Neutral Citation Number: [2017] EWCA Civ 408

Case No: B6/2015/3887+4366

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, FAMILY DIVISION
Sir Peter Singer
GL 13D01112

Royal Courts of Justice
Strand, London, WC2A 2LL

13/06/2017

B e f o r e :

LORD JUSTICE McFARLANE
LORD JUSTICE McCOMBE
and
LORD JUSTICE DAVID RICHARDS

Between:

JULIE THERESE SHARP	**Appellant**
- and -	
ROBIN DUNCAN SHARP	**Respondent**

Frank Feehan QC and Deepak Nagpal (instructed by Josiah-Lake Gardiner) for the Appellant
Jonathan Southgate QC and Joseph Switalski (instructed by Harrison Clark Rickerby) for the Respondent

Hearing date : 23rd February 2017

HTML VERSION OF JUDGMENT APPROVED

Lord Justice McFarlane:

1. In *White v White* [2001] 1 AC 596 (*'White')* the House of Lords established what has become a principle that the matrimonial assets of a divorcing couple should normally be shared between them on an equal basis. The present appeal requires this court to consider whether that is inevitably the case where the marriage has been short, there are no children, the couple have both worked and maintained separate finances, and where one of them has been paid very substantial bonuses during their time together. Although the possibility of a relaxation of the sharing principle in such circumstances has been described in earlier cases, this is the first occasion that the point has arisen directly for determination at Court of Appeal level since *White* and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 ('*Miller*').

2. The case was heard at first instance by Sir Peter Singer, sitting as a judge of the High Court. Following a four-day hearing in May 2015, with judgment handed down on 6 November 2015 ([2015] EWHC 2921 (Fam)), the judge awarded capital totalling £2.725 million to the husband, which represented exactly 50% of the total matrimonial assets of £5.45 million (after deductions and concessions). The wife now appeals against that outcome. Her appeal is resisted by the husband.

The factual background

3. I shall refer to Mrs Julie Sharp as 'the wife' and Mr Robin Sharp as 'the husband', notwithstanding that their marriage ended in December 2014. They are each in their early 40's and have no children. The factual background can be shortly stated and I gratefully adopt the summary given by Sir Peter Singer in the opening paragraphs of his extremely clear and well-crafted judgment:

'2. Each party comes from a relatively modest financial background. Each of them worked hard to achieve the qualifications and experience which each of them brought to their relationship at the start of the six years for which their cohabitation and marriage lasted. W since before the parties met worked continuously for one employer and proved her value as a trader in a particular sector of the wholesale fuel trade. H was from before they met in mid-2007 continuously till October 2012 employed by an international company involved with IT. Their basic salaries were not very different in the early years of their cohabitation, around the £100,000 p.a. mark. But there was this significant difference, that W received discretionary annual bonuses until her trading activity recently became limited as a result of developments which affected her industry. For the central five years of their relationship W's bonuses totalled £10.5M, whereas any bonuses H's employment brought were comparatively trivial. The parties were both continuously employed until in

October 2012 H took voluntary redundancy in circumstances which have been the source of one of the many challenges and disputes in this case.
3. The parties commenced cohabitation in rented accommodation at about the end of 2007, became engaged to marry in August 2008 and did so in June 2009. In anticipation of that marriage in November 2008 they purchased their first home, SD, in a Gloucestershire town. The property was purchased outright in joint names with funds, some £1.02M, provided exclusively by W. That figure includes some £200,000 spent on extensive works to the property…'.

4. In October 2012, the couple purchased a second property in joint names, LC, for £2M. Although they planned, in due course, to sell their first home, SD, events intervened and both houses are still currently owned by them, with the husband living in one and the wife in the other. At the time that the parties decided to purchase LC the husband took redundancy; he claims that this was so that he could project-manage the extensive refurbishment work that the couple then undertook on this property, the wife strongly disputes the extent of his role in that regard. They did not move to live in LC until September 2013, but by that time the difficulties in their marriage, that were soon to lead to divorce, had become apparent.

5. By at least February 2013 the husband had started a clandestine affair which, despite the growing suspicions of the wife, he continued to deny (with the full truth only surfacing during the course of his oral evidence in May 2015). Although the wife filed a divorce petition in December 2013, physical separation did not take place until the husband moved from LC to live at SD in July 2014.

6. The period of pre-marital cohabitation, therefore, ran from the end of 2007 until the marriage in June 2009, some 18 months, and the marriage effectively lasted until the divorce petition in December 2013 making a period of six years in all. A period that the judge described as 'not so desperately short … as some, but still by no means lengthy'.

7. Whilst it was not an agreed fact that the couple maintained separate finances, several significant unchallenged aspects of their financial arrangements (listed at paragraph 47 of the Appellant's Skeleton Argument) indicate that there was in fact a marked degree of separation, albeit, as the judge found (para 46) there was no 'deliberate and agreed intention on their part to maintain strict separation of their finances. For example, they would, not infrequently, split restaurant bills between them and, regularly, each pay half of any utility bills on the two properties. Further, although the husband was aware that the wife received substantial bonuses during the period, he was never privy to the details and, in addition to providing the total purchase price of the two houses, the wife fully funded the couple's various holidays and bought a series of three Aston Martin cars for the husband.

8. At the time of the hearing before Sir Peter Singer the total assets held by either party amounted to £6.9 million, of which LC represented £1.455 million, SD represented £1.067 million and £4.171 million was credited to the wife's bank

accounts. The balance was made up with a range of other smaller elements. The figure for "matrimonial assets" of £5.45 million used by the judge in his final calculation was arrived at by subtracting £1.1 million from £6.9 million, being the rounded-up value of SD, which the husband conceded should be kept out of the "matrimonial asset" pot on the basis that it was acquired by the wife before the couple were married, and further subtracting £350,000 to reflect the balance of other pre-acquired assets.

The first instance hearing

9. As Sir Peter Singer's judgment shows, the parties adopted polarised positions at the first instance hearing. The wife's opening stance, which was to offer a lump sum of £400,000, had moved (at the close) to propose an unencumbered transfer of SD to the husband together with a lump sum of £130,000 to cover his legal fees (representing a total value of £1.23 million). In contrast the husband sought a total package, including SD, of £3 million. In addition to the dispute as to capital, there was a further issue concerning the parties' pensions which the judge resolved and which is not the subject of appeal.

10. The judge was highly critical of the way that the wife had sought to develop and pursue a range of points within the proceedings. In particular, her attempt to run a case based upon the husband's conduct was, as the judge found it to be, both unfounded and disproportionate to the overall wealth of the parties. In addition, in a passage of the judgment attractively entitled "clutter-clearance", the judge cut through a whole range of issues that had been raised by the parties. No challenge is made to the judge's conclusions on these points and it is, therefore, not necessary to spell them out in this judgment. Within that section of the judgment, however, the judge did make the following observations which are relevant to the central issue:

'[referring to the wife's case that it was a "coincidence" that the payment of substantial bonuses to her during a 20-year career occurred during the marriage] … I of course accept that it is a circumstance, and indeed quite a remarkable circumstance, of the case, and that it would indeed have had a quite other cast if W's bonuses had been in the bag before they met.' [paragraph 28]

'The simple fact is that the two of them had the good fortune in those years of their relationship as a result of extraneous market movements in her commodity sector that W was able to mine very profitable seams for her employers, for which £10M of bonuses was their recognition and her reward.' [paragraph 33]

11. From paragraph 44 onwards the judge reviewed the parties' respective cases starting with the wife's submission that the entirety of the capital value falling for distribution arose from her 'unilateral assets', which were received by her in the context of a "genuine dual career family" and where the couple had maintained a strict separation between their respective finances. At paragraph 46 the judge summarised the wife's case and stated his conclusion on the factual basis underpinning this point:

'Mr. Feehan maintains that sharing in this case is not appropriate *at all* once H's needs have been met, and that the wealth built up from earnings and bonuses which came to W during the relationship should remain hers. The evidential basis for this is the assertion that the couple maintained financial segregation within their marriage. True it is that they had no joint bank account nor any joint investments at any stage. They for the most part maintained contributory arrangements whereby they shared their household expenditure, he meeting the bills and she putting in a monthly amount towards them. There seem to have been times, and it may well have happened often, that each would contribute half to the cost of a meal out or some other social occasion: but this does not seem to have been an invariable rule. And W in fact bore the brunt of major items of expenditure. I have already referred to H's cars, but there were in addition their expensive holidays the cost of which W met. What is lacking is any suggestion that there was a deliberate and agreed intention on their part to maintain strict separation of their finances.' [emphasis in original]

12. Thereafter the judge reviewed the relevant authorities, to which I will turn in due course, before concluding that there should not be an 'inroad into the sharing concept to which the parties in effect subscribe when they marry unless they choose to opt out (or attempt to do so) with a [pre-nuptial agreement]'. On the question of whether there was an agreement of that quality (namely a pre-nuptial agreement) in this case, at paragraph 50, the judge concluded:

    'But as I say I am not persuaded that there is evidentially established any sufficiently clear and consistent pattern of separate finances as might found such a finding in this case. The pattern rather is, to my mind, one of open-ended liberality regularly maintained to meet the wishes and even the whims which W afforded them both. It was in this way that their incomes were pooled, and in addition clearly both contributed to regular household outgoings and other expenditure.'

13. As I have indicated, I shall refer in more detail to Sir Peter Singer's observations and conclusions upon the law once I have described the relevant authorities. For present purposes it is sufficient to record that, but for the husband's concession, the judge would have included the value of SD in the pot for equal sharing, despite the fact that it was purchased prior to the marriage, on the basis that by using her funds to purchase the couple's first matrimonial home that part of her capital became "mingled" with any other matrimonial property.

14. At paragraph 59, the judge set out his overall conclusion on the question of sharing:

    'No sufficient reason has been identified in this case for departing from equality of division. The fact that this is in effect a husband's claim against a wife rather than the more conventional claim of wife against husband empathetically does not call for a discount. Thus the principled outcome would be that of the £6.9M of current assets (that is to say at this stage

ignoring pension entitlements) H should receive sufficient to leave him with £3.275M (that is to say half of £6.9M but after deduction off the top of the £350,000 [for agreed pre-acquired assets]).'

