

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT AIRDRIE

[2024] SC AIR 4

AIR-F357-20

JUDGMENT OF SHERIFF SCOTT PATTISON

in the cause

AB

Pursuer

against

CB

Defender

Pursuer: Ms Mountain, Solicitor Advocate; Brodies, Solicitors, Glasgow

Defender: Ferry; Weightmans, Solicitors, Glasgow

AIRDRIE, 11 September 2023

The Sheriff, having resumed consideration of the cause, Finds in fact that:-

1. The parties are husband and wife, having been married at Kilsyth in the registration district of Kilsyth on 13 July 2002.
2. There are three children of the parties' marriage: JB; LB and SB. JB was the only child under the age of sixteen by the conclusion of the proof.
3. The parties separated on 28 February 2019. On 28 February 2019 the pursuer moved out of the matrimonial home. 28 February 2019 is the relevant date in terms of the Family Law (Scotland) Act 1985. The parties have been separated for a period in excess of two years. The marriage has broken down irretrievably. There is no prospect of reconciliation.

4. Since the parties' separation, the children have lived with the defender at the address in the instance. The arrangements for the care of the children are satisfactory.

5. As at the relevant date, the parties had the following matrimonial property:

i. The matrimonial home, title to which is in their joint names. The property has a current value of £625,000. The property was previously owned by the pursuer's grandparents. It was purchased by the parties on 7 August 2012. The property was valued at £225,000 at the time of purchase. The parties purchased the property at the reduced price of £180,000. The parties benefitted from a reduction in the purchase price to the extent of £45,000 which reflected the pursuer's inheritance from his grandmother. The matrimonial home is situated in very close proximity to the pursuer's family business and to a property in which his parents live.

ii. An RBS Instant Saver account in the name of the pursuer. The sum at credit of the said account was £7,778.79.

iii. An RBS Select account in the name of the pursuer. The sum at credit of the said account was £8,110.10.

iv. The cash equivalent transfer value of the pursuer's pension with B&CE, plan number 1465/PP, with a CETV of £766.54.

v. The cash equivalent transfer value of the pursuer's pension with B&CE, plan number 5684/R, with a cash equivalent transfer value of £1,854.49 apportioned to the period of the marriage.

vi. The cash equivalent transfer value of the pursuer's pension with B&CE, plan number 5521/C, with a CETV of £1,729.72 apportioned to the period of the marriage.

- vii. The cash equivalent transfer value of the pursuer's interests in the Rowanmoor SSAS Scheme in the name of his company in which the pursuer has an interest by virtue of being a director, with an apportioned value of £165,487.
- viii. The pursuer's 324 shares with Standard Life, with a value of £799.
- ix. The pursuer's Premium Bonds with NS&I, with a value of £100.
- x. A TSB Spend & Save account held in the joint names of the parties, with a balance of £1,030.46. That account was used by the defender only. It continued to be used exclusively by her post separation.
- xi. Personalised registration plate, with a value of £1,500. The registration plate was sold by the defender following separation and the proceeds retained by her.
- xii. A TSB Easy Saver account in the name of the defender, with a balance of £3,000.
- xiii. The defender's SPPA pension with a cash equivalent transfer value of £132,721.63.
- xiv. The defender's B&CE pension with a CETV of £805.67.
- xv. The defender's Land Rover Discovery motor vehicle with a value of £24,000. The defender sold the vehicle after separation. She used £6,500 as a deposit on a brand new Range Rover. She retained the balance of £17,500. She did not use the balance to clear the corresponding Lloyds TSB bank loan.
- xvi. A £40,000 bonus payment made to the pursuer and which was processed according to company records on 20 December 2018.
- xvii. The pursuer's pension with Standard Life with a CETV for the period of the marriage of £9,166.45.
- xviii. The pursuer's pension with Standard Life with a CETV of £33,578.19.

6. As at the relevant date the parties had the following liabilities:
 - i. The mortgage over the matrimonial home. At the time of proof, the outstanding balance was £215,137.
 - ii. Sums outstanding in relation to a personal loan taken by the pursuer from his company. The sum outstanding was £4,524.93.
 - iii. The sum outstanding in respect of the defender's John Lewis credit card. The sum outstanding was £489.44.
 - iv. A TSB loan in the name of the defender in respect of her Land Rover motor vehicle, with an outstanding balance of £19,883.91.
7. The parties bought their first property together in 1999. They sold that property and purchased a further property. When the second property was sold, the parties used £200,000 from the proceeds of sale towards the purchase of, and works in relation to, the matrimonial home. The original property was partially demolished and substantially renovated and rebuilt.
8. The pursuer and his brother, DB, are joint shareholders and directors in their company. The company was incorporated in 1990. The pursuer and his brother became shareholders and directors in 1998. The business is the pursuer's sole source of income. The company is primarily a demolition business. It is involved in large scale projects. The company has a well-established policy of retaining profit. Profits are used to purchase and maintain machinery for business purposes. Decisions about the business are made by the pursuer in conjunction with his brother, and with advice from the company accountant. At the date of separation the retained profits in the business amounted to retained profits of (in or around) £1,518,711.

9. Prior to separation, from the parties' combined salaries, the sum of £100/week was paid into the pursuer's account ending 9337; £30/week was paid into the pursuer's account ending 9859; and the balance of the parties' salaries of £681.73/week was paid into the account ending 4760 in the parties' joint names.

10. The parties loaned the sum of £70,000 to the pursuer's company to assist with cash flow for the materials and labour required in the build of the matrimonial home. The £70,000 loan had been made to the company from the proceeds of sale of the parties' previous property. The said funds were repaid by the company in full. Most of the repayment was made to the parties' joint account; some to an account in the pursuer's sole name; and the remainder to HMRC in satisfaction of the pursuer's tax liabilities.

11. The defender worked full time as a teacher throughout the marriage, with the exception of maternity leave, which she took for one year after the birth of each child. She is still employed full time as a teacher.

12. The defender looked after the family home, the children and all aspects of the family's life together. She will continue to be the lead carer for the child who is currently under 16 and the two older children will reside with her while in further education. She made significant contributions at an early stage in the marriage including providing the joint loan to the company at a difficult time. This allowed the pursuer time and space to grow a very successful company which seems likely to continue to succeed. This was an economic advantage derived by him. She has lesser earning potential and will be the lead carer for the children going forward. He has greater earning potential and the dividends taken in recent times make this clear.

13. The parties' lifestyle improved as the profitability of the business increased. This included the employment of cleaners, gardeners and tutors; and the purchase of expensive holidays and jewellery.
14. The pursuer has been paying £3,000 per month to the defender following an award of interim aliment being made by this court in a separate, ongoing aliment action (reference number AIR-F311-20). He funds this by way of drawing dividends from the business. He requires to pay tax on those dividends. The defender receives the interim aliment tax free.
15. Funding options available to the pursuer for the purposes of any payment to be made to the defender in this action include a director's loan. This would carry a heavy tax implication. Dividends could be drawn, but again this will carry heavy tax liabilities. The business has always carried little cash. Borrowing could be taken against plant/machinery owned by the business, or against the matrimonial home, should this be retained by the pursuer. He has recently secured, through the business, a line of credit with Lombard Direct of up to £600,000.
16. The defender is a full time teacher, earning £2,300/month net. She has applied to the Child Maintenance Service in respect of JB. The current Child Maintenance assessment equates to a payment by the pursuer of £1,200 per month. She is also in receipt of Child Benefit.
17. The parties' daughter LB will start university in September 2023.
18. The pursuer shared in dividends from the business of £235,000 in 2021. These were divided equally between him and his brother. This figure includes those dividends which were drawn to meet the payments of interim aliment to the defender, and the associated tax.

19. The vast majority of the pursuer's income during the marriage was paid into the parties' joint account and used by the defender and for the benefit of the family, at the defender's discretion.

20. There is a boundary issue in respect of the matrimonial home. There will be an ongoing requirement for cooperation between the owner(s) of the house and the pursuer's company if it is to be resolved. There is likely to be a need for ongoing cooperation between the company and the owner(s) of the matrimonial home in the long term in light of the proximity of the house to the business, and the existence of a shared access road. The house is a bespoke property and if placed on the open market would take some time to be sold and in fact may not be sold.

21. The parties originally both wanted the other's share in the matrimonial home to be transferred to them. The defender changed her position on this matter on 30 August 2023 and communicated to the court that she wished for the house to either be sold and profit to be distributed between the parties or for her share to be transferred to the pursuer with a consequential capital sum to be made payable to her.

22. The parties have no direct communication. This has been the case since separation. There is a non-harassment order in place against the pursuer. He cannot have any contact with the defender as a result. He was admonished in relation to the criminal charge against him. The parties have made, and continue to make, serious allegations about each other's conduct.

