EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 35
F66/21

Lord Pentland
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the appeal

by

SARAH LOUISE GUNN or FOSTER

Pursuer and Reclaimer

Against

ROSS STEWART FOSTER

Defender and Respondent

Pursuer and Reclaimer: Scott K.C., Mountain (sol. adv.); Brodies LLP
Defender and Respondent: Brabender K.C.; Harper McLeod LLP

29 September 2023

Introduction and background

[1] This reclaiming motion (appeal) concerns the interaction of various provisions of the Family Law (Scotland) Act 1985, particularly in relation to assessing the present and foreseeable resources that may be available to implement orders for financial provision on divorce. The central issue concerns the treatment, in the context of fair sharing of the value of the matrimonial property, of the wife's shares in a private limited company operated by the husband.

[2] Mrs and Mr Foster married in 2004 and have three children together, the youngest of whom is aged 15. They separated on 31 October 2019, a date accepted as the relevant date for the identification and initial valuation of their matrimonial property. They were unable to resolve the issue of fair financial provision on divorce and litigated that matter at proof.

Relevant legislation

Family Law (Scotland) Act 1985

> **"8 Orders for financial provision.**
> (1) In an action for divorce, either party to the marriage and in an action for dissolution of a civil partnership, either partner may apply to the court for one or more of the following orders—
>
> (a) an order for the payment of a capital sum to him by the other party to the action;
>
> (aa) an order for the transfer of property to him by the other party to the action;
>
> (2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, 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.
>
> **9 Principles to be applied.**
>
> (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
>
> (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership;
>
> (b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
>
> (c) any economic burden of caring;
>
> (i) after divorce, for a child of the marriage under the age of 16 years;
>
> (ii) after dissolution of the civil partnership, for a child of the civil partnership, under that age
>
> should be shared fairly between the persons;
>
> (d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is

reasonable to enable him to adjust, over a period of not more than three years from,

(i) the date of the decree of divorce, to the loss of that support on divorce;

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution:

(e) a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—
'economic advantage' means advantage gained whether before or during the marriage or civil partnership and includes gains in capital, in income and in earning capacity, and 'economic disadvantage' shall be construed accordingly;
'contributions' means contributions made whether before or during the marriage or civil partnership; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

10 Sharing of the value of matrimonial property or partnership property

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property … shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.
……..
(3A) In its application to property transferred by virtue of an order under section 8(1)(aa) of this Act this section will have effect as if –

(a) … for 'relevant date' there were substituted 'appropriate valuation date'

(b) after that subsection there were inserted –

"(2A) Subject to subsection (2B), in this section the "appropriate valuation date" means—

(a) where the parties to the marriage or, as the case may be, the partners agree on a date, that date;

(b) where there is no such agreement, the date of the making of the order under section 8(1)(aa).

(2B)If the court considers that, because of the exceptional circumstances of the case, subsection (2A)(b) should not apply, the appropriate valuation date shall be such other date (being a date as near as may be to the date referred to in subsection (2A)(b)) as the court may determine."; …

…..

11 Factors to be taken into account.

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.
(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and
(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or the partnership property or otherwise.
…….

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage or as the case may be of either partner unless—

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

12 Orders for payment of capital sum or transfer of property.
(1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—

(a) on granting decree of divorce or of dissolution of a civil partnership; or
(b) within such period as the court on granting the decree may specify.

(2) The court, on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date.
(3) The court, on making an order under section 8(2) of this Act for payment of a capital sum, may order that the capital sum shall be payable by instalments.
(4) Where an order referred to in subsection (1) above has been made, the court may, on an application by-

(a) either party to the marriage,
(b) either partner,

on a material change of circumstances, vary the date or method of payment of the capital sum or the date of transfer of property."

The Finance (No.2) Act 2023

[3] The Finance (No.2) Act 2023 has, by section 41, amended the Taxation of Chargeable Gains Act 1992 in relation to disposals made on or after 6 April 2023. In particular section 58 of the 1992 Act has been amended to read, so far as material, as follows:

"58(1A) If an individual ('A') disposes of an asset to another individual ('B') in circumstances where any of subsections (1B) to (1D) applies, A and B are to be

treated as if B acquired the asset from A for a consideration of such amount as would secure that on the disposal neither a gain nor a loss would accrue to A….

(1D) This subsection applies where-

(a) A and B have ceased to be, or are in the process of ceasing to be, married to, or civil partners of, each other, and

(b) The disposal of the asset is in accordance with an agreement or order within subsection (2)(a) or (b) of section 225B (disposals in connection with divorce etc) but as if, in subsection (2)(a), after 'partner' there were inserted, 'or former spouse or civil partner'…

Subsection (2) of section 225B of the 1992 Act includes the following qualifying list of orders-

…

(b) An order of a court-

(i) made on granting … a decree of divorce …

(v) made under section 8 of the Family Law Scotland Act 1985, including incidental orders made by virtue of section 14 of that Act…"