15. Finally, the judge applied a concession offered by the husband to the effect that the value of SD should be deducted from the pool of matrimonial property (as described in paragraph 8 above) to produce a final total payment to the husband of £2.725 million.

The Legal Context

16. Before turning to the detailed submissions made to this court by each party, it is helpful to establish the background by referring in detail to the legal context within which this case falls to be decided.

17. The starting point is Matrimonial Causes Act 1973, s 25 ['MCA 1973'] which establishes the approach to be taken by a court when determining an application for financial provision on divorce under the heading 'Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24, 24A, 24B and 24E':

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A, 24B or 24E above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard 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 or nullity of marriage, 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.

18. In passing, it is right to record that the simple fact that one party of the marriage has committed adultery, even if, as here, that is relied upon as the factual basis for seeking a divorce, has long been held to fall short of the type of 'conduct' required to trigger its inclusion as a relevant factor under s 25(2)(g) for determining the division of the couple's finances (for example, see *Harnett v Harnett* [1974] 1 All ER 764).

19. In this area of the law the seminal decision is that of the House of Lords in *White v White* in which, for the first time since the legislation was enacted, their Lordships' House considered the approach to be taken to financial provision under MCA 1973, s 25. The leading speech of Lord Nicholls, with whom the other members of the Judicial Committee agreed, established and described the target of achieving 'fairness' which is to be measured against the yardstick of equality. Although the present appeal concerns a possible relaxation of the 'sharing principle' (as it has come to be known), and there is no direct challenge to the existence of that principle itself, it is in my view nevertheless helpful to read in full what Lord Nicholls said in *White* when describing the approach to 'equality'.

20. In a central passage of his speech ([2001] 1 AC at 605), under the heading 'Equality', Lord Nicholls said:

> 'Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. … But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): "the contributions which each … has made or is likely … to make to the *welfare of the family*, including any contribution by looking after the home or caring for the family" (Emphasis added). If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.'

21. Lord Nicholls' description of the general background and the need to avoid discrimination, which, whilst couched in terms of a traditional division of roles where one partner earns the money and the other looks after the home and the children, also contemplates cases where 'both parents work', is based on the premise that 'each contributed equally to the family'. There is to be 'no

bias in favour of the money-earner and against the home-maker and the child-carer'.

22. Lord Nicholls expressly disavowed the establishment of a 'presumption' or 'starting point' of equality (pages 605H and 606E), holding that such a presumption would go beyond the permissible bounds of interpretation of s 25 and amount to an impermissible judicial gloss. In describing the use of equality as a 'yardstick', he readily contemplated that, in some cases, fairness will require an outcome which is not based on equal shares:

    'As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.'

23. Lord Nicholls went on (at page 606A) to describe in broad terms the societal changes which were in his contemplation when developing 'equality' as the yardstick for the division of matrimonial assets:

    'There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money-earning qualifications and skills.'

24. These necessarily broad and general observations, which focus on a traditional bread-winner/home-maker model, do not expressly contemplate the situation in the present case where both parties have been earning and, prior to the final months when the husband left work to project-managing the creation of their new home, both have also contributed equally to their family life together, yet one has earned very significantly more than the other.

25. At this point it is chronologically appropriate to refer to the Court of Appeal decision in *Foster v Foster* [2003] EWCA Civ 565, which, post-*White*, considered the disposition of assets following a 4-year, childless, marriage between a couple in their 30's. The original decision of a district judge had sought to return to each party what he or she had brought to the marriage and then divide the profits made during the marriage (out of modest property development) equally between them, with the result that the wife left with 61% and the husband 39% of the capital. On appeal by the wife, a circuit judge had increased her share to 70% in order to give greater account to the substantial contributions that she had made. The Court of Appeal (Peter Gibson, Chadwick and Hale LJJ) allowed the husband's appeal and reinstated the district judge's order.

26. In the course of her judgment, Hale LJ (as she then was), with whom the other members of the court agreed, rehearsed and endorsed the key principles to be drawn from *White* as to the equal recognition that is to be afforded to the

contribution that each spouse may make to the welfare of the family, notwithstanding that, in money terms, there may be inequalities between them. Hale LJ then identified the central issue (at para 20):

'This case, therefore, is all about *contributions* and whether each should be regarded as having made an equal contribution to the assets accumulated in a joint enterprise which should then be shared equally unless there are other considerations telling against this.' [emphasis added]

On the facts of *Foster*, Hale LJ held that no consideration such as housing need or the needs of any children applied and, therefore, the district judge had been correct in dividing the profits equally, once the parties' initial contributions had been accounted for. The appeal was therefore allowed and the original division reinstated.

27. The second significant authority in terms of the development of the 'sharing principle' is the House of Lords' decision in cases of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 ('*Miller*'). The underlying facts of the two cases were very different. In *Miller*, the couple had been married for less than three years, but during that time the husband's wealth increased substantially because of business arrangements that he had made prior to the marriage. In *McFarlane*, the wife had given up her professional career to provide a home for the family during a long marriage, whilst the husband was a partner in a leading accountancy firm; the principal issue in *McFarlane* related to periodical payments. The facts of the *Miller* case are therefore much closer to those in the present appeal.

28. In the opening passage of his speech, under the heading of 'The requirements of fairness', Lord Nicholls started by noting the statutory requirement to give 'first consideration' to the welfare while a minor of any child (MCA 1973, s 25(1)) before moving on to describe 'several elements, or strands' which are discernible as the requirements of fairness in any given case. The first such strand is that of financial needs, which, in many cases, is likely to be both the beginning and the end of the court's evaluation. The second is 'compensation', which does not arise in the present case, and the third is 'sharing' about which Lord Nicholls said (at paragraph 16):

'16. A third strand is sharing. This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that "husband and wife are now for all practical purposes equal partners in marriage": *R v R* [1992] 1 AC 599. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule.
17. This principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [2003] 2 FLR 299, 305, para 19 per Hale LJ. A

short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership.
18. A different approach was suggested in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108. There the court accepted the proposition that entitlement to an equal division must reflect not only the parties' respective contributions "but also an accrual over time": p 122, para 40. It would be "fundamentally unfair" that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contributions for more than 20 years: para 43. In *M v M (Financial Relief: Substantial Earning Capacity)* [2004] 2 FLR 236, 252, para 55(7), this point was regarded as "well made".
19. I am unable to agree with this approach. This approach would mean that on the breakdown of a short marriage the money-earner would have a head start over the home-maker and child-carer. To confine the *White* approach to the "fruits of a long marital partnership" would be to re-introduce precisely the sort of discrimination the *White* case was intended to negate.
20. For the same reason the courts should be exceedingly slow to introduce, or reintroduce, a distinction between "family" assets and "business or investment" assets. In all cases the nature and source of the parties' property are matter to be taken into account when determining the requirements of fairness. The decision of Munby J in *P v P (Inherited Property)* [2005] 1 FLR 576 regarding a family farm is an instance. But "business and investment" assets can be the financial fruits of a marriage partnership as much as "family" assets. The equal sharing principle applies to the former as well as the latter. The rationale underlying the sharing principle is as much applicable to "business and investment" assets as to "family" assets.'

29. Lord Nicholls then moved on (paragraph 21) to consider *'Matrimonial property and non-matrimonial property'*. The following extracts from this passage are of particular relevance to the present appeal:

'22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.
23. The matter stands differently regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. …

24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.
25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs.'

30. In the context of the short *Miller* marriage, Lord Nicholls reviewed the 'The pre-*White* short marriage cases' at paragraphs 54 and 55:

'54. Several issues arise from these judgments. The first concerns the relevance today of the approach to short marriages enunciated in the 1980s. In the 1980s and earlier there were several reported cases concerning short marriages. The facts vary widely, but in these cases the general approach to division of assets was to concentrate on making provision for the financial needs of the claimant, usually the wife, and on compensating her for any financial disadvantage she had suffered from the breakdown of the marriage. To greater or lesser extent this approach appears in S v S [1977] Fam 127, H v H (Financial Provision: Short Marriage) (1981) 2 FLR 392, Robertson v Robertson (1982) 4 FLR 387, Attar v Attar (No 2) [1985] FLR 653 and Hedges v Hedges [1991] 1 FLR 196.
55. On the present appeal Mr Turner submitted this approach has not been invalidated by the decision in the White case [2001] 1 AC 596. Both Singer J and the Court of Appeal declined to adopt this submission. They were right to do so. In the 1980s cases attention was directed predominantly at the wife's needs. There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties' needs. That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties' respective financial needs and any need for compensation. The court will look at all the circumstances. The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property.'

31. Finally, in terms of Lord Nicholls speech in *Miller*, it is instructive to consider in full his approach to the division of property on the particular facts of that case:

'69. I accept the husband's contention that both the judge and the Court of Appeal misdirected themselves on the "conduct" issue. Even so I would dismiss Mr Miller's appeal, largely for two reasons. The first concerns the increase in the husband's wealth during the marriage. The husband brought substantial wealth into the marriage at its outset. That was non-matrimonial property. That was a major financial contribution he made to the marriage. But it would be wrong to suppose that during the period of the marriage the husband's assets increased only by the comparatively modest amount of £300,000 or so represented by his property other than his New Star shares.
70. When the parties married New Star had not got off the ground, although some of the groundwork had been done. New Star then expanded and flourished, as a result of activities undertaken for the most part during the period of the marriage. New Star set itself to grow quickly, and it did so. By rights issues and placings spread over the period from March 2001 to December 2003 substantial numbers of shares were issued at prices ranging from £80 to £150 per share. As a result New Star paid out over £140m in acquiring management of funds having assets worth the staggering amount of £3.73 billion. It is in this context that the experts' valuations of £12m and £18m for the husband's New Star shares, if they could currently have been sold, have to be seen.
71. Plainly the accretion to the husband's wealth during the marriage, as a result of work he did during the marriage, was very substantial indeed. Although the marriage was short, the matrimonial property was of great value. The gain in the husband's earned wealth during the marriage was huge.
72. Secondly, the judge was entitled to regard the high standard of living enjoyed by the parties during the marriage as a key feature of this case. That was not a standard of living the wife would be likely to achieve for herself.
73. Having regard to these two features I consider the sum of £5m awarded by the judge is appropriate in this highly unusual case. The midway figure between the experts' valuations of the New Star shares was £15m. Taking this as no more than some indication of the value of these shares, the husband's worth was of the very approximate order of £32m. An award of £5m, including in this the matrimonial home, represents less than one-third of the value of the New Star shares and less than one-sixth of the husband's total worth. An award of less than one-half of the value of the New Star shares reflects the amount of work done by the husband on this business project before the marriage.'

