B1/2001/2504
Neutral Citation No: [2002] EWCA Civ 1685

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE – FAMILY DIVISION
(MR JUSTICE CONNELL)

Royal Courts of Justice
Strand London WC2A 2LL
Thursday 14 November 2002

Before:

LORD JUSTICE THORPE

LORD JUSTICE MAY

MR JUSTICE BODEY

Between:

SHAN ELIZABETH ROSE LAMBERT
Appellant

- and –

HARRY PAUL LAMBERT
Respondent

NICHOLAS MOSTYN QC & RICHARD TODD (instructed by Messrs Schillings of London W1D 3TL) appeared for the appellant

MARTIN POINTER QC & NIGEL DYER (instructed by Messrs Manches & Co of London WC2B 4RP) appeared for the respondent

Hearing dates: 14/15 October 2002
- -
JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

THORPE LJ:
Introduction

1. This is an appeal from the judgment of Connell J dated 22 October 2001. He conducted the trial of the ancillary relief proceedings brought by Shan Lambert against her husband Harry Lambert for eight days between 2 and 10 October. The judgment that he gave some twelve days later was reserved and handed down. Permission to appeal was given by me on paper on 5 December 2001, the application having been lodged with this court on 16 November following refusal by Connell J on 31 October. An interval of ten months between grant of permission and listing of the appeal is most unusual and in many ways undesirable. The skeleton arguments of the appellant and respondent were settled on 14 November 2001 and 17 May 2002 respectively. In the year between trial and listing of the appeal there have been a number of significant decisions both

here and abroad in a fluid area of the law. Accordingly the skeletons were but scant guide to the oral submissions. Such a delay is above all undesirable for the parties. Until the litigation is concluded it is difficult for them to complete the transition from married life to independent life either financially or emotionally.

2. The case would be very suitable for use in a textbook on ancillary relief. It is a big money case, and the family fortune, taken by the judge to be £20.2M, was all generated during the marriage. Both husband and wife worked hard for their success. There are two children now grown up and independently rich as a consequence of the diversion of a substantial proportion of the family fortune into a trust for their benefit. There are no complicating factors. Following a take-over of the husband's company after the separation the family fortune is more or less all liquid. The wife has always contended for an equal division. The husband offered her only 30% on the grounds that his special contribution entitled him to the lion's share.

The Shape of the Judgment of Connell J

3. Having introduced the parties as being then aged respectively 49 (the applicant wife) and 57 (the respondent husband), Connell J summarised the essential history with admirable brevity as follows:

"2. The marriage lasted 23 years. There are two children, a son aged 20 and a daughter aged nearly 19. Both are at university and are wealthy as a result of a trust which was created for them by their parents in 1985 and which is based in Guernsey. The value of the trust assets is now £7.3M and both children in reality are financially independent.

The parties' significant wealth arises from the sale of the shares in the company Adscene Ltd in September 1999 for £75M. Of this sum the husband received £19,726,000, the wife received £500,000, and the children's trust received £6M. This company had been floated on the stock exchange in 1987, and the quoted share price at the time of the sale was 155p. However the price paid for the shares after negotiation conducted by the husband and the board of directors was 263p. Adscene was a company founded by the husband in March 1973, 9 months before he met the wife and 15 months before he married her on 20 June 1974. Adscene produced and distributed a free local newspaper funded by advertising revenue, and it expanded dramatically over the course of the marriage until it was sold as described."

4. In paragraphs 4 and 5 the judge recorded the principal area of factual dispute between the parties. The husband's case was that he had launched the company and set it on a successful path prior to the marriage, and that its success during the marriage was the result of his drive and initiative. After the separation he contended that the eventual sale was at an outstanding price achieved by his special negotiating skills. He asserted that his wife's involvement in the company was more or less ornamental.

5. By contrast the wife claimed for herself not only a committed contribution as wife and mother but also a contribution to the success of the business which she asserted was pivotal. The judge then recorded Mr Pointer QC's submission that, on the husband's case, his contribution to the creation of the family fortune was exceptional, as defined by this court in *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, and that it significantly outweighed the admittedly full but domestic contribution of the wife.

6. In paragraph 6 the judge directed himself as to the law, impeccably in my opinion. He said:

"The court's fundamental duty however remains to apply section 25 of the Matrimonial Causes Act 1973 to all the circumstances of this case in its attempt to arrive at a fair outcome. Although the issue of the parties contributions to the welfare of the family has been uppermost in the minds of the parties and of their representatives, I observe that that issue can claim no statutory priority in the discretionary exercise. I must have regard to each of the eight matters separately specified in section 25(2) against the background of all the circumstances of the case. Since each of the children is now adult and wealthy as described, their welfare no longer requires 'first consideration'."

7. The judge then carried out the section 25 exercise considering in turn each of the section 25(2) criteria. That exercise took him from paragraph 7 to paragraph 28. Between paragraphs 29 and 38 he reviewed those passages in *White v White* [2001] 1 AC 596 and *Cowan v Cowan* of particular application to the case. Finally in paragraphs 39 and 40 he expressed his conclusion, namely a 63%: 37% split in favour of the husband. That left the wife with assets totalling £7.5M, nearer the figure of £6M for which Mr Pointer QC had contended than the figure of £10.2M for which Mr Mostyn QC had striven. The order was summarised thus in the final paragraph, paragraph 41:

"Ringleton Manor worth £1.6M will be transferred to the wife. She has other assets worth £2.8M in round figures. I shall in addition order a lump sum payment in full and final satisfaction of all her claims of £3.1M."

The Grounds of Appeal

8. In his grounds of appeal Mr Mostyn QC attacks the judgment on three fronts:

   i. First he contends that Connell J fell into the trap of gender discrimination by concluding that the husband's contribution as a money maker was special, of greater value than the wife's, and a justification for an unequal division of the family fortune.
   ii. Second he submits that the husband held the proceeds of sale of his shares in the company as trustee pending the outcome of the wife's ancillary relief claims. His subsequent investments were reckless and the wife's entitlement should have been determined on the notional basis that the assets retained the value that they held immediately after the sale of the business.
   iii. Third he says that the judgment focussed insufficiently on the wife's needs as the future owner of the final matrimonial home, with the consequence that the yield from her investment capital would not meet her outgoings.

9. This appeal was dominated by the first ground, which raises many difficult questions and requires a review of recent authorities both here and abroad. The submission underlying the second ground had been rejected by Connell J on the facts and particularly on his assessment of the husband's good faith. Before us when Mr Mostyn saw that the wind was against him he tacitly abandoned this ground. The third ground requires no consideration of law and principle. It is fact dependent and focuses on a single paragraph in the judgment below. I will defer any consideration of ground three until I have dealt with the first ground.

