In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2006: No. 19

BETWEEN:

DEBRA KAYE ARAUJO

Petitioner

-and-

MICHAEL BRIAN TEIXEIRA ARAUJO

Respondent

JUDGMENT

Date of Hearing: 28 January to 1 February 2008

Date of Judgment: 11 March 2008

Mrs Georgia Marshall, Marshall Diel & Myers, for the Petitioner

Mr David Kessaram, Cox Hallett Wilkinson and Ms Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Background

1. The parties to these ancillary relief proceedings, to whom I will refer in the usual way as “the Husband” and “the Wife” were married on 29 October 1994. Following the breakdown of the marriage, the parties continued to live separately within the matrimonial home from approximately September 2005; decree nisi was pronounced on 31 March 2006, and that decree nisi was made absolute on 16 May 2006. The Husband eventually left the matrimonial home at about the end of

July or beginning of August 2006. There are two children of the family, both boys, the older of whom will shortly be 11, and the younger having just turned 9. The Wife continues to reside in the former matrimonial home with the children, although the children spend half of their time with the Husband.

2. The Wife works in the international business sector, as an underwriter with Zurich Insurance Company. The Husband is a businessman, with interests originally in three, but now two, principal businesses. I will not at this stage address the trust structures which separate the businesses from the Husband's interest in them. First, he is a 75% shareholder in A&P Marine Ltd. ("A&P"), a company which buys, sells and maintains boats. He has been working in this business since before the parties were married, and describes it as the business from which he has always earned his income. In addition the Husband started the business known as Bermuda Truck Finders Ltd. ("BTFL"), in or about 2000. The Husband's partner in this venture is Eugene Botelho and as the name of the business suggests, the business is concerned with the importation of trucks into Bermuda. This business was once highly successful, but that is no longer the case. Finally, in terms of the Husband's principal business interests, he and Mr Botelho bought the company known as World Distributors Ltd. ("WDL"), in or about 2003. WDL is in the business of selling Yamaha motor cycles. On 1 February 2006, the BTFL business was amalgamated with WDL, and the amalgamated entity is owned by the Taboo Trust, through a holding company named STU Holdings Ltd. ("STU"). Since the amalgamation, BTFL's profit (or contributions to the profits of WDL) has reduced considerably. There are two other businesses which will fall to be considered in due course, Data Tag (Bermuda) Ltd ("Data Tag") and Bermuda Tire Ltd ("Bermuda Tire"). Both parties have worked on a full-time basis throughout the marriage, although the Wife indicated that she had cut back her hours for approximately two years following the birth of her second child, working during that period until 3.30 p.m.

3. There are in fact cross applications, the Wife having filed her notice of intention to apply for ancillary relief on 22 August 2006, and the Husband having made his

application on 4 January 2007. There have been extensive affidavits filed on both sides, and any number of orders for directions dealing with the usual interlocutory applications in the form of rule 77 requests, valuations and the like.

4. One such matter arose because Mrs Marshall, for the Wife, elected to serve the proceedings on the trustees of a number of trusts (some six or seven in all) which had been settled by the Husband during the course of the marriage. I will refer to the trustees as "the Trustees" even though the various trusts did not have common trustees. The one trustee who is common to all the trusts is Hildeberto De Frias, who is an attorney, and he clearly took a leading role on behalf of the different trustees. Service on the Trustees inevitably led to their representation, and at a directions hearing on 12 April 2007 I considered whether the Trustees should be joined in the proceedings. Mrs Marshall took the view that such joinder was not necessary, and that she needed more time to consider the position. However, I accepted the submission made by Saul Froomkin QC on behalf of the Trustees that his clients needed the protection in costs afforded by Order 62 rule 6(2) of the Rules of the Supreme Court 1985. Further, the reality was that the Trustees had been served with the proceedings, and the position taken by the Trustees of willingness to assist was obviously helpful to both parties and to the Court. Mr Froomkin did not attend the hearing.

The Affidavits

5. The Wife's first affidavit was sworn on 1 November 2006, and although it dealt in part with the Wife's income and expenses, it was largely concerned with interim financial relief, with particular reference to the payment of the children's school fees. The Husband's first affidavit was sworn on 9 November 2006, and replied to the Wife's aforesaid affidavit. The Wife then swore her second affidavit on 8 December 2006, in which she responded to the Husband's affidavit. The Husband then swore his second affidavit on 4 January 2007, purportedly in support of his application for ancillary relief, but in reality a continued response to the Wife's response.

6. The Husband then swore a further affidavit, his third, on 15 January 2007, in response to the Wife's application for ancillary relief. He relied upon the two previous affidavits which he had sworn, and then dealt extensively with financial matters. In doing so, the Husband set out important background in relation to the various trusts to which I have already referred, and in my view it is instructive to set out some of these references verbatim, as follows:

    Paragraph 16

    "The matrimonial home was purchased by the Trustees of the South Breeze Trust, in order for estate planning purposes and in order to keep this property from my business ventures."

    Paragraph 19

    "In addition I was lending monies from A&P Marine Ltd. to the Sea Breeze Trust in order to do renovations to the new premises, which the Sea Breeze Trust had recently purchased and from which A&P Marine Ltd, was going to be run out of."

    "I had to buy the property on Addendum Lane (owned by the Sea Breeze Trust), in order to provide a shop from which I could run my business, as I was unable to find other rental property."

    Paragraph 23

    "Mr Botelho and I used the monies earned by Bermuda Truck Finders to purchase various properties in or about 2001, 2002 and 2003, which were purchased in the name of the Tucker's Court Trust. I note that we purchased these properties in the name of a trust in order to keep these investments separate from the family investments and to protect my family investments in the event that the investments lost money. Mr Botelho and I went looking for investment properties to buy and eventually found the 18 St Michael's Road, which was a four apartment house. We decided to use the monies from Bermuda Truck Finders to purchase this property as

the rent from the apartments would be sufficient to pay for the mortgage payment which we would be required to take up to purchase the property. Mr Botelho and I took care of all the arrangements with respect to renting out the four rental units in the property and responding to the tenant issues from time to time."

Paragraph 24

"In or about 2002 we had sufficient monies again to purchase another property and we purchased two condominiums;"

"All of these properties were ultimately sold for a profit and the net sale proceeds were used to purchase the property on North Street in 2003, which I will refer to later in this affidavit. I refer to Tab 11 of the enclosures of my attorney's letter date 27 October 2006 which encloses the purchase and vendor completion statements for these three properties. I also refer to Tab 10, which sets out the loans, which Bermuda Truck Finders has made to the Tucker's Court Trust in connection with the purchase of these properties"

Paragraph 27

(Having described how the Husband and Mr Botelho had negotiated to buy WDL)

"The structure that we put into place to own the company was the Taboo Trust, which in turn incorporated a holding company called STU Holdings Ltd. that in turn purchased World Distributors Ltd. We borrowed $700,000 from the Bank in order to purchase this company. Both Mr Botelho and I had to personally guarantee the $700,000. Once again, I refused to use the matrimonial home as collateral for this loan, as I wanted to protect my family assets from business ventures, which may or may not work out."

Paragraph 28

"At the time that we purchased World Distributors Ltd., Mr Botelho and I decided that we would try to sell the investment properties, in order to help pay for the loan we had to take up to purchase WDL. In the end we did not use the monies received from the sale of the investment properties to pay off the mortgage but used them instead to help pay for the purchase of the North Street property (referred to later in this affidavit)".

Paragraph 29

"Mr Botelho and I decided that we would try to find property to purchase into which we could move World Distributors Ltd. once the lease expired. We had great difficulty finding anything that was suitable and in the end purchased property on North Street through the Tucker's Court Trust. The purchase price for the land on North Street was $700,000. We used the monies from the sale of the investment properties referred to earlier in this affidavit to purchase the North Street property as well as borrowing money from Bermuda Truck Finders Ltd. and taking up a mortgage to purchase it."

"We decided that we would erect premises on the North Street property out of which World Distributors Ltd. would be run. Mr Botelho and I went to the architect and had the plans drawn up for the property to be built on the North Street property. We also made the financial arrangements for the Bank to borrow the money to erect the building on the North Street property. The plan ultimately came to fruition in or around 2006, when the Tucker's Court Trust took up a $7 million term loan facility with the Bank of Bermuda Ltd. in order to build the property on the North Street property."

Paragraph 34

"In or about 2002 as mentioned, I realized that I needed to purchase property from which I could run A&P Marine Ltd. My landlord at the

time told me that he has sold the building I was renting and I could not find any other property to rent. After looking for the appropriate property, I arranged for The Trustees of the Sea Breeze Trust to purchase property on Addendum Lane for the sum of $450,000."

"I hired an architect and had the plans drawn up to build a building on this property. The Trustees borrowed monies to build the building, and the mortgage secured against this property currently stands at $1.3 million. In addition, the Trust owes A&P Marine Ltd the sum of $416,097.50. I personally guaranteed this mortgage."

Paragraph 36

"Once A&P. moved into the premises on Addendum Lane, it became apparent that we needed additional land to house the boats to be worked on. Through the Snap Dragon Trust, 15 Addendum Lane was purchased for the sum of $1 million."

"I did loan the sum of $300,000 to the Snap Dragon Trust in order to purchase the property. The Trust owes this money to me. I received the $300,000 from a dividend received from Bermuda Truck Finders Ltd."

7. So it can be seen from these extracts that different trusts have been used by the Husband for his different business enterprises, that the Husband (sometimes acting with Mr Botelho) has been the controlling force behind the activities of the various trusts, and that there has been very considerable confusion between the operation of the trusts by the Trustees and the operation of those trusts at the behest of the Husband acting on behalf of the various underlying businesses. I make these references because as I understood the position from one or more of the directions hearings, Ms MacLellan did not accept that the assets which are in trust do in fact form part of the matrimonial assets, a position which Mr Kessaram confirmed at the outset of the hearing. And no doubt in support of this

position, the Husband consistently sought in his affidavits to distinguish between family assets and his business interests which were held in trust.

8. The next affidavit in the series was sworn in support of a summons issued on behalf of the Wife pursuant to section 41 of the Matrimonial Causes Act 1974 ("the Act"). In that summons the Wife sought to set aside three deeds, all dated 9 September 2005, pursuant to which she had been removed as a beneficiary of the Taboo Trust, the Tucker's Court Trust, the Cool Breeze Trust and the Sea Breeze Trust. The Wife further sought a variation, pursuant to section 28 of the Act, of those four trusts and the South Breeze Trust, to the extent necessary for her claim for ancillary relief to be fully and properly disposed of, and finally sought an order pursuant to section 41 of the Act that the Snap Dragon Trust be set aside in its entirety. The Wife's affidavit in support was her fourth affidavit, sworn on 22 March 2007, her third affidavit having being sworn in respect of an unrelated matter. In this affidavit, the Wife responded to the Husband's third affidavit, and dealt with the position in relation to the various trusts, including her removal as a beneficiary of the trusts identified.

9. This affidavit in turn led to a reply affidavit being filed by the Husband, his fourth, on 3 May 2007. By this time there had of course been six affidavits filed, this being the seventh, and counsel on both sides were agreed that the Husband should have leave to file a further affidavit. Whether it was by this time productive for the Husband so to respond is another matter.