32. Baroness Hale, who commenced her speech with an important review of the history of the development of this area of the law, stressed that 'English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts'. From that starting position, Parliament and the courts have developed a jurisdiction for achieving a fair distribution of property on divorce. Baroness Hale moved on (paragraph 137) to seek to identify some sort of rationale for the redistribution of resources and, in common with Lord Nicholls, fixed upon there being at least three elements, namely 'needs', 'compensation', and 'sharing the fruits of the matrimonial partnership'; the concept of sharing being based on the 'widespread perception that marriage is a partnership of equals'.

33. At paragraph 143, Baroness Hale referred to the earlier decision of *Foster v Foster*, in which she had delivered the principal judgment:

'143. But there are many cases in which the approach of roughly equal sharing of partnership assets with no continuing claims one against the other is nowadays entirely feasible and fair. One example is *Foster v Foster* [2003] 2 FLR 299, a comparatively short childless marriage, where each could earn their own living after divorce, but where capital assets had been built up by their joint efforts during the marriage. Although one party had earned more and thus contributed more in purely financial terms to the acquisition of those assets, both contributed what they could, and the fair result was to divide the product of their joint endeavours equally.'

34. In the context of the present case, the section of Baroness Hale's speech headed '*The source of the assets and the length of the marriage*' (paragraphs 147 to 153) is plainly of importance. Having noted that, at least in academic circles, there was 'a perception that the size of the non-business partner's share should be linked to the length of the marriage', Lady Hale observed that 'the strength of these perceptions is such that it could be unwise for the law to ignore them completely' (paragraphs 147 and 148). Later (paragraph 149) she identified the question to be addressed as:

'whether in the very big money cases, it is fair to take some account of the source and the nature of the assets, in the same way that some account is taken of the sources of those assets in inherited or family wealth. Is the "matrimonial property" to consist of everything acquired during the marriage (which should probably include periods of premarital cohabitation and engagement) or might a distinction be drawn between "family" and other assets?'

35. After briefly considering the particular situation of a couple who have also been business partners in a joint venture (for example farming), Baroness Hale continued:

'150. More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality? On the one hand is the view, already expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money's worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.
151. On the other hand is the view that this is unrealistic. We do not yet have a system of community of property, whether full or deferred. Even modest

legislative steps towards this have been strenuously resisted. Ownership and contributions still feature in divorcing couples' own perceptions of a fair result, some drawing a distinction between the home and joint savings accounts, on the one hand, and pensions, individual savings and debts, on the other. Some of these are not family assets in the way that the home, its contents and the family savings are family assets. Their value may well be speculative or their possession risky. It is not suggested that the domestic partner should share in the risks or potential liabilities, a problem which bedevils many community of property regimes and can give domestic contributions a negative value. It simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition. If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him. Further, great wealth can be generated in a very short time, as the Miller case shows; but domestic contributions by their very nature take time to mature into contributions to the welfare of the family.

152. My Lords, while I do not think that these arguments can be ignored, I think that they are irrelevant in the great majority of cases. In the very small number of cases where they might make a difference, of which Miller may be one, the answer is the same as that given in *White v White* in connection with premarital property, inheritance and gifts. The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, "*Comment on GW v RW (Financial Provision: Departure from Equality)*" [2003] Fam Law 386, 388) rather than in terms of accrual over time (see Eekelaar, "*Asset Distribution on Divorce-Time and Property*" [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

153. This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked

outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.'

36. In terms of the application of the approach that she had described to the *Miller* case itself, Baroness Hale's description of the relevant factors justifying the court's award to Mrs Miller of substantially less than a 50% share is instructive. Lady Hale first summarised the approach of the first instance judge (para 157):

'The judge eschewed the yardstick of equality because the assets had not been generated by their joint efforts (cf *Foster*) but by the husband using his pre-marriage assets and expertise to generate substantial extra profits during the marriage. The judge quantified her claim without reference to the unfathomable value of the New Star shares acquired during the marriage, but in such a way as to give her a permanent income upon which she could live in the former matrimonial home albeit at a lower standard than she had been accustomed during the marriage.'

In that part of her conclusion, Baroness Hale (i) distinguished *Foster* on the basis that that had been a case where the wealth acquired during the marriage to which the sharing principle applied arose from their joint efforts, (ii) endorsed quantification of the claim without direct reference to the value of the New Star acquisition and (iii) endorsed a 'needs' based approach which permitted continued residence in the former matrimonial home. Baroness Hale went on (para 158) to justify the approach under this third point by reference to the objective of the statute and earlier case-law, with account being given, under MCA 1973, s 25(2)(c), to the standard of living enjoyed during the marriage, before continuing:

'[The judge's award] should enable a gentle transition from that standard [of living] to the standard that she could expect as a self-sufficient woman. But she is also entitled to some share in the assets. "…" She is also entitled to some share in the considerable increase of the husband's wealth during the marriage. Had the yardstick of equality been applied to all the assets which accrued during the marriage, she would have got much more than she did. In my view the judge was wrong to take account of the reasons for the break-up of the marriage, but there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage. Whether one puts this as the result of the contacts and capacities he brought to the marriage or as the result of the nature and source of the assets generated (or, put another way, whichever the rationale one chooses from *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108), it comes to much the same thing.'

That approach, including shares in the properties and other family assets, led to a figure which was so close to that fixed by the judge that Baroness Hale concluded that Mr Miller's appeal should be dismissed.

37. Lord Mance, whilst concurring with 'the very substantial common ground' in the two speeches of Lord Nicholls and Baroness Hale, identified the main difference between them as relating to the area covered by Lord Nicholls in

paragraphs 17-19 and 55 and by Baroness Hale in paragraphs 148-152. Lord Mance first offers a helpful commentary on the conflicting approaches of Lord Nicholls and Baroness Hale before describing the basis of his own analysis. Given the importance of these issues to the present appeal, I will reproduce the relevant passage in full:

'167. Thirdly, this is the area where the approaches of Lord Nicholls and Baroness Hale diverge in some measure, at least in principle. On the one hand, on Lord Nicholls's approach, non-matrimonial property is viewed as all property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps the income or fruits of that property), while matrimonial property is viewed as all other property. The yardstick of equality applies generally to matrimonial property (although the shorter the marriage, the smaller the matrimonial property is in the nature of things likely to be). But the yardstick is not so readily applicable to non-matrimonial property, especially after a short marriage, but in some circumstances even after a long marriage.
168. On the other hand, Baroness Hale's approach takes a more limited conception of matrimonial property, as embracing "family assets" (cf *Wachtel v Wachtel* [1973] Fam 72, 90 per Lord Denning MR) and family businesses or joint ventures in which both parties work (cf *Foster v Foster* [2003] 2 FLR 299, 305, para 19, per Hale LJ). In relation to such property she agrees that the yardstick of equality may readily be applied. In contrast, she identifies other "non-business-partnership, non-family assets", to which that yardstick may not apply with the same force particularly in the case of short marriages; these include on her approach not merely (a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits), but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.
169. Baroness Hale acknowledges that the difference between the two approaches will in the great majority of cases be irrelevant. Further, it seems to me that after a short marriage it may in reality often be difficult to determine precisely what assets (other than family assets) were generated during the marriage. The present case is an example, with arguments about whether Mr Miller can be said (by reason of his contacts, his gentleman's agreement with Mr Duffield and/or his experience) to have brought into the marriage any asset relating to his potential interest in New Star. To take into account the shortness of a marriage could enable a court to cut through some of these more intricate arguments in a manner consistent with section 25(2)(d) of the 1973 Act. More fundamentally, to allow the duration of a marriage as a relevant factor would cater for the considerations that, while some people may make a large amount of money in a short time, the nature of their work or other factors may mean that they do not do so at a consistent rate over their lives as a whole or for more than a short period of their lives, and furthermore, as Baroness Hale has pointed out, that there may be long-term risks in relation to non-business-partnership, non-family assets which remain with those directly involved in generating them. The longer the marriage, the less likely these are to be significant considerations. In a short marriage, the timing of which may or may not coincide with a period of significant increase in the value of non-business-partnership, non-family assets, such considerations

argue in favour of some further flexibility in the application of the yardstick of equality of division. I see force in and would agree with the views expressed by Baroness Hale in paras 151–152 of her judgment to the effect that the duration of a marriage, mentioned expressly in section 25(2)(d) of the Act, cannot be discounted as a relevant factor.

170. Fourthly, and whatever the position on the third point, I agree with what Baroness Hale has said in para 153, which is, as I see it, also consistent with the last sentence of para 25 of Lord Nicholls's speech. The present marriage had what one might call a traditional aspect. Mr Miller worked, and Mrs Miller gave up work to look after him. But there can be marriages, long as well as short, where both partners are and remain financially active, and independently so. They may contribute to a house and joint expenses, but it does not necessarily follow that they are or regard themselves in other respects as engaged in a joint financial enterprise for all purposes. Intrusive inquiries into the other's financial affairs might, during the marriage, be viewed as inconsistent with a proper respect for the other's personal autonomy and development, and even more so if the other were to claim a share of any profit made from them. In such a case the wife might still have the particular additional burden of combining the bearing of and caring for children with work outside the home. If one partner (and it might, with increasing likelihood I hope, be the wife) were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony. Once needs and compensation had been addressed, the misfortune of divorce would not of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married.'