Connell J's Treatment of Contributions

10. How then did Connell J deal with contributions? It is perhaps indicative that the section of his judgment devoted to contributions is the longest. He considered the wife's contribution, dealing first with home life. He said this:

"The wife's contribution as wife and mother is accepted by the husband. Given that this was a husband who was intent on building up Adscene, who worked long hours to that end and who, on his own account, was often away from home for much of the working week, the contribution made by the wife in this regard was particularly valuable. The husband's contribution vis-a-vis home life and his children was primarily confined to weekends; so that he was a committed but frequently absent husband and father. When home he made the major decisions on modernisation and the wife did her best to implement these when he was away."

He noted that for at least the first five years of the marriage the wife ran her own business which enabled her to pay for the food and other domestic articles. "This was a constructive contribution in the early days of the marriage and in my view is evidence of the unsurprising fact that the parties treated the marriage as a partnership from an early stage."

11. He put the wife's contribution to Adscene into proper perspective, thus:

"I do not see her role as pivotal. On the other hand it would not be fair to her to describe it as purely incidental, since the husband was able to turn to her for support when such was appropriate or necessary in his view. Thus her contribution to the business was modest when compared to that of the husband, but was not irrelevant or meaningless. Bearing in mind the words of the statute, she made a full contribution by looking after the home and caring for the family, which was supplemented when the need arose by her willingness to support the husband in his efforts to develop the business."

12. Turning to the husband, he recorded his case for exceptional contribution which was advanced on three fronts: first that the company was created and established prior to marriage, second that during the years of cohabitation the husband's achievement was the product of his exceptional innovation and talent, third that the sale of Adscene some two years after the separation for a price two and half times the separation value was the product of his exceptional judgement and negotiating skills. As to the first the judge recorded that at the date of the marriage the company was only part way through its first year of trading, that the real growth: "all took place during the course of the marriage and during the time that the wife was supporting the husband as well as looking after his home and bringing up the children. This pot of gold was truly created during the marriage". However in relation to the second phase the judge held that the development *"was achieved very largely thanks to the husband's efforts and I have no doubt that he was an excellent businessman and manifestly a successful entrepreneur*".

Of the third phase, the sale, this was the finding:

"The husband is entitled to significant credit for this in view of his early participation in the sale process, but in my view it would be stretching language to describe this part of his contribution as exceptional. No doubt as a successful entrepreneur he displayed the talents of a good negotiator in order to reach a good conclusion. It was a very satisfactory conclusion materially assisted by a good businessman but no more than that."

13. Paragraph 26 concluded this section of the judgment with this overall assessment of the husband's contribution:

"Thus, as indicated, the husband made a very substantial contribution to the welfare of this family by creating its wealth with occasional assistance from his wife. It would not be right in my view to describe him as a genius, and the most exceptional part of his contribution relates to the very large sum of money acquired by the family as described. It is difficult to envisage a financial contribution in a big money case which is not in one sense exceptional, since by definition exceptional or unusual wealth has been created. Where, as here, that contribution consists of a good idea, initiative, entrepreneurial skills and extensive hard work the question still remains whether that contribution is so special when compared to the contribution of the wife and balanced against the other section 25 circumstances as to demand special recognition."

14. The judge's answer to the question that he had posed himself in the final sentence of paragraph 26 comes in paragraphs 39 and 40, which not only answer the question but also decide the outcome of the case. I therefore set them out in full:

"There is of course a problem in that any court which decides that the contribution of one spouse is properly described as special may appear thereby to decry the contribution of the other spouse. But that is not in fact the case. The wife, as here, may have made a full domestic contribution and a modest business contribution. That being recognised, it cannot be described as an exceptional contribution without causing offence to language. On the other hand the husband may have accumulated exceptional wealth by displaying over many years an innovative approach coupled with excellent business skills and very hard work. If that is so the court must decide whether (per Lord Justice Mance) ''here was something really special about the skill or effort devoted'' by the husband; and in that case must consider its impact on the appropriate order.

In my view the contribution made by this husband is as entitled to the description 'really special' or 'exceptional' as was the contribution made by Mr Cowan. Although I would not describe him as a genius, he was more than just a hard working businessman. He showed innovative visions and the ability to develop these visions (see Thorpe LJ at paragraph 67). He was not merely a successful businessman but an exceptionally active, determined and innovative one (see Robert Walker LJ at paragraph 94). His was a special achievement, via special business skills, acumen and effort (see Mance LJ at paragraph 155). The wife's contribution was as described, without any feature which can be described as 'really special'. In answer to the question posed in argument by Mr Mostyn QC, namely 'What more could the wife have done to justify an award of 50%?' The answer is: 'In the circumstances, probably nothing'. That in my view does not lead to the conclusion that an award of less than 50% is unfair. In a case where the issue of contribution is central to outcome, an award which leaves this wife with approximately 37.5% of the assets (£7,500,000) is a fair outcome, which departs from the yardstick of equality in deference to the really special contribution of the husband as described. It also recognises in full the contribution of this particular wife thanks to whose help and support the husband was free to pursue those skills. In percentage terms it is similar to the award made in Cowan where the wife achieved 38%. The husband's proposal of a lump sum of £1.6M would have left the wife with (but) 30%. Such an award would not adequately have recognised the various different elements of her contribution which have been previously described."

15. In developing his attack on these paragraphs Mr Mostyn relies upon the decision in *White v White* [2001] 1 AC 596 and upon five cases that were not available to Connell J. Before coming to his submissions it is convenient to review his authorities.

The Recent Authorities

16. There are three authorities in this jurisdiction, which require scrutiny. I take them in chronological order, the first being the case of *H-J v H-J* [2002] 1 FLR 415. Coleridge J on 17 October 2001 considered cross-appeals in a case first decided by District Judge Million involving assets of approximately £2,711,000. The District Judge's order gave the wife approximately 45% of the assets. Coleridge J increased the wife's share to equality. In so doing Coleridge J differed from District Judge Million neither in principle nor in approach but on a point of detail irrelevant to this review. I begin by recording the approach of the District Judge. I extract three separate passages from his judgment:

1. "Counsel says that this greater emphasis on contributions is an inevitable consequence of the decision in White. I disagree. It is a temptation but it is not a consequence and to give way to it is to commit the very error which White warns us not to, that is to treat some of the factors in section 25(2), in this case contributions, as more important than the others."
2. "For my part, I would find it repugnant as a judicial exercise to have, in effect, to draw up a merit table in which fine gradations of contribution give rise to a marginally increased or decreased share in the financial spoils of marriage. By whose standards should I measure such distinctions?"
3. "In this case, it is sufficient, as I find, to record that both the husband and wife each made their full and equal contributions in their respective roles within this long marriage. The family has been financially successful and the job of raising the children and looking after the various homes has also been successful. The role of the husband has been predominant in the financial success and, as I find, the role of the mother and wife has been predominant in keeping house and raising the children. Any further distinction is, in my judgment, impossible to draw on the evidence."