The Lord Ordinary's opinion

[4] In May 2022 a proof took place before the Lord Ordinary. The dispute between the parties had by then narrowed but there remained some questions of valuation which were resolved at first instance and not re-opened on appeal. As detailed in the Lord Ordinary's Opinion ([2023] CSOH 56), the parties 'assets included two heritable properties owned jointly and burdened with secured loans. Their principal asset comprised their respective shareholdings in a company called RRR Holdings Limited, in which Mrs Foster held 30% of the issued shares and Mr Foster held the remaining 70%. RRR held 90% of the issued shares in a subsidiary, Snowdrop UK Limited, which trades as a housing developer. UK in turn owned the whole share capital in Snowdrop (Aberdeen) Limited. Shortly prior to the relevant date a transaction was entered into whereby two investors received shares in UK in exchange for the conversion of certain loans and interest. New articles of association were

adopted and a subscription, shareholder and options agreement was entered into between UK, its shareholders and the parties.

[5] The issue of valuation of RRR resulted in what are now unchallenged findings by the Lord Ordinary that Mrs Foster's shareholding was worth £858,547 and Mr Foster's £2,003,275 at the relevant date. By the time of proof those values had increased to £1,216,224 and £2,837,856 respectively. The up to date values were relevant in the event of a transfer of Mrs Foster's shareholding to Mr Foster. Both of the expert witnesses involved had used the net asset value as the basis of valuation, with the value of work in progress having been the contentious area.

[6] During the marriage Mrs Foster had been a director of RRR as well as a shareholder and also a director of UK. She claimed that following separation she had been excluded from the management of RRR and UK and that Mr Foster had attempted to remove her as a director without her knowledge or consent. The Lord Ordinary concluded on that point that Mr Foster's purported attempts to remove his wife as a director were ineffective and that she remained a director of both companies.

[7] On the issue that has become the central focus of this reclaiming motion, the Lord Ordinary found that Mrs Foster had various remedies open to her in relation to her shareholding should she retain that asset after divorce. In particular, she could petition the court for relief under section 994 of the Companies Act 2006 if Mr Foster, as a majority shareholder, engaged in conduct that was unfairly prejudicial to her, although it was accepted that these would be expensive and complex proceedings. Evidence was led about other options open to Mrs Foster including sale of the company, purchase of her shares by the company, the creation of a new company to purchase the shares and transfer of her shares to Mr Foster. Of those, the Lord Ordinary considered that she could not, in the

context of financial provision under the 1985 Act, require the company to purchase the pursuer's shares nor could the court order that a new company be created to purchase the shares.

[8] It was accepted that fair sharing of the matrimonial property could be achieved by equal sharing of its net value. Mrs Foster's proposal was that the court should order a suitable capital sum to be paid to her that reflected the value of her shares in the company and either order her to transfer her shares to Mr Foster or accept her undertaking to do so on receipt of the capital sum. She acknowledged that this would have to be paid over a period of time and was willing to accept payment by instalments.

[9] Neither party wanted the company to be sold although Mrs Foster had a conclusion for that. A sale of the parties' shares was described by her counsel to the Lord Ordinary as an unattractive "final option". Mr Foster was particularly keen that no order for sale of the company should be made. His position was that he wanted his wife to be bought out for value but claimed that the company had not operated in any way detrimental to the value of her holding since the relevant date. Her shares had increased in value and the problem was the realisation of their value. There had been evidence that sales on the open market of house building companies were rare, as house builders tended to acquire land rather than another company. Mr Foster's view was that the possibility of the court ordering a sale was damaging the company. There was evidence in relation to the possible tax consequences of the court making an order either for sale of the company or for a transfer of the shares from Mrs Foster to Mr Foster. Each would give rise to a charge to capital gains tax, the extent of which it was said would depend on whether or not business asset disposal relief was available.

[10] The Lord Ordinary decided that making the order suggested by Mrs Foster would not be reasonable having regard to the parties' resources. She was not satisfied that Mr Foster had or will have resources to permit him to purchase Mrs Foster's shares. She did not consider that there was a proper basis in the provisions of the 1985 Act for an order to be made that had the effect of releasing to Mrs Foster the monetary value of her shares in RRR. She acknowledged that, although the value of the pursuer's shareholding was substantial, she could not realise it and its value may decrease. The impact of taxation on any future realisation was uncertain and depended on the value of the asset at the time, the availability or otherwise of business asset disposal relief and the way in which any realisation was structured. Accordingly, the Lord Ordinary made no orders in relation to the parties' shareholdings in RRR.

[11] Mrs Foster had a standalone claim under section 9(1)(b) of the 1985 Act. The Lord Ordinary concluded that her 30% shareholding represented a partial recognition of Mrs Foster's contribution to the ability of the business to operate and generate funds, so the retention by her of her shareholding would correct to some extent the economic disadvantage she had sustained through giving up her career to care for the parties' children. The overall economic disadvantage that she had sustained outweighed a separate economic disadvantage to Mr Foster which had been identified. An adjustment to the balancing payment due to Mrs Foster in terms of the couple's other assets was made such that it was increased by about £50,000. A periodical allowance for two years or until such time as RRR organised a buy back of Mrs Foster's shares, whichever was the earlier, was also ordered.

Submissions for the reclaimer