said H cannot seek to finesse away the impact of this body of written evidence by not testing it orally. The evidence included:

57.1 John Alderman who wrote of the purchase of W's properties and of H's lack of interest in her business;

57.2 Steven Kossak a curator of the Metropolitan Museum of Art in New York who deposed to W having no business relations with H since 1987;

57.3 Sir Robert Bruce-Gardner, a former director of conservation at the Courtauld Institute who stated that from his observation from 1986, H had no involvement in W's business;

57.4 Sharon Solomons, who from 1986 acted as W's shipper. She stated that from 1986 she neither received nor sent any shipments on H's behalf, nor had she had any correspondence or instructions from him regarding any shipments;

57.5 Margaret Mark, the vendor of No 37B, who stated that despite H's assertion, she never met him;

57.6 Mr Kaku, a gallery owner from Tokyo, who spoke of W's abilities and H's lack of involvement in the business;

57.7 Mr Edward O'Neill, a dealer in Chinese antiques in Hong Kong, who also spoke of W's abilities and H's lack of involvement in the business;

57.8 Alby Nall-Cain who spoke of the business' humble beginnings and of H's non-involvement in it.

[58] H's case is that the move to London in 1985 was a joint venture. The business that was established was a partnership between him and W. Later there was a conversation between him W and Fabio when it was expressly agreed that it would be a three way partnership and that each partner would have a fixed monthly salary of $2,500. He says that the purchase of the two flats were purchased by him and W. He says that he was not a shareholder in the business nor a titleholder of the properties because he left administration to W and because he trusted her.

[59] H asserted that very valuable stock was taken from Italy to London in 1985 and that shortly thereafter W had stated in the presence of Nathaniel Vita that she had cash from sales of $1.25m (this was the second figure that H mentioned: the first was $750,000).

[60] The nature of the partnership was that H would be largely based out in the East and would source and buy items which he would arrange to be shipped to London. In this he relied on the evidence principally of the following:

60.1 His nephew Massimiliano Delpero who gave written evidence of

his attempts to try to broker a settlement by mediation, which I regard as of doubtful admissibility. Even if admissible I regard the evidence as of tangential relevance.

60.2 Nathaniel Vita stated that he regarded H as a member of his family. He stated that it was joint decision of H and W to relocate to London. He claimed to have offered loans to the business on the strength of representations from H that the stock was worth $1m. He was unable to confirm H's evidence concerning the conversation about cash of $750,000 or $1.25m.

60.3 Guido Fuga told me that he had overheard telephone conversations and a couple of face to face discussions between H and W when they were talking about their business.

60.4 Olga Getto stated that she was aware that H was continually sending things to W. She admitted that she had been in a sexual relationship with H from the mid-1980s until the 1990s.

60.5 Lobsang Wujohkstsang stated that when a student at the University of Punjab at Chandigarh from 1985 onwards he knew H and W and that he was aware from conversations with H that he was in business with W and was sending items to her in London.

60.6 Tado Lithangpa gave evidence to me via video-link from Peking. He gave evidence in heavily accented and halting English. He is a Tibetan dealer in artefacts based in Lhasa. He stated that from 1976 to 1994 he sold many items to H which were sent to London. He only started to deal directly with W after 1994.

[61] It can be seen from the above that there is a stark conflict between the evidence of W and Fabio and their witnesses and H and his witnesses. This is a case where one or other bloc is giving deliberately false evidence. There is no room for me to fudge the issue by finding that there has been some kind of misunderstanding. There is no room for me to find that there is a third way.

[62] Needless to say, at this distance of time the documentary evidence is almost non-existent. W and Fabio have produced some correspondence of the business from that period comprising letters of negotiation with foreign dealers. What is striking is the total absence of reference to H in those letters. Indeed there is almost no documentary evidence to connect H to this business at all.

[63] The transfers of $44,500 from W's Swiss bank account and the £75,000 said by her to come from Señor Daltabuit's account are marked respectively 'O/RENZO ROSSI' and 'RIF: RENZO ROSSI'. Mr Tidbury accepted that H at that time did not have any Swiss Bank account and that he was not aware that W had one. W's explanation for this was that it had been suggested to her by her accountant that if she characterised the remittances into this country as 'maintenance' from H then she might be in a better position to argue with the Inland Revenue that she should not have to pay tax on the money. While this strikes me as somewhat dubious behaviour I do not consider that these two references support H's case at all.

[64] Similarly, I do not think that H's distinctly patchy recollection of the provenance of certain items appearing in the Rossi and Rossi catalogues in 1993 and 1994 helps him at all. He seemed to be more wrong than right in his

identification of source and disposal, and I have to say that I regarded this evidence as a pretty naïve attempt to bolster his case generally.