17. Of District Judge Million's approach Coleridge J said at 428:

"In the context of this case in relation to this question of contribution, I unhesitatingly agree with the district judge that no useful distinction can be drawn between the husband's contribution and the wife's contribution. I can find nothing special, exceptional or stellar about the husband's contribution in this case. He has undoubtedly worked diligently and successfully and over a long period to amass the assets that have been amassed over the duration of this marriage. He has had some good years and some very good years, but if the facts of this case lead to a finding of a special contribution, in my judgment it would be the thin end of a wedge being driven right into the heart of the principles underlying White v White. So I unhesitatingly come to the view that the district judge's findings and approach were correct even in the light of Cowan v Cowan."

18. At the conclusion of his judgment Coleridge J said this:

"Underlying this appeal and my decision to allow it there seems to me to be two important points:

The significance attaching to a particular fractional percentage is more than merely the monetary value it represents. It goes to the core of the party's understanding of fairness. So 50/50 resonates with fairness (as the House of

Lords has identified); both parties depart with the sense of being equally valued. There are no winners or losers. Once there is a departure from equality, as there often has to be, however small that departure, one party (more often the wife) is left with a sense of grievance, of her efforts having been undervalued. Understandably, at the time of divorce these considerations matter a great deal to the parties.

In this case, after a marriage which lasted in excess of 25 years, net assets, after deduction of notional sale costs and capital gains tax, have been accumulated amounting to more than £2.7M. Accordingly, there is ample to go round. It would indeed be sad if, in this category of cases (as opposed to those cases where the overall means are less than sufficient and so the needs of children and their carers must inevitably remain predominant), the broad and sweeping reform underlying the speeches in White v White was to become bogged down in a welter of zealous, over-sophisticated and costly forensic analysis, or watered down by judicial reticence."

19. The next reported case is a decision of a deputy, Mr Peter Hughes QC in a case of *H v H (Financial Provision: Special Contribution)* [2002] 2 FLR 1021. The family assets amounted to approximately £6M. The husband was described as a highly successful city solicitor. Mr Pointer, on his behalf, contended that for various reasons his financial accumulations during the course of his professional life amounted to a special contribution: but on behalf of the wife it was submitted that he was no more than a typical successful City solicitor. The judge noted that the wife had also succumbed to the temptation to play up her own contribution. In rejecting Mr Pointer's submission the judge said this:

"I have considerable sympathy for the husband, who has been highly successful and worked extremely hard over many years and no doubt feels that he has created the wealth that exists today. I am unable to accept, though, that his contribution calls for special recognition as in the cases of Cowan and Lambert.

It is not easy to define what may amount to a 'stellar' or really special contribution, but rather like the elephant, it is not difficult to spot when you come across it.

In Cowan Mance LJ referred to the relevance of the expectations of the parties. In my judgment that is an important consideration. What did the parties anticipate when they set out on their married life together? To what extent have those expectations been realised or have their lives taken a course neither of them would ever have expected and led to riches they would never have contemplated? That was the case in Cowan. It was also so in Lambert. In both cases the success of the marriage far exceeded the parties joint expectations.

That cannot be said here. The husband was already a qualified solicitor with a well-regarded city firm when the parties married. He was set on the career that he has pursued successfully, as both he and the wife hoped for. He has had to work hard and it has not always been easy. The rewards have though been substantial, as no doubt they had hoped they would be, and over the years he has had the full support of the wife in her role of looking after the home and family."

20. The last case in this jurisdiction was another decision of Coleridge J given on 2 July 2002 in the case of *G v G*, as yet unreported. The family assets were in the region of £8.5M. The wife sought a half share. The husband proposed that she should have 40%. The husband had built the family fortune through exceptional hard work and astute business acumen in the field of substantial development and

construction projects. The case was largely fought on the issue of the husband's contribution. I cite paragraphs 33 and 34 of the judgment in full:

"But how should the court now evaluate those respective contributions in the context of section 25? It is in this area that, needless to say, enormous amounts of forensic energy have been expended. That this should have happened is largely due, of course, to the recent case law on the subject. I have had the benefit of being referred not only to White at length but also all the decided cases which have been reported since that case on this particular subject. The husband's counsel has helpfully produced a folder containing all the relevant authorities. He did this in aid of his argument that the husband's contribution should be not regarded as one of equality with the wife's but of a character and quality which marks it out as special or stellar or outstanding. This, he said, should lead to a finding that (after applying the equality crosscheck required since White) his client should end up with more than half the resources.

In a number of decisions since White e.g. Cowan [2001] 2 FLR 192 and L v L (Financial Provision: Contributions) [2002] 1 FLR 642, the court has recognised, in an appropriate case, the possibility of a (financial) contribution by one spouse or another at such an extra-ordinary level that it is entitled to special recognition and value. Unfortunately, this has led to this concept becoming the centrally important issue in almost every case particularly where the assets exceed the party's reasonable needs. Hardly a case is heard nowadays than that one party (usually the husband) seeks to establish that he has played a markedly more valuable part in the accumulation of the wealth and the marriage partnership so that he should be specially rewarded by way of a greater share of the assets. I wonder whether, with respect to the members of the Court of Appeal in Cowan, they would have made the extensive remarks they did (about the possibility of a special contribution) if they had realised the forensic Pandora's Box that would be opened in actual practice. The effect is not at all dissimilar to the 'conduct' debates of the 1970s. In those days 'conduct' was similarly raised against wives to try and limit their claims. However, the court, recognising the undesirable consequences inherent in those arguments and further the impossibility of fairly adjudicating upon them introduced the concept of 'obvious and gross' very effectively to limit their application. It is suggested by some that these current 'special contribution' debates are reintroducing conduct by the backdoor. I would say by the front door. For what is 'contribution' but a species of conduct. 'Conduct' (subsection 2(g)) refers to the negative behaviour of one of the spouses. 'Contribution' (subsection 2(f)) is the positive behaviour of one or other of the parties. Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences. Firstly they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward not back. In part that involves a determination of factual issue (and obviously the court is equipped to undertake that). But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? Negative 'conduct' is one thing (particularly where it is recognisably 'obvious and gross') but the valuing of positive 'contribution' varies from time to time. Should a wealth creator receive more because eg his talents are very unusual or merely conventional but well employed? Should a housewife receive less because part of her daily work over many years was mitigated by the employment of staff? Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? These are some of the arguments now regularly being deployed. It is much the same as comparing apples with pears and the debate is about as sterile or useful."