38. Lord Hoffmann agreed with Baroness Hale. Lord Hope considered that the speeches of Lord Nicholls and Baroness Hale complemented each other and, on all points relevant to the disposal of the appeals, he agreed with them both.

39. The outcome in *Miller* was that the husband's appeal was dismissed with the result that the wife retained a total award worth £5M in a case where the husband's assets were in the region of £17M (as they had been at the start of the marriage) but where he had acquired shares during the marriage in an asset management company ('New Star') which were almost impossible to value but may well have been worth between £12M and £18M.

40. The Court of Appeal [Sir Mark Potter P, Thorpe and Wilson LJJ] sought to interpret and apply the speeches of the House of Lords in *Miller* in the case of *Charman v Charman (No 4)* [2007] EWCA Civ 503. On the facts, *Charman* is a long way from the present case as it involved a 28-year marriage with two children. Giving the judgment of the court, Sir Mark Potter P considered the development of the concept of 'equality' from its origin in the speech of Lord Nicholls in *White* as a 'yardstick' to the position in *Miller*. Sir Mark noted that, in *Miller*, 'the House clearly moved' so that Lord Nicholls referred to the 'equal sharing principle' and to the 'sharing entitlement':

'… those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt when, referring to remarks by Lord Nicholls at [29], [Baroness Hale] said, at [144],

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

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

66. To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in paragraph 68 below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale in *Miller* at [141] and [143] to "sharing … the fruits of the matrimonial partnership" and to "the approach of roughly equal sharing of partnership assets". We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at p.605 F-G and in *Miller* at [24] and [26] Lord Nicholls approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale, that in *White* the House had set too widely the general application of what was then a yardstick.'

41. The President, having noted that Baroness Hale had drawn a distinction between 'family assets', to which the sharing principle applied, and 'non-business-partnership, non-family assets' (subsequently labelled 'unilateral assets'), to which it did not necessarily apply, stressed that this distinction only applied to a limited class of cases:

'83. … As we will show, Baroness Hale put forward the distinction between unilateral assets and other matrimonial property for use in cases in which the marriage was short. And, although *obiter* she suggested an extension of it to another situation, namely that of the dual career to which we turn in paragraph 86 below, she definitely did not commend the distinction for use in other cases. …'

42. The court in *Charman* noted that the House of Lords in *Miller* had been in substantial disagreement on the question of whether the sharing principle applied to cases in which the property had been generated during a short marriage and observed (paragraph 85):

'85. … We suggest with respect that, while the approach of Lord Nicholls was perhaps the more logical, the approach both of Baroness Hale, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls, at [17] to [20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in *Miller* by reference, at [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled *"The source of the assets and the length of the marriage"* Baroness Hale, at [147] to [152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at [158], her rationale for justifying departure from equality in *Miller*. Lord Mance, at [169], powerfully stressed the practical value of Baroness Hale's approach, namely that it would often obviate the need to address the argument, sometimes called the "seed-corn" argument, raised in *Miller* itself, to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.
86. The extension of the concept of unilateral assets, suggested by Baroness Hale in *Miller*, at [153], was expressly endorsed by Lord Mance, at [170]. Although *obiter*, it clearly commands great respect. It relates to the 'dual career'. The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined. Lord Mance offered, at [170], the following interesting rationalisation for the suggested extension:
"Once needs and compensation had been addressed, the misfortune of divorce would not of itself … be justification for the court to disturb principles by which the parties had chosen to live their lives while married."
Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.

43. In the more recent decision of *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42; [2011] 1 AC 534, Lord Philips PSC, giving the judgment of the majority, described the history of the court's 'ancillary relief' jurisdiction (paragraphs 17 to 30), in the course of which, after summarising the decisions in both *White* and *Miller*, he noted that in *Charman* (at para 66) the Court of Appeal had referred to the possible exception in respect of assets that the parties had treated as separate property as perhaps foreshadowing the movement of the law towards a more frequent distribution of property in accordance with the previous agreement of the parties, by words or conduct. That passage (at para 30) is immediately followed by the heading of the next section of judgment: '*Nuptial agreements, separation agreements and public*

policy'. In the present appeal, Mr Jonathan Southgate QC for the Respondent husband argued that this juxtaposition was significant and reinforced his submission that Sir Peter Singer had been correct in limiting any exception to the sharing principle in short marriage cases to those where the parties had made a formal pre-nuptial agreement.

44. Finally, it is right to record that a different constitution of this court (The Master of the Rolls, King and Moylan LJJ) recently observed in *Work v Gray* [2017] EWCA Civ 270 (at para 34), that since *White*, *Miller* and *Charman*:

'The sharing principle is now firmly embedded and, in those cases where the resources exceed needs, the "ordinary consequence" of its application will be the equal division of matrimonial property: Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980 at para 21.'

45. In *Work v Gray*, which focussed upon the possible exception from sharing in cases of 'special contribution', the judgment of the court placed significant weight upon the public interest in the promotion of clarity and consistency in the approach courts should take to the division of finances on divorce (para 80):

'81. Provided the guidance is authoritative, this applies whether or not, as the court said in *Charman*, the guidance is part of the reasoning behind the actual decision. Only to apply this approach if the guidance is part of the reasoning is too restrictive in the context of s 25 which gives an unfettered discretion and when cases involving its application will only very occasionally reach the Supreme Court and, although more frequently, still occasionally reach this court.
82. The public interest is reflected in the two objectives which the Court of Appeal in *Charman* said would "govern what we say" (para 63). They were, as referred to above, "to be loyal to what we understand to be the spirit as well as the letter of such guidance on the topic as has been given by the House of Lords" and, secondly, "to express ourselves as clearly and simply as the subject allows" (para 63).
83. Accordingly, absent anything since *Miller*, as further explained in *Charman*, which shows that the principles as to special contribution described in those cases are uncertain or were erroneous or have caused unfairness, we consider that we, too, should be loyal to those principles.'

46. For my part, I readily adopt a similar approach to the parallel task of analysing and applying the same authorities insofar as they apply to 'short marriage' and 'unilateral assets' within the present appeal.

The judge's decision

47. Having already set out an account of the judge's ultimate conclusion (para 14 above), it is now necessary to describe his approach to the decisions of *White*, *Miller* and *Charman*.

48. Dealing first with the wife's submission that this was an example of the 'genuine dual career family' described by Baroness Hale at paragraph 153 of *Miller*, Sir Peter Singer, in quoting the whole of that paragraph, gave particular emphasis to the following sentences:

'We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life.'

Sir Peter then observed (para 45):

'I take that to be a suggested formulation which would allow family assets, assets acquired during the course of the relationship, to be treated in a non-sharing manner if one party has built up savings or reserves from their greater earnings or indeed it could be from their smaller expenditure. That too seems to have been the way in which Lord Mance understood the proposition at paragraph 170 …'

49. After summarising the evidence on this aspect at paragraph 46 (see paragraph 11 above), the judge quoted directly from paragraph 86 of the judgment in *Charman* (see para 41 above) relating to the manner in which the parties had 'chosen' to organise their finances with the potential of Lord Mance's words foreshadowing future developments, he drew together his conclusion on the law on this aspect at paragraphs 48 to 50:

'48. That last passage [ie the reference to Lord Mance] looks forward to the increasing use of prenuptial agreements and anticipates where *Radmacher* and the Law Commission Report *Matrimonial Property, Needs and Agreements* (Law Comm No 343) have since led. But I do not believe that this rationalisation is consistent with the principles developed since the decision of the House of Lords in *White* in 1970 (sic) and that there should be this inroad into the sharing concept in which the parties in effect subscribe when they marry unless they choose to opt out (or attempt to do so) with a prenup. The pre-*White* regime where reasonable needs were the be-all and end-all which regularly left financially fruitful husbands with the pick of the harvest and domestically contributing wives with, in comparison, the crumbs was rightly swept away by the twin cleansing winds which brought to an end the then prevalent discrimination and imposed an overdue re-evaluationary realignment with the words and principles of the statute. "Not to share" as Baroness Hale speculated might be appropriate in cases where there are unilateral assets seems to me, with every respect, a retrograde step which would incidentally open up fresh arenas of factual dispute for spouses to rummage through.
49. Certainly I am fortified in that belief by the patent lack of enthusiasm of the Court of Appeal in *Charman* for the concept of unilateral assets, and by those judges' express intention to keep the application of the concept closely confined. Indeed it is difficult to think of a case in which it has been applied as opposed to being discussed.
50. But as I say I am not persuaded that there is evidentially established any sufficiently clear and consistent pattern of separate finances as might found such a finding in this case. The pattern rather is, to my mind, one of open-

ended liberality regularly maintained to meet the wishes and even the whims which W afforded them both. It was in this way that their incomes were pooled, and in addition clearly both contributed to regular household outgoings and other expenditure.'

50. In relation to the 'short marriage' aspect of the case, Sir Peter Singer posed the question: 'What impact if any does [the length of this marriage] make upon the sharing principle, if it applies as here I conclude it should?'. Mr Feehan relies upon that sentence as establishing that the judge concluded that the length of this marriage was indeed one to which any special consideration as to shortness should apply. After recording that Lord Nicholls in *Miller* considered that the sharing principle applied to short marriages as to others, the judge referred extensively to *Foster* before concluding his resume of the law on 'short marriages' by recording Baroness Hale's reference to *Foster* at paragraph 143 of her speech in *Miller*.

51. Sir Peter Singer then drew his conclusions on the legal argument together shortly at paragraph 54:

'54. Does the sharing principle apply? It is in my judgment consistent with current principle that the matrimonial acquest, the value of the assets and savings built up during the marriage, irrespective of the very different proportions in which the parties contributed them, should be subject to the equal sharing principle.'

52. The judge then revised the figures by taking account of pre-acquired capital before concluding (at para 59, reproduced at para 14 above) that no sufficient reason had been identified for departing from equality of division. Finally, the judge approved of the husband's concession to leave the first house, SD, out of the joint asset pot at a value of £1.1M with the result that the value to be transferred to him in settlement of his claim was £2.725M (made up of a transfer of SD plus a £1.625M lump sum) being exactly 50% of the capital, less the value of SD and an additional £350,000 in pre-acquired assets.