23. The defender inherited the sum of £80,000 in January 2023.

Finding in fact and in law:

1. The parties' marriage has broken down irretrievably. The parties have been separated for a period in excess of two years. The marriage has broken down irretrievably. There is no prospect of reconciliation.
2. For the purposes of Section 10 of the Family Law (Scotland) Act 1985, the relevant date is 28 February 2019 being the date upon which the parties ceased to cohabit.
3. The net matrimonial property to be divided between the parties amounts to £817,394.26.
4. Both parties have dissipated matrimonial property/funds: the pursuer by failing to disclose a bonus payment of £40,000 in 2018 and the defender by selling the Land Rover (supra) post separation.
5. Special circumstances justify a departure from equal sharing of the matrimonial property. Taking account of these special circumstances and the whole facts of the case a fair sharing of the matrimonial property in this case would be achieved by the defender receiving a greater share of the matrimonial property.
6. The retained profits of (in or around) £1,518,711 in the company do not form part of the matrimonial property.
7. The company was a family company, originally set up by the pursuer's father in 1990. The pursuer and his brother DB became equal shareholders in the company when ownership was transferred to them by their father in 1998, four years prior to the pursuer's marriage to the defender. The pursuer's shareholding in the company is accordingly not matrimonial.
8. The matrimonial home, was owned by the pursuer's grandparents. The purchase price of the land on which the matrimonial home was built was reduced by the sum of

£45,000 to reflect the inheritance from the pursuer's grandmother. This is a special circumstance in terms of Section 10(6)(b) in terms of the source of funds however it is not fair or appropriate to take it into account given the overall circumstances of the case and the scheme of division which is necessary and appropriate.

9. The retained profits [and the pursuer's greater earning potential] ought to be taken into consideration in terms of Section 9(1)(b). The pursuer has obtained an economic advantage which is balanced to a large extent but not entirely balanced by the advantages received by the defender during the marriage. The retained profits by the pursuer is a special circumstance in terms of Section 10(6) of the Act to the extent that he was in a position to grow the business and retain profits for further growth into the future due to the efforts and contributions of the defender during the marriage.

10. As a result and when considering this and all other factors in the case there ought to be an unequal sharing of the matrimonial property in the defender's favour with her receiving 57% of the net property amounting to £465,914.67.

11. The defender's share in the matrimonial home should be transferred to the pursuer.

12. Taking the defender's assets and liabilities into account, and the transfer of the house to the pursuer she already has a share of the matrimonial property amounting to £142,684.91.

13. The defender is entitled to a capital sum payment from the pursuer of £323,229.76.

14. The defender was dependent to a substantial degree on the financial support of the pursuer and is entitled to financial provision to assist her in adjusting. This will be satisfied by a requirement that the pursuer pay her £1000 per month for a period of 18 months post decree.

15. During the period of separation the pursuer should not have cut off the oil supply to the house. He should not have done so or at least should have given more notice of his intention. The defender paid £8000 for a new boiler and oil tank. He should bear the cost.

16. Having regard to the principles set out in section 9(1)(a), (b), (d) and (e) of the Family Law (Scotland) Act 1985 the following orders should be made ((1) and (2) representing fifty seven per cent of the net matrimonial property at the relevant date):

(1) An order for the transfer of the defender's right, title and interest in the matrimonial home to the pursuer;

(2) An order for payment of a capital sum to the defender by the pursuer of £323,229.76.

(3) an order for payment to the pursuer by the defender of periodical allowance of £1000 per month for a period of 18 months; such orders being justified by the principles referred to and reasonable having regard to the resources of the parties.

In addition the pursuer should pay the defender £8000 with reference to the boiler and oil tank.

THEREFORE,

Finds it established that the marriage has broken down irretrievably on the basis of the parties' non cohabitation for a continuous period of two years and grants decree of divorce in terms of the pursuer's crave 1 and divorces the pursuer AB from the defender CB; sustains the pursuer's first plea in law and repels the defender's first and second pleas in law accordingly;

Makes the following orders having found that special circumstances exist and being satisfied that a 57/43 percentage split of the matrimonial property in the defender's favour is appropriate:

Matrimonial home

Noting the defender's change of position as advised to the court on 30 August 2023 and that she now consents to the matrimonial home either being sold on the open market with appropriate division of proceeds or her share in the house being transferred to the pursuer, leaving the decision to the court; Refuses the defender's second crave as no longer insisted in and in terms of the pursuer's second crave grants decree for the transfer of the defender's right, title and interest in the matrimonial home to the pursuer; ordains the defender to make, execute and deliver to the pursuer a valid disposition of the said subjects and such other deeds as may be necessary to give the pursuer a valid title to the subjects, and that within one month of the date of decree; and in the event of the defender failing to make, execute and deliver such disposition and other deeds, authorises and ordains the Sheriff Clerk to subscribe on behalf of the pursuer a disposition of the subjects and such other deeds as may be necessary to give the pursuer a valid title to the subjects, all as adjusted at the sight of Sheriff Clerk; sustains the pursuer's fifth and sixth pleas in law and repels the defender's third and seventh pleas in law;

Capital sum

Grants the defender's first crave in part; grants decree against the pursuer for payment to the defender of a capital sum of THREE HUNDRED AND TWENTY THREE THOUSAND, TWO HUNDRED AND TWENTY NINE POUNDS AND SEVENTY SIX PENCE (£323,229.76) STERLING with interest thereon at the rate of eight per cent (8%) per annum from the date of decree; sustains the defender's sixth plea in law and repels the pursuer's fourth plea in law;

Refuses the pursuer's third crave and the defender's third crave as not insisted in;

Orders the pursuer to pay to the defender of the sum of EIGHT THOUSAND POUNDS (£8000) STERLING as payment for the boiler and oil tank, with interest thereon at the rate of eight per cent (8%) per annum from the date of decree;

Periodical allowance

Grants the defender's fourth crave and grants decree against the pursuer for payment to the defender of a periodical allowance of ONE THOUSAND POUNDS (£1000.00) sterling per calendar month for a period of 18 months, from the date of decree of divorce, with interest thereon at the rate of Eight Per Cent (8%) per annum, on any such payment from the date same falls due until payment is made;

Refuses the defender's sixth crave as not insisted in and therefore sustains the pursuer's tenth and eleventh pleas in law as unnecessary and not insisted in and repels the defender's twelfth and thirteenth pleas in law;

Dismisses all other craves for either party and repels any further pleas in law insofar as not already dealt with;

Appoints the sheriff clerk at Airdrie to fix a hearing on expenses unless these are agreed and asks parties to liaise with the clerk; if a hearing is required parties should lodge written submissions of no longer than two pages; said hearing will be by webex;

NOTE**Procedure**

[1] This is an action for divorce with associated craves in relation to the matrimonial home and other financial matters.

[2] The case called before me for proof in Airdrie Sheriff Court on 21 November 2022 and evidence concluded on 14 February 2023, having been heard on separate dates. I called for written submissions and heard parties on these on 17 April and 15 May 2023 and thereafter made avizandum. I also fixed a hearing post-avizandum for reasons which I will explain.

Agreement

[3] Parties agreed significant facts in two joint minutes narrowing the scope of the issues in dispute. A note of disputed issues was provided to the court by each party.

[4] The pursuer's agent at the start of the proof sought amendment of the ground of divorce in crave one to that of two years non-cohabitation. This was not opposed and it was a matter of agreement that the parties separated on 28 February 2019. Decree of divorce will be granted on this basis.

[5] It was confirmed further that the defender no longer requires an order for an interdict and power of arrest (in terms of her crave 6) as there is currently a non-harassment order in place, granted at Glasgow Sheriff Court on 9 November 2022 for one year following the conviction of the pursuer for threatening or abusive behaviour towards the defender.

Preliminary matters

[6] There are three preliminary matters I require to address these having been raised by the pursuer.

Allegation of inappropriate discussion

[7] On 13 February 2023, during the Proof and whilst under oath, the defender, the defender's sister, their agent and his assistant went into a separate room and had a discussion. The pursuer, while unaware of the nature of the discussion, argued that the defender ought not to have been conversing with her witness whilst she was under oath - and certainly not with her legal representation present. It was submitted that independence and impartiality are requirements of admissibility and not merely a factor affecting the weight to be given to the evidence – *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59 at [51]. The pursuer argued that as a result, the defender's evidence (from 14 February onwards) should be either disregarded, or at the very least treated with caution, as it cannot be held to be independent of that of her sister and the advice of her agent.

[8] In *Williamson v HM Advocate*, 1979 J.C. 36 it was held that only in extreme circumstances would an approach made to a witness in a civil case, prior to or during his examination, be held to be so improper as to require the sheriff to hold that the witness's subsequent evidence was inadmissible. However, in the present case, and in circumstances where the defender, her agent(s) and her witness all entered into a discussion together, it was submitted that there was sufficient impropriety such that this should be treated extremely seriously.