21. When he came to express his conclusions on the issue of contributions he said this:

"Does that put the husband into that narrow category of wealth creators whose special gift or talent is the foundation of great wealth? I cannot so find in this case. I cannot evaluate the husband's contribution as greater than the wife's without discriminating against her on the grounds that the work she did over just as long a period was of less value than the husband's. That is precisely the approach foresworn by Lord Nicholls. The husband in this case was a hard working, dedicated husband, a father and provider over 32 years. By the same token the wife was a hard working and dedicated housewife, a mother and homemaker over the same period. ***'Each in their different spheres contributed equally to the family****' per Lord Nicholls. To find otherwise would, on the facts of this case in my judgment, amount to blatant discrimination. The husband's role was the glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way in which the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it then be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in terms of the overall benefit to the marriage partnership or to the family?"*

22. At the conclusion of his judgment Coleridge J noted that the case had cost the family over £400,000. He continued:

"That is not especially unusual in this class of case. But the parities 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 spouses. Perhaps 'obvious and gross' has a renewed role here. 'Obvious' because it imports the concept of very easily discernible and 'gross' in the sense of it being abnormally large. Unless this or something similar is soon introduced to curb these debates I fear there is a real danger that the forward looking 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."

23. I turn now to the neighbouring jurisdiction of Northern Ireland whose statutory provision more or less mirrors ours. McLaughlin J decided the case of *M v M* on 20 December 2001. The overall assets amounted to about £3.67M. The case had a number of complexities which I need not record. I want only to demonstrate the judge's approach to the evaluation of contributions. At page 28 of his approved judgment he said:

"In the course of adducing evidence before me counsel sought to tempt me with a bait of this kind. He led evidence, and relied upon it in his closing submissions, that the husband worked very long hours getting out of bed at 6.00am to be at work by 7.00am. His work did not finish until late in the evening as he carried on his working day by supervising Y limited and the other business premises owned by the company. I accept all of that evidence as true, but to concentrate on that and fail to recognise that, whilst he toiled at work on company business, Mrs M from early in the morning was getting the children ready for school, taking them there, running the home during the day, collecting them after school, cooking and cleaning, nurturing them by ferrying them to social, sporting and recreational activities, supervising homework and tutoring them when required, would be to be

guilty of the very kind of discrimination warned against by Lord Nicholls. An example of the value of the life's work of Mrs M can be seen today in the accomplishments and personalities of their children. These are the abiding rewards of her labour of love rather than the transient rewards in the form of money produced by the labour of the husband. In the context of this family's life these admirable qualities of both parties are to be considered of equal value. Indeed the words of Lord Nicholls might almost have been written to describe the respective roles of Mr and Mrs M."

24. I close my review of Mr Mostyn's authorities by recording a recent significant development in Australia. This is of particular relevance given the extent to which Mance LJ was influenced by Australian authority, and particularly the case of *Lynch v Lynch* [2000] FamCA 1353, [2001] FLC 93-075, in formulating and expressing guidance in the case of *Cowan* on the assessment of what constitutes an exceptional contribution by the family money-maker. The case in point is *Figgins v Figgins* [2002] FamCA 688. *Figgins* was an appeal to the Full Court in a big money case whose distinguishing features were inheritance and a relatively brief marriage. The Full Court consisted of Nicholson CJ sitting with Ellis and Buckley JJ. In giving the judgment of the court Nicholson CJ said that in the Australian jurisprudence special contribution "clearly refers to some special factor of skill or capacity that produces the result that there is a loading in favour of the party providing it". By way of instance he cited the case of *Lynch* and in particular this paragraph from the judgment of the majority of the Full Court:

"However, there are cases where the performance of those roles has what may be described as 'special' features about it either adding to or detracting from what may be described as the norm. For example in relation to the homemaker role the evidence may demonstrate the carrying out of responsibilities well beyond the norm as, for example, where the homemaker has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of a handicapped or special needs child. On the other hand, in the breadwinner role the facts may demonstrate an outstanding application of time and energy to producing income and the application of what some of the cases have referred to as 'special skills'."

25. Immediately following that citation comes this highly critical appraisal in paragraph 57:

"We are troubled that in the absence of specific legislative direction, courts consider they should make subjective assessments of whether the quality of a party's contributions was 'outstanding'. It is almost impossible to determine questions such as: Was he a good businessman/artist/surgeon or just lucky? Was she a good cook/housekeeper/entertainer or just an attractive personality? We think it invidious for a judge to in effect give 'marks' to a wife or husband during a marriage. We think that this doctrine of 'special contribution' should, in an appropriate case, be reconsidered. We think that the decision of the House of Lords in White v White gives force to these concerns."

26. The court returned to this theme at paragraph 131. The court's clear message is that the concept of special contribution reached its zenith in the decision of the full court in *Lynch*. The impact of *White v White* in Australia stretches beyond valuing equally the contribution of the male breadwinner and the female homemaker to challenge and seemingly to overrule the proposition that one spouse's contribution might, in an appropriate case, be elevated to such an exceptional degree as to dictate the division of the family fortune. Accordingly it is necessary to cite in full paragraphs 131 – 134 of the court's judgment:

"In Cowan (supra) Thorpe LJ commented (at 210) in relation to Lord Nicholls' formulation in White (supra) that the ratio of the judgments in White is that the judge's objective is about fairness rather than equality. See Cordle [2001] EWCA Civ 1791.

We respectfully agree. We think that the important concept that can be said to emerge from White is that, in order to test whether a result is fair, or in Australian terms just and equitable, it is important to ask whether the husband and wife are being treated equally. It states in the clearest terms the modern recognition of equality of the sexes and the need to abandon all forms of discrimination
.
In the present case we think that the emphasis given by White to gender equality is important in testing the overall result. We think that the lesson to be learned from White is that it is a major error to approach these cases upon the basis that one arrives at a figure that is thought to satisfy the needs of the wife and give the balance to the husband.

In some cases that may produce an appropriate result but in many others it is likely to be productive of a grave injustice. We reject the concept that there is something special about the role of the male breadwinner that means that he should achieve such a preferred position in relation to his female partner. To do so is to pay mere lip service to gender equality. Marriage is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other. We think that cases such as Lynch v Lynch (supra) and the minority view of Guest J in Farmer v Bramley [2000] Fam CA 1615 have missed this point and have led to an imbalance of gender considerations in arriving at results that unduly favour the male partner."

27. From these authorities in this and related jurisdictions two consistent themes emerge. First it is unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for dividing the product of the breadwinner's efforts unequally between them. Second both the practicality and the value of the exercise of marking the parties to a failed marriage on their respective performances is questioned. Some judges understandably regard it as a distasteful exercise. In this jurisdiction, both in the judgment of District Judge Million and in the judgments of Coleridge J are clear warnings that the excess commonly seen in the litigation of the issue of the applicant's reasonable requirements has now been transposed into disputed, and often futile, evaluations of the contributions of both of the parties. Additionally the decision of the full court in *Figgins v Figgins* clearly supports Coleridge J's distaste for special contributions and suggests the need for this court to return to the relevance of an asserted special contribution and to reconsider its impact upon the section 25 exercise.