The Yamantaka Mandala

[65] When H was giving evidence I asked him to identify to me the single most valuable transaction that he entered into on behalf of the business. He told me about a large kesi Mandala dating from about 1300 AD which he had purchased for about $550,000.

[66] A kesi is a large textile weaving or tapestry. A Mandala is the representation of the cosmos. At its centre it is occupied by a deity who is surrounded by a series of worlds or spiritual stages through which the believer must pass before reaching the centre and thus enlightenment.

[67] This kesi Mandala now hangs in the Metropolitan Museum in New York and is one of its most important pieces in the field of Sino-Tibetan art. It has the wrathful Yamantaka as its central deity. The cult of Yamantaka was introduced into China by a disciple of Phagspa, a preceptor or teacher to Kublai Khan (1215–1294) and the most powerful lama in the early Yuan dynasty. This particular *kesi* contains (at bottom left) the portraits as donors of the Emperors Wenzong and Mingzong who reigned from 1328 to 1332.

[68] H told me that he found the Mandala in Lhasa, Tibet at the time of the First Gulf War. It is to be noted that this took place between 16 January 1991 and 6 April 1991. H stated that he found it through a local broker, Tado Lithangpa. H said that it was 2–3 m high; that it was made from silk, feathers and dyed leather; and that it was embroidered. He said that it was purchased for $550,000 which W brought out to Lhasa in cash stuffed into the pockets of a hunting jacket. That cash came from the safe of the gallery. The broker sent the kesi to Hong Kong where a female friend Daniella Vita (the wife of Nathaniel Vita) collected it. She (Daniella) brought it to London. It was then sent to Switzerland for restoration. Two years later it was sold to Mr Kaku (one of W's witnesses – above).

[69] After an overnight adjournment H was further cross-examined about the Mandala. He now remembered aspects that he had not mentioned the day before. He said that he had been mistaken when he said that it had been sold to Mr Kaku – the buyer was Mr Horiuchi. He said that it was a well known piece hanging in the Metropolitan Museum. He now remembered that the kesi that he had bought was missing two small portions. Of these one had been owned by Spink and Sons and one had been owned by an American called Bruce Miller.

[70] The evidence of W about the Mandala (which was supported by Fabio) was as follows. She saw the item in 1989 or 1990 in Lhasa. It was shown to her by Tado Lithangpa. It was bundled up. When it was opened it was full of moths and very dirty. Its intrinsic beauty was however striking. It was a kesi tapestry made of silk. It was like a French d'Aubisson tapestry. It did not contain any leather or feathers. Part of the kesi was missing. Sometimes these tapestries had been cut up in order to supply covers for religious books. W was of the view that this was the best tapestry that she had seen in her life. Tado Lithangpa wanted $1m for it.

[71] W retuned to London and spoke to Anthony Gardner. He said that Spink and Sons co-owned with a Mr Schatten one fragment from that very same tapestry, and that a Swiss dealer based in Paris called Mr Kiro

Roncoroni had another fragment. Mr Gardner saw how important it was to purchase the main piece so that the kesi could be reconstituted. W did not have $1m. Therefore she and Mr Gardner entered into a co-venture to purchase Tado's piece.

[72] Tado Lithangpa agreed to accept $600,000. That was supplied as to $300,000 by Spink and Sons and $300,000 by W. W told me she raised her money from Mr Vita, on the basis of a 60/40 profit sharing deal with him.

[73] When all the money was assembled it was wired to Tado Lithangpa in Hong Kong. W was emphatic that she did not travel to Lhasa with the money in cash. Tado brought the item to Hong Kong in a suitcase. From there Daniella Vita brought it to London.

[74] Upon its arrival it was reunited with the Spink/Schatten fragment. Schatten was paid about $70,000 for his interest. (W produced a letter from Bruce Miller confirming that he had sold the fragment to Mr Schatten in 1990–91, and that Schatten had later sold a 50% interest to Spink and Sons).

[75] Mr Roncoroni agreed to supply his piece on the basis that he was paid $300,000 when the reconstituted whole was sold on.

[76] Fabio produced three photographs of the kesi. The first showed the kesi missing both of the two fragments. The second showed it when reunited with the Spink/Schatten fragment. The third showed it reunited with both missing fragments. Once all the pieces were gathered the kesi was sent for restoration to Maggie Dobbie in Fulham. It was not sent to Switzerland.

[77] The piece took 2 years to sell. Eventually it was sold in 1991 to Mr Horiuchi for $1.5m. This is confirmed by a supplemental statement from Francesca Galloway. Later Mr Horiuchi asked Spink and Sons to represent him on the sale to the Metropolitan, which acquired it in 1992.