[9] This point was taken the day after the occurrence. The defender's representative explained at the time and in submissions that: the purpose of the meeting had only been to

check court programming issues and there was no discussion of the evidence. The defender's solicitor referred to his significant experience and his affront that any suggestion was being made that he had acted inappropriately. He had explained the situation at the time and his colleague had confirmed the position also. He said he would confirm the position on oath if required and invited the pursuer's solicitor advocate to question her on the matter which she did. It was submitted that no caution required to be given to the defender's evidence based on this brief discussion. Prior to the meeting referred to the defender had already adopted her affidavit. It was suggested that her evidence was not and could not be tainted by what happened.

Decision

[10] It was unwise to meet behind closed doors during the defender's evidence not least due to the likely perception of potentially inappropriate discussions. However I do not find that there was impropriety here. I accept the explanation given by the defender's solicitor concerning the nature of the meeting and in particular that there was no discussion of evidence or any matter which might taint the evidence of the defender or another witness. There is therefore no need to treat any part of the defender's evidence with caution based on this incident.

Affidavits of JH or P and KH or H

[11] Further to the discussion referred to above neither of the defender's sisters were called as witnesses. The pursuer did not dispute the competence of lodging their affidavits (*Maciver v Mackenzie* 1942 jc 51) but submitted that no weight at all should be attached to them given that their evidence was not agreed and was untested relying on *Walker on*

Evidence (4th ed) Ch 20 paragraph 20.1.1 which states that secondary or substitutionary evidence is inadmissible when primary or original evidence is, or ought to be, available.

[12] The defender argued that the pursuer's submission should be repelled and that the court has no discretion to refuse to allow affidavit statements to be lodged in evidence per Macphail (15.43). Although the witnesses did not ultimately give evidence their affidavits should still be considered it being a matter for the court what weight ought to be given to them. It was submitted that there had been considerable other evidence from other sources and the affidavits merely provided additional support to the conclusions which can already be drawn.

Decision

[13] I prefer the defender's analysis. The affidavits are admissible and I will afford them appropriate weight.

Admissibility of text messages obtained by the defender

[14] During the course of the proof the defender's agent sought to lodge what purported to be a text message exchange from the pursuer's phone. The pursuer objected and argued that this evidence should be disregarded in its entirety as having been illegally or improperly obtained. Further the defender's representative indicated that he had held the production in question since the proof commenced but it was not produced until much later, and only during cross examination. There was accordingly insufficient notice and no opportunity for investigation. The inventory should not be admitted.

[15] *Duke of Argyll v Duchess of Argyll* 1963 SLT (Notes) 42 was relied upon. In this case the view was taken that the reasoning applied in criminal cases to the admission of evidence

obtained irregularly would form an appropriate basis for consideration of its admission in civil cases, namely that it would be relevant to have regard to the nature of the evidence, the purpose for which it was to be used in evidence, the manner in which it was obtained, fairness to the party from whom it had been illegally obtained, and fairness considered in light of the matters to be determined in the proceedings as a whole.

[16] The defender argued that there was a significant dispute on the facts on this issue. The message in question had pinged up on a family laptop to which all had access and she took a picture of it with her phone. She did not hack into the pursuer's device or steal information from him. The information is relevant and important to the issue of whether the pursuer had authorised bonus payments of £35,000 to his brother prior to separation (and to which the pursuer would then also have been entitled). The objection should be repelled.

[17] Parties agreed the issue was matter was for the court to decide applying its discretion as to whether it was fair to admit the inventory in question *Martin v McGuiness* 2003 SLT 1424.

Decision

[18] The inventory lodged is admissible. I accept the defender's evidence that the message was observed, "happened upon" on a family computer to which the pursuer's phone messages must have been linked. The expectation of privacy must therefore have been limited. Applying *Duchess of Argyll* and the principles drawn from the criminal case of *Lawrie v Muir* it is not unfair to admit the evidence.

[19] Although other inventories were lodged by the defender during the course of the proof at very little notice, no objection was taken to those by the pursuer and I have therefore admitted them having reserved my position on this issue during the proof.

The divorce

[20] Parties were agreed that the marriage had broken down irretrievably and that there was no prospect of reconciliation. Evidence of the breakdown was provided in the supporting affidavit of the pursuer's sister, JB. The pursuer seeks decree of divorce. The parties have one child under the age of sixteen, namely JB.

[21] The pursuer indicates in his affidavit (paragraph 4) that he has regular contact with JB, who lives with the defender. He is progressing well. He has a good group of friends and sees his family on both sides regularly. The arrangements for JB are satisfactory. Neither of the parties, indeed no witness raised any concern as to the effect on JB of decree of divorce being granted. I am therefore satisfied that the arrangements in respect of JB are satisfactory and that decree of divorce may be granted.

Financial issues: Identification of matrimonial property

[22] The court requires to identify the matrimonial property and decide on fair division of it, applying the principles of the Family Law (Scotland) Act 1985.

[23] Matrimonial property is defined in **section 10(4)** of the 1985 Act:

“Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act ‘the matrimonial property’ means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)-

- (a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date"

[24] The net value of matrimonial property is defined in **section 10 (2)** of the 1985 Act:

"Subject to subsection (3A) below the net value of the persons property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage

(a) before the marriage so far as they relate to the matrimonial property, and

(b) during the marriage, which are outstanding at that date."

[25] There is therefore an exclusion of assets acquired before the date of marriage (other than the family home, in certain circumstances).

[26] Matrimonial property is to be valued at the "relevant date" (usually the date of separation). The custom is of course to look at the "willing buyer/willing seller" in determining value.

[27] The parties in this case were married on 13 July 2002. The parties agreed on Record and in the Joint Minute of Admissions that the relevant date is 28 February 2019, which is when they separated.

[28] The first joint minute agreed the values to be attributed to most of the matrimonial assets and liabilities. Some remained in dispute.

Disputed issues

[29] Parties produced separate lists of the disputed issues which I have consolidated.

[30] I will take the disputed issues in turn to firstly identify the matrimonial including the contested issue of the business profits. After a determination of the extent and value of the matrimonial property I will set out my analysis of how that should be fairly divided including what should happen to the matrimonial home.

[31] First though a word on the credibility and reliability of witnesses and the pursuer and defender. I took the view that in the main the pursuer and defender were credible and reliable witnesses but this was a bitter divorce where each was trying to win and that came through in their evidence. There was little or no empathy and little or no capacity of either to step into the shoes of the other. This tainted each of their accounts on certain matters and I will allude to this as necessary. The evidence of other witnesses was in general credible and reliable.

[32] I have taken account of all of the evidence, submissions and the authorities submitted and highlighted in submissions.

Registration plates ...AGB and ... 7E

[33] The defender sold a Land Rover Discovery vehicle post separation. This was agreed to be matrimonial property. It included the registration plate ... AGB. The defender retained the sale proceeds. She said the pursuer had gifted her the plate for an anniversary and that she got £700 for it which she used to pay bills pending receipt of aliment (paragraph 71 ii of her affidavit). The pursuer stated he had seen no evidence of the sale price, but noted that the plate had a value of approximately £1,500 (paragraph 13 l of his affidavit). The defender accepted that she sold it but provided no evidence to vouch the sum she obtained of the sum she obtained for it.

[34] The defender argued that the pursuer's position concerning the purchase and ownership of the registration plates ... AGB and particularly ... 7E should not be believed either as the purchase of the latter was completely contradicted by the tenor of text messages between them about its' purchase.

[35] I preferred the pursuer's evidence on the issue of whether he had gifted the plate and am satisfied he had not done so. It would have been very odd to have gifted a plate with his own initials on it [... AGB]. In the absence of any vouching by the defender to prove the gift or the sale price she received I find that ... AGB plate was matrimonial property which she sold unilaterally. I accept the pursuer's estimate of its value at £1500 and it will be included in the matrimonial property.

[36] In relation to ... 7E I prefer the pursuer's submissions. The text messages relied upon by the defender (6/7/12 of process) are more consistent with the pursuer's position that he or the company bought the plate. Indeed he says, "*if you got the cash I have the reg....*" and although there appears to be further discussion about selling his registration plate to help fund the purchase of ... 7E this appears not to have happened and is consistent with his evidence that he did not receive the funds from her as he had asked and was necessary. His evidence is to be preferred on the matter.

[37] The plate ... 7E is therefore to be treated as a company and not a matrimonial asset.

Outstanding loan due to the pursuer's company in the sum of £4,525.03

[38] The pursuer's position is that the parties regularly took loans from the business. He spoke to taking a small loan and identified sums being recorded in a loan schedule which lodged at 5/1/7. The accountant was aware of the arrangement. His brother DB was also aware.

[39] The defender accepted that there was evidence that the loan existed. Her opposition to it appeared to be that she did not understand why it had been required, rather than that it did not exist. Mr M, Chartered Accountant for the defender, confirmed in examination that it would be quite normal for the directors of a business this size to take loans in this way.

[40] The defender argued that the pursuer's suggestion that he owed the company this loan should be approached with caution and argued that the debt had not been properly vouched.