28. Before turning to Mr Mostyn's detailed criticisms of Connell J's approach it is very necessary to remember where *Lambert* stands in the chronology of the authorities cited to us. It was handed down only five days after the decision of Coleridge J in *H-J v H-J* and it seems reasonable to assume that each was delivered without knowledge of the other. It therefore precedes *H v H, G v G* and *Figgins v Figgins*. Had this appeal been listed within three months of the grant of permission, which would be usual enough in family appeals, Mr Mostyn would probably have had only *H-J* to support his submissions.

Counsel's Submissions

29. In developing his submissions Mr Mostyn states that the consequence of the decision of this court in *Cowan v Cowan* has been to create a culture in which the husband in every big money case asserts an exceptional financial contribution, thus provoking lengthy and costly battles. He further states that the judges of the Family Division have divided into those who have embraced the spirit of the decision in *White v White* and those who have adhered to ingrained discriminatory thinking.

30. Mr Mostyn's detailed submissions stop short of wholesale assault on the decision in *Cowan v Cowan*. He suggests that its acknowledgement of the possibility of special contributions must be confined to the rarest instances and perhaps only where the acquisition of the family fortune is achieved by innovative genius: thus the court can terminate the new forensic industry in the field of contribution. He submits that the fundamental and important rule against gender discrimination must lead to the following plain conclusions:

    i. The contribution of the homemaker is no less valuable than the contribution of the breadwinner and judges should eschew the undesirable exercise of awarding marks to parties for performance during marriage.
    ii. The breadwinner's contribution cannot be rendered special by reference to the size of the product. If the size of the pot alone constitutes a good reason for departure from equality that would mean that the yardstick could never apply in such a case. So too would it be wrong to regard the workaholic breadwinner as having made a special contribution, since invariably his physical and emotional absence from family life casts special burdens on the homemaker. As to entrepreneurs, Mr Mostyn emphasises that they live dangerously: the wife is not shielded when the husband's effort results in bankruptcy. Since she fully shares the risks she should equally share the fruits of success. Finally he suggests that the entrepreneur continues his earning capacity uninterrupted after the division of the family fortune whilst the wife, whose earning capacity has long since been sacrificed, has little or no prospect of reviving it.

31. Turning to the present case Mr Mostyn emphasises the judge's respective findings that this husband could not be described as a genius whilst the wife could probably have done no more to qualify for an award of 50%. He submits that having categorised the husband's contribution realistically at the outset of paragraph 26 it was not open to the judge to elevate it to something special by taking selected exerts from the judgments in *Cowan*. Finally he submits that, insofar as exceeded expectations is a relevant consideration, the husband, in advancing the first limb of his claim to special contributions, had asserted that Adscene was immediately and spectacularly successful.

32. When Mr Mostyn was asked to explain why, given his clear submissions as to the equal worth of the different contributions, he had devoted so much time and effort at the trial to establish the wife's pivotal business contribution, he responded that it was because he anticipated that he had no other prospect of achieving an equal share in front of Connell J. He pointed out that by contrast he had argued the case of Mrs G in front of Coleridge J on the simple basis that her contribution as homemaker was no less valuable than that of Mr G.

33. I turn to the rival submissions of Mr Pointer. He was critical of the scale of the wife's costs which are put at £650,000. That was to be contrasted with his client's costs which he put at £344,000. That was by way of introduction to his first clear submission that the case had been fully tried by a most experienced Family Division judge over the course of eight days. Having seen and heard the parties

the judge had arrived at clear conclusions in the exercise of a broad discretion. The speech of Lord Hoffman in *Piglowska v Piglowski* rendered any interference by this court unprincipled. He characterised Mr Mostyn's submissions as implicitly labelling the decision in *Cowan* as being inconsistent with that in *White*. He relied most strongly on the judgment of Mance LJ in *Cowan v Cowan* which shows that the trial judge is entitled, indeed bound, to make a value judgment as to the respective worth of the contributions of the spouses and to place the husband's financial contribution on the spectrum stretching from the ordinary to the extraordinary. Mr Pointer contests that a new litigation industry has developed around the concept of special contribution or in the area of contributions generally. He disputes that exceeded expectations has become a new field of unnecessary skirmishing. He does not recognise a broad division of the Family Division bench into those who seek to find equality and those who seek to avoid it. He submits that the statute requires the judge to make a full and comparative assessment of the respective contributions of the parties. It is a task that cannot be avoided and judges of the Division have particular expertise in making value judgments of that nature. He supports the judge's view that wherever the family fortune is spectacular the breadwinner will in all probability have made a special contribution. He suggests a threshold of about £10M: above that the fortune made entirely within the marriage by the unaided efforts of one of the spouses is likely to be regarded by the court as a significant achievement and therefore a special contribution to be reflected in the outcome. He is particularly critical of the decisions of Coleridge J who he submits has taken an impermissible judicial stride towards a presumption of equality.

34. Turning to the present case Mr Pointer submits that the single question is whether the wealth generated by Mr Lambert allowed a discretionary choice of a 37%:63% split. He argues that the submission that the wife bore additional burdens because of the husband's commitment to the company is to make a stereotypical assumption: here the children were at boarding schools and the family employed staff. Mr Pointer defends paragraphs 26 and 40 of the judgment as being proper findings in a territory that is essentially that of the trial judge. As to the suggestion that genius alone deserves recognition in the award, Mr Pointer submits that cases are not to be decided by reference to the IQ of the parties but to what has been achieved by acquisition. Finally he draws a comparison between Mrs Cowan, who contributed over 40 years of marriage during which the husband accumulated a fortune of £11.5M, with Mrs Lambert, who contributed during 23 years of marriage during which her husband achieved a fortune of £27M. Ultimately he suggests that greater restraint on unnecessary future litigation would be achieved by dismissing the appeal.

35. In his submissions in reply Mr Mostyn reiterated that this was essentially a discriminatory judgment. If due allowance be made for the lifetime needs of each, the whole of the balance above that calculation was awarded to the husband.

36. I will consider the issues raised by these submissions generally and then in their application to the present appeal.

General Conclusions

37. Section 25(2)(f) imposes a duty on the court to have regard amongst other matters in particular to:

"(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."