10. In any event, two further affidavits were filed on the Husband's behalf at this time, in the form of one from Douglas Stevens, the accountant for two of the businesses in which the Husband was involved, WDL and A&P, and one from the Husband's business partner, Mr Botelho. There were then two affidavits filed by Mr De Frias. The first of these dealt in detail with the establishment and operation of the various trusts and the second simply corrected an error which Mr De Frias had made in the first affidavit.

11. The Husband then sought and was granted leave to file an affidavit in response to the affidavits of Mr De Frias, and the Wife correspondingly granted a right of reply. The Husband's fifth affidavit was dated 25 June 2007, and explained conflicts between his earlier financial disclosure and what had been sworn to by Mr De Frias. The Wife's fifth affidavit was sworn on 25 July 2007, but as well as responding to the affidavits of Mr De Frias and the Husband's fifth affidavit, responded at length to the Husband's fourth affidavit and briefly to the affidavits sworn by Mr Botelho and Mr Stevens. Finally, there was a second affidavit from Mr Stevens sworn on 17 August 2007, giving further detail as to the financial affairs of WDL.

12. Mercifully that was the last affidavit filed, making a total of four affidavits sworn by the Wife, five by the Husband, and five by other deponents.

Issues on the Affidavits

13. There are two matters which were dealt with at some length in the affidavits which I raised at the outset with counsel. The first of these is the issue of contribution, and it did seem to me on a review of the affidavits that each of the parties had gone to considerable, if not inordinate, length in relation to this aspect of matters, with a view to emphasising the extent of his or her own contribution and minimising the contribution of the other spouse. That did not seem to me to be ever likely to be a productive exercise, in the circumstances of the parties to and history of this marriage. In expressing that view, I made it clear that I did not seek to restrict counsel's approach either to the evidence or to submissions; I was merely expressing the hope that what seemed to me to be the excessive positions taken in the affidavits would not be duplicated at the hearing.

14. The other matter was the Husband's efforts to separate his business interests from the family interests, when looking at the joint matrimonial assets. Leaving aside, for one moment, the role played by the various trusts, and assuming that the Husband's business interests had always been held in his sole name, these would generally fall to be taken into account in considering the Wife's application for

ancillary relief, not least because section 29(1)(a) of the Act requires it, in terms of looking at the property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. The question which then follows is whether the Husband has succeeded in removing these trust assets from consideration by the Court, in terms either of their being matrimonial assets, or a financial resource available to the Husband for the purposes of section 29 of the Act. Mr Kessaram indicated that neither position was accepted by the Husband, and did not wish to have this aspect of matters dealt with as a preliminary issue; accordingly I left matters on the basis that each side would put his or her case in the normal way.

The Trusts

15. No doubt at this stage it would be helpful to summarise the position in relation to the assets owned by the various trusts, as appears from the affidavits. There is a somewhat fuller schedule contained in the Wife's fifth affidavit. The position appears to be as follows:

Trust	Assets
South Breeze Trust	The matrimonial home
Sea Breeze Trust	The property at lot 16B Addendum Lane from which A&P operates
The Taboo Trust	STU, which in turn owns WDL and, following amalgamation, BTFL.
Tucker's Court Trust	The North Street property from which WDL operates
Cool Breeze Trust	20% of Data Tag
The Snap Dragon Trust	Lot 15 Addendum Lane, land used by A&P to store boats
Northbreeze Trust	"Terminated", after aborted investment in townhouse

16. It is also no doubt helpful to refer to the trusts as these were referred to in the affidavits and the evidence, particularly that of Mr De Frias. He referred to the Taboo Trust and the Tucker's Court Trust as being "the Common Trusts", insofar as they were common to the Husband and to Mr Botelho; the Common Trusts together with the Sea Breeze Trust and the Cool Breeze Trust were referred to by Mr De Frias as "the Commercial Trusts".

The Evidence

17. The Wife gave evidence on her own behalf, and called no other witnesses, there having been no affidavits sworn by any other party on her behalf. For the Husband, he gave evidence, as did his business partner Mr Botelho, his accountant Douglas Stevens of Armoury Limited, and Mr De Frias. Lastly Bruce Sharpe, whom the parties had agreed should be appointed to value the businesses of WDL and A&P gave evidence in relation to his valuations. For the sake of completeness I should also mention that the various properties owned by the trusts were valued, but no dispute arose in regard to those valuations.

18. In regard to the evidence, I will not make reference to those parts of the evidence which are uncontroversial, and which I will need to deal with elsewhere in this judgment, such as the details which the Wife gave of her updated earnings and current assets. In terms of debts, it is to be noted that she indicated that she owes an amount of approximately $70,000 in legal fees, which of course does not include the hearing itself, nor preparation for hearing. During closing submissions Mrs Marshall referred to the level of the Wife's legal fees as $100,000, and although there was no evidence to this effect, one can envisage that the cost of preparation and hearing will result in something approaching that figure. Past payments in respect of legal fees have been made, particularly from the bonus payments she had received. The Wife indicated that up until 2002 the Husband had earned more than she had, but in fact after 2002, the Husband's income position was rather artificial, insofar as his income from employment was restricted to the $2,000 per week which he drew from his employment with A&P. But there were various payments made from BTFL, which was the company

which provided the cash to make the real estate investments in the name of Tucker's Court Trust, which I referred to in the extract from the Husband's affidavit set out in paragraph 6 above. Those payments, together with a substantial profit on the real estate investments which was eventually realised, ultimately were used towards the cost of the North Street property from which WDL now operates, and essentially went towards the substantial equity which now exists in this property. The Husband also received a dividend from BTFL which he loaned to the Snap Dragon Trust as part of the funds required to purchase the property at lot 15 Addendum Lane, which came to be used both by A&P and WDL. Lastly, WDL itself made substantial profits; its best years were 2005, when it earned a profit of approximately $618,000, and 2006, when it earned a profit of $692,000. The Husband said in his third affidavit that neither he nor Mr Botelho had ever taken any dividends or bonuses from the company, but that is not the same as saying that he has not received any benefit from its successful operation. WDL was a subsidiary of STU and STU paid one million dollars for the shares of WDL (not the figure of $700,000 which the Husband mentioned in his third affidavit). Of that sum, $700,000 was raised by way of a loan from the Bank of Bermuda and the balance of $300,000 secured by way of a promissory note from the vendor. WDL paid dividends from its profits to STU, which STU used to discharge the debt incurred for the purchase, such that the entirety of the borrowing, both in terms of bank loan and promissory note, has now been repaid. STU is in turn owned by the Taboo Trust, and leaving aside for the moment the distinction to be drawn between the Husband's position as a discretionary object of the Taboo Trust and his personal position, the reality is that the Husband has benefitted very considerably from the business of WDL. I mention these matters only to put in context the Wife's evidence as to her income relative to the Husband's in the period from 2002 onwards. In relation to the Husband's business interests, and particularly those where he was investing jointly with Mr Botelho, the Wife maintained that the Husband had never suggested that those interests were for his benefit only, and said that it had always been her understanding that such business interests were for the benefit of the family.

19. I will deal with the evidence given for the Husband in the order of the witnesses, the first of whom was Mr Botelho. Mr Botelho gave evidence in relation to the investments made with the cash received from BTFL, very little of which is controversial. The first controversial subject was in relation to the decision made by Mr Botelho and the Husband to purchase WDL, in respect of which Mr Botelho's affidavit evidence was as follows:

> "When Mr Araujo and I reached the decision to purchase World Distributors Ltd. we discussed and agreed that in the event that either one of us passed away that it was our wish that, subject to the discretion of the Trustees, that our interest in the business would pass to the other person. It was specifically discussed and agreed that it was our wish that our share would not be passed on to our families. In order to protect our families financially in the event of our untimely death, the business purchased a life insurance policy on each of our lives in the amount of $1,000,000, which monies are to be paid to our families in the event that we die".

20. Such a statement is of course in conflict with the position as evidenced by the relevant trust. It is the Taboo Trust which owns STU, which in turn owns WDL. This trust was settled with the assistance of Mr De Frias on 28 June 2002, the settlors being the Husband and Mr Botelho, and the Trustees being Mr De Frias and Mr Botelho's sister Catherine. The discretionary beneficiaries were the Husband, the Wife, Mr Botelho, and his wife Tara.

21. When Mr Botelho was cross examined on this subject, he maintained that prior to the establishment of the trust, he and the Husband did not intend to have their respective families as beneficiaries under the trust. He was also referred to the Tucker's Court Trust, the other of the Common Trusts, which was settled on 22 June 2001, with the same settlors, trustees and beneficiaries as in the subsequent Taboo Trust.

22. Perhaps the most critical part of Mr Botelho's evidence, from a number of different perspectives, was in relation to the removal both of the Wife and his wife Tara, as beneficiaries of the Common Trusts, something of which the Wife naturally makes complaint so far as she is concerned. In her case, this was achieved in respect of both trusts by deeds of removal of beneficiary dated 9 September 2005. Mr Botelho in fact said that he was not aware that the Wife had been removed as a beneficiary of the Common Trusts in September 2005, but this cannot be right; he was a party to both deeds of removal. In relation to the removal of his wife Tara as a beneficiary, Mr Botelho gave evidence as to how this came about, after they had separated, and I will refer to that aspect of matters in some detail because I think it important both in terms of how Mr De Frias as trustee exercised his discretion under the trusts, and how Mr De Frias' acts were perceived by Mr Botelho.

23. To put the removal of Tara as a beneficiary in context, the power to exclude a member of the specified class (i.e. a beneficiary) is a power given to the Trustees with the "necessary consent" of the protector. As I have said Mr De Frias and Catherine Botelho were the Trustees, but the protector was Mr De Frias. That in itself is, as I understand it, unusual. In The International Trust by Glasson, there is a chapter on protectors which states:

> "The term is usually used to describe a person, who is not one of the trustees of a trust but upon whom the trust deed confers a 'watchdog' role in respect of the administration of the trust by the trustees."
>
> and
>
> "The aim of the appointment of a protector is, therefore, to monitor the trustees in the administration of the trust, on one level to prevent those trustees from abusing their powers or breaching their duties, but also to ensure as far as possible that the trust is administered in accordance with the wishes of the settlor, at any rate in the case of the more important decisions and often on a day-to-day basis."

24. In the case of these trusts, no protection was afforded by the appointment of one of the Trustees as protector. Mr Botelho's evidence as to the removal of his wife as a beneficiary of the Common Trusts is relatively short, and I will therefore set out my note of it in full, as fallows:

> "I did this through my lawyer Mr De Frias. I said that was what I wanted. He was saddened but he got back to me and said it would be carried out. It took four to five days.
>
> Mr De Frias is the point person. I spoke to my sister and informed her that Tara would be removed from all the trusts."

And following that part of Mr Botelho's evidence, he said:

> "I believe after the four or five days when he called, it had been carried out"

So Mr Botelho had again lost sight of the fact that he had signed the deeds. And in regard to the Wife's removal as a beneficiary of the Common Trusts, at the behest of the Husband, Mr Botelho did not give evidence beyond saying that he had not been aware of that removal. He was not questioned on that statement, no doubt because it was not appreciated until the Husband gave his evidence that the Husband's version of events was that he had consulted with him before speaking to Mr De Frias. I will of course come to Mr De Frias' evidence on this point, but so far as Mr Botelho was concerned in relation to the removal of his own wife as a beneficiary, he clearly expected his wishes to be complied with by Mr De Frias, and in relation to the position of his sister as a trustee, she was told rather than asked.