[41] I am satisfied in the circumstances that the loan was taken and is in fact vouched in the loan schedule. The amount outstanding was very specific. There was no evidence of any reason to doubt that such a loan had been taken and it should be treated as a matrimonial debt.

Whether retained profits in the company form part of the net matrimonial property available for division

[42] The pursuer argued strongly that the retained profits of (in or around) £1,518,711 did not form part of the matrimonial property. This was accepted by the defender in submissions and her focus was that the retained profits were a special circumstance justifying unequal division and account ought to be taken of them in terms of section 9(1)(b) and an economic advantage argument.

[43] The company was a family company, originally set up by the pursuer's father in 1990. The pursuer and his brother DB became equal shareholders in the company when ownership was transferred to them by their father in 1998, four years prior to the pursuer's marriage to the defender (pursuer's affidavit paragraph 25).

[44] I am satisfied that the pursuer's shareholding in the company is accordingly not matrimonial (section 10(4)).

[45] The retained profits in the company are therefore not matrimonial. This was accepted by the defender in submissions and no further analysis of this issue is required.

[46] Parties provided submissions on the available section 9(1)(b) arguments in relation to a potential unequal division of the matrimonial property both generally and with arguments specifically relating to the retained profits and I will return to consider these shortly.

The extent of a loan outstanding to the pursuer's business which was loaned by the parties in 2012

[47] The pursuer stated that *both* parties (not simply the defender) made a loan of £70,000 to the company to assist with cash flow for the build for the matrimonial home. The funds came from the sale of their previous property. His position was that this money was repaid to the parties (or to HMRC to fulfil individual tax obligations) in full. As far as the company is concerned, the sums have been repaid.

[48] The defender contended that the company had paid back most of the loan but that £8500 was still due to both parties. Mr RM's report (6/7/2) confirmed that amount but he had not taken account of three payments made to HMRC on the pursuer's behalf to satisfy personal tax liabilities. Mr R's report (5/39) had taken account of these and found that the loan had therefore been repaid in full.

[49] I should say that I accepted the defender's account that she had been asked by the pursuer to transfer the £70,000 to the company in 2012 as there was a shortfall in funds and the company could not pay wages at that time; rather than the pursuer's account of it being used for building work for which there is no vouching. The defender's account is simply more likely to be true in my view given the company was in a relatively early, developmental stage. I also find that the £70,000 came from the proceeds of the sale of the parties' previous home. However I also accept the loan has been repaid and that there is no outstanding shortfall due to the parties. The pursuer's tax liabilities were repaid to that

value [£8400]. It is unfortunate that the defender was not consulted and was unaware of this but it is also highly likely in my view that she would have agreed to such a use of the funds at the time and would have accepted same as repayment.

[50] Further if a sum remained due to her it would of course constitute an additional asset of hers and in essence a debt owed here by the company. It would thereby reduce the level of any capital sum payment she would be entitled to receive. [I also note that I cannot order the company to make any payment to her.]

Whether additional sums of £40,000 (in respect of a bonus payment purportedly allocated to the defender prior to separation) and £35,000 ought to feature in the schedule of matrimonial property as being additional matrimonial assets belonging to the pursuer
£40,000 bonus payment

[51] Company records (6/2/4) disclose a bonus payment to the pursuer of £40,000, processed on 20 December 2018 prior to the date of separation.

[52] The pursuer said he had no recollection of what happened to this sum. Despite the defender having gone through a specification process, no additional sums were found.

[53] He did take a payment of £40,000 post separation which he used to purchase additional premium bonds so that sums would be available for the divorce, if required. The pursuer's solicitor advocate argued that there was no other explanation as to what happened to this sum and that the court ought not to make a finding as to the existence of any additional sums.

[54] The pursuer pointed out that, when cross examined and pointed to transactions in bank statements, the defender conceded that all of the sums received by the pursuer appeared to have moved between his own account and the joint account. Despite this as I

understand it the defender argues that this payment is unaccounted for, was matrimonial property and was dissipated by the pursuer.

[55] There are a number of possibilities. Either the payment was not made at all, it was made to an account we do not know about or in cash and used by the pursuer who conceded that the amount would have been matrimonial property “if it had not been spent” and that he “needed to live.” When asked if it had been paid to the joint account the pursuer said that he would need to check.

[56] I find from an assessment of the substance of his evidence and his demeanour that the pursuer has not been candid about this amount. He is an astute business man and on top of his finances and for him not to know chapter and verse on what happened to such a large bonus payment is simply not credible. I find on the balance of probabilities that that the pursuer received the bonus payment, which was matrimonial property and which was spent by him.

£35,000 bonus payment

[57] The pursuer was asked whether he had authorised bonus payments of £35,000 to his fellow director and brother DB on 28 February 2019 just prior to separation. It was suggested he had and that he would also have been entitled to such a payment which would then have been matrimonial property. The pursuer did not confirm this had happened but said his brother may have asked and that they both would have received the same. He said the company books and accounts would confirm.

[58] The pursuer was then shown copy emails from his brother making requests for £15,000 and £20,000 at that time. There was an objection to admissibility of these which I have now repelled as a preliminary issue in this judgment.

[59] However there is no evidence such amounts were ever paid to DB. There was no reference to the books or accounts to prove payment. In all the circumstances I cannot make a finding that bonus payments were agreed prior to the date of separation and paid thereafter and I exclude the purported payments of £35,000 from the matrimonial property in this case.

Whether the sum of £40,000 paid into the defender's account by her mother and still held in the defender's TSB savings account at the relevant date for distribution amongst grandchildren should be left out of account as not matrimonial property

[60] The defender's position is that the funds held in the said account are not matrimonial property, having come from inheritance from her parents. There was £40,066.74 in that account when the parties separated (per the agreement in the first joint minute). The pursuer argued that the defender had failed to discharge the onus on her to prove that these funds were ear-marked as inheritance from her parents.

[61] The pursuer said he was unaware of the funds. He was surprised her parents would have such sums available. He suspected that some of the funds utilised by the defender's parents to purchase their own home had come from the parties' joint bank account which was largely controlled by the defender.

[62] It is true that statements from the parties' joint account show regular transfers in and out at significant levels (5/19).

[63] However in my view the defender was telling the truth on this matter and I accepted her evidence. There was in addition a signed note from her mother at 1/32 which in my mind was an important piece of supporting evidence.

[64] I believed her account. It was vouched. The pursuer was overly cynical and wrong to question this. This sum should be left out of account. It is not matrimonial property.

Whether the pursuer's pension interests with Standard Life should be excluded from the net value of the matrimonial property

[65] The pursuer ultimately made an argument that these two pensions should be excluded from the value of the matrimonial property.

[66] The CETV of the pursuer's interest in these pension plans were £9,166.45 and £33,578.17 at the relevant date.

[67] However both pensions were agreed to be matrimonial property in the joint minute lodged before the proof commenced. The proof proceeded on that basis. These should not therefore be left out of account. *Douglas v Douglas 2019 FAM LR 12.*

A fair division of the matrimonial property

The law

[68] Section 8 of the Family Law (Scotland) Act 1985 sets out the orders that a party to a divorce action can crave. It is clarified within section (8)(2) that where an application for an order has been made:

"the court shall make such order, if any as is

- (a) justified by the principles set out in section 9 of this Act; and
- (b) reasonable having regard to the resources of the parties."

Section 9 deals with the principles to be applied.

[69] Section 9(1)(a) makes it clear that: "the net value of matrimonial property should be shared fairly between the parties to the marriage."

[70] Section 9(1(b) states that:

"fair account should be taken of any economic advantage derived by either person from contributions of the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family."

[71] Section 9(2) clarifies that economic disadvantage means disadvantage gained whether before or during the marriage and includes loss of capital, income and in earning capacity.

[72] The same section clarifies that contributions means contributions made whether before or during the marriage and includes indirect and non-financial contributions and, in particular, any such contributions made by looking after the family home or caring for the family. This section has been invoked by the defender only.

[73] Section 11(2) requires a balancing of economic advantage and disadvantage and consideration of whether any imbalance has been, or will be, corrected a sharing of the value of matrimonial property or otherwise ie section 9(1)(b) may be particularly relevant when such sharing would otherwise be limited.

[74] Section 11(3) indicates the factors which ought to be taken into account when considering the question of the economic burden of caring for a child under the age of 16 years.

[75] Section 9(1)(b) is in effect a threshold test which, if passed, allows the court to exercise a discretion about the award it makes. It enables fair compensation to be awarded, on a rough and ready valuation, in cases where otherwise none could be claimed. The point is to redress the gains and losses flowing from a relationship on a broad basis, bearing in mind that there are non-financial factors to weigh in deciding on what is fair. It is widely accepted that this ought to be looked at on a case by case basis.