The Appellant's Case

53. In presenting the wife's appeal to this court Mr Frank Feehan QC, who appeared below, leading Mr Deepak Nagpal, who did not, identified two related, but distinct, features that he submits were marked out by the House of Lords in *Miller* for a different approach to that of simple equal division. The first is a short, dual career, childless marriage. The second is that the parties have structured their finances in a particular way. The Appellant's case is that both features are present here to a sufficient degree to justify a relaxation of the sharing principle.

54. The wife's case is that the starting point is that the doctrine of separate property applies, so that concepts such as 'matrimonial property' or 'marital acquest' or 'the sharing principle' must be considered against the starting point of separate ownership of property. The legal position is that each spouse separately owns property unless and until the court exercises its redistributive

powers under MCA 1973. The mere fact of a marriage is insufficient of itself, it is submitted, to justify equal division without there having been an equal contribution by the joint endeavours of the parties; there being no discrimination between domestic or financial contribution to those endeavours.

55. Mr Feehan submits that in a short, childless marriage, where both parties have had their own careers and one generates significantly more income than the other, it is a fiction to suggest that the other party has 'contributed', even indirectly, to the generation of that income.

56. The fact that Parliament has expressly identified the duration of the marriage as a factor for specific consideration in s 25(2)(d) is simply a recognition that fairness is likely to dictate a different approach depending on the length of a marriage.

57. Mr Feehan argues that *Foster v Foster* is to be distinguished from the present case because the parties in that case had been jointly engaged in developing a property portfolio, the profits from which fell to be shared, and where there was no notion of the couple maintaining separate finances.

58. Another strand of the Appellant's case relates to the structure of this couple's finances. Mr Feehan draws attention to this factor being identified as relevant in each of the key speeches of Lord Nicholls, Baroness Hale and Lord Mance in *Miller* (paras 25, 153 and 170) and by this court in paragraph 86 in *Charman* in the reference to 'words or conduct'. The relevance of this factor is not, submits the Appellant, to be limited solely to formal pre-nuptial agreements, as held by Sir Peter Singer in the present case. This was a 'dual career family' and the observations of Baroness Hale and Lord Mance (paras 153 and 170) should be given full weight.

59. In his oral submissions, Mr Feehan described the cocktail of factors before this court as being a 'perfect storm', which, unusually, combines a number of features that have been identified as, individually, potentially justifying a departure from equality so that it can be properly said that the facts of this case establish a true exception to the sharing principle.

60. Mr Feehan challenges the approach followed by Sir Peter Singer on three bases:

    i) The fact that there has been some pooling of assets does not undermine the general separation of assets that was maintained by this couple;

    ii) The giving of gifts, rather than undermining the separation of finances, in fact demonstrates that the 'gift' comes out of a different fund from the general matrimonial pot;

    iii) The documentary evidence was plain that the couple had maintained separate funds.

61. As to the outcome, Mr Feehan submits that the capital pool should be limited to the combined value of the two properties (£2.6M) divided equally, with the husband having no additional call on the wife's separate capital; thereby justifying an award of £1.3M to the husband.

The Respondent's case

62. Mr Southgate, who appeared below, firmly submits that, despite the apparent majority view represented by Baroness Hale and Lord Mance in *Miller*, it is the speech of Lord Nicholls that has since held sway and been taken as 'settled law' in 'short marriage' and/or unilateral finance cases. On that basis, Sir Peter Singer was, on the husband's case, perfectly entitled and, indeed, correct to decide the case as he did; as a matter of law his decision is therefore unappealable.

63. Basing his submissions on the analysis by Lord Nicholls, Mr Southgate submits that a marriage is a partnership of equals and a short marriage is no less a partnership of equals than a longer marriage. The principles in *White* were intended to be of universal application with the object of removing discrimination, setting down clear principles to promote consistency, and assisting parties and their advisers to resolve disputes. Following *White* the courts regularly witnessed attempts by parties to argue for exceptions on the facts of their case. Such an approach was deprecated by Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] 2 FLR 1143 (para 49):

'[after noting that the costs ran to more than £400,000] That is not especially unusual in this class of case. But the parties are not assisted to achieve compromise when they are encouraged by the law to indulge in a detailed and lengthy retrospective involving a general rummage through the attic of their marriage to discover relics from the past to enhance their role or diminish their spouse's. … Unless [something similar to 'gross and obvious' regarding 'conduct'] is soon introduced to curb these debates, I fear there is a real danger that the forward-looking *White v White* innovations will be lost in a sea of post break-up backward-looking mutual recrimination and the court's task and role in this already uncertain area will thereby be set back at least a generation.'

Coleridge J's characterisation of the approach that the court should take was subsequently endorsed by Thorpe LJ in *Lambert v Lambert* [2002] EWCA Civ 1685 at paragraph 39:

'… I do not accept that the duty [on family judges] requires a detailed critical appraisal of the performance of each of the parties during the marriage. Couples who cannot agree division are entitled to seek a judicial decision without exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal. I fully agree with Coleridge J that any other approach encourages a vain endeavour to recreate historical situations, choices and failings which in the context of a long marriage can never be recaptured fully or accurately.'

and by Lord Nicholls in *Miller* at paragraph 67:

'A good reason for departing from equality is not to be found in the minutiae of married life.'

64. Although Mrs Miller only received £5M out of total assets of over £30M, Mr Southgate submits that that result demonstrates that the House of Lords were persuaded that the *White* principles are of universal application and apply fully to short marriages, such as that of Mr and Mrs Miller. Mr Southgate relied upon the words of Lord Nicholls at paragraph 69 (quoted at para 31 above) and Baroness Hale at paragraph 158 (quoted at para 36 above) to submit that the controversy between these two speeches did not prevent Lady Hale from agreeing that Mrs Miller was entitled to 'share' in her husband's unilateral New Star business assets even though, on Mr Southgate's assumption, they could not have been classified as 'family assets'.

65. Although Mr Southgate is correct that each member of the Judicial Committee held that Mrs Miller was entitled to share in the New Star assets, by concentrating upon Lord Nicholls' speech, his submission avoided the central point that that share was held to be very substantially less than an equal one, thereby, on the view of the majority, establishing an exception to the equal sharing principle, rather than confirming it as the husband seeks to do in this appeal.

66. Mr Southgate described a period of uncertainty that followed the speeches in *Miller* as a result of the diversity of views expressed in the various judgments of the House of Lords, but, he submits, clarification came quickly as a result of the decision of this court in *Charman* which defined matrimonial property and held that the sharing principle applied to <u>all</u> property, but that there may be more justification for departing from equal sharing with respect to property which arose from external donation ('non-matrimonial property').

67. Mr Southgate further submits that the judgment in *Charman* resolved the dispute between Lord Nicholls, on the one hand, and Baroness Hale and Lord Mance, on the other, as to 'family assets' and 'unilateral assets', with the Court of Appeal expressing a very clear preference for the approach of Lord Nicholls.

68. Mr Southgate told the court that, following *Charman*, no distinction is now made between 'family assets' and 'business/investment/unilateral assets'; his submission reads:

'In practice in the absence of a binding nuptial agreement, all matrimonial property is treated as subject fully to the equal sharing principle (absent special contribution) because the courts have adhered to the statement of Lord Nicholls in *Miller/McFarlane* that it should be, and have accepted that "the rationale underlying the sharing principle is as much applicable to 'business and investment' assets as it is to 'family' assets" [Lord Nicholls para 20]'.

Mr Southgate also reported that, in like manner, Lord Nicholls inclusion of short marriages fully within the sharing principle has been taken up and applied, without exception, by the courts.

69. Mr Southgate, in his skeleton, described the position where neither the nature of the asset nor the length of the marriage justified a departure from sharing as now being taken as 'settled law' and representing 'a welcome area of certainty which will inevitably have enabled a much greater number of cases to be resolved without recourse to litigation'. Any move back from this settled position would be a retrograde and unwelcome step, which would also be discriminatory. Mr Southgate's stance in this respect was maintained fully in his oral submissions, which, in part, demonstrated both dismay and surprise that this court in 2017 could even question the settled law post-*Charman* that he had described. In short, the husband's case is that (to use counsel's phrase) there was a fork in the road post *Miller* and the Court of Appeal held in *Charman* that the approach of Lord Nicholls in *Miller* was the right one to follow; the wife's appeal is now seeking to take the court back to that fork in the road and argue that a different direction should be followed.

70. Mr Southgate argued that it was not intrinsically unfair for the husband in this case to have a share in the larger pot of assets. In particular, he, rightly, laid stress upon the immense experience of this particular judge in the evaluation of fairness in cases of matrimonial finance.

71. On a wider view, if, as is accepted, a husband in this position would be fully entitled to a 50% share of these assets after a marriage of, say, 10 years, at what stage, asks Mr Southgate, does he achieve that entitlement: on the occurrence of some event or change of quality in the marriage, on some date, or for some other reason? To move away from the certainty provided by Lord Nicholls's approach, which does not entertain exceptions, risks opening (or reopening) a Pandora's Box where uncertainty and extended litigation are the order of the day. On the husband's case, consistency and certainty are key elements within the overall concept of 'fairness'.

72. Mr Southgate relied upon the fact that the Supreme Court in *Radmacher* had been at pains to set out precisely what is required before a pre-nuptial agreement will be binding as a basis for submitting that it cannot be right that the mere 'happenstance' of a marriage lasting a short time, or the couple keeping finances separate, could found a basis for imposing a bar on equality in the sharing of assets on divorce where there has been no attempt to make a nuptial agreement.