[78] I am satisfied beyond any reasonable doubt that the version of events given by W is true and that H has invented his account. Moreover I am satisfied that H has procured both Nathaniel Vita and Tado Lithangpa to give false evidence about this.

[79] H's account is riddled with mistakes and inconsistencies. It was easy for him to latch onto this acquisition as in the small circle of Sino-Tibetan art dealers the milestones of this famous transaction would have been common knowledge. But H made too many mistakes:

79.1 The piece was not found in 1991, but 1989 or 1990.
79.2 It was not an embroidery but a tapestry.
79.3 It did not contain feathers or dyed leather.
79.4 W did not come to Lhasa with the purchase money of $550,000 in cash stuffed into a hunting jacket.
79.5 The second missing fragment was not owned by Mr Miller but Mr Roncoroni.
79.6 It was not sent for restoration to Switzerland.
79.7 It was not sold to Mr Kaku.

Also, I do not believe that H spontaneously remembered overnight about the missing fragments. I believe that he only 'remembered' this after some further research.

[80] Mr Vita denied being part of a arrangement for the purchase of the Mandala. His evidence can be characterised as an attack of amnesia. He

repeatedly said that he either knew nothing or could remember nothing. He spoke in the subjunctive: 'if Renzo were to need money I would lend it to him'. He said he would not have lent money to W as 'she did not have the competence to do the purchases'. He said that he lent money to H 'or it could have been in another form … this was 20 years ago'. He said that 'I do not believe that I financed the Mandala, as far as I can remember'.

[81] Mr Vita stated clearly that he had never lent money to W. He was then shown documents which tolerably clearly showed that he had lent about $194,000 in 1993 to W and Fabio via his Swiss bank. Moreover a letter written by him to W and Fabio in 1995 referred to him having acted as a guarantor of some borrowing of the business.

[82] I have to say that my distinct impression was that Mr Vita out of loyalty to H was prepared to give untrue evidence. I think that he tried to avoid telling straight lies by qualifying as much as he could with expressions of lack of memory.

[83] Tado Lithangpa admitted that he had spoken to H several times in the week before he gave evidence. He gave evidence on day six, a week-end having intervened since H gave his evidence. He said that he sold the Mandala to H for $550,000 but 'my memory is weak'. He said that W did not come and see it and that the money was paid to his account in Hong Kong in three or four instalments. He said that two corners of the Mandala were missing.

[84] Tado Lithangpa's evidence about W not coming to see the kesi and as to how payment was made is at complete variance with H's own evidence, which suggests H and he not getting their stories straight. I have to say that I do not believe his evidence. I believe that he was put up to telling a false story by H.

Factual conclusion

[85] I take the view that the tale of the Mandala stands as a touchstone for the assessment of H's case generally. I am satisfied that H's case on it is false. It fatally undermines his case as to the existence of a business relationship with W. I am satisfied that at no time after 1985 did H have a business relationship with W and Fabio. He was not a partner in the business. He has never had a beneficial interest in it. He has never had a beneficial interest in the two flats. His evidence about this is false. I reject the evidence of his supporting witnesses.

Mentorship

[86] In her evidence W accepted that she would not have set up the business in London but for the fact that H had been trading in this field in the Turin days. Fabio stated that he and W owed a historical debt to H. This acceptance of H's mentoring is reflected in both the 1993 and 1994 catalogues of the business. In the former, Renzo Rossi is thanked for 'valuable assistance'; the latter says that 'essential to this publication (has) been … Renzo Rossi whose vast experience in Asian art remains the cornerstone of our continued endeavours in this field'.

[87] I take the view that H was the mentor of W and Fabio and the inspiration for their business. His contribution to the business goes no higher than this. I will have to decide whether such mentorship can or should be reflected in an award of ancillary relief in his favour.

1993 to the present time

[88] In 1993, H was detained in India for allegedly stealing an object from a temple. He says that his bail conditions prevented him from leaving India apart from two occasions until 2001. Those two occasions were to see his gravely ill mother, and to attend her funeral. However, H's passport clearly shows him to be in Italy in the early part of 1996. He was unable to explain why. In February 1996, H instructed an Italian lawyer, Avvocato Migliorini, to seek a payment of $500,000 as his share of the partnership assets. In August 1996, Avvocato Migliorini, after H's return to India, was reiterating his demands. In November 1996, Mr Vita was seeking to arrange a meeting to broker a deal.

[89] Although H says that the Indian charges against him were dismissed in 2001, it took until February 2004 for him to file his Form A. The civil proceedings were mounted in March and October 2005. H has for most of the duration of the case had the benefit of legal aid. His costs amount to £68,000. The combined costs of W and Fabio amount to £175,000.