[76] Special circumstances also fall to be considered. Fair sharing means equal sharing, unless some other division is justified by special circumstances. Section 10(6) lists five examples of "special circumstances" which may justify a departure from equal sharing, as follows, though the list is not exhaustive:

1. The terms of any agreement between the parties;
2. Source of funds used to acquire any asset;
3. Destruction of property;
4. Nature and use of matrimonial property;
5. Expenses of valuation or transfer.

[77] Both parties advance arguments in this case to find special circumstances and the defender argues that such special circumstances justify a departure from an equal sharing of the matrimonial property. I will take the issues advanced in turn in the order helpfully set out in the pursuer's written submissions.

Whether the defender used the proceeds from the post separation sale of her Land Rover to meet financial obligations for the family.

[78] Parties agreed that the defender sold a Land Rover Discovery motor vehicle post separation. This was matrimonial property and was sold without discussion with the pursuer. She used £6,500 as a deposit on a brand new Range Rover. She retained the balance of £17,500. She did not use the balance to clear the corresponding Lloyds TSB bank loan which is agreed to be a liability at the relevant date.

[79] She said she used the balance to fund the family for 8 months. She further explained that she had repaid two credit card debts (the pursuer pointed out that one of which was

run up since separation, and argued this represented a continued pattern of overspending, and the other of which was a matrimonial debt). She put £10,000 into savings.

[80] The pursuer stated in his affidavit that "if she had paid the [associated] loan off at that point she would have had a surplus of more than £4,000" (paragraph 13 t).

[81] The pursuer drew attention to the fact that in cross-examination, when asked whether she had actually needed to sell it when she had, the defender was unable to say whether her financial arrangements had altered at the point of sale. Despite being directed to evidence demonstrating that the financial arrangements did not change until October 2019 (some 3 months after the sale of the Land Rover), she was unwilling to make that concession. However, at a later point in her evidence she conceded that she had sold the Land Rover as a pre-emptive measure in case of financial difficulty down the line.

[82] The pursuer submitted that the defender had also signed a hire purchase agreement for a brand new Land Rover worth £52,000 (her 1st op p 25) with monthly payments of £525. This was said to be an unnecessary purchase, although the defender's position was that she "didn't have a choice". The pursuer argued that there had no willingness by the defender to "cut her cloth" since separation. Her spending has been excessive. In particular, she received £7,000 by way of an insurance payment after a Dyson marked her flooring. She explained in her productions that she spent this on Christmas, but contradicted that in her oral evidence.

Decision

[83] The defender seeks to have the funds from the sale of the vehicle excluded from the matrimonial property. I am not prepared to make such an order. I did not find her evidence on the point clear or convincing and I also find favour in the pursuer's submission that,

along with other examples, the purchase of a luxury, high end new Land Rover was unnecessary and indicative of a refusal to economise and “cut her cloth.” As the pursuer also argued there was no paper trail or vouching to show funds from the sale being used for family expenditure.

[84] This would have been relatively easy to obtain in my view and I draw an inference from the absence of such vouching. What it comes down to then is that the pursuer sold a matrimonial asset, did not pay off the associated liability, used the funds and did not satisfy me that the funds were used to fund family expenses. She also took on a significant debt on a new vehicle. The vehicle was matrimonial property and the £24,000 proceeds of sale will therefore not be excluded.

Whether the pursuer has dissipated matrimonial funds

[85] The defender argued that the pursuer had dissipated matrimonial funds. Other than the use of sex workers, which he did not shy from admitting and explained with reference to a long term lack of intimacy within the marriage, the pursuer rejected this contention. Any such amounts were in the region of a few hundred pounds.

[86] Despite exhaustive examination of accounts and transactions there was no evidence of long term or persistent dissipation by the pursuer beyond that of the £40,000 bonus from 2018 which was not explained and which I will add to the matrimonial property for the reasons I have already set out.

In the event that the pursuer's share of the retained profits in his company are not treated as forming part of the matrimonial property for division, whether any account ought to be taken of the retained profits in the company in determining a fair division.

[87] The retained profits are not matrimonial property (supra).

[88] The expert witnesses were in broad agreement. There was no meaningful dispute as to the extent of the profits: £24,041 at the date of marriage and £1,518,711 or thereby at the date of separation (an increase of £1,494,670 between date of marriage and date of separation).

The defender's arguments

[89] While accepting that the profits were not matrimonial property the defender sought to invoke section 9(1)(b) in three ways:

[90] Firstly, that the pursuer could have withdrawn further profits and utilised those to decrease the parties' indebtedness.

[91] Secondly, that the defender assisted the pursuer financially to help support his business (with particular reference to a purported loan by the defender to the company in 2012) and that he received an economic advantage in being able to devote his whole time and attention to building up his assets in his business due to her substantial financial and non-financial contributions; which were not balanced out in terms of advantages she received.

[92] It was submitted that the defender had looked after the children almost singlehandedly, as well as managing the household and finances allowing the pursuer to devote his attention to his business. Her regular wages had assisted in supporting the pursuer when his business was in its infancy; her salary contributions assisted in the

parties' securing mortgages and paying the bills; she helped in loaning the business £70,000 when the parties did so jointly (as I refer to above).

[93] The pursuer also used the defender's tax and employment status to pay himself wages presumably to save tax.

[94] He benefitted in being able to retain his profits in his business and keep that income from becoming part of the matrimonial with the defender using all of her income to keep the bills paid. The defender suffered disadvantage by incurring loans and debt when the pursuer could have taken dividends and improved the parties' financial situation.

[95] In all the circumstances there were said to be strong arguments in terms of section 9(1)(b) of the 1985 Act in favour of an unequal share of the matrimonial property in the defender's favour.

The pursuer's arguments

[96] The pursuer argued that an unequal division of matrimonial property in the present case was not merited.

[97] It was submitted that while there is authority that the court can make further provision for a party under section 9(1)(b) where profit has been retained in a non-matrimonial business, this was limited to specific circumstances. Referencing *Wilson (Hazel) v Wilson (Stewart James)* 1999, SLT 249 and *Hodge v Hodge* 2008 Fam LR 51 it was submitted that any economic advantage derived by the pursuer had been balanced. The parties had both lived an affluent lifestyle due to the pursuer's interest in the company. Any disadvantage to the defender (or advantage to the pursuer) has accordingly been balanced. The defender had maintained her employment. She had had the benefit of employing tutors, employing cleaners, going on luxury holidays arranged and chosen by her, acquiring

expensive jewellery and hosting lavish Christmas celebrations. The children had two bedrooms each in the family home. The parties' lifestyle improved as the business grew and became more profitable.

[98] The parties each had different roles in the household, as with any marriage - that in itself does not justify an unequal sharing of matrimonial property. The defender accepted that the pursuer worked longer hours than her but would bath the children when they were younger, play with them, do some cooking, take them swimming, gave them the opportunity to be involved in the family business and so on. She accepted that he had a good relationship with the children and was a "family man".

[99] It was submitted that decisions to retain the profits in the business were not unreasonable. If the court were minded to award an unequal share in favour of the defender it should take a similar approach to Lord Marnoch in *Wilson* (where a 62% share in favour the defender was awarded) restricted here to a 52% share given that, distinguishing *Wilson*, where the pursuer had not benefited from an uplift in lifestyle by virtue of her husband's business, the defender had very much enjoyed a luxurious lifestyle.

Decision

[100] Firstly I should address the question as to whether the pursuer was behaving unreasonably or to the detriment of the defender or the family by retaining what became substantial profits in the business and not taking higher or more regular dividends.

[101] I preferred the pursuer's evidence and submissions on this issue. I accepted his evidence that profits were not retained in the business artificially and that he did not retain profits in the business deliberately so that the defender would not share in them. He stated that he and his brother, as fellow directors, could not take all of the money out of the

company in dividends as such a course of action would leave the company in a very risky operating position - (affidavit, paragraph 32).

[102] In addition none of the expert accountants who gave evidence criticised the strategic approach taken to retention of profits by the business which, as a demolition company, requires to invest heavily in plant and machinery. The pursuer stated that profits were drawn down or retained in the company based upon business decisions made by the pursuer in conjunction with his brother and their accountant, DP.

[103] Mr P had been the family accountant for 26 years. He confirms that there was an annual review to discuss the business accounts. He stated (paragraph 2) that the pursuer and his brother prioritised expansion of the business, whilst reducing risk. He described them as always having been cautious and I did not take this as a criticism. They were described as having had a "consistent approach". When profits were higher (2017 and 2018) reserves were retained in the business. This was partly for tax reasons as well as to allow for reinvestment. They had habitually chosen to reinvest for the good of the business and buy plant and machinery.

[104] Mr P stated that both brothers had always taken equivalent dividends. He was also very clear (paragraph 7) that "profit does not equal cash". He said it was a flawed approach to look at the business and come to that conclusion. He explained in evidence that it would be "impossible" to do a business plan for this particular business. He also said that cash can fluctuate hugely throughout the course of a year.