73. Mr Southgate's submissions were attractively clear and firmly delivered. In short, the husband's case is that it is now settled law that (save for special contribution or truly non-matrimonial assets) all assets are to be divided equally between spouses irrespective of the length of the marriage or the manner in which the parties have conducted their financial life. The only basis for departing from such a division arises where a formal pre-nuptial agreement has been made. The husband's position is in accordance with the approach of Lord Nicholls in *White* and *Miller*, which has been endorsed by this court in *Charman* and applied by courts ever since (as Sir Peter Singer did in the present case). In addition, it would be wholly unworkable and unprincipled for any alternative basis for division to be adopted. Mr Southgate therefore

submitted that the only principled approach was that of Lord Nicholls, which should be applied to all marriages from day one.

Discussion

The Importance of Principles

74. Without sound principles, the determination of what is the 'fair' division of capital assets following a divorce would quickly descend to the kind of fact-specific, case by case, analysis rightly deprecated by Coleridge J in *G v G* (and many other authoritative voices) and would be likely to result in great emotional and financial cost to the parties in each case, without any significant benefit to either of them or to society in general. Such cases, fought outside any structure based on principle, in which every conceivable allegation, no matter how historical, is deployed by one side, familiar to family lawyers in the past, are, in the words of Macbeth, 'full of sound and fury, signifying nothing'. If, as I accept, the decisions of *White*, *Miller* and *Charman* have to a great extent limited the potential for, and relevance of, parties fighting cases in this manner, and have increased the predictability of outcome and, therefore, the potential for early settlement, that is to be welcomed. It is the welcome fruit of a jurisdiction founded upon clearly understood principles.

75. Nothing that is said in this judgment is intended in any manner to unsettle the clear understanding that has been reached post-*White* on the approach that is to be taken to the vast majority of cases. The focus of the present appeal, which is very narrow, is upon whether there is a fringe of cases that may lie outside the equal sharing principle.

Basis of Conclusion

76. The length of this judgment is an indication both of the potential importance of the point at issue for the discrete cohort of cases to which it may relate and of the measure of difficulty that I have encountered in resolving upon the correct way forward. Having now taken a substantial period for reflection, during which I have read and re-read the judgments in *White*, *Miller* and *Charman*, it is possible to identify the source of the difficulty with some precision. It arises from any attempt to reconcile the clear view of the majority of the House of Lords in *Miller*, on the one hand, and the manner in which the observations and guidance given by the Court of Appeal in *Charman* are said to have been subsequently applied by judges and the profession (represented by way of example by Sir Peter Singer's judgment in the present case and Mr Southgate's submissions), on the other.

77. In reality, as I will explain, it is not possible to reconcile the majority opinion in *Miller*, or indeed the outcome of *Miller* to which all five members of the Judicial Committee subscribed, with the analysis adopted by Sir Peter Singer in the present case or, if it is representative, with the approach that has apparently been taken by courts and the profession post-*Charman*. Despite that wide margin of respect that I have for the wisdom and experience in this field of the judge, in the end, I am clear that it is just not possible to finesse the

House of Lords' decision in *Miller*, in so far as it relates to short, childless, marriages with potentially separate property, so as to be compatible with the judge's analysis in this case.

78. As I will attempt to explain in more detail at paragraph 107 below, the *obiter* observations at paragraph 86 in *Charman* preferring the approach of Lord Nicholls were observations that had no application to the present case. If an erroneous approach to the decision in *Charman* has been taken up by practitioners, developed and then concretised to the extent demonstrated in the judgment in the present case and by the general approach of the profession described by Mr Southgate it would seem that this has led to a situation where the law in relation to this category of married couples has become far removed from the principled and flexible approach of the majority in *Miller*.

79. Put another way, if, as Mr Southgate submits, there was a 'fork in the road' with respect to short marriage cases that was intended to establish the direction of travel thereafter, that fork did not, and could not, have occurred, as he suggests, as a result of the Court of Appeal in *Charman* expressing a preference for Lord Nicholls approach in *Miller*; any such fork could only have occurred as a consequence of the *Miller* decision itself as a result of the majority opinions of Baroness Hale, with whom Lord Hoffmann agreed, and Lord Mance. In this context Lord Nicholls was a lone voice in *Miller,* in so far as he differed from Baroness Hale and Lord Mance, as neither Lord Hoffmann nor Lord Hope agreed with him on those matters.

Explanation of Conclusion

80. The task of identifying the principles to be distilled from *White* and, more particularly, from *Miller* is complicated by the number of speeches, the breadth of coverage of the key topics and the need to discern the basis for the actual decision of the House of Lords on the facts of the *Miller* case. I agree that it is necessary to adopt the approach described recently at paragraphs 81 to 83 of *Work v Gray* (see para 45 above) that, in this field, 'provided the guidance is authoritative' it should be followed without undue consideration of the distinction between that which forms part of the reasoning behind the decision, and that which does not, in order to be loyal to the spirit, as much as the letter, of such guidance. In undertaking that exercise, however, it is nevertheless necessary to differentiate between the guidance given by the various members of the Judicial Committee where there is a difference between them. In order to determine which of two differing opinions is the 'authoritative' guidance, the basic principle based on identifying the majority view must surely still apply. Where, therefore, the lone opinion of Lord Nicholls on a matter is in conflict with that of the three members of the House who were in agreement on that matter, the opinion of the majority must be the authoritative view. Insofar as the judgment of this court in *Charman* at paragraph 86 has been interpreted as expressing a preference for the opinion of Lord Nicholls on such matters, such an interpretation is, in my view, erroneous.

81. *Charman* was neither a short marriage, nor a 'dual career' case. The Court of Appeal's observations at paragraph 86 did not, therefore, form any part of the reasons for the decision in that case. If, contrary to my reading of it (see para 107 below), what is said in paragraph 86 conflicts with the guidance of the majority in *Miller*, the latter must, in any event, hold sway with this court.

82. Further, the inclusive approach to authoritative *obiter* statements encouraged by *Work v Gray* is an adjunct to the ordinary principle of precedent that where a line of reasoning is part of the justification for the House of Lords' actual decision, it must be taken as binding and followed by this court. Insofar as the actual decision in *Miller* establishes the basis for a relaxation of the equal sharing principle in a short marriage where unilateral assets have been received by one partner, then there can be no argument that such an approach may apply, on the facts, in other cases.

83. In order to explain the conclusion that I have now summarised, it is necessary to return to key passages in the speeches of Lord Nicholls, Baroness Hale and Lord Mance in *Miller*. Although these have been set out in full, it may be helpful if I focus on particular extracts at this stage starting with the speech of Lord Nicholls.

84. The first observation to make, and it is important, is that there is much common ground to be found in the speeches of Lord Nicholls and Baroness Hale. Both are keen to 'search … for what are the *requirements* of fairness' (Lord Nicholls para 9 – emphasis in original) or to 'search for principle' (Baroness Hale para 123). In doing so, both identify fairness, equality and non-discrimination as principles and both draw out the same three 'strands' of 'needs', 'compensation' and 'sharing', which Lord Nicholls describes as the 'equal sharing' principle. Both consider that predictability of outcome and a consistent approach to similar cases before the court are central aspects of 'fairness'.

85. Lord Nicholls bases the equal sharing principle upon the concept of marriage as a partnership of equals so that 'when their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary', but he goes on to 'emphasise the qualifying phrase: "unless there is good reason to the contrary"' with 'the yardstick of equality to be applied as an aid, not a rule' (para 16). These words are important. Firstly, they trail one of the principal issues upon which Lord Nicholls diverges from the other members of the Judicial Committee, namely the definition of just what 'assets' are to be regarded as assets of the partnership. Secondly, Lord Nicholls is explicit in stressing that, in some cases, there may be good reason for not applying the equal sharing principle to the division of assets. Thirdly, this is not as a concrete 'rule', but as an aid to assist in reaching a fair determination in each case; put another way, it is a principle rather than a formula to be applied rigidly to every case. This latter point is a clear echo of Lord Nicholls' cautionary words in *White* (page 606) that 'a presumption of equal division would go beyond the permissible bounds of interpretation of section 25' and 'would be an impermissible judicial gloss'.

86. If, as the court was told by Mr Southgate, the equal sharing principle of 50/50 allocation is now applied by courts and practitioners, in cases which are not pre-determined by 'needs', to all relevant assets in every marriage, without exception, from the moment the couple leaves the church or the Register Office, this would seem to be a very significant and wholly unjustified development from the approach so carefully described by Lord Nicholls. An automatic or blind application of a 50/50 split in every case can only be an impermissible judicial gloss on the statute, which expressly requires the court to consider all the circumstances of the case.

87. The first point on which the two principal speeches in *Miller* differ is, of course, on whether or not the court should make a distinction between 'family assets' and 'business or investment' assets, with Lord Nicholls advising that the court should be 'exceedingly slow' to do so (para 20). Lord Nicholls delineated 'matrimonial property' as being all property acquired during the marriage otherwise than by inheritance or gift, or property brought into the marriage by one or other party (para 22).

88. Before the judge, Mr Feehan's submission was that his client's bonuses came to her as part of an extensive period of employment in the energy sector and that the payment of substantial sums during the marriage was simply a 'coincidence', rather than having any direct connection with how the couple were working and conducting their lives as partners at that time. Sir Peter Singer accepted that the bonus payments were quite a remarkable circumstance and 'would indeed have had a quite other cast if W's bonuses had been in the bag before they met' (para 28). In terms of 'fairness', it could be said that an inflexible approach which is quite as black and white as that described by Sir Peter may be unfair, in a blind, arbitrary sense, to either party in a short marriage depending upon the date of bonus payment: for example, no sharing to the husband if paid six months before marriage, but full 50/50 shares if paid six months afterwards. It is in contrast with the more flexible approach of Baroness Hale and the majority, which would take account of the nature and source of property and the way the couple have lived their lives. For the avoidance of doubt, I would, however, stress that concepts of 'fledging' and/or 'springboard' or, more generally, capitalisation of a spouse's earning capacity as at the date of the marriage, were rightly ignored by the judge in accordance with the judgment of this court in *Jones v Jones* [2011] EWCA Civ 41.

89. In terms of the distinction between the approach taken by Lord Nicholls and that by Baroness Hale relating to the categorisation of the source of assets owned by the individual spouses, I have already summarised and quoted extensively from the relevant section of Baroness Hale's speech (paras 147 to 153) at para 34 above. It is now time to analyse these paragraphs in more detail in order to identify their relevance to the present appeal.