25. The other area of Mr Botelho's evidence which should be noted was in relation to the profitability of WDL. Mr Botelho referred to the different profit figures which had been earned for the last four full financial years. The company's year

end is 31 January, so that references to the 2007 financial statements are references to the financial statements for the year ended 31 January 2007. Mr Botelho explained that the company had to move from its original home to a temporary location while new premises were being built, and was in the temporary premises for 18 months. He said that but for the disruption occasioned by that, he would have expected the company to sustain approximately the same level of net profit as achieved in 2005 and 2006, i.e. above the $600,000 level. He said that the profit was now down both due to the business interruption and the increased expense of operating at the new building. In this regard, the expenses will shortly increase significantly, because the rent is calculated with reference to the required loan repayment, and at present interest only is being paid on the loan. That position will change from 1 April 2008, when repayment of principal commences, and the rent jumps from approximately $16,000 per month to $58,500 per month. Mr Botelho said that he did not now expect the net profit of the business to increase, and although the estimated profit for the year ended 31 January 2008 was put in the region of $250,000, Mr Botelho later said that for the current year he would be pleased to make $200,000. At the same time he dismissed the figure which Mr Sharpe had produced in his report when he had commented that management's net income projections for 2009 (i.e. covering calendar year 2008) seemed overly optimistic. Mr Sharpe said that he had given significant thought to the reasonability of the annual profit projections and had concluded that they were unattainable, so that for the purpose of the valuation he had revised them downwards from a figure of approximately $250,000 to one of approximately $130,000. Mr Botelho said that Mr Sharpe was looking at numbers whereas he was looking at his own ability, and further said that the success of the company depended on the decisions he made. In the event, Mr Sharpe did substantially revise his figure of $130,000, for the reasons which appear below.

26. The next witness was Mr Stevens of Armoury Limited, who had prepared the financial statements for the various companies. While I have no doubt that Mr

Stevens' evidence was helpful to all concerned, and it certainly was to the Court, I do not think it necessary to highlight any particular part of it at this stage.

27. The Husband then started his evidence, because of the non-availability of the next two witnesses, and concluded his evidence only after they had completed their evidence. A point arises as to whether his evidence was affected by the evidence given by Mr De Frias. I will deal with the Husband's evidence later. The next witness was Mr De Frias.

28. After dealing with formal matters in relation to the trusts, Mr De Frias referred to the original beneficiaries of the Common Trusts. He confirmed that he had originally been instructed that the Husband and Mr Botelho were to be the beneficiaries, but said that he had suggested that their spouses should be included for long term estate planning purposes, and that is of course what happened. Mr De Frias said that another reason for including the spouses was that neither the Husband nor Mr Botelho had wanted a "winner take all" situation, so that if one died the survivor took everything.

29. Mr De Frias was questioned extensively in regard to the purchase of lot 15 Addendum Lane, which he had dealt with in his affidavit. The position there was that there had been a contract for the purchase of lot 15 entered into between Paul Rodrigues as vendor and the Trustees as trustees of the Cool Breeze Trust as purchaser. The discretionary beneficiaries of the Cool Breeze Trust, which had been settled on 13 April 2004, included the Wife. Mr Rodrigues had been difficult to deal with, and the transaction was only ultimately consummated after court proceedings had been issued. However, by that time, the identity of the purchaser had changed to the Snap Dragon Trust, the beneficiaries of which were the Husband's parents. The reason for this change was said by Mr De Frias to be because during the period that Mr Rodrigues was being difficult, he had become aware that difficulties in the marriage had arisen, and Mr De Frias had been made aware that the Husband's position was that he did not wish to borrow money for a trust of which the Wife was a beneficiary. More correctly, of course, it was the

trust which would be borrowing money, but no doubt the Husband would be in the position of guarantor. Perhaps the reference by the Husband to his own borrowing was occasioned by reason of the Husband equating his personal interests with any expectation under the trusts. In any event, Mr De Frias confirmed that he had discussed the position with the Husband, and that he had been asked to set up a new trust and enter into the same contract on behalf of that trust with Mr Rodrigues. He said that he had complied with that request, having considered the Husband's marital difficulties and the difficulties with Mr Rodrigues. Although Mr De Frias referred to various concerns as governing his decision, he was bound to concede when pressed that the real concern was caused by the imminent breakdown of the Husband's marriage. Mr De Frias recognised that in acting on the Husband's concern, he was acting potentially to the Wife's detriment, since she went from being a discretionary object of one trust to not being a discretionary object to another. He also accepted that he had a fiduciary relationship with the beneficiaries of the trust of which the Wife was a discretionary object, and said that he had considered the position and exercised his discretion as he thought appropriate. Mr De Frias said that he had considered applying to the court for directions, but had decided against it on the basis that he had the discretion, and he had chosen to exercise it.

30. Mr De Frias then gave his evidence in relation to the Wife's removal as a beneficiary of the Commercial Trusts. Mr De Frias said that he had been approached by the Husband to consider such removal. He described having met with the Husband, when he had been asked to consider removing the Wife as a beneficiary for various reasons. While Mr De Frias first said that the possibility of divorce was one of the reasons, indeed one of the main reasons, but not the only reason, he ultimately conceded that his concerns all arose directly or indirectly from the breakdown of the marriage. Again, in relation to the actual removal, I will set out my note of the relevant testimony, as follows:

> "I proceeded to remove the Wife as a beneficiary, within a week or a week and a half. It was not an easy decision. I did confer with the co-trustees

> briefly. With Catherine on the Taboo Trust and the Tucker's Court Trust and on the others with Mr Botelho. It was brief with both. With Catherine, it was more in the nature of advising her that I'd made a decision. With Mr Botelho he knew ahead of me that the Husband was going to make the request."

31. Mr De Frias also gave evidence in relation to the removal of Tara Botelho as a beneficiary, saying that in that case Mr Botelho had called him and asked him to remove her, and that he had called Mr Botelho back to advise that he would comply with that request.

32. In relation to both removals, Mr De Frias was cross examined extensively, and again, I will set out my note of his evidence:

> "I was aware in relation to all of the trusts that there was an intention to benefit the wives.
>
> It was clear that the underlying assets of these trusts were created during the marriage of the respective husbands.
>
> I did not know that these wives had claims on all assets created during the marriage – that's not my area.
>
> I would have assumed that to be the case if the Husband or Mr Botelho held the assets in their own names.
>
> I removed the wives as beneficiaries because with divorce coming they would no longer be a member of their respective families.
>
> The reason for their removal was because of the breakdown of the marriage and how their claims might impact going forward. Those were my immediate concerns.
>
> I suspected that these wives either would have or would make claims. The reason that I removed them was not to lessen the claims they might have to the underlying assets of the trusts, it was to lessen the risk to the development of the businesses and the properties. I knew full well that if

they were going to assert claims to the assets they might include the trusts in the matrimonial proceedings.

I did not at the time have a concern about a variation of settlement claim.

At the time I removed the wives I knew that they had access to the courts in respect of any decision I made as trustee.

I did not perceive that they could not make claims – I knew that they could. I did think that there was a benefit to the husbands and a corresponding detriment to the wives in removing them as beneficiaries.

I was not focusing on a variation of settlement claim or the notion of precluding them from such a claim. I did not wish to deprive anyone of recourse to the courts to set aside a decision I made as trustee if they felt such decision was made improperly. But I had no compunction about making a decision that was detrimental to the wives.

Not arrived at easily, but I did make that decision."

33. The next witness was Mr Sharpe, and I will deal with his evidence when it comes to the valuations of WDL and A&P. Finally, the Husband completed his evidence, and I will deal with all of that evidence next. In his evidence the Husband talked of his intention at the time of the settlement of the Taboo Trust and particularly in relation to the $1 million life insurance policies, in terms which largely corroborated what Mr Botelho had said. Particularly, the Husband not only confirmed the structure, but said that the first person he had told was the Wife, when he had explained the structure to her, and the fact that on his death the business assets would pass to Mr Botelho, and the Husband's family would have the benefit of the life insurance policy.

34. In relation to BTFL and its early profitability, the Husband accepted that of the profits realised when the real estate investments owned by the Tucker's Court Trusts had been sold, a total of just under $700,000 had been invested in the North Street property. At the same time $400,000 had been paid to each of the Husband and Mr Botelho.

35. Reverting to the intention at the time of the settlement of the Taboo Trust, the Husband was referred to what he had said in his third affidavit, in terms of taking business risks in the hope that they would pay off and provide financial security for the future. He accepted that "financial security" was intended to mean security for his family, but carried on to say that "his family" would not include the Wife following divorce. In relation to the Tucker's Court Trust, the Husband acknowledged that the Wife was originally a beneficiary, and that the intention at the time of settlement was to benefit his family as to 50%, and Mr Botelho's family as to 50%. In relation to the Taboo Trust, although the beneficiaries were the same as in the Tucker's Court Trust, the Husband did not accept that 50% of this trust was for the benefit of his family.

36. In regard to the removal of the Wife as a beneficiary of the Common Trusts, the Husband's evidence is again instructive. He said that after the Wife had confirmed that she wanted a divorce in September 2005, he had gone to Mr Botelho and discussed matters with him. The Husband then carried on to say "we both decided that in the best interests I have her removed from the trusts", as well as saying that he had her removed from his personal life insurance policies. The implication from this piece of evidence is that it was perceived by the two of them not just to be in the Husband's best interests, but also in those of Mr Botelho. It also demonstrates how the two regarded the decision as theirs, as opposed to that of Mr De Frias.

37. But what is most significant about this piece of evidence from the Husband is that it completely contradicts the evidence given by Mr Botelho, to which I have referred in paragraph 22 above, when he said that he was not aware that the Wife had been removed as a beneficiary of the Common Trusts in September 2005. I mentioned there that this had to be wrong because Mr Botelho had signed the relevant deeds, but there is also a very serious conflict with the evidence of the Husband, to which I will return.

38. The Husband then dealt with the borrowing in relation to lot 16B Addendum Lane, and then turned to the establishment of the Cool Breeze Trust, which was settled to purchase lot 15 Addendum Lane (the lot adjoining lot 16B, where A&P stored the boats that it worked on). This was the purchase that was eventually completed in the name of the Snap Dragon Trust, and the Cool Breeze Trust was instead used for the purpose of owning the Husband's investment in Data Tag. However, the Husband accepted that when the Cool Breeze Trust had been established, his intention was that his family would benefit; it was only after the Wife had indicated her wish to divorce that the Husband resolved that he was "not going to go into debt and have her as a beneficiary". The Husband accepted that the problems in the marriage had started in 2003, and indeed he had said that that was when the Wife had first requested a divorce, and the significance of this was that the Wife had been designated a beneficiary when this trust had been established in April 2004, notwithstanding those earlier matrimonial difficulties.