38. How then is the court to approach that duty in the light of the judicial debate revealed by recent authority? The language of the subsection certainly does not suggest any bias in favour of the breadwinner. Lord Nicholls could hardly have expressed more clearly or more forcefully the need to guard against gender discrimination in this as in all areas of the trial judge's assessment. There must be an end to the sterile assertion that the breadwinner's contribution weighs heavier than the homemaker's. It is easy to criticise with hindsight and I do not mean to do so by suggesting that even in October 2001 Mr Mostyn should have had the courage of his convictions. Perhaps more realistically his strategy was driven by the need to respond to the husband's special contribution riposte to the case for equal division. Hereafter there is much to be said in favour of a straightforward presentation of the homemaker's case on this issue unencumbered by unrealistic and strategic claims to significant contribution to the accumulation of wealth. As Robert Walker LJ succinctly said in *Cowan* the nature of the contributions is intrinsically different and incommensurable. Each should be recognised as no less valuable than the other. Whilst I accept Mr Pointer's submission that the judge has a duty to assess each and every one of the section 25(2) criteria that bear on outcome and equally that judges of the Family Division have great expertise in making value judgments, I do not accept that the duty 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 historic situations, choices and failings which in the context of a long marriage can never be recaptured fully or accurately. I share the views of District Judge Million cited by Coleridge J in *H-J v H-J* at 421A. I fully agree with the views expressed by McLaughlin J in the case of *M v M.* I do not consider that the approach which has been adopted by Coleridge J amounts to an impermissible judicial stride towards a presumption of equality. A distinction must be drawn between an assessment of equality of contribution and an order for equality of division. A finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the other statutory criteria as well as the over-arching search for fairness.

39. A formula for the equal division of assets on divorce is justly criticised for producing crude and unfair outcomes. It might be unfair to the one who inherited those assets years before the marriage. It might be unfair to the one who needs all the available assets to provide a secure home for the children. However a formula for the equal division of whatever surplus there may be having made fair provision for the assessed needs of each of the parties before the court would produce a fair outcome in many test cases. When chairing the Ancillary Relief Working Group charged with advising the Lord Chancellor on options for reform of section 25 I tabled a proposal for some reduction in the width of judicial discretion by adopting a rebuttable presumption of equal division of any surplus (see Appendix 1 to the report). The proposal met with little support at the time. However it was subsequently reflected in the government's proposal contained in paragraph 4.49 of the inter-departmental White Paper Supporting Families published in October 1998. The government's publication in June 1999 of the responses demonstrates that, although the proposal attracted relatively few responses, the vast majority of the responses were in favour. I have since consistently argued that the reform of section 25 along the lines of the government's proposal would be beneficial in many respects, not least in bringing statutory provisions first enacted in 1970 more into line with contemporary social values and expectations. In the absence of legislation and given the encouragement expressed by Lord Nicholls (and more strongly by Lord Cooke of Thorndon) in *White v White*, Coleridge J is, in my judgment, entitled to regard the crosscheck of equality as an important duty.

40. I would not, however, share all the reasoning of Coleridge J expressed in the concluding paragraphs of his judgment in *H-J v H-J*. It is the objective judicial consideration of fairness rather than the parties' subjective understanding that must determine outcome. Parties who share the perception that equality would be fair to each of them never get to trial. The notion that the judge who orders equal division despatches the parties from the judgment seat without a sense of grievance and with a sense of being equally valued may instance a piece of judicial wishful thinking. I am however in full agreement with the approach expressed in his following paragraph to cases that broadly equate with the case that he there decided.

41. Equally the warnings which he, as an experienced specialist amongst specialists, expresses in paragraph 34 of his judgment in *G v G* must be heeded. Where a family has accumulated a fortune almost too large to dissipate, it might be thought that an expensive and contentious trial would be an unlikely necessity. But all who specialise in this field know that it is not so and accordingly there is a tendency for the case to escalate as it proceeds, each tactical development attracting at least another in response. Therefore if the decision of this court in *Cowan v Cowan* has indeed opened what Coleridge J describes as a forensic Pandora's Box, then it is important that we should endeavour to close and lock the lid.
42. I also endorse concerns that he expresses in his final paragraph at the costs of these tactical exercises. Our concern should be all the greater given that the costs in the present case are estimated to amount to almost £1M.

Special Contributions

43. The absence of any legislative review of section 25 since 1984 has undoubtedly created problems for the judiciary. (I leave aside the somewhat enigmatic amendment to section 25(2)(g) enacted by the Family Law Act 1996 which is not to be brought into force.) The judgments in *Cowan v Cowan* that consider the legitimacy of a departure from equality on the basis of exceptional financial contribution must be understood in the context of that case. First the trial had been conducted before the decision in *White v White* and therefore decided on the basis of reasonable requirements. On appeal it was common ground that in principle the court was free to depart from equality if the husband's financial contribution had been sufficiently exceptional. Both parties submitted that that issue should be remitted for determination by the trial judge. Out of a desire to achieve finality and avoid further costs we declined and ourselves made the value judgment from the evidence and findings at trial, which were of course not specifically directed to the issue. With the advantage of hindsight it seems regrettable, given the significance subsequently attached to our judgments, that the crucial issue was not addressed at trial nor was there any argument before this court on the validity of the principle.

44. The authority of *Cowan v Cowan* cannot therefore be elevated nearly as high as Mr Pointer would have it. In my judgment I based my departure from equality on five considerations, of which the special character of the husband's contribution was but one. Each member of the court advanced different reasons for arriving at the same result. Those who have subsequently attempted to argue that their breadwinning contributions were special have focussed on the judgment of Mance LJ. In his reasoning he placed considerable reliance on the Australian authorities culminating in the decision of the full court in *Lynch v Lynch*. But a large question mark has been placed against that line of authority by the judgment of the full court in *Figgins v Figgins*. In *Cowan* I offered no new approach and certainly no new principle. As I said in paragraph 41, this court could do no more than explore

the boundaries by the application of the principles to be found in *White* on a case by case basis. I recognise that the specialist professions hope for and probably expect more. But just as this court evolved guidelines for the application of the statutory criteria approximately 30 years ago (notably of course the concept of reasonable requirements and the Duxbury mechanism for capitalisation of reasonable requirements), so, it seems to me, this court must adopt the same approach now that those guidelines have to a substantial extent become outdated and then proscribed by the decision in *White*.

45. Having now heard submissions, both full and reasoned, against the concept of special contribution save in the most exceptional and limited circumstance, the danger of gender discrimination resulting from a finding of special financial contribution is plain. If all that is regarded is the scale of the breadwinner's success then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success. Examples cited of the mother who cares for a handicapped child seem to me both theoretical and distasteful. Such sacrifices and achievements are the product of love and commitment and are not to be counted in cash. The more driven the breadwinner the less available will he be physically and emotionally both as a husband and a father. There is also some justification in Mr Mostyn's emphasis on the extent to which the homemaker frequently sacrifices her potential to generate assets by undertaking the domestic commitment to husband and children. At the same time she risks the outcome of failure and so earns her entitlement to share in the successful outcome.