90. The opening section of paragraph 150 precisely engages with the facts in this case:

'More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality?'

In the present case the husband made no contribution to the source of the wife's bonuses and this is not a case where, save in the final year, the husband is said to have contributed more to the home life or welfare of the family than the wife. This case is, therefore, a 'non-business partnership, non-family asset case' where the bulk (indeed effectively all) of the property has been generated by the wife.

91. Having listed the arguments on the one hand in favour of full mixing of assets as 'matrimonial property' on marriage (para 150) and, on the other, those against (para 151), Baroness Hale concluded that the latter arguments (referring to wealth exclusively generated by one spouse, particularly in a very short time) could not be ignored in the very small number of cases where they might make a difference. In that limited cohort of cases, the assets that have been unilaterally generated by one party fall for consideration in the same manner as established by *White* with respect to premarital property, inheritance and gifts (para 152):

'The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue …rather than in terms of accrual over time …. This avoids the complexities of devising a formula for such accruals.'

92. In the present case the wife's bonuses were not 'family assets' as categorised by Baroness Hale and, in contrast to *Foster*, they had not been generated by the joint efforts of the parties (*Foster* being a case which was held to be 'all about contribution'). It is hard to justify holding that this case is not one where 'there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them' (Baroness Hale para 153). By Baroness Hale's analysis at paragraph 152 the court is obliged to take account of the duration of the marriage with a view to considering reducing the husband's share to reflect the period of his domestic contribution. Further, in a case where, in contrast to the more traditional 'bread-winner' / 'home-maker' model, each partner worked full time for most of the marriage, and where there are no children, it must be necessary for the court also to evaluate the extent, if any, by which the husband's domestic contribution exceeded that of the wife.

93. Although based on principle, the approach described not only by Baroness Hale and Lord Mance, but also by Lord Nicholls, is not wholly black and white, with particular categories of asset either very plainly being in or out of account, or with particular factual circumstances either clearly triggering a plain exception to 50/50 sharing or not. Each of their Lordships' and Ladyship's speeches attempts to delineate an approach, within the broad principles, which is, to a degree, more subtle and flexible than that. If, as the speeches of the majority contemplate, some grounds for departure from the equal sharing principle may lie in the littoral zone along its outer edges, these will require careful, fact-specific, evaluation and cannot be fairly determined by the blind application of an arithmetic formula.

94. Finally, in terms of the applicability of Baroness Hale's analysis to the present case, it is helpful to repeat paragraph 153 of her speech in full:

'This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them.'

Going back to the founding principle of her approach, namely the English law of separate property during marriage, that sentence recognises that, in the absence of a blanket principle of shared matrimonial property, there must be some circumstances where a party will retain sole ownership of assets acquired and retained during the marriage. Paragraph 153 continues:

'The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life.'

It is difficult to discern any distinction between the circumstances described above by Baroness Hale and those in the present case, subject to the words of caution that follow:

'However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.'

The final sentence identifies the potential for the approach described to impact adversely upon a spouse, such as Mr Sharp, in a 'dual career' case, who has

worked full time, having his share reduced, whereas the share of a spouse who has been a home-maker might not be reduced. The award in *Miller*, however, did include a substantial reduction from 50% notwithstanding that Mrs Miller had become the home-maker and it was not a dual career case; it does not therefore follow that a home-maker would enjoy equal sharing in such cases in a manner which would unfairly contrast with a spouse who had pursued a career.

95. For the reasons that he gave at paragraph 169, Lord Mance expressly agreed with the views expressed by Baroness Hale at paras 151 and 152 to the effect that the duration of the marriage cannot be discounted. In any event, and of particular importance in the context of this appeal, Lord Mance agreed with what Baroness Hale had said at paragraph 153 which he considered was also consistent with the last sentence of Lord Nicholls speech at paragraph 25 (the relevance of how the parties had organised their finances).

96. The following words from Lord Mance's judgment at paragraph 170 might well be describing the circumstances in the present appeal:

'Mr Miller worked, and Mrs Miller gave up work to look after him. But there can be marriages, long as well as short, where both partners are and remain financially active, and independently so. They may contribute to a house and joint expenses, but it does not necessarily follow that they are or regard themselves in other respects as engaged in a joint financial enterprise for all purposes.'

And:

'If one partner (and it might, with increasing likelihood I hope, be the wife) were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony. Once needs and compensation had been addressed, the misfortune of divorce would not of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married.'

97. The inescapable conclusion from this analysis of the speeches in *Miller*, in terms of the possibility of some alteration from, rather than a strict application of, the equal sharing principle in relation to short, childless marriages, where both spouses have largely been in full-time employment and where only some of their finances have been pooled, is that fairness may require a reduction from a full 50% share or the exclusion of some property from the 50% calculation. Of the five members of the Judicial Committee, only Lord Nicholls suggested a contrary view and even on his analysis the potential for some form of relaxation can be seen.

98. In contrast to the position in *Charman*, this court now has to confront the short marriage 'dual career' issue directly on the facts of the present case. In my view, whilst affording due respect to the observations made by the

experienced court in *Charman*, we are obliged to go back to the speeches in *Miller* and do so on the basis that I have described (in particular at paragraphs 81 and 107). For the reasons that I have given, the authoritative guidance in relation to short marriage, dual-career cases is to be found in the speeches of the majority and not, where it differs, in that of Lord Nicholls.

99. Whilst much of what is said in this regard in *Miller* (for example relating to dual-careers) is probably *obiter*, the conclusive point to be taken from *Miller*, however, arises from the actual determination of the House of Lords on the *Miller* appeal itself, where all five of their Lordships agreed that Mrs Miller should receive substantially less than 50% of the value of the New Star shares. The existence of a basis for departing from a strict application of equal sharing, albeit in a small number of cases and on the unusual facts of that case, is thereby established as a matter of law.

100. Lord Nicholls (paras 71 to 73) identified (i) the husband's 'huge' accretion of wealth during a short marriage and (ii) the high standard of living that the wife could not achieve for herself as the two features that justified the judge's award to Mrs Miller in a 'highly unusual case', with, importantly, 'the award of less than one-half of the value of the New Star shares [reflecting] the amount of work done by the husband on this business project before the marriage'. It is to be noted that Lord Nicholls' second factor, relating to the standard of living, must have been a factor in Mrs Miller's favour pointing towards maximising her award, yet, even taking account of that factor, Lord Nicholls endorsed a figure of well below 50%.

101. As set out at paragraph 36 above, Baroness Hale upheld the first instance judge who had distinguished *Foster*, had not made any direct reference to the value of the New Star shares and had looked to provide sufficient permanent income to support the wife continuing to live in the former matrimonial home. Lady Hale also held that Mrs Miller should have (i) a share of the combined value of the two matrimonial homes (which were plainly matrimonial property) together with other assets obviously acquired for the benefit of the family, and (ii) some share in the considerable increase in the husband's wealth during the marriage. An award based on the yardstick of equality would have entitled the wife to receive 'much more' than she did. Baroness Hale held that 'there was a reason to depart from the yardstick of equality because [the New Star shares] were business assets generated solely by the husband during a short marriage.'

102. Lord Mance, who agreed with Baroness Hale's reasoning on the issues of 'short marriage' and 'dual career', after taking account of a range of other factors, upheld the judge's award, whilst indicating that it was, in his view, on the high side.

103. Lord Hoffmann expressly agreed with Baroness Hale. Lord Hope agreed with the outcome without expressing a view on those matters which divided Lord Nicholls from the other members of the Judicial Committee.

104. I have spent time in teasing out the elements which each of the members of the House of Lords stated as justification for the award of £5M to Mrs Miller because, in my view, the majority plainly determined the appeal by affording substantial weight both to the shortness of the marriage and to the very significant unilateral gain in the husband's finances.

105. The similarities between the factual structure in *Miller* and that in the present appeal are plain, albeit that the figures in the present case may justify the label '*Miller*-lite'. Mrs Sharp received bonuses way beyond the level of her previous earnings purely as a result of her employment and (in contrast to *Foster*) without any contribution, either domestic or business, from her husband. Both cases involve short marriages. An additional factor in the present case, not present in *Miller*, is that the couple both worked throughout the marriage, save for the final year, so that any difference between their respective contributions to the welfare of the family in the home front will have been much less distinct than that in *Miller*.

106. *Miller* is a short marriage, but not a dual career, case. This distinction is directly acknowledged by Baroness Hale at paragraph 152: "the duration of the marriage may justify a departure from the yardstick of equality of division". This was also the ratio of Baroness Hale's decision on the facts of *Miller* where, at paragraph 158, she said: "there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage." By contrast, at paragraph 153, Baroness Hale goes on to consider a different case, which did not arise on the facts of either *Miller* or *McFarlane*, namely a dual career marriage of any length (and not expressly confined to a short marriage). While the first sentence and, probably, the second sentence of paragraph 153 are part of the *ratio* of *Miller*, the rest of that paragraph appears to be *obiter*.

107. The distinction between the treatment of short marriages in paragraph 152 and the (*obiter*) discussion about dual career marriages in paragraph 153 in *Miller* was recognised by this court in *Charman* at paragraph 83 and that distinction is carried forward in paragraphs 85 and 86. At paragraph 85 the court addresses the issue of short marriages and accepts the majority view expressed by Baroness Hale at paragraph 152 of *Miller*, while at paragraph 86 they address the *obiter* example of dual career marriages. It was clearly unnecessary for them to do so, because *Charman* was not a dual career marriage. What is said at paragraph 86 is therefore *obiter* comment on Baroness Hale's *obiter* comment on dual career marriages. The court appears to have been concerned that recognition of unilateral assets as falling outside the sharing principle in a *long* (or more than short) marriage could well produce an unfair result. For that reason, they wanted the notion of different treatment of unilateral assets in such marriages to be "closely confined". Baroness Hale had herself recognised the need for care and limitation in the last three sentences of paragraph 153. That issue, which does not arise on the facts of the present case, remains a matter for debate on another day. On that analysis of the key passages in the judgment in *Charman*, there is no impediment, in terms of possible conflict, for this court now to contemplate a

departure from the equal sharing principle in the case of a dual career marriage which was short, and where the couple had kept their finances separate

108. If Mr Southgate's submission to this court that, following *Charman*, the profession and judges at first instance have read *Charman* as requiring the courts to apply the equal sharing principle to unilateral assets even in a short marriage case (assuming needs are met) is right, that approach is plainly contrary to the decision in *Miller* and is not justified by anything that was said in *Charman*.