[105] The pursuer's brother noted (paragraph 10) that taking more money out of the business for each brother to pay off their respective mortgages was "not something we thought was in the best interest of the business to do...That was a joint decision."

[106] The defender relied on a report prepared by RM (5/38) who also noted a well-established policy of retaining profit in the business and did not criticise it. He agreed that shareholders are not obliged to distribute profit and that it is not unusual for owners of a private company in Scotland to retain profit. Further the pursuer would be entitled to 50% but could not distribute profits without the agreement of his brother.

[107] Further (at paragraph 6): "it does not necessarily follow" that [just because there was retained profit] the company was in a position to pay that level of dividends to shareholders". It would require sufficient cash at bank. Demolition companies require significant investment in fixed assets. The cash at bank in 2019 was £220,295.

[108] It was accepted by RM in examination in chief that he would expect a business such as this to retain profit at a "reasonably high" level. This view was shared by Mr R, who stated that although in some businesses directors appeared unaware of their statutory duties, he did not have the impression that this was the case for this particular business.

[109] It can be seen from 2.4 of RM's report that the level of retained profit increased in each year of the marriage, other than a dip between 2010 and 2014. This is consistent with the pursuer's position that he and his brother reinvested in the company each year.

[110] I do not find that the decision to retain profits was itself unreasonable nor that it was to prevent the defender benefiting from them. Cogent, understandable reasons were provide for the approach taken. It was a reasonable strategic approach by the directors given the size of the company and he nature of its work. However, with perfect hindsight there was scope for utilising a proportion of the retained profits to deal with some of the matrimonial debt and a proportion, though by no means all of the mortgage.

[111] I also accept the pursuer's submission that the defender benefited from a high standard of living due to the company and the salary he took on a monthly basis and

through very high dividends at times. It is said that she has suffered disadvantage by the pursuer not taking further dividends to pay down matrimonial debt. However, other than the £40,000 bonus payment in 2018, all of the pursuer's salary and dividends have been paid into accounts for the family and which the defender managed. They lived in a large, expensive home where the children had two rooms each, enjoyed luxury holidays, expensive cars, tutors, gardeners and cleaners. She benefited greatly from the company and his developing of his business.

[112] I understand that my role is to determine a fair division of the property between the parties taking account of all the facts before me. Based on *Hodge* (supra) I believe I can take a broad approach and see matters "in the round."

[113] *Wilson* (supra) is clearly the case which is most in point though reliance has been placed on *Coyle v Coyle* 2004 Family LR 2 and *Cuniff v Cuniff* 1999 SC 537 by the defender - and I have had had careful regard to those cases and the others before me.

[114] In *Wilson* the pursuer sought to invoke the principle of 9 (1) (b) to take account of the defender's share of profits in the farming business which he had chosen to retain in the business during the course of the parties' marriage. The total retained profit was £480K. The pursuer contended that she had served as housekeeper and nanny during the marriage. The parties did not lead an affluent lifestyle. Lord Marnoch described that the pursuer had been "denied... any share of the profits in question." He found that the economic advantage derived by the defender in that case through retaining or ploughing back profits in his non matrimonial company throughout the marriage had not been balanced by an economic advantage to the pursuer such as a better lifestyle, and it was proper to award the pursuer in that case a sum over and above that derived from an equal sharing of the parties' matrimonial property to redress the imbalance.

[115] The court was accordingly persuaded to grant an additional sum to the pursuer under 9(1)(b), in the sum of £100,000. The total sum payable to the pursuer was accordingly £408,609. This, in addition to the £93,452 already held by her, gave her a total of around 62% of the net matrimonial property. It was also noted by Lord Marnoch that the payment could be made by the company without too much difficulty.

[116] Both parties sought to distinguish *Wilson* to some extent from the facts before me. The pursuer stressing inter alia the affluent lifestyle already enjoyed by the defender and the defender focusing on her contributions which allowed the business to flourish and the sheer amount of the profits accrued. In *Wilson* Lord Marnoch specifically stated (p.254 E-H):

“Although the pursuer made no complaint anent the adequacy of the financial support which she received..... during the 17 years of the marriage, **there is no evidence to suggest the parties lifestyle was in any way affluent** [my emphasis]. Therefore for the defender’s decision to retain or plough back in the company the profits in question I do not do not doubt that that lifestyle could have been substantially improved. In any event, and for whatever reason, the pursuer has been denied, up to now, any share in the profits in question...”

[117] I preferred the pursuer’s analysis of *Wilson* as set out above. The pursuer in that case obtained what was in effect a 62% share against a background in which she had not substantially benefited from the business and had not enjoyed an affluent lifestyle. In this case the defender has enjoyed an affluent lifestyle as I have described. She benefited from the company.

[118] I find that to a large extent the economic advantage to the pursuer in being able to concentrate on and grow the business due to the defender’s contribution has been balanced. But not entirely.

[119] The defender has clearly taken the lead in looking after the family home, the children and all aspects of the family’s life together. It is agreed she will continue to be the lead carer for the child who is currently under 16 and the two older children will reside with her while

in further education. She made significant contributions at an early stage in the marriage including providing the joint loan to the company at a difficult time. This allowed the pursuer time and space to grow a very successful company which seems likely to continue to succeed on the evidence before me. This was an economic advantage derived by him. She has lesser earning potential and will be the point person for the children going forward. He has greater earning potential and the dividends taken in recent times make this clear. It is also clear that the £1.5 million in retained profits available in the pursuer's business (even accounting for the fact they are shared with his brother) are much more extensive than those available in *Wilson*.

[120] As to special circumstances in general parties did not disagree that while the provisions of section 10(6) give guidance they are not an exhaustive list and "should not fetter the court's discretion in applying the principle of fairness" set out in s. 9(1) a. (*supra*) where Lord McCluskey reiterated the comments of Lord Jauncey of Tullichettle in *Jacques v Jacques*, 1997 SC(HL) 20, page 22.

[121] It is also worth setting out Lord McCluskey's comments:

"It is important to note that, although 'special circumstances' may include the examples specified as (a) to (e), that provision as to inclusion is 'without prejudice to the generality of the words'. It is clear that the court of first instance is not obliged to ignore relevant and material circumstances just because they are not specified in the five particular paragraphs, but must take account of any material circumstances special to the case. In *Jacques v Jacques* at p 22, Lord Jauncey of Tullichettle *Cunniff v Cunniff*, 1999 S.C. 537 (1999) © 2022 Thomson Reuters. 4 said: 'The provisions of subsec (6) give guidance to the court of first instance but they do not fetter its discretion in applying the principle set out in sec 9(1)(a). This is the approach which one would expect Parliament to have adopted in a field where individual cases vary so greatly, where legislation cannot reasonably provide for so many different eventualities and where the court which has heard the evidence is best equipped to deal with each situation as it arises."

[122] I consider that there are a number of special circumstances arising. The defender's contributions to the business and the home as outlined above allowing the pursuer to grow

the business is one. The retained profits and the pursuer's greater earning potential represents a related but separate special circumstance.

[123] It seems to me that these circumstances require to be taken into consideration in terms of section 9(1)(b). I accept the defender's contention that the retained profits by the pursuer is a special circumstance in terms of section 10(6) of the Act given that he was in a position to grow the business and retain profits for further growth into the future due to the efforts and contributions of the defender during the marriage. His significantly greater earnings during the marriage and future earning potential is also relevant and a special circumstance. He has obtained an economic advantage which is not entirely balanced by the advantages received by the defender during the marriage.

[124] Given this and balancing it with the whole circumstances of the case I am satisfied that this ought to be reflected both in an unequal sharing of the matrimonial property in the defender's favour with her receiving 57% of the net property overall to reflect the profits within the business and her contribution in the home which assisted the pursuer and his business and his much greater earning potential.

[125] I have taken into account the business financials and I am satisfied that the business will remain in a robust position post decree. Of course the detail of how to achieve the fair sharing required depends greatly on what is to happen to the matrimonial home and I now turn to that issue.

The matrimonial home

[126] The issue of the matrimonial home was vexed prior to a change in position by the defender on 30 August 2023.

[127] There are three issues for decision in relation to the matrimonial home. It seems convenient to take them in the following order:

1. The issue of whether special circumstances exist in relation to the reduction of the purchase price of the matrimonial home
2. The issue of transfer
3. Mortgage payments made by the defender following separation

Whether special circumstances exist in relation to the reduction of the purchase price of the matrimonial home

The pursuer's argument

[128] The matrimonial home was owned by his grandparents. The purchase price of the land on which the matrimonial home was built was reduced by the sum of £45,000 to reflect the inheritance from the pursuer's grandmother. The parties therefore paid £180,000 for the land, rather than £225,000 (which in itself was £25,000 below valuation). Evidence of this is found in the letter from the conveyancing solicitors at 5/1/12 which was referred to by the pursuer in oral evidence.