46. In sum I am much more wary of the issue of special contribution than I was in writing my judgment in *Cowan*. Perhaps Chief Justice Nicholson, who seems poised to banish the phenomenon, may have found the better path. The circumstances set out in paragraph 43 above allow this court to re-evaluate the whole issue. However for the present, given the infinite variety of fact and circumstance, I propose to mark time on a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous to even to attempt to speculate on the boundaries of the exceptional. In the course of argument I suggested that it might more readily be found in the generating force behind the fortune rather than in the mere product itself. A number of hypothetical examples were canvassed ranging from the creative artist via the superstar footballer to the inventive genius who not only creates but also develops some universal aid or prescription. All that seems to me to be more safely left to future case by case exploration.

Exceeded Expectations

47. I am doubtful of the origins of this test for the existence of a special contribution. There is no doubt that it originates from the judgment of Mance LJ in *Cowan v Cowan* at paragraph 161. There he said:

"The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently."

48. The interpretation that Mr Hughes QC in *H v H* placed on that passage appears from the paragraphs of his judgment which I have cited above.

49. Certainly Mance LJ posits success going beyond general expectations but when he turns to the subjective hopes of the other spouse he does not relate those hopes

to the outset of the venture but rather to what might have been had family lives and activities been differently divided.

50. However all that may be I reject the interpretation and approach adopted by Mr Hughes. There is an understandable desire for tests and mechanisms to strengthen judicial confidence in the rationality of the discretionary outcome. But the danger is over-sophistication and complexity that ends up by perverting the statutory task. The concept of special contribution is first formulated and then the concept of exceeded expectations is deployed to demonstrate special contribution. Each provides an opportunity to win a point over the other party. Furthermore the concept of exceeded expectations invites exactly the sort of exchanges that raise the emotional temperature and augment the costs. The exchanges are of questionable relevance to the essential objective assessment of fairness. In any marriage of considerable duration evidence as to what the young couple at the outset of their married life each thought, felt, intended, expected or aspired to is likely to be more imaginative and self-serving than realistic.

Specific Conclusions

51. How then do these general conclusions bear on the principle issue argued in the present appeal, the issue of special contribution? Within it there are two questions: (a) was the judge right to find that the husband's contribution was special, and (b) if yes, was he right on that ground, and on that ground alone, to depart so far from equality?

52. Mr Mostyn criticises paragraph 26 of the judgment, perhaps not entirely fairly, as posing a question at its close which has effectively already been answered in the negative in the opening. It may be that the main foundation for the judge's conclusion was the size of the family fortune, albeit generated by the husband's hard work, determination and acumen. If that be the yardstick there is an obvious danger of gender discrimination. There may be cases where the product alone justifies a conclusion of a special contribution but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish. If I turn to the question posed by Connell J at the end of paragraph 26, a good idea, initiative, entrepreneurial skills and extensive hard work are in my judgment insufficient to attract the label. It is too easy to compile a comparable catalogue of qualities that the homemaker has brought to the other essential contribution.

53. I have every sympathy for Connell J and every appreciation of his succinct and skilful judgment. I am in no doubt that he looked at the case as he did in part because of the way the applicant's case was fought with its outdated endeavour to present her as pivotal in the company. Furthermore we judge this appeal against a consistent pattern of recent authority which was not available to Connell J. I recognise that he had eight days of evidence in which to assess the parties, and particularly the special qualities of the husband. I recognise the force of Mr Pointer's submission that it is not for us to interfere with such assessments. However there is a gulf between the approach of Connell J in *Lambert* and the approach of Coleridge J in *H-J*, each writing independently and handing down within a week of each other. The two approaches cannot be reconciled and in my judgment the approach of Coleridge J must be supported. Once Connell J had concluded that the husband was not a genius and that the wife could not have done more, he should not have elevated one contribution above the other, given that the two are essentially incommensurable.

54. Even if Connell J was entitled to find the husband's contribution special it would not in my opinion justify so great a departure from equality. If it be conceived

that each needed approximately £7.5M to maintain their respective lifestyles the surplus of £5.2M all went to the husband. That hardly satisfies the fairness test. If outcomes become driven by comparative assessment of contribution then there is an obvious danger of over-emphasis on that criterion with a corresponding under-emphasis of others. Of course, as I have said before, the special characteristics of each case draw to them some of the criteria whilst others are evidently not engaged. We must therefore ask which criteria, other than contribution, were engaged here and how did the judge deal with them?

55. He dealt with each of the section 25(2) considerations in turn. First he carefully considered the assets, as to the extent of which there was no great contention, although much dispute as to whether after the sale of Adscene the husband had exercised his control and management irresponsibly or selfishly. All those issues were resolved in the husband's favour. Next came needs. This is an important paragraph to which I will return. On the standard of living, Connell J recorded that it had improved dramatically, achieving a rating of high from the mid 1980s onwards and, by the 1990s, extravagant. He concluded that each should be able to enjoy a comparable standard for the future. In relation to age and duration of marriage Connell J recorded the facts: the husband then 57, the wife then 49, the marriage 23 years in duration. However nothing follows as to how those considerations bore on outcome. The lengthy section dealing with contributions I have already reviewed. In relation to the three remaining subsections (disability, conduct and loss of pension) the judge simply recorded that neither party had suggested that these considerations had any bearing on the case.

Age and Duration of Marriage

56. With all due respect to Connell J I consider that some reflection should have been given to age and duration of marriage. As to the latter it is not just the duration of 23 years but the fact that they span the most productive period of the wife's life from 22 to 45. Not only are those the years of child bearing and rearing but those are the years in which an adult develops talents and expends the force of energy in the chosen work. The wife had a modest business which she gave up. What sort of an independent career she sacrificed is a matter of speculation.

57. In my judgment the respective ages of the parties are also relevant. Of the fortune of £27.5M derived from the sale of Adscene, £7M has been allocated to the children. The greater part that remains is primarily, if not exclusively, for the parties to meet their needs during the remainder of their lives. Applying actuarial tables the wife has a further span of 35 years whilst the husband has a further span of about 23 years. This consideration may require some reflection in an assessment of the respective future needs of the parties, the consideration to which I now turn.

Needs

58. At the outset the judge considered two inter-connected areas of dispute, the wife's desire to remain at the former matrimonial home, Ringleton Manor, and her asserted need for an income of £460,000 a year net. As to the first the judge held that the wife's proposal was reasonable. However the judge did not make any finding as to what her expenditure would be as the owner/occupier of the property. The husband had advanced a figure of £194,000. Connell J merely criticised the forensic exercise of preparing for the wife a budget that was plainly inflated. He said:

"I question the value of an exercise of this nature in a case of this type. It is manifest that there are ample funds available to provide properly for the future needs of both spouses. In such a case it is for the wife (or the husband as the

case may be) to decide whether a particular aspect of proposed expenditure is justifiable in the circumstances …. In short the Duxbury type exercise which has been undertaken in this case for illustrative purposes as well as by way of quantification of the wife's claim in part is in my view of little value. The wife will have available to her the home which she chooses and sufficient income to enable her to maintain a high standard of living. The same will be the case for the husband …. Whichever solution is preferred by the court in this case both parties will be well able to satisfy their financial needs and to meet their obligations and responsibilities for the foreseeable future."