39. The Husband then gave extensive evidence in relation to A&P, and the relationship between the calculation of the rent and the payment of the mortgage. In this area the Husband gave certain answers which it was simple to demonstrate were not true. For instance, when WDL had moved out of the space at Addendum Lane, a replacement tenant was found, and such tenant paid $7,000 per month, compared with the $6,000 which had been paid by WDL. The monthly mortgage payment was approximately $15,000 and A&P's rent calculated so that the total rent was equivalent to the mortgage. Yet the Husband would not initially accept that he could drop the A&P rent by $1,000 per month, by reason of the increase in rent payable by the new tenant. Eventually, he was obliged to accept the obvious. Even then, there were questions which one might have expected the Husband to be able to answer, and which he appeared unable to. One of these was why the A&P profit and loss account prepared by Mr Stevens showed an increase in rent of $3,000 between October and November 2007. The Husband first said that that was because of the increase in mortgage, but when he was referred to the terms of the letter from Butterfield Bank dated 19

July 2007, he accepted that that covered the increase to $15,000 per month. The Husband's final answer was that those questions should be put to Mr Stevens.

40. It also transpired that the figure for rent included a sum of $2,500 per month which represented the repayment to the bank of the loan which the Husband had taken out many years before to purchase the shares in A&P. This was clearly not even an expense of A&P, but the Husband said that he had been advised by an accountant at the time not to put the figure in as a loan, but to refer to it as rent.

41. In relation to legal fees, the Husband said that he owed approximately $80,000.

Finding as to Credibility

42. Let me first refer to the Husband's evidence in relation to his intention at the time of the settlement of the Taboo Trust. The problem with this evidence is not just that it does not accord with the terms of the Taboo Trust, which designated the Wife as a named discretionary beneficiary, but more to the point, neither does it accord with the evidence of Mr De Frias. His evidence was clear that neither the Husband nor the Mr Botelho had wanted a "winner take all" situation if one of them were to die, and that that was another reason (the first being that the spouses should be included for long term estate planning purposes) for including the settlors' spouses as discretionary objects of the Common Trusts. I accept Mr De Frias' evidence, and I do, therefore, reject this evidence on the Husband's part.

43. I also think there is merit in the point made by Mrs Marshall in relation to the position of the Wife as a beneficiary of the Cool Breeze Trust. When the Husband had started to give his evidence, he agreed that it was intended that the beneficiaries were to be his family. When his evidence resumed after Mr De Frias had given his evidence, the Husband said that he did not know that it would be a detriment to the Wife when he gave instructions to Mr De Frias to set up the Snap Dragon Trust, which trust of course then effectively took over the contract for the purchase of lot 15 Addendum Lane which had previously been made by the trustees of the Cool Breeze Trust. The Husband came up with a convoluted

piece of evidence to justify his view that he was not depriving the Wife of a benefit.

44. No doubt the Husband's intention at the time of the settlement of the Taboo Trust is the most important part of his evidence which I reject, but I should also say that it seemed to me that the Husband was keen to play down his own skills, and particularly his financial acumen, and to paint Mr Botelho as the "brains" behind their joint business ventures, a position which his counsel adopted in his closing submissions. I thought it an over-statement for the Husband to say, when being challenged as to his knowledge of the Bermuda Tire enterprise, that the plan had changed many times and that he simply went in the direction that Mr Botelho pointed him. Neither do I think it the case, as the Husband had commented at this part of his evidence, that it was Mr Botelho who called the shots. That was certainly not how the Husband had described the operation of BTFL, or their joint real estate investments through the Tucker's Court Trust, which generated substantial profit for both of them. In his third affidavit, the Husband described how it was his contact in Japan which had led to the start of the BTFL business, and that he had approached Mr Botelho at that time because he did not feel that he had enough time to commit to this new business venture. The Husband also referred to his having taken business risks, and indeed throughout his affidavit, the Husband painted a picture of the business ventures with Mr Botelho as being a partnership of equals.

45. I should also comment in relation to Mr Botelho's credibility, not just because of the conflict between Mr Botelho and the Husband in relation to Mr Botelho's knowledge of the Wife's removal as a beneficiary (on which I prefer the evidence of the Husband, not least because it was supported by the evidence of Mr De Frias), but also because of the conflict between Mr Botelho's evidence and that of Mr De Frias in relation to the intention of the settlors when the Taboo Trust was settled. Mr Botelho was adamant that the consequence of the life insurance policy arrangement was that the interests of one settlor would pass to the other on the death of that one. As I have pointed out when dealing with matters from the

Husband's perspective, this clearly conflicts with the evidence of Mr De Frias, who gave his evidence with reference to both settlors. I have already indicated that I accept Mr De Frias' evidence on this aspect of matters.

46. The conclusion that I necessarily draw is that the Husband manufactured his evidence in relation to his intention at the time of the creation of the Taboo Trust, both because this trust owned the most profitable business, and to bolster his argument that his business interests were always intended to be treated differently from his family's interests. Were that genuinely to have been the case, I would have expected the Husband's approach to the Tucker's Court Trust to have been the same as that for the Taboo Trust, which it was not. And the second part of my conclusion is that Mr Botelho was willing to join in the charade to assist his business partner. Accordingly, I find that the Husband's intention when settling the Taboo Trust was indeed as the Wife described her understanding of it, namely that it was established for the benefit of the family.

The Nature of the Trust Assets

47. In dealing with this aspect of matters, let me start with the question whether the trusts, or indeed any of them, were sham trusts. At the outset Mrs Marshall had made it clear that there would be no such argument, but sought to resile from that position in her closing submissions. Mr Kessaram naturally objected, on the basis that if he had been on notice as to the sham trust argument, he would have raised questions with the witnesses, and no doubt particularly with Mr De Frias, in relation to that aspect of matters. I agree with Mr Kessaram that in the circumstances it would be unfair to allow the argument to be raised after the evidence had closed, but in any event I do not think that the argument would have stood any chance of success. For the argument to succeed, it would necessarily require an acceptance by the Court that Mr De Frias was party to the sham, and there was no evidence whatsoever to suggest this to have been the case.

48. I therefore turn to the alternative argument, which is that the trust assets represent a financial resource to the Husband. I might say that at one stage of the closing

arguments, Mr Kessaram had conceded that the trust assets were a financial resource of the Husband, but sought to draw a distinction between their being a financial resource and their being matrimonial assets. In the event, Mr Kessaram did seek to resile from that position, instead saying that those trust assets might in the future represent financial resources of the Husband, but that they were not financial resources now.

49. In regard to this aspect of matters, Mrs Marshall for the Wife submitted that it was clear from the evidence that the Trustees (by which no doubt she meant Mr De Frias) had been only too happy to oblige the Husband and Mr Botelho whenever they had given him instructions to act in a certain way. I do not think that it is necessarily right to characterise the requests made by the Husband and Mr Botelho as "instructions to act in a certain way", but neither do I think that such a characterisation matters. What the Court needs to decide is whether the Trustees would have advanced the assets of the relevant trusts to the Husband, if he had so requested. In making her argument, Mrs Marshall relied upon the case of *Charman v Charman (No. 4)* [2007] EWCA Civ 503. It is of course true that the assets owned by the South Breeze Trust and the Commercial Trusts involve a number of different factors, being concerned with businesses and properties from which those businesses operate, and in the case of the Common Trusts the position is made more complex by the interests of Mr Botelho. But for the purpose of answering the question, I will assume that in relation to the Common Trusts the request would be one made both by the Husband and Mr Botelho.

50. To my mind, there are three highly compelling separate pieces of evidence which drive me to the conclusion that the Trustees (and in real terms I have no doubt that this meant Mr De Frias) would have complied with any request made by either the Husband or the Husband and Mr Botelho jointly, to advance the assets of the relevant trust to either him or them. The first such evidence covers the matters to which the Husband referred in his third affidavit, which I have set out in paragraph 6 above. In relation to all of the matters mentioned there, it is absolutely clear that the Husband was at all material times doing what he thought

was appropriate in terms of his own interests, confident in the knowledge that the Trustees would rubber stamp whatever decisions either he, or, where appropriate, he and Mr Botelho, reached. There is simply no other way to look at the manner in which the Husband and Mr Botelho acted, or how the Husband regarded those actions.

51. The next matter is in relation to the removal of the Wife as a beneficiary of the four Commercial Trusts, and Tara Botelho as a beneficiary of the Common Trusts, when their marriages to the Husband and Mr Botelho had broken down. It was quite clear from the evidence of the Husband and Mr Botelho that they were confident that their wishes would be followed, and I thought it highly significant that the Husband should obviously regard his conversation with Mr Botelho, the co-settlor of the Common Trusts, as being more important than his later one with Mr De Frias. And what they decided was to have the Wife removed, rather than to ask the Trustees, which in reality meant Mr De Frias, to exercise their (or his) discretion so as to accomplish this. And of course one of the Trustees, Catherine Botelho, was not even genuinely consulted by her co-trustee; Mr De Frias said that in the brief conversation that he had with her, it was more a question of advising her that he had made a decision. So against the background of the evidence of the Husband and Mr Botelho in relation to the removal of the wives as beneficiaries of the relevant trusts, I do not accept Mr De Frias' evidence, both affidavit and oral, to the effect that he gave the matter earnest consideration, with the decision itself being a difficult one; "not a decision taken lightly" in his affidavit, and "not an easy decision" in his oral evidence. I am quite satisfied that Mr De Frias' decision (and through him that of the Trustees) did indeed represent a straightforward compliance with the request of the settlors which was always going to happen.

52. The third of these three pieces of evidence relates to the fact that the Trustees, in the form of Mr De Frias, had in fact authorised substantial payments to each of the Husband and Mr Botelho, when they had realised the profit on their real estate investments, made in the name of the Tucker's Court Trust. Both the

Husband and Mr Botelho wished a direct distribution to be made to them in the sum of $400,000 each. Mr De Frias had detailed his reservations in paragraphs 27 and 28 of his affidavit. He indicated there that when he met with the Husband and Mr Botelho to discuss the investment of a part of the profits into business ventures which were being conducted independently of each other, he had "expressed some reluctance and concern in making such investments as a trustee of the Tucker's Court Trust." His view was that it would be better to appoint equal amounts out of the Tucker's Court Trust to separate trusts for each of them, which could then be invested in independent investments or business ventures. However, Mr De Frias carried on to say that both the Husband and Mr Botelho had wished to keep things simple, so that in the event he had agreed to make a direct distribution to them as they had sought. Mr De Frias referred later in his affidavit to the fact that so far as the Husband was concerned, that had become an estate planning issue, but what is clear from Mr De Frias' affidavit evidence is that he was prepared to comply with the wishes of the Husband and Mr Botelho even when it did not accord with his advice.

53. Looking at this history of the manner in which these trusts were operated by the Trustees in the form of Mr De Frias, I am satisfied, and find, that any request for an advance by the Husband to the Trustees would lead to such request being complied with. I make two further points in this regard. First, I do not attach any weight to the statement which Mrs Marshall urges I should take into account, that Mr De Frias had indicated in his affidavit that he would comply with any order which the Court deems appropriate to make. That is an entirely different issue, and seemed to me to address the question of the Wife's summons under section 41 of the Act. Secondly, I appreciate that neither the Husband nor Mr Botelho presently intends to sell the businesses of WDL and / or A&P, and it may well be that in the circumstance of those businesses there is little available cash to withdraw. But that was not always the case, as some of the past payments from the trusts demonstrate, and the real question is whether, if the request were made, and assuming compliance would be possible, it would be complied with. I am satisfied on the basis of the evidence I have identified that it would. Finally, in

regard to this issue, I stress that I am doing no more than dealing with the trust assets as a financial resource of the Husband. I will come in due course to the argument in relation to liquidity, the difference between family assets on the one hand and unilateral assets on the other, and the relevant date for valuation.

The Snap Dragon Trust

54. I should, and do, deal with this trust separately, because of the fact that it is the Husband's parents who are the discretionary beneficiaries of the trust. This came about during the period of delay in the purchase of the underlying asset, lot 15 Addendum Lane, during which period of delay the marriage had broken down. The reason that the Husband as settlor had chosen to make his parents the beneficiaries of this trust arose from the fact that when he had settled the Sea Breeze Trust, and that trust had purchased lot 16B Addendum Lane, the Husband had needed to provide security for the necessary bank borrowing. He described in his evidence how the Wife would not allow him to use the matrimonial home as collateral, and described how he had borrowed $300,000 from the bank on the security of his parents' home. Even the Husband conceded that it was unlikely that they would be at risk in relation to their security, since he had bought for $400,000 and this was a time of rising markets. However, when the construction costs on that site ran over budget, the Husband had not been able to secure the release of his parents' property as he had hoped. In his affidavit, the Husband said by way of explanation:

> "I note that my parents have been made beneficiaries of this trust. The reason for this is in case my business dealings do not work out and I am made bankrupt. My parents will at least be reimbursed some money so that their property is not placed in jeopardy."

55. It is also of note that Mr De Frias did not regard there as being a real risk to the Husband's parents at the time of the original guarantee, saying that if a forced sale had been necessary, he would expect to sell for at least $300,000. He had then referred to the fact that as more money was borrowed during the course of

construction, the Husband's parents had potentially been at risk, but he accepted that given the current valuation of this property and the present amount of the debt, the reality now was that the Husband's parents were no longer at risk.

56. I have already set out the history of the switch from the purchase of lot 15 Addendum Lane by the Cool Breeze Trust to the Snap Dragon Trust, in paragraph 29 above. It should also be made clear that the Husband put substantial monies of his own into the purchase of this lot; $300,000 was loaned by the Husband to the trust, the source of these funds being a dividend from BTFL. In addition, further funds in the amount of $69,726 were required to close the purchase, which the Husband accepted came from joint monies, either in the form of the joint account, or from monies that were in the South Breeze Trust. The Husband said that he had made it clear to Mr De Frias that that was to be treated as a loan, and that the trust was liable to repay that loan.

57. All of this is really by way of background; the important question is whether the Snap Dragon Trust should be treated any differently than the Commercial Trusts when it comes to the question of it being regarded as a financial resource to the Husband. In my judgment, there is no warrant for treating it differently. I note that the children of the family were added as beneficiaries, and I am sure that the reality of the matter is that if the Husband made a request of Mr De Frias that he be added as a beneficiary, Mr De Frias would oblige. And if that were to be followed by a request to make an advance or deal with the assets of this trust in a particular way, Mr De Frias would similarly oblige. All of this becomes academic in view of my subsequent findings.

Business Valuations

58. As already indicated, Mr Sharpe was appointed with the consent of the parties to value the businesses known as WDL and A&P. Both valuations were dated 14 January 2008; in the case of A&P the assessment was made as at 31 December 2007, and in the case of WDL as at 31 January 2008. The valuations were made of the entire businesses, rather than the Husband's interest in them.

Valuation of A&P

59. Mr Sharpe's valuation was stated to have been largely based on financial information, estimates and projections prepared by Armoury Limited in the form of Mr Stevens and the Husband. Mr Sharpe said that it was also based on interviews with the Husband.

60. Before dealing with the details of the valuations, I should refer to the past profitability of the company, which I do with particular reference to the notes which Mr Stevens had attached to the relevant financial statements when these had been prepared. The company's year end is 31 December and for calendar year 2003, A&P had made a net profit of $225,000. Unfortunately, that was its last year of profitability, and for the following four years, A&P made losses of $218,000, $117,0000, $233,000 and $22,000.

61. Mr Stevens' notes to the financial statements following the 2004 loss noted that the gross profit percentage had "dropped alarmingly from 29% to 15%", which Mr Stevens had equated to a loss of stock amounting to some $327,000, which he said indicated either rampant stealing, an incorrect inventory count or both. He made recommendations for a better system of inventory control. The following year, he described the gross profit percentage as still being alarmingly low, although it had risen some 5%. Mr Stevens noted that there was still insufficient inventory control, and commented that an improved method of controlling inventory either had been or would be instituted with effect from 1 April 2006. Problems remained in 2006, although not limited to inventory, and for calendar year 2007, the position had improved. Even so, Mr Stevens was reluctant to accept that the business had indeed "turned the corner", although he did note that all figures had improved tremendously, and he believed that the company had a good prospect of increasing its sale figures, a necessity if it were to make good profits.

62. Mr Sharpe calculated alternative valuations, based firstly on the free cash flow approach, and secondly on the asset approach. Given the company's loss making history, the free cash flow approach produced almost a nominal figure for the company's value, of $28,000. The asset approach produced a figure of $241,000, which latter figure Mr Shape took as the company's value.

63. Although there were a number of questions from counsel on both sides of Mr Sharpe, essentially this valuation was accepted. It is of note that Mr Sharpe was pessimistic as to the company's future, saying that he did not think that the business could be described as a going concern.

64. I accept Mr Sharpe's report and evidence, and given that the Husband owns 75% of the share capital of A&P, attribute a value of $180,750 to his interest in that Business. The only comment that I would make in relation to the value of this business is that that figure is to be contrasted with a very much greater value years before. The Husband's own evidence was that when he had bought a 50% interest in the business before the marriage, that interest had cost him approximately $560,000.

Valuation of WDL

65. In fact, Mr Sharpe produced two alternative valuations, (as he may have done for A&P; I appear only to have the one) the difference between the two relating to the collectibility of the loan owed to WDL by the Tucker's Court Trust. Mr Sharpe used a figure of $784,797 for the loan to the Tucker's Court Trust and $5,312 for the loan to Data Tag. As appears below, the loan to Data Tag has now been repaid. The Tucker's Court Trust does of course own the North Street property from which WDL operates, and there is an equity in that property substantially in excess of the loan. In practice, both sides worked on the basis that the loan was indeed collectible, and this is the basis upon which I will proceed.

66. Again, Mr Sharpe's valuation was largely based on financial information, estimates and projections prepared by Mr Stevens and in this case Mr Botelho, and Mr Sharpe indicated that it was also based on interviews with the Husband. He said specifically that Mr Stevens had provided an estimated balance sheet as at 31 January 2008, an estimated income statement for the year ending 31 January 2008 and projections for the following year. It became clear during cross-examination that Mr Sharpe had attached considerable weight to these projections, while making his own assessment as to the reasonability of the projections.

67. The four years from 31 January 2004 had produced profits of $314,000, $618,000, $692,000, $410,000. The estimated net profit for the year ended 31 January 2008 was $246,000.

68. The projections Mr Sharpe received from Mr Stevens suggested that the net profit for 2009 (effectively calendar year 2008) would not be dissimilar to the estimated profit to 31 January 2008. Mr Sharpe commented that the 2009 financial year would be very different from 2008, largely due to the demands of the new division called Bermuda Tire, as well as the impact of increased rent. In this regard, Mr Sharpe had understood on the basis of what he had been told by Mr Stevens and Mr Botelho that the rent would increase to $60,000 per month when the bank loan became amortised in April 2008. In fact, the correct figure is $58,500, but this ignored the contribution of $15,000 per month received from the tenant of the top floor of the building, so that the real figure for WDL was $43,500 per month. Mr Sharpe had discounted management's net income projections for the financial year 2009 on the basis that these were overly optimistic, and had revised the anticipated profit from $252,000 down to $130,000. On this basis, Mr Sharpe reached a valuation of $1,834,000.

69. However, Mr Sharpe was quite clear that the adjustment to the rent (and the annual figure was some $198,000) necessarily meant an increase in profitability which would affect his valuation. He duly revised his figures overnight, as well

as doing two further valuations based on hypothetical projections put to him by Mrs Marshall. On the basis of the adjustment of rent, he revised his valuation for the business from $1,834,000 to $2,334,000. In relation to the hypothetical exercises, which were premised on a substantially greater profit, one such scenario produced an increase and the other, strangely, produced a lower figure than Mr Sharpe's adjusted figure. I confess that I did not understand how a higher profit could produce a lower valuation, but the issue was in any event academic, because Mr Sharpe did not accept the two hypotheses put to him by Mrs Marshall, and did not regard his adjusted valuation of $2,334,000 as being affected by those scenarios.

70. Mr Sharpe was questioned by Mr Kessaram in relation to what Mr Botelho had said in his own evidence as to the likely profitability for WDL in financial year 2009. The problem with placing too much reliance on what Mr Botelho had said, as opposed to the projections produced by Mr Stevens, is that Mr Botelho was not consistent. I have referred to his evidence in relation to the profitability to WDL at paragraph 25, where he referred to maintaining the same profit (in the region of $250,000), but shortly thereafter said that he would be pleased to make $200,000. Mr Kessaram urged me to attach weight to a comment made by Mr Botelho of which I did not have a note, save in relation to the comment being put to Mr Sharpe. That comment was "if we're not on our game, we'll lose money". Even with the much increased expenses for WDL now that it has moved into the North Street property, I do not think there is any question of it losing money, and I regard that comment by Mr Botelho as a throwaway comment to which I would attach no weight. It also has to be borne in mind that the projections prepared by Mr Stevens had themselves been based on projections that Mr Botelho had given to him. Mr Sharpe was concerned that it would be a challenge for WDL both to increase sales and to make the projected profit of $20,000 per month from the Bermuda Tire business, but in the end he stood by his valuation and I accept it. It is important to bear in mind when looking at the recent profit history of WDL that there has been significant business interruption caused by the company having to vacate its original site, then to operate from temporary premises for

approximately 18 months, and then to make a second move to the North Street premises. In any event, Mr Shape's valuation is accepted, so that I find the value of the business to be $2,334,000, which means that the Husband's one half share of the value of the business is worth $1,167,000.

71. One matter which I should deal with, if only by way of explanation, is to explain what happened to the business of BTFL. This was an enormously profitable business in its early years, and it was from the profits of this business that the investments in real estate were made by the Tucker's Court Trust, which in turn, upon realisation of those real estate investments, were converted into the investment in the North Street property. It is worth remembering exactly how profitable BTFL was, and an indication of this comes from the summary of the property transactions exhibited to Mr De Frias' affidavit. This shows that very nearly a million dollars was loaned to the Tucker's Court Trust from BTFL, and that amount effectively turned into more than $1.6 million by virtue of the real estate investments. Upon realisation of those investments, the sale proceeds were in part distributed to the Husband and Mr Botelho, and in part invested in the North Street property, with a balance of approximately $230,000 paid back by the Tucker's Court Trust to BTFL. BTFL also provided the lion's share ($600,000) of the loan made to Mr Botelho to enable him to clear the debt on his properties so that they could be offered as security for the borrowing of the $7 million which was needed for construction of the North Street building.