[129] The parties did not pay the £180,000 immediately, but did so once they were in a position to obtain mortgage borrowing. The pursuer argued this was a clear special circumstance which the court should take into account and would justify the unequal division of the net value of the matrimonial property in the pursuer's favour. This is particularly the case where the defender herself has inherited from her late parents, which inheritance will not be shared with the pursuer.

[130] It was submitted that it would be reasonable that the £45,000 benefit, and inflationary increase in value, associated with the pursuer's inheritance, be taken into account in this case.

The defender's argument

[131] The defender argued that the £45,000 discount should be ignored (and should not be discounted from the matrimonial property) as that would afford the pursuer an additional benefit which would be unfair.

[132] The defender was not a party to any discussions about the discount. The parties purchased the property jointly for £180,000 in a derelict state. If there was a discount, it is unclear whether this was a family discount, a trust provision or an inheritance. The onus was on the pursuer to establish the matter as a special circumstance that merited him being reimbursed somehow. This was particularly so as the pursuer chose to jointly purchase the property with the defender therefore agreeing to her sharing in the entire value of the property.

[133] It was submitted that often parties purchasing a joint family home together do not expect it to be unravelled later because of differing contributions.

[134] Even if the court considered there to be a special circumstance, it has a discretion whether to take it into account in the overall circumstances of the case.

Decision

[135] I preferred the pursuer's submission to the extent that I find a special circumstance in relation to the source of funds. I accepted his evidence – supported by the solicitor's letter at 5/1/12 that following the death of his grandparents that he and his wife would buy the house

undervalue as a result of a family agreement. He said the house was put in trust for his father when his grandmother passed away. His father was dividing what he had received as inheritance with the pursuer and siblings. It was agreed between the pursuer and his siblings that the pursuer would buy the house from his father and there was a reduction in price to reflect inheritance. There was no reason to doubt this account, namely that the funds represented inheritance.

[136] However he himself benefited from the funds being used to buy the house which was jointly owned and will continue to do so given the decision I outline below in relation to the house itself. Overall I think it is inappropriate and unfair to unravel these funds as part of the divorce settlement. They were used for the benefit of the family housing and the family benefited as was intended.

[137] While I agree with the pursuer that the facts represent a special circumstance in terms of section 10(6)(b) in terms of the source of funds – given the overall scheme of division and the need to do justice between the parties I have decided to leave this sum out of account.

The issue of transfer

[138] At proof both parties argued that the other's share in the property should be transferred to them. Neither wished the house to be sold or even to try to sell it. The estate agent had indicated that because of its proximity to the demolition yard it could take a long time to sell and may in fact not sell at all. Parties agreed a current value of £625,000. The mortgage outstanding is £215,137.00. Each party's share of the home, net of mortgage, is therefore £204,931.50.

[139] It is a 6/7 bedroom detached home. Both parties, if it were sold, could easily find more than acceptable alternative properties either in the area or elsewhere in Lanarkshire or the central belt.

The defender's change of position

[140] However, the defender's position changed during the avizandum period and she advised the court on 30 August 2023 that she no longer wished to remain in the matrimonial home. She advised that she had taken advice from agencies and had taken this decision due to the pursuer's behaviour towards her and her family and her feeling that it would not be safe for her to continue living in the same vicinity as his workplace and parents' home. She feared that she would continue to be stalked, harassed and intimidated by the pursuer particularly if the court transferred the property to her. I should say that the pursuer denied the allegations made and indeed added counter allegations of his own.

[141] She asked that the property either be sold or transferred to the pursuer with a sufficient capital sum being ordered to be paid to her to allow her to buy another property. When pressed her solicitor did not specify which was her principal and which her secondary positions and the issue was left in the court's hands to achieve a faire outcome.

Decision

[142] This was originally the hardest decision in the case and the most marginal prior to the defender's change of position. I would much have preferred to simply make an order for sale and appropriate division thereafter but the need for finality and a clean break has greater weight against the background of the expert evidence that the house will take time to sell and may not sell at all.

[143] I should say that the defender's change in stance was communicated to me at a post avizandum hearing I had convened due to concerns I had about the defender's ability to afford to take on the house on her own in light of that fact that she would require to make a significant capital balancing payment to the pursuer. Both parties had provided me with submissions to demonstrate affordability and the availability of mortgage offers and the like. I had reached a tentative conclusion that the house should be transferred to the defender, principally because of her role as main carer for the children and their stability, subject to assurances about affordability. All that has changed and further analysis is unnecessary now given her change in position.

[144] Given the significant chance that the house will not sell at its potential value, may take a long time to sell or may not sell at all, I have decided that the defender's share in the property be transferred to the pursuer. This will allow a clean break and the capital sum which will require to be paid to her will allow her, with or without a small mortgage to top it up, to buy a new property and live mortgage free.

Whether the defender was largely responsible for maintaining the parties' mortgage following separation, and what impact, if any, this ought to have on division.

[145] I preferred the pursuer's submissions on this issue.

[146] The defender had sole occupation of the property following separation (at her insistence), utilising both parties' share of the property. The pursuer continued to make all of his regular payments into the parties' joint account. It was only when his payment reduced by £150 per month (which he required to do in order to make a small contribution to his parents' household) that an action for aliment (and interim aliment) was raised by the defender. These facts are not in any serious dispute.

[147] I note the terms of *Fox v Fox* [2019] SC STI 3, a case in which a wife paid mortgage payments on a jointly owned property after separation. The court held that any disadvantage to her in doing so was balanced by the husband's disadvantage in having to accommodate himself elsewhere. The pursuer required at a fairly early stage to pay rent to his parents and then privately. There is no need to look more finely at this issue. Both parties will benefit from the orders made and there should be no double counting.

Periodical allowance

The defender's argument

[148] The defender craves an award of periodical allowance at the rate of £4,000/month for a period of 3 years, or until the parties' youngest child is 18.

[149] Section 9(1)(d) provides that:

"a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce".

[150] The defender argued that she had been financially dependent on the pursuer and required time to adjust to the lack of support. She required financial support to ensure that the children are accommodated and well supported. Given the substantial disparity between their incomes and expenditures, an award of periodical allowance should be made.

[151] While the defender had had the benefit of interim aliment from the pursuer since end of October 2020 prior to that she had to support herself and the family from limited income and required to utilise her savings, take out a loan, and borrow from relatives to support herself.

[152] It was clear from the schedule of income and outgoings lodged in the aliment action and this divorce action that the defender was in need of support.

The pursuer's argument

[153] The pursuer argued that no award of periodical allowance should be made as the defender ought to be reasonably able to adjust. The test for periodical allowance is very different to that for interim aliment and the defender has already had support for over 3 years in which to adjust to being without the pursuer's support.

[154] The pursuer argued that the defender would require to make cutbacks. She had now applied for child maintenance and an assessment at £1,200/month had been made (for JB and LB). This was however based (in the pursuer's estimation) on the inflated dividend income being drawn by the pursuer from the business and I was left with the impression that the figure would be disputed by him and may be adjusted down. She also receives Child Benefit of around £200/month.

[155] It was submitted that she ought to be able to maintain herself and the children at a good level using child maintenance, Child Benefit and her full time salary.

Decision

[156] I note from the section that the claimant must have been dependent to a *substantial degree*.

[157] The court is directed to have regard to five factors:

- (1) the age, health and earning capacity of the claimant;
- (2) the duration and extent of the dependence prior to divorce;
- (3) any intention to undertake a course of education or training;

- (4) the needs and resources of the parties; and
- (5) all the other circumstances of the case.

[158] In this case the defender will continue in her teaching career after the divorce. The defender pled no intention to undergo further training. She is a fully trained, full time teacher.

Needs and resources

[159] The pursuer had argued that (para 40) the current award of interim aliment (£3,000/month) is putting him in financial difficulty. He takes a salary of £1,400/month from the business - his salary is disclosed in his P60 at 5/28 (£18,934.76 at April 2022). He takes the rest in dividends.

[160] The pursuer's evidence was that it is "not the norm" for the parties to take dividends at the level at which they were drawn in 2019. I accepted this evidence given the pattern ascertainable from the accounts.

[161] The defender refers (paragraph 33) to the business accounts and the pursuer's share in £235,500 of dividends taken in the last year. However, the pursuer's share of these is 50%.

[162] After paying tax, most of his share of this was used to pay for the defender's interim aliment. He has required to take dividends at that level to meet that cost, but it is not a sustainable position. Again I accepted this evidence and the pursuer's argument on the point.

[163] By way of comparison, in 2019, the pursuer's total income was £86,643 before tax (5/29). In 2020 it was £114,041 (5/30).

[164] The defender had stated that the outgoings for the family home exceeded £8,000/month during the marriage (paragraph 29 of her affidavit). However, she conceded

in cross examination that she could have managed on the sum of £5,200 per month. This evidenced a degree of inconsistency.

[165] I accepted the pursuer's submission that the defender's affidavit suggests that she wishes to be divorced with no impact on her lifestyle or finances

[166] Having considered the matter I am satisfied that the defender's stated costs are excessive. She will require to make adjustments to make ends meet.