59. Mr Mostyn's argument focuses on the final sentence. The solutions to which the judge refers are the solution of £10.2M or the solution of £6M advanced by the wife and the husband respectively. But Ringleton Manor and its contents count for £1.878M. On the judge's eventual award of £7.5M the sum remaining to the wife for income production is therefore £5,622,000. At an annual yield of 4.5% gross, less tax, that would leave the wife with an annual income of £150,000 approximately without amortisation. So she would be forced to draw down capital in order to remain in the former matrimonial home, even on the husband's assessment of her need at £190,000 a year. Contrast the position of the husband. Under the judge's division he has about £12.7M. Assuming for him the same investment in housing and chattels of £1.878M he has a sum for income production of £10.8M which would produce for him at the same assumed rate nearly £300,000 per annum after tax without amortisation.

60. In my judgment Mr Mostyn succeeds in this submission which Mr Pointer could not convincingly undo. Assuming in the husband's favour that his present residence in Monaco where he is not subject to United Kingdom tax is only short-term, I see no possible reason why the wife alone should be required to amortise in order to meet the cost of living in the property which the judge has found that she reasonably occupies. If there were any consideration of amortisation then the wife's greater life expectancy enters the calculation. Finally there is validity in Mr Mostyn's submission that after the sale of Adscene the husband resumed his entrepreneurial activities with the prospect of a further decade of successful business. By contrast the wife has no realistic prospect of augmenting the yield from her investment capital.

61. I conclude that Connell J fell into error in holding that however the family fortune were divided both parties would be able to satisfy their financial needs for the foreseeable future. Had there been a finding as to the wife's reasonable income needs as the occupier of the final matrimonial home (a figure that would presumably be less than half her assertion but no less than the figure for which the husband contended) then it would have become critical to consider whether division of assets at the level proposed by the husband or at any level less than that for which the wife contended, would indeed meet her future needs.

62. I have therefore reached the conclusion that the wife is entitled to succeed in this appeal. The only justification for a departure from equality asserted by the husband cannot be upheld without discrimination. Of importance too is the rival consideration that the wife's needs, given the respective ages of the parties, point towards equality. I would therefore increase the wife's lump sum from £3,152,732 to £5,751,474 or such other sum as counsel may agree to be necessary to bring her to a 50% share.

63. I am conscious that this conclusion does little to increase clarity or predictability of outcomes. However any expectation of such was surely unrealistic. Specialists in the field, whether judges, practitioners or academics, have yet to suggest a

principle or mechanism that might produce greater certainty or predictability within the very wide discretionary field for which parliament opted in 1984. Such new approaches as have been advocated or debated all require legislation for their introduction. Accordingly it must be recognised that a largely unfettered judicial discretion comes at a price.

MAY LJ:

64. I agree that this appeal should be allowed to the extent which Thorpe LJ describes and for the reasons which he gives.

BODEY J:

65. Notwithstanding the understandable submissions of Mr Pointer QC that this court should not interfere with the discretionary decision of a most experienced Family Division judge, who both saw and heard the witnesses and properly directed himself as to the law, I nevertheless agree that this appeal should be allowed.

66. This is for two main reasons. The first relates to the evaluation of the parties' differing contributions, in which respect Connell J made four crucial findings of mixed fact and value-judgment, namely:

i. *that "…. the parties treated this marriage as a partnership from an early stage";*
ii. *that "…. this pot of gold was truly created during the marriage";*
iii. *that "…. in answer to the question posed in argument by Mr Mostyn QC, namely 'what more could the wife have done to justify an award of 50%?', the answer is: 'in the circumstances, probably nothing'"; and*
iv. *that "…. it would not be right in my view to describe [the husband] as a genius and the most exceptional part of his contribution relates to the very large sum of money acquired by the family as described".*

67. Without overlooking the judge's other findings as to the husband's qualities as an exceptionally active determined and innovative businessman able to develop his visions, it does seem to me that the four findings at (i) to (iv) above flagged up cumulatively the risk of unfairness, if unequal weight were to be given to the differing nature of the parties' respective contributions to the family's welfare according to their particular roles in the marriage.

68. The recent authorities examined by Thorpe LJ further developing the law both here and elsewhere since the decision under appeal, which we (unlike Connell J) have had the advantage of considering, make this point not only the more forcefully but, in my view, conclusively.

69. I agree that it is not possible to define once and for all, by way of some formulaic label, the precise characteristics of the fortune-maker (or fortune-making) required in the paradigm case such as this, in order that when the proposed distribution of the resources is checked against the 'yardstick of equality', the fully contributing homemaker should receive a lesser share of the wealth than the fortune-maker.

70. However, those characteristics or circumstances clearly have to be of a wholly exceptional nature, such that it would very obviously be inconsistent with the objective of achieving fairness (ie it would create an unfair outcome) for them to be ignored.

71. I do not accept Mr Pointer's submission that to state the position in this way represents an 'impermissible judicial gloss' on one of the section 25 statutory

criteria (ie the requirement to consider the parties' contributions). It is rather to apply the guidance of the House of Lords in *White v White*, recognising that where – in the paradigm case like this – the homemaker has given of her (or his) utmost, then any weighting of the impact of contributions in favour of the fortune-maker is almost always going to be unfair, since ex hypothesi the pure homemaker neither has the opportunity to create wealth, nor in the nature of things the ability to have any meaningful comparative 'value' accorded to her (or his) particular contributions to the welfare of the family.

72. I conclude that, as the law has now been further developed, such wholly exceptional characteristics and circumstances as are referred to in paragraph 70 above did not exist in this case.

73. The second main reason for allowing this appeal, being more of fact and less of general importance, relates to the criterion of the wife's needs.

74. As demonstrated by Thorpe LJ, her income position under the existing award would be insufficient to enable her to continue to reside at Ringleton Manor, as was held by the judge to be a reasonable aspiration, unless (even on the basis of the lower budget put forward by the husband for her to do so) she were to amortise part of her capital.

75. For her to have to amortise capital when the husband himself would not have to do likewise, does not seem to me to meet the aim of achieving fairness in the circumstances of a long marriage such as this, during which the family fortune was created and within which, as found, each party gave respectively of his/her all.

76. I agree with Thorpe LJ that the wife's presentation below of an excessively high budget would have tended to divert attention away from this significant point, as would the very fact of the judge's conclusion that the husband's contribution by way of wealth creation called for an unequal distribution of the available resources.

77. For these reasons and the others expressed more fully by Thorpe LJ, I too would replace the order of the learned judge with one achieving an equal division of the overall capital resources.