109. In his judgment Sir Peter Singer (para 48) held that, save where parties expressly chose to opt out (or attempt to do so) of the sharing concept to which couples subscribe when they marry by making a pre-nuptial agreement, the speeches of Baroness Hale and Lord Mance, in so far as they contemplated unilateral finances in a short marriage, dual career, case, were not consistent with the principles developed since the decision in *White*. For the reasons that I have given, it was, with respect, not open to Sir Peter so to conclude. Baroness Hale, Lord Mance and Lord Hoffmann had expressed their concluded view that the law should entertain the possibility for departure from the sharing principle on this basis; as the majority, that view should have been followed. The *obiter* observations of the Court of Appeal in *Charman* at paragraph 86, expressing a preference for the lone opinion of Lord Nicholls, should not have been taken as a determinative statement of the law. There is no ground in the judgment in *Charman* for holding that any exception is to be confined only to those cases where the parties have established a formal pre-nuptial agreement. To hold that Lord Mance's phrase as to the 'principles by which the parties had chosen to live their lives while married' looks forward to *Radmacher* and the different issue of enforceable pre-nuptial agreements, simply writes an unsustainable and unjustified meaning into Lord Mance's words. The judgment in *Charman*, upon which Sir Peter relied on this point, does not go so far as to limit the relevance of the arrangement of finances to cases of express pre-nuptial agreements.

110. It is plain from Mr Southgate's description of the path taken by the profession and the family courts post-*Charman*, that Sir Peter Singer's analysis in the present case was on all fours with that approach and, as such, is in no manner to be singled out for bespoke criticism. On the contrary, the judgment demonstrates a careful, considered and wise application of that very approach, so that, if the approach is sound in law, Mr Southgate was fully justified in submitting that it is unappealable.

111. For the reasons that I have given, I have, however, come to the clear conclusion that in so far as the decision of the judge in the present case was at odds with the authoritative guidance of the majority in *Miller* and the actual decision of the full court in that case he was in error.

112. In addition, even on the basis of the tentative foresight offered in *Charman* as to a movement towards more frequent reliance upon the distribution of finances in accordance with the apparent agreement of the parties, the judge's holding that the sharing principle must apply unless the

parties have entered into a pre-nuptial agreement is unsustainable and not supported by any authority. It follows that Sir Peter Singer's finding at paragraph 50 that the conduct of the parties in relation to separate finances fell short of supporting a finding akin to a pre-nuptial agreement must fall away as no longer being relevant. On the facts of this case, the manner in which the couple arranged their finances was more than sufficient to establish that Mrs Sharp maintained her capital separately in a manner which is compatible with that described by Baroness Hale in *Miller*.

113. It is, therefore, my conclusion that the division of the assets determined by Sir Peter Singer in this case does not accord with the approach dictated by the majority of the House of Lords in *Miller*. Further, as a matter of law, the decision of the House in *Miller* established that departure from the principle of equal sharing may occur in order to achieve the overarching goal of fairness in a particular case. This case is, therefore, one of the 'very small number of cases' (Baroness Hale, para 152) where the factors that I have identified justify departure from the equal sharing principle.

114. On the facts of this case, Mr Feehan is therefore right that the combination of potentially relevant factors (short marriage, no children, dual incomes and separate finances) is sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness between these parties. His submission that the husband's claim should be limited to a 50% share of the two properties assumes firstly that all of the other property is non-matrimonial property and secondly that Mr Sharp should have no call upon it. As the award given to Mrs Miller shows, the factors that are in play in this regard are not to be taken as water-tight, black and white, elements when the overall task is to achieve a fair outcome. In addition to retaining one half of the capital value of the two properties (£1.3M), I consider that the husband should receive an additional award to reflect a combination of the following three factors: (a) the standard of living enjoyed during the marriage; (b) the need for a modest capital fund in order to live in the property that he is to retain; and (c) some share in the assets held by the wife. I would assess the value of that additional award in this case at £700,000 making a total award of £2M, made up of the SD property which is to be transferred to him (value £1.1M) plus a lump sum payment of £900,000.

115. In calculating the award, and in view of the fact that the wife's liquid capital is not to be treated as part of the matrimonial assets for equal sharing, it is not appropriate to take account of the husband's concession regarding the SD property, which was purchased prior to the marriage. Both properties were matrimonial homes and, as such, properly fall to be divided equally between the parties.

116. For the reasons that I have given, I would allow the appeal, set aside the judge's order as to the division of capital and replace it with a property adjustment order allocating SD to the husband and LC to the wife, with an additional lump sum payment of £900,000 to the husband. All other aspects of Sir Peter Singer's order are to remain unchanged.

Costs Appeal

117. On the 10th December 2015, following an application made by the husband, Sir Peter Singer determined that the wife should pay the husband £80,000 in costs as a contribution to his overall costs bill of £200,000. He did so on the basis that the wife's approach to the litigation had been disproportionate in taking up and litigating every possible issue.

118. The wife now appeals against the judge's order or costs on the basis, firstly, that insufficient weight was afforded to the general rule that there is to be no order for costs in a financial order case. Secondly, that the judge failed sufficiently to identify the factors upon which he relied in dis-applying the general rule, and, thirdly, that insufficient weight was given to a number of countervailing factors.

119. I propose to deal with this issue in brief terms. Although the judge's judgment on costs is brief, he does, in contrast, set out in detail in his substantive judgment each of the criticisms that he made as to the wife's litigation conduct. The judge took account of the fact that the husband had not been blameless in his own approach to matters (in particular his lack of candour as to the extent of his adultery), but he nevertheless concluded that the wife's pursuit of a range of matters in the litigation went beyond the bounds of what was reasonable and were out of proportion to the husband's own negative behaviour. The award of £80,000 was less than half of the sum claimed by the husband.

120. Issues of costs are primarily for the trial judge who, in Sir Peter Singer's words, has lived through the litigation at first hand. Despite the arguments raised on behalf of the wife, I can detect no error in principle in the judge's approach nor any ground upon which to interfere with his exercise of discretion. I would on that basis dismiss the appeal on costs.

Lord Justice McCombe:

121. I entirely agree that this appeal should be allowed and that the order proposed by McFarlane LJ should be substituted for the order made by the judge. I do so essentially for the reasons that my Lord has given. I only add some comments of my own because of the importance of this question to the relatively narrow band of cases (narrow, but significant to the parties) in which the present problem arises, and also because we are differing from a judge whose views on this area of the law command the highest respect.

122. I have to confess that, as Mr Southgate's argument was developed, with force and skill, I found it hard to understand how the majority speeches of the House of Lords in *Miller* had seemingly been put to one side by the profession and, as he submitted, by some courts. It seemed to me to be clear that those speeches applied precisely to the facts of the present case and called for a different view to be taken of the case from that of the learned judge. I was

surprised that the judgment in *Charman* could be taken as suggesting otherwise.

123. Baroness Hale, Lord Mance and Lord Hoffmann were in accord with each other over the matters covered by her Ladyship in paragraphs 150 to 153 of her speech. In the small area of difference from Lord Nicholls, the latter was in a clear minority. It seemed to me, moreover, that the entirety of those paragraphs of Baroness Hale's speech were contributory to the reasoning behind the result at which the House arrived in *Miller*. Thus, while one might argue the interesting jurisprudential problem as to whether any part of paragraph 153 was indeed *obiter dictum*, as this court thought in *Charman* and indeed as McFarlane LJ does now, or whether it formed part of the *ratio decidendi*, it seemed clear to me that the entire passage (representing the majority view of the House) was determinative of the issue in this present case which was argued so ably by counsel before us. For what it is worth, it seems to me that the first two sentences of paragraph 153 were part of Baroness Hale's reasons for reaching her decision and the example which then follows ("the genuine dual career family") was part of the justification for that decision and part of the reasoning by which the result was achieved.

124. In so far as these passages of Baroness Hale's speech are, as this court considered in *Charman*, to be "closely confined", then I see no reason not to apply them to a case (like the present) where they are directly in point. One thing that is entirely clear about the comments made upon these passages in *Charman* is that they *were* entirely *obiter* and could have had little (if any) direct bearing upon the decision in that case which concerned a 28-year long marriage of parties to whom two children had been born.

125. Like McFarlane LJ, I do not read Lord Mance's remarks in paragraph 170 of the speeches in *Miller* as directed solely to cases where parties have entered into formal pre-nuptial agreements. The paragraph seems to me to be far more general than that. I, therefore, agree with my Lord that the judge in this case was incorrect to limit the relaxation of the sharing principle to cases where pre-nuptial agreements have been made.

126. In my judgment, moreover, the majority speeches in *Miller* follow more closely the statutory criteria, to which the courts are directed in section 25 of the 1973 Act, than the argument for the respondent would permit. We do not have a system of community of property and the statute directs attention to a wide variety of criteria for resolution of matrimonial finance problems, one of which is expressly the duration of the marriage. The principle of equality obviously properly applies to the vast majority of cases as the House of Lords cases have decided, but to the small minority, to which the majority view in *Miller* is of direct application, I consider that it is right for this court to follow it, particularly when it also falls within the close confines to which this court in *Charman* accepted it should be applied.

127. Therefore, as I have said already, I agree that the substantive appeal should be allowed. I agree that the appeal on costs should be dismissed.

Lord Justice David Richards:

128. I agree that this appeal should be allowed for the reasons given by McFarlane LJ; I also agree that the appeal on costs should be dismissed.