[167] Child trust funds could be paused or cut. Those children who attend university can access student funding and loans if necessary as most students do. Food and clothing costs can be reduced as can those for the cleaner and gardener. I am also satisfied as I have said that she should not have bought the new Land Rover post separation. This was a chance to economise which was missed. The payments are high and perhaps the vehicle could be sold or refinanced to bring the payments down to a more manageable level.

[168] She will receive a substantial capital sum. She will have her teacher's salary, child benefit and child maintenance payments.

[169] My attention was drawn to the case of *In McConnell v McConnell* 1997 Fam LR 108 in which the duration of an award of periodical allowance was revised from three years to six months of support on the basis that Mrs McConnell had sufficient capital from which she could readjust.

[170] In *MacKenzie v MacKenzie* 1991 SCLR 252 the pursuer had income of slightly under £6,000 per annum, despite this small sum from which to feed and clothe herself and her child the court awarded periodical allowance at the rate of £300 per month.

[171] The defender in this case is not wholly dependent on her husband like the wife was in *MacKenzie*, and she will need to adjust both her lifestyle and expectations moving forward.

[172] The defender has had the benefit of a generous lifestyle due to her marriage to the pursuer but has continued to work throughout the marriage. She has been dependent on the pursuer and I am satisfied that this was to a substantial degree; I am also satisfied that with some further support that she will be able to adjust within a further short period. She was dependent on him for an affluent lifestyle but she is in a happy position where even after divorce she can have a good one.

[173] Overall however I am satisfied that the defender requires some further time to adjust to a reduced level of income and support and the pursuer has far greater resources available to him both now and going forward. I am satisfied that periodical allowance ought to be paid by the pursuer to the defender but not at the level craved which is unreasonable and unsustainable. I am satisfied that periodical allowance of £1000 per month should be paid to her by the pursuer for a period of 18 months from the date of decree of divorce.

Conduct

[174] The defender invited me to take account of the pursuer's conduct in terms of section 11(7) of the Act; as I understood it this was on the basis that it would be "manifestly inequitable" to leave the conduct out of account in determining not just the issue of periodical allowance but the division of matrimonial property.

[175] It was argued that the pursued had behaved badly by:

- retaining profits;
- not properly disclosing his assets and income;
- not financially supporting the defender post separation until interim aliment was awarded;
- not helping look after the children;

- cutting off the oil supply to the house;

[176] It is said that all of this adversely affected the financial resources of the defender and that she required to use savings and borrowings from relatives to make it through to the point when interim aliment was awarded.

[177] I am not satisfied that there is a significant argument to be made in terms of section 11(7). I have already set out my conclusion that it was not unreasonable for the pursuer to retain profits in the way he and his brother did. I have made a ruling about the 2018 £40,000 bonus and this will be included in the matrimonial property but other than this I am not prepared to conclude that the pursuer deliberately concealed assets. The original omission of the two Standard Life pensions were explained and I accept that he passed the relevant information to his solicitors when he had it and that it was then disclosed; and I have included them in my determination of the matrimonial property. I do not accept the argument that he did not look after the children or provide for the defender till interim aliment was awarded. Indeed it was only when he slightly cut back the money he had been making available to her that she claimed for aliment.

[178] In relation to the issue of the oil supply however I believe the pursuer clearly should not have cut off the supply or at least should have given more notice of his intention. This was a bitter split as I have said and this action was vindictive *prima facie*. He should pay for the cost of the new boiler and the oil tank particularly as he will now benefit from them given the decision I have made concerning the family home. The defender said this cost her around £8000 and I will order that he pay that amount to her. This is all the more appropriate given that the pursuer is getting the house.

[179] Beyond this I am not prepared to make anything of the conduct argument and will not adjust my conclusions any further for or against either party in terms of section 11(7).

Decisions/orders

[180] The pursuer will retain the matrimonial home for the reasons discussed above. The defender should transfer her share in the matrimonial home to him.

[181] The net matrimonial property is £817,394.26.

[182] I have attached my working in the schedule attached in Annex 1.

[183] From the disputed issues the matrimonial property includes the following assets: the two Standard Life Pensions, the 2018 bonus of £40,000, and £1500 reflecting the sale value of the plate 007 AGB.

[184] It includes the loan of £4,525.93 as a matrimonial debt.

[185] It excludes the disputed bonus or potential bonus of £35,000, the plate BEA 7E, the retained profits, the £8500 allegedly still remaining of the £70,000 loan to the company and the £40,000 transferred to the defender by her mother to distribute to the children.

[186] I am leaving out of account the payments made by the defender to the mortgage post-separation.

[187] I have left out of account the £45,000 inheritance/discount with reference to the purchase of the family home.

[188] I have found special circumstances, set out above, justifying a 57/43 percentage split of the net property in favour of the defender.

[189] Taking into account the transfer of the home to the pursuer and viewing the mortgage as his debt only, the defender's share of 57% of the net matrimonial property would amount to £465,914.67. Taking her current assets and liabilities together the defender already has £142,684.91 including her pension and sums in bank accounts less her liabilities, her loan and her credit card debt.

[190] She is therefore entitled to a capital payment of £323,229.76. Added to this will be the £8000 to be paid to her for the oil tank and boiler at the house.

[191] A periodical allowance of £1000 per month will also be paid by the pursuer to the defender for a period of 18 months from the date of decree.

Conclusion

[192] I will put the case out for a hearing on expenses unless these are agreed and ask for short written submissions (no more than two pages) in advance.

Postscript

[1] I asked for further submissions post-avizandum to clarify whether the defender could afford a mortgage on the matrimonial home were it to be transferred to her in circumstances where she would require to make a significant balancing payment to the pursuer; as that was where my consideration of the evidence and a fair division was leading me at that time. There had been a clear change in the mortgage market and with interest rates since the proof began.

[2] The pursuer objected to this based on *Rankin v Jack* 2010 CSIH 48 and I should briefly address this for completeness.

[3] I heard from parties under reservation of competency and relevancy. In the course of a short initial hearing the defender submitted that she had a mortgage offer in principle and that she was considering using some of her inheritance from her parents to pay down the mortgage to make it affordable for her. The defender also referred to *Murley v Murley* 1995 SCLR 1138 and the possibility of the defender granting a standard security in favour of the pursuer post any transfer of his title and share to her. This was a new argument but one I felt had to be explored given the marginal nature of the decision regarding the home. The pursuer clearly required to have time to consider and respond so I fixed a further short hearing for the purpose of clarifying affordability with regards to the defender's position and to allow parties to address me further on the standard security option and whether it might be viable in this case.

[4] It was at this hearing on 30 August that the defender intimated her change of position which made the purpose of the additional submissions somewhat academic.

[5] However I should record that the further submissions were necessary. Having heard them under reservation initially I had decided to repel the objection and that I was right to

hear from parties further. Both had an opportunity to address me on the issues which had arisen during my consideration of the case while at avizandum and *Rankin* (supra) was in my mind distinguishable as in that case evidence was heard on a matter in which issues of credibility and reliability arose. This was rather more straightforward and binary: was a mortgage affordable and thereafter short legal submissions arising from *Murley* (supra).

[6] While I do not routinely invite further submissions post-avizandum it is not an unusual practice amongst sheriffs and it is occasionally helpful to do so albeit with a careful eye on the issues of finality of proceedings and fairness to parties. While the defender had indicated in her evidence that it would be a stretch to afford the house without an additional capital sum being paid to her by the pursuer, evidence had been led but not in detail about inheritance money available to her; and as I say mortgage rates had changed since the proof commenced. It was appropriate to obtain clarification on these important issues to avoid an injustice.

Appendix 1

Asset	Pursuer	Defender
Heritable		
Matrimonial home	£625,000.00	
Bank accounts		
TSB joint account		£1,030.96
RBS Savings Account	£7,778.79	
RBS Select Account	£8,111.10	
TSB easy saver		£3,000.00
Cars		
personalised plate ... AGB		£1,500.00
Land Rover Discovery		£24,000.00
Pensions		
B & CE		£805.67
B&CE	£766.54	
B&CE	£1,854.49	
B&CE	£1,729.72	
SSAS	£165,487.00	
SPPA pension		£132,721.63
Standard life pensions x2	£42,744.64	
Investments		
Premium Bonds	£100.00	
Abrdn plc shares	£799.00	
bonus	£40,000.00	
Liabilities		
TSB loan re Land Rover		-£19,883.91
John Lewis Credit Card		-£489.44
Company loan	-£4,525.03	
Mortgage over matrimonial home	-£215,137.00	
	£674,709.25	£142,684.91
Net value of matrimonial property		£817,394.16
57% thereof		£465,914.67
Balancing payment to defender		<u>£323,229.76</u>

57% share £465,914.67 less what the defender currently has i.e. £142,684.91 =
£323,229.76