The resolution of this case

[90] H's claims under the Partnership Act 1890 and TOLATA will be dismissed.

[91] This leaves H's claim for ancillary relief. My order will be that H's application under s 37 Matrimonial Causes Act 1973 will be dismissed and that the claims of himself and W for all forms of ancillary relief will be dismissed on the clean break basis in life and death. My reasons are as follows:

91.1 When W transferred to Fabio in July 2003 the benefit of the loan owed to her by the business of £255,000, neither she nor Fabio had any inkling that H would make a claim against her for ancillary relief. She had sound estate planning reasons to transfer the loan to Fabio. By 2003 she would have been deemed domiciled for Inheritance Tax purposes. She stated that at her age mortality was a concern and avoidance of Inheritance Tax a consideration. Although the statute reverses the burden of proof so that W has to show that she made the transfer without intending to defeat H's claim for ancillary relief, I am quite satisfied that she has succeeded in doing so.

91.2 The totality of W's assets can be tabulated thus:

	£	
39D Randolph Avenue	375,000	
costs of sale at 3%	(11,250)	
Mortgage	(72,000)	
	291,750	
50% is	145,875	A
37B Randolph Avenue	785,000	
costs of sale at 3%	(23,550)	
Mortgage	(82,000)	
	679,450	

50% is	339,725	B
Rossi and Rossi Ltd	100,000	
50% is	50,000	C
W's assets (A + B + C)	535,600	

91.3 In my opinion, every penny of this represents non-matrimonial post-separation accrual in the sense described by Coleridge J in *N v N* and by Lord Mance in *Cowan* and *Miller*. None of this money was accrued on the back of assets accumulated before 1985.

91.4 Even if this claim had been mounted timeously, I would have concluded that H's claim to share in W's after acquired assets would have been very tenuous. Although I do not dismiss outright the concept of a claim for ancillary relief based on mentorship I would have thought that save in the most clamant case (which I am having difficulty in imagining) it would be hard to establish and in any event would require clear evidence of cause and effect.

91.5 In any event, I am satisfied that H's claims to a sharing of W's assets must fail on account of the delay in mounting them. H made clear on his acknowledgement of service in December 1994 that he would not make a financial claim. He may have changed his mind in February 1996 when he was in Italy. It was open to him to have mounted a claim for ancillary relief at that point. I do not accept that his presence in India disabled him from mounting a claim had he wished to do so. H has given no explanation as to why he delayed for 3 years after the resolution of his Indian problems before starting his claim. The delay of 12 years (1992–2004) has been gravely prejudicial to W. She has in that period been working hard with Fabio to build up her assets. She must have believed that H had effectively waived his claims. The passage of time has hampered this court's search for the truth. For that difficulty H is entirely responsible.

91.6 This leaves only H's needs based claim. In fairness to Mr Tidbury he had more or less abandoned this aspect of H's claim by the time he came to make his final speech. In evidence H said that his dream was to live out his days in India which made somewhat hard to credit his claim that W should buy him a flat in Turin. H advanced no evidence as to capital needs apart from asserting that a number of his friends had lent him money. They may well have done but that does not mean that W should pay them.

91.7 In *Miller*, at para [137], Baroness Hale of Richmond stated:

> 'The cardinal feature is that each [rationale] is looking at factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended.'

At para [138], she stated:

'[138] The most common rationale is that *the relationship has generated needs* which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in *White*: see pp 608g to 609a). This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.'

91.8 These passages suggest that in order to justify a needs based award identification ought to be made of a causal connection between the need and the marital relationship. This seems to me to make perfect sense both legally and morally (although I am not suggesting that such a causal link is a sine qua non for an award). The facts of this case exemplify it. Let it be assumed that H has needs for capital to buy accommodation and to meet his debts, and for income over his Italian state pension of EUR500 per month. What is the causal connection of such needs to this relationship that ended physically in 1978 and financially in 1985? Why should W be expected to meet needs that appear to arise because of the way that H's separate life has unfolded for the last 23 years? In my view, it would be wrong for W to be expected to do so.

91.9 H has not mounted a claim for a periodical payments order. Had he done so it would have failed. W's income is modest: effectively she and Fabio share the profits from the business via a joint account. W stated that she lives frugally and I have no doubt that this is the case.

91.10 In deciding that all of the claims of each party for ancillary relief

should be irrevocably dismissed I have taken into account all the factors mentioned in s 25(2) of the Matrimonial Causes Act 1973. Above all I have concluded that it would be *fair* that on the facts of this case neither party should be required to make any payment to the other.

Order accordingly.

Solicitors: *Osbornes* for the applicant
Streathers for the first and second defendants

GILLIAN DOUGLAS