72. With effect from February 2006, the business of BTFL was merged with that of WDL, and the corporate entity that was BTFL ceased to exist. Despite this, Mr Botelho's evidence was that separate accounts for BTFL and WDL continued to be maintained. Further, there remained a bank account in the name of BTFL, and Mr Botelho indicated that they continued to track profit and loss by means of the bank account, through the bank statements, and bearing in mind the number of trucks ordered. Mr Stevens' evidence was that he had not been responsible for the books of BTFL prior to the amalgamation, but that upon amalgamation he had consolidated the financial of BTFL with those of WDL. He was able to

produce a document from his working papers showing the position immediately prior to amalgamation, with a relatively nominal figure for the net profit of the business. This accorded with the Husband's evidence that the business had slowed down considerably, for various reasons. Although the Wife challenged that contention in her affidavit evidence, the reality is that such profit as the business of importing trucks now generates simply forms part of the profit of WDL.

Data Tag

73. No valuation was produced of this business, although there were references to the profit made by it. Data Tag is in the business of providing a security marking system for motorcycles, and sells tags to other cycle businesses as well as to WDL. Mr Botelho said that it was a requirement for a cycle owner to have such a tag if he or she wished to secure comprehensive insurance coverage.

74. Mr Botelho also described how Data Tag's initial operation had been funded by a large loan from WDL, which Data Tag repaid by providing tags to WDL without charge, and making an adjustment to the loan balance. Mr Botelho said that Data Tag had now paid back something like $131,000, and the balance sheet produced by Mr Stevens at 30 November 2007 showed that there was just under $19,000 owing to WDL at that time, although in his evidence, Mr Stevens said that that loan has now been fully repaid.

75. The Husband's interest in Data Tag is one of 20%, owned through the Cool Breeze Trust, the trust which was settled with a view to acquiring lot 15 Addendum Lane, as described above. Mr Botelho said in his evidence that Data Tag's net income was approximately $30,000 per annum, but did say that Mr Stevens would produce the financial statements. He did so, and these in fact showed a current profit of almost $70,000 for ten months, equating to an annual profit of $82,500. Even this may be on the low side, bearing in mind the company's ability to pay back its remaining debt to WDL of almost $19,000 in less than two months. In any event, Mrs Marshall simply relied upon the income

flow from Data Tag, which on the basis of the Husband's 20% shareholding would give him a share of $16,000 per annum. There was no evidence as to how the company proposed to distribute its profit now that the debt to WDL has been cleared.

Valuations of Property

76. The various property valuations were conducted both as at 11 July 2006, a date which as I understand it represents the date of separation, and at 15 November 2007, this being as close to the date of hearing as was practicable. In the case of the North Street property there was a valuation as at 7 February 2006, based upon what was then a projected building, as well as a valuation of the completed building as at 15 November 2007. The different valuations arise from the argument that on the facts of this case I should be looking at the date of separation, rather than following the traditional course which obtains by reason of the use of the present tense in section 29 (1)(a) of the Act, which is that the Court is normally concerned with the value of assets as at the date of hearing. It is generally recognised that the traditional date can be departed from where there has been a very significant change accounted for by more than just inflation or deflation. In fact, counsel for the Husband did not press the point particularly strongly, saying in his submissions that "the appropriate date for valuation may be the date of separation rather than the date of hearing". But the Husband's attorneys had said in correspondence that the date of separation should represent a cut off date in relation to the valuation of the matrimonial assets, and the argument must have been made with greater vigour at an earlier stage of the proceedings if the parties were to go to the trouble and expense of obtaining alternative valuations. In any event, the point has to be considered.

77. It is clear from a review of the relevant authorities that a departure from the norm, of the relevant date for valuation being that of the court hearing, is

exceptional. In *N -v- N (Financial Provisional: Sale of Company)* [2001] 2FLR 69, Coleridge J referred to the argument of the husband in that case, and said:

> "again, I think there is intrinsically some merit in this argument in this particular case but it needs to be approached with very great caution."
>
> And
>
> "Mr Mostyn urges me to reject this argument completely because, as he rightly points out, traditionally these applications have always been approached on the basis of the values existing at the date when the hearing takes place.
> I am quite sure that even now in most cases that is the correct date when valuation should be applied. But I think the court must have a eye to the valuation at the date of separation where there has been a very significant change accounted for by more than just inflation or deflation; natural inflation pressures on particular assets, for instance, the value of a house moving up or down in the housing market."

78. Similarly, in *Cowan -v- Cowan* [2001] EWCA Civ 679, Mance LJ rejected the submission of counsel that the date of separation represented a cut off date. He commented that the date of the exercise of the court's power is not only accepted to be the traditional date, but was also the natural date in the case before the court. And Mance LJ carried on to refer to the cautionary words used by Coleridge J in *N -v- N*.

79. I do not think that a more detailed analysis of the cases on this aspect of matters is called for, and I will deal with the various assets in turn. First, in relation to the former matrimonial home, the increase in value is relatively modest (just over 8% in almost 18 months), and there is no evidence of an increase by reason of some particular effort or contribution of one party. For this asset, the relevant date is the hearing date. In relation to lot 16B Addendum Lane the figures are unchanged between the two dates, so that the issue does not even arise. In

relation to lot 15 Addendum Lane, there is a significant increase in value from $700,000 at the date of separation to $900,000 in the November 2007 valuation. But two things have to be borne in mind in relation to this property; the first is that on his own evidence the Husband significantly overpaid for the property because he was "held to ransom" by the owner, who appreciated that the Husband was in difficulty running his business without the use of this particular lot. In consequence, the Husband had purchased the lot for $1 million, so that the value of $700,000 represented a significant reduction in terms of the matrimonial assets. Further, the reason for the increase in value was because of general market conditions, and not because of any special effort or contribution. Again, I find that the later valuation is the appropriate one.

80. That leaves the North Street property, where of course it is the case that there was a significant effort in terms of the construction of the building, to which the Husband no doubt made his contribution. And the increase in value is reasonably significant, although in fact not that great in percentage terms. As at 7 February 2006, the valuation was put at a range of $8.5 million to $9 million, and at 15 November 2007, almost two years later, the value was put at $10 million. However, it does seem to me highly dangerous to say that this is the sort of increase that should cause the Court to value the property as at the date of separation. I say this particularly because the North Street property is the property which houses WDL, and while the value of the North Street property increased between the date of separation and the date of hearing, it should be borne in mind that the value of WDL will have diminished considerably during the same period. At the date of separation, the profit for the last full financial year was $692,000, a level which Mr Sharpe said would have produced a valuation 3 to 4 times as high as that based on the real figures. For the year ended 31 January 2008, it was in the region of $250,000. The authorities clearly demonstrate that it is not simply an increase in value by reason of some particular contribution that is relevant. The particular question was put to Coleridge J in *N -v- N*, where he said

> "Mr Mostyn asked the hypothetical question; what would the position be if the value had similarly declined significantly since the date of the separation? In my judgment that too, in an appropriate case, could be a factor to be taken into account, particularly perhaps where the decline was as a result of action or inaction by the paying party."

81. In the circumstances of this case, I would not regard the increase in the value of the North Street property as being sufficiently great to follow the exceptional course of accepting the valuation as at the date of separation. If I were to be wrong in that regard, then I would still be influenced by the substantial reduction in the value of WDL, and would take the view that the increase in the value of the North Street property should be offset by the diminution in the value of the business of WDL. So I am satisfied that in the case of all the matrimonial assets, the relevant date for the purposes of valuation is the date of the hearing or as close to that as the parties have been able to achieve.

Assets – the Net Figures

82. There are mortgages on all of the real property assets. The amounts currently owing are set out in the agreed statement of facts, and I will simply apply the mortgage debt to the respective property values to give a net figure when the time comes to consider the overall position. Mrs Marshall submitted her figures on the net values of the various properties taking into account not simply the outstanding debt, but the costs associated with a sale, in accordance with standard practice.

The Debt to the Tucker's Court Trust

83. This asset was ignored in the closing submissions of the Husband's attorneys, who stated that the only asset of the Tucker's Court Trust was the North Street property. On the other hand, this asset formed part of the submission on behalf of the Wife, where one half of the promissory note was valued at $457,960.

84. I can see no reason why this asset should be disregarded. It represents real money which was paid by the Tucker's Court Trust to Mr Botelho at the time when the Husband and Mr Botelho were concluding their negotiations for the financing of the construction of the building at 16 North Street. For reasons which are not entirely clear, they (or the bank) took the view that security would be better furnished if two properties owned by Mr Botelho (or in the case of one of those properties, a trust of which he was a beneficiary) could be offered as security free and clear. For this purpose a loan of $800,000 was made to Mr Botelho, so that he could clear the indebtedness on those properties, and so that they could form part of the security provided to the bank in respect of the North Street property and the associated construction. Mr Botelho executed a promissory note in favour of the Tucker's Court Trust in the sum of $800,000, of which $200,000 was paid to him by WDL, and $600,000 paid by BTFL. Although Mr Botelho sought to draw a distinction between money which came from BTFL's earnings and money which formed a cash surplus, the reality is that he received that cash benefit, and there has been no repayment of principal or indeed any payment of interest, which has accrued at the rate of 7% per annum since the date of the promissory note, 25 January 2006. The promissory note is payable within 30 days of demand. This clearly represents a significant asset so far as the Tucker's Court Trust is concerned, and since the Husband has a 50% beneficial interest in that trust, I agree with Mrs Marshall that the promissory note represents an asset to the Husband equivalent in value to $457,960.

The Nature of the Assets and the Discounting Factor

85. I have run these two issues together in the heading of this section, because it does seem to me that the two issues are very much related. In the written submissions for the Husband, emphasis was placed on the need for the Court, in the exercise of its discretion, to have regard to the nature of the assets and to distinguish between "copper-bottomed assets" and other assets that are illiquid and bear financial risk. The authority of *Wells -v- Wells* [2002] EWCA Civ 476 was cited in support of the proposition that where it is not possible to achieve a clean break because of the lack of liquidity in the assets, the court should consider how the

copper-bottomed and risk laden assets can be apportioned fairly. It is no doubt important to remember that in *Wells,* a significant portion of the husband's assets consisted of his shareholding in the business which he ran, which business was encountering difficulties, which led to no less than six alternative valuations of the husband's shareholding being advanced to the trial judge. The judge found it difficult to place a value on the husband's shareholding in the circumstances of that case.

86. In this case, leaving aside the matrimonial home, there are two different business enterprises, A&P and WDL, each of which operates out of its "own" property. While the Husband has a 75% interest in A&P, he owns the property from which it operates 100%, through the Sea Breeze Trust and the Snap Dragon Trust. In relation to WDL, which operates the more substantial business and owns the more valuable property, the Husband's interest in each is 50%. I accept that in respect of both business and related properties, questions of liquidity will need to be addressed.

87. However, in his closing submissions, Mr Kessaram also referred me to the cases of *Ellison -v- Ellison* [1985] Court of Appeal judgment dated 12 July 1985, and *Duncan -v- Duncan* [2005] Supreme Court judgment dated 7 November 2005, in support of his submission that the property values in the case before me should be discounted.

88. While I accept that it is important to consider the question of liquidity in regard to both the Husband's business interests and the related property, I do think that the cases of *Ellison* and *Duncan* can and should be distinguished. In each of those two cases, the husband was a practising barrister and attorney with an interest both in the law firm from which he practised, and in the real property from which the law firm practised. In *Ellison*, the trial judge had commented upon the husband's inability to dispose of his interest in the law firm and the underlying property without being unable to continue to practise his profession, describing the asset as being more in the nature of "tools of trade". He therefore

discounted the value of this interest in its entirety. That judgment was upheld by the Court of Appeal. In *Duncan*, I took the view that some discount was required following the decision of the House of Lords in *White -v- White* [2001] AC 596. But the facts of this case do not fall on a par with those of *Ellison* and *Duncan*. In relation to the Husband's interest in WDL, the Husband does not work in the business at all. In respect of his interest in A&P, this is the business from which the Husband earns his livelihood, but on the other hand the profitability of the business was such that Mr Sharpe did not value the business on the basis of its income, but essentially on an asset or break up value. Mr Sharpe said that he did not think the business could be described as a going concern, and he also commented that he did not regard the operation of the business as representing the best use of the land. (Although I have a clear recollection of this comment, I did not make a written note of it. I do also note that in his valuation, Mr Sharpe said that the rent paid was not materially different from the market rate, so I attach little weight to the comment.) That said, however, from the Husband's perspective, I accept that it is his wish to continue to operate this business; whether it will "turn the corner" for him to be able to achieve that wish is another question.

89. However, given the Husband's current intention, it does seem to me that there should be some substantial discount made in relation to the value of the business of A&P, and the related real property. It seems to me that this is very much tied in with the illiquid nature of these assets and I will consider this aspect of matters when I come to the division of the matrimonial assets in due course.

Unilateral or Non-Family Assets

90. Again, this was a subject which had obviously been contentious during the course of preparation for hearing, but it was dealt with relatively shortly in the written submissions made by counsel on the Husband's behalf. Those submissions did of course endeavour to separate the trust assets from the matrimonial assets, although it was accepted that the trusts could in the future represent financial

resources of the Husband. But in relation to the issue of unilateral assets, the submissions put the matter as follows:

> "The court should distinguish in appropriate cases between matrimonial and "family" assets on the one hand and "unilateral" assets on the other. In dual-career marriages assets which the parties by their words or conduct appear to have agreed were to be kept under the separate control of one party might not be subject to the sharing principle."

And the case of *Charman* was cited in support of that contention.

91. I have of course rejected the notion that the parties intended to keep the Husband's business assets separate from the family assets. Perhaps the only further comment I need to add is in relation to the Husband's shareholding in A&P, which is an asset which the written submissions for the Husband say is a non-marital asset because it was brought into the marriage by the Husband. This is true only in one sense. As the Husband indicated in his evidence, that asset was brought into the marriage along with a very substantial bank borrowing to pay for it. The bank borrowing has very nearly been paid off in full, so that in practical terms it can be said to have been acquired during the course of the marriage, even thought the present value of the Husband's interest is A&P is significantly less than the level of debt which he brought into the marriage, attributable to that asset.

92. In her submissions, Mrs Marshall went into considerable detail as to the legal justification for treating certain assets as non-family assets, whether they were generated post separation in the form of unilateral assets, i.e. autonomous funds accumulated by dual earners. I do not think that the underlying facts of this case require an examination of the relevant cases, because of my findings that there was no intention of the part of the Husband to exclude the family when the Commercial Trusts were established; that, as the Wife described, the Commercial Trusts were established for the benefit of the family, and, lastly, that they in any event represent a financial resource to the Husband.

The Section 29 Criteria

93. I have reviewed the relevant criteria with care, but will not go through the statutory criteria with comments when none is really necessary, and will confine my comments to the areas of dispute or contention.

94. In relation to earnings, the parties put the position somewhat differently. For the Husband, it is simply said that the Wife earns twice as much as he does; for the Wife, rather more analysis is provided. The Wife had provided an updated statement of her income, effective 31 December 2007. This showed salary, allowances and a discretionary bonus which for that year totalled approximately $195,000. In addition she received certain other benefits, the most substantial of which was a payment into the government pension scheme. She also receives the rent from the apartment at the former matrimonial home, in an amount of $3,500 per month or $42,000 per annum, so that Mrs Marshall put the Wife's total income at $237,600 per annum.

95. For the Husband, Mrs Marshall started with the figure of the Husband's employment income from A&P in the sum of $104,000 per annum, and added the loan repayment of $2,500 per month, which she described as indirect income to the Husband. This is obviously correct, so that there is an additional figure of $22,500 per annum, since the loan repayments cover the 25% share of the minority shareholder. Next is the Husband's share in the profits now generated by Data Tag, which amount to approximately $16,000 per annum. I referred to the fact that there was no evidence as to how the company proposed to distribute this profit, but given that this company has an entirely different shareholding than the Husband's joint ventures with Mr Botelho, it seems realistic to count this as real income in the Husband's hands.

96. The last component of the Husband's income which Mrs Marshall pressed for arose from the interest in WDL. Mrs Marshall was content to work from the lower annual profit figure given by Mr Botelho of $200,000, of which the

Husband's entitlement would be $100,000. Again, it may or may not be that all of these monies will be paid out to the Husband but they do properly represent income to him, and I do therefore agree with Mrs Marshall's calculation which puts the Husband's income at $242,500. This is very close to that of the Wife, and I therefore find that their earnings are very much in the same bracket, and can effectively be treated as equal.

97. In relation to debts, each of the parties has a substantial debt in respect of legal fees. Costs have yet to be dealt with, and I would say no more in relation to that aspect of matters at this stage. The Wife has a loan in respect of her car which approximates to the value of the car, and in relation to the matrimonial home, there is a substantial mortgage, on which the sum of $1,280,588 remains owing. The mortgage is now amortised, having been interest only, and the payments amount to $10,500 per month. The rent from the apartment is applied towards this amount.

98. So far as the Husband is concerned, he is personally liable as guarantor for the various trust loans, but the actual loan repayments are being funded from income generated by the occupying businesses. There is clearly a greater vulnerability in regard to A&P's continued viability, but if that company were not able at some future date to service the mortgage, one has to bear in mind Mr Sharpe's comment that the properties could be put to better use, to which I have referred, and from which I infer the Husband would have no difficulty receiving a comparable rent to that paid at present.

99. In relation to the standard of living enjoyed by the parties before the breakdown of the marriage, Mrs Marshall described this is being a comfortable middle class standard of living, which seems a reasonable description, from which counsel for the Husband did not dissent.

100. In relation to the duration of the marriage, Mr Kessaram said that this was not a long marriage, and that it had lasted for eleven years before the breakdown. I

would simply classify the marriage as having being of medium length. The Husband is now 41, and the Wife 38.

101. In relation to any physical or mental disability, the Wife suffers from alcoholism, and continues to undertake counselling. Mrs Marshall described her ongoing recovery, and cautioned that she was susceptible to relapse, which could impact upon her earnings. She also referred to the stress which naturally comes with the breakdown of a marriage, as it does from the trauma of litigation. Mr Kessaram referred to the potential for relapse as something which would impact upon the Husband. The reality at this stage is that the Wife has remained in relatively high level employment throughout this period, and indeed before undergoing treatment. The Wife's health position is noted, but it is not such that it will affect the orders which I am being asked to make at the end of the day.

102. In relation to contribution, I referred to this issue in paragraph 13 above. This is a marriage where both parties have worked throughout the marriage, and as Mrs Marshall mentioned in her closing submissions, the Husband accepted that this was a partnership of equals. Put another way, I am satisfied that both parties contributed in a variety of ways to the financial success of the marriage, of which full time employment was no doubt but one aspect. As such, there is no distinction to be drawn between their respective contributions.

Summary in Relation to Assets

103. Before listing the assets and their values, there is one minor aspect of matters which I should deal with, and this relates to the loans made by the Husband, either to the business of A&P or to the Snap Dragon Trust. The loan to A&P amounted to $100,000, and the total monies loaned to the Snap Dragon Trust amounted to $369,726, of which $300,000 represented funds of the Husband, and $69,726 represented joint funds of the parties. In relation to the loan to A&P, it seems unlikely that this will be repaid in the short term, given A&P's lack of profitability. In relation to the Snap Dragon Trust, it has a substantial outstanding mortgage, and as with the Husband's other business ventures, the

rent is calculated with reference to repayment of the mortgage, so that without some adjustment, there will be no funds to discharge this loan for some considerable time. Mrs Marshall appears to have recognised this, in her calculation of the net equity in this property without reference to this loan, and although she referred to the loan in looking at the general asset position, she did not take it into account in her calculation of the net equity of the various properties in the schedule attached to her submissions. I would propose to follow the same course, but recognising that there is no doubt some unquantified benefit to the Husband in following such a course. That leaves the position in relation to the matrimonial assets as follows:

Assets	**Value**
5 Rock Garden Lane	$822,128
16 North Street (1/2 interest)	$1,242,654
16B Addendum Lane	$427,561
15 Addendum Lane	$113,077
A&P (75% interest)	$181,004
WDL (1/2 interest)	$1,167,000
Promissory Note from Mr Botelho to Tucker's Court Trust (1/2 interest)	$457,960
	$4,411,384

The Appropriate Division of Assets

104. Having done this exercise, Mrs Marshall, for the Wife sought, effectively, to have the matrimonial home transferred to her. Because of the trust structure this would require the appointment of new trustees. In addition, she sought the sum of $450,000 to enable the Wife to pay off her debts and reduce the mortgage to a more manageable level. In fact, the Wife had said in her evidence that she was no longer worried about losing the house by virtue of her inability to pay the mortgage. Finally, the Wife sought an assignment to her of the promissory note (by which I assume Mrs Marshall meant the Husband's one half interest in the promissory note) from Mr Botelho to the Tucker's Court Trust. Mrs Marshall

recognised the potential difficulty of converting the promissory note into cash, and sought orders prohibiting further encumbrances in relation to the North Street property until such time as the two properties which Mr Botelho had provided to the bank by way of security could be released from the loan facility, at which time it appears that the Wife expected to be able to receive payment on the promissory note. The Wife's proposal would mean that she would receive (albeit not immediately) approximately 40% of the undiscounted matrimonial assets. In regard to the proposed lump sum of $450,000, it is not clear what the source of these funds was to be.

105. For the Husband, Mr Kessaram proposed a sale of the matrimonial home, which he described as the only "copper-bottomed" asset that exists in the case, and an equal sharing of the proceeds of sale after payment of the mortgage and costs of sale. Mr Kessaram then dealt with the remaining assets on the basis of his primary contentions that these should first not be treated as part of the matrimonial assets, and if so treated should be heavily discounted. I have so far dealt with the first of those, but have dealt with discounting only with reference to the "tools of trade" argument, and not with reference to liquidity. In relation to A&P, Mr Kessaram's fall-back position was that if the Wife had any claim to the value of the Husband's shares, there should be "a large discount" to the value of his shareholding. His written submissions suggested 75%, the figure I applied in *Duncan*. In relation to the debt due from A&P to the Husband ($100,000), Mr Kessaram suggested that this should be disregarded, given the likely difficulty of collection. Finally, in relation to A&P, Mr Kessaram said that any amount to be payable by the Husband to the Wife in respect of this assets should be structured so that it did not jeopardise either the Husband's solvency or the viability of A&P. The Husband's position was much the same in relation to the loan to the Snap Dragon Trust of $369,726, of which $300,000 represented the Husband's funds, the source being the profits from the real estate trades conducted in the name of the Tucker's Court Trust, which monies of course had their origins in the profits generated by BTFL; the balance of $69,726 had effectively

represented joint funds. Mr Kessaram essentially took the same position in relation to this loan as to the loan from the Husband to A&P.

106. In relation to the assets of the Taboo Trust and the Tucker's Court Trust (that is to say, essentially, the Husband's interest in the business of WDL and the real property from which it operates), Mr Kessaram maintained his primary position, and then said that if the Court were minded to make any order referable to the assets in these trusts, it should be minimal having regard to

- the duration of the marriage,
- the fact that the North Street property had been acquired shortly before the parties separated
- that the shares of WDL had been acquired without recourse to family assets and the loans had been paid off by the business itself,
- the unilateral asset argument, and finally
- an argument based on the contention that Mr Botelho was the driving force in the development of the business, and that the Husband only enjoyed these interests because of the nature of his relationship with Mr Botelho.

Again, Mr Kessaram cautioned that any order referable to these assets should be structured in a way that did not cause the Husband's bankruptcy or affect the viability of WDL.

107. There is no question but that the position in relation to the division of assets is extremely difficult, given the fact that the business real estate cannot, in practical terms, be separated from the associated business. In relation to the business of A&P, the undiscounted value of the business and the two separate lots at Addendum Lane totals $721,642. It is in my view clearly right that the Husband should retain these assets, but not right that the real estate component should be heavily discounted, as I think should be done for the business itself. The real

estate represents approximately 75% of the combination of business and real estate, and given the doubtful viability of the business, and Mr Sharpe's comment on the alternative use of the real estate, it does not seem to me to be right to discount the real property in any way. While the Husband may not be prepared to follow such a course, commercially it would no doubt make sense to liquidate the business and find some alternative use for the land. If the Husband wishes to continue in the business of A&P when this does not make commercial sense, he may of course do so, but that should not be at the Wife's expense. I would propose to discount the value of the business by the amount of 75%, accepting the figure suggested by Mr Kessaram, but to apply no discount to the real estate, and to work on the basis that the Husband should retain these assets.

108. When it comes to the business of WDL, again it is appropriate to treat WDL and the North Street property together. These two assets represent more than half of the total of the matrimonial assets. However, I do not think that reliance can be placed upon all of the factors for which Mr Kessaram contended. First, in relation to the fact that the North Street land was acquired only shortly before the parties separated, this is no doubt true, but on the other hand, something like $1.3 million went into the building from the Tucker's Court Trust either directly or by way of security, and as I have said before, the source of these monies was the large profits which had been generated some years earlier from BTFL, and then the real estate investments, all of which occurred during the course of the marriage. Similarly, WDL was acquired during the course of the marriage, albeit towards the end of the marriage. And while it is obviously the case that the profits from the business paid for the acquisition, in relatively short order, the fact that no family assets paid for the business does not mean that the business, now free and clear, does not constitute a family asset. Having rejected the Husband's evidence as to his intention when settling the Taboo Trust with Mr Botelho, and having rejected the unilateral asset argument, the reality is that if the marriage had continued, this is an asset which would have available for the benefit of the family.

109. More difficult is the nature of the Husband's interest, and no doubt it would have been helpful to have some evidence from someone such as Mr Sharpe as to the appropriate discounting factor to be applied to the Husband's interest in WDL and the North Street property. While there can be no discount based upon the principles of *Ellison* and *Duncan*, it seems to me that in practical terms, a significant discount is appropriate. It is Mr Botelho who manages the enterprise, and I cannot imagine that a sale of the Husband's interest in what is effectively a partnership would generate full value. That said, I do not have any basis upon which it seems to me I can fix the proper level of discount.

110. In terms of assets, that leaves only the matrimonial home and the promissory note. Whatever the level of discount in relation to WDL and the North Street property, it would always have to be the case that the Wife should be entitled to the matrimonial home. The notion that it should be sold and the proceeds divided is, in my view, completely unrealistic given the extent of the assets which are presently in the Husband's name, in effective terms. I would therefore order that the matrimonial home be transferred to the Wife, subject to the existing mortgage, recognising that I will need to hear counsel in relation to the logistics of the change in the trust arrangement which will be required.

111. That leaves the promissory note, and while I have concerns in relation to the liquidity of that, given its dependence on Mr Botelho's personal financial circumstances, of which I have no knowledge, and its underlying link with the North Street property, the proposal made by Mrs Marshall appears to recognise those difficulties. Whichever way one looks at the division of the assets, and notwithstanding that the Husband's business assets may be illiquid and the matrimonial home effectively liquid, it does seem to me that it would be wrong to leave the Husband entitled to the benefit of this asset. I have already dealt with the need to discount the Husband's interest in A&P. If one were to discount the value of his interest in WDL and the North Street property by 50%, and leave out the value of the promissory note, the Husband would still have just over two thirds of the joint assets. In my view, the correct course to follow is to leave the

Husband with his business interests, both in terms of A&P and its related properties, and WDL and its related property, but to give the Wife the benefit of the Husband's interest in the promissory note issued by Mr Botelho in favour of the Tucker's Court Trust. As indicated above, Mrs Marshall made proposals as to how this could best be achieved, and in principle I would adopt those. Mr Kessaram did not comment on the proposals, and cannot be criticised for that. In the absence of having heard from him, my view is that the best course to follow in relation to this asset and the most suitable mechanism for its transfer to the Wife is to invite further submissions from counsel. There will in any event need to be a further hearing to deal with the issue of costs, and the two matters can be dealt with at the same time. Those submissions will not alter the in principle decision which I have made.

112. For the avoidance of doubt I would not order any separate lump sum to be paid by the Husband to the Wife, as sought by Mrs Marshall. I do not see that there is the liquidity to justify any such order.

113. In *White -v- White*, Lord Nicholls of Birkenhead, having referred to the requirement of fairness, and the importance of there being no bias in favour of the money-earner and against the home-maker and the child-carer, said:

> "A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. 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."

114. In this case, I am acutely conscious of the fact that the division of assets which I have ordered strays considerably from equality, at least if the values of the businesses and associated properties are taken at an undiscounted basis. My reason for departing from the yardstick of equality is that, particularly with the business of WDL and the property from which it operates, there has to be, in my view, a substantial discounting factor. I referred in paragraph 111 to the fact that leaving out the value of the promissory note, and discounting the value of the Husband's interest in A&P, WDL and the North Street property as proposed, the Husband's share would be just over two thirds of the joint assets. Having ordered that the Wife should have the benefit of the promissory note, and leaving the discounted figures unchanged, the transfer of the benefit of the promissory note to the Wife does bring her share to just over 41%. And while I do recognise that my discounting of WDL and the North Street property has been arbitrary, I have been left with little alternative. The Wife seeks a clean break, which makes obvious good sense. That would not be achieved by giving her any level of interest in either business or the related real estate of such business. But there are further complicating factors; in the case of A&P, the business is in difficulty, from which it may or may not emerge to operate successfully; however, it does require the use of the Addendum Lane property if it is to have any chance of success. In the case of WDL, the interest of Mr Botelho is a major complicating factor. This is no doubt why Mrs Marshall for the Wife did not pursue any business related option. Neither does it make sense in my view to order the payment of a lump sum which the Husband clearly does not have, and there is no good reason to think he will be able to refinance the existing level of borrowing so as to make such funds available.

The Section 41 Applications

115. The orders which I have made thus far affect only the South Breeze Trust and the Tucker's Court Trust, and that only in relation to the Husband's interest in

the promissory note. In regard to that latter aspect, I have made no order as to the detail, but it follows from the orders that I have made that there should be no orders made in respect of paragraphs 1(a)(c) and (d) of the Wife's summons of 23 March 2007; no orders in respect of paragraph 2 (a)(c) and (d) of that summons, and no order in respect of paragraph 3 of the summons. In his affidavit, Mr De Frias had indicated that he would comply with any order made by the Court in relation to the deeds of removal and the Snap Dragon Trust, but he did not deal with any variation of the trusts, such as is necessary in respect of the South Breeze Trust. Mrs Marshall for the Wife seeks an order for new trustees to be appointed, and if that course were to be followed (and there would also need to be a change of protector) those trustees could, with the protector's consent, restore the Wife to her position as beneficiary and remove the Husband as a beneficiary. I expect that it will be a straightforward matter for counsel to work out the appropriate mechanism for dealing with the South Breeze Trust, and will deal with that aspect of matters at the future hearing if my optimism in this regard is misplaced.

116. I recognise that in dealing the matters as I have above, I have not dealt with Mr Kessaram's argument in relation to the Court's jurisdiction to make the orders sought by the Wife, based on the authority of *Mubarak -v- Mubarik* [2007] EWHC 220 (Fam). Indeed, there is an argument in relation to the Snap Dragon Trust which was not put to me by counsel, to which I will refer, recognising that my comments in this regard are obiter. The Wife's summons simply sought to set aside the Snap Dragon Trust in its entirety, pursuant to section 41 of the Act. The applicable section would no doubt be section 41(2)(b), with the settlement being the reviewable disposition. The problem here is a timing one, insofar as the Snap Dragon Trust was established by declaration of trust in August 2005. This was at about the time of the breakdown of the marriage, but before the issue of divorce proceedings, and approximately a year before the Wife's notice of intention to apply for ancillary relief. The jurisdiction under section 41 of the Act operates after proceedings for financial relief are brought.

117. Mr Kessaram's argument based on *Mubarak* related to the deeds of removal of the Wife as a discretionary beneficiary, on the basis that such deeds are not "reviewable dispositions" which would involve a transfer of property or an interest in property. Tied in with the same argument is whether the interest which the Wife had before the deeds of removal could properly be described as "property". Had it been necessary for me to deal with the argument, I would have been bound to conclude that the Wife's interest under the Commercial Trusts could not properly be described as property, and the deeds of removal themselves could not properly amount to a disposition, and would therefore not be reviewable.

118. I should make it clear that these comments do not affect my view as to the Court's jurisdiction in relation to variation of settlement orders pursuant to section 28(1)(c) of the Act, and in relation to the orders I have made which affect the South Breeze Trust and the Tucker's Court Trust.

The Remaining Applications

119. Although the Husband issued his own application for ancillary relief, including an application for financial provision for himself, that was not pursued and the only matter which is outstanding is the need to make an order in respect of the school fees for the children. In this regard the Wife seeks an order that until such time as she receives payment on the promissory note, the Husband should be required to pay the school fees in their entirety, but that upon such payment she is prepared to meet one half of the school fees. For his part, the Husband seeks an order that the Wife should be responsible for two thirds of the school fees, no doubt based on a comparison of the parties' respective income without reference to the Husband's income beyond his salary from A&P.

120. As I have found, the parties in fact earn comparable amounts, and in my view this should be the factor which governs the payment of school fees, and the position in relation to the promissory note should not be taken into account. I would make an order that the parties be responsible for future school fees in an

amount of one half each. That order does not affect any obligation of the Husband by virtue of past orders.

Costs

121. I indicated to the parties at an early stage that I would hear counsel as to costs on delivery of the judgment, and will follow that course.

Dated the 11th of March 2008.

Hon. Geoffrey R. Bell
Puisne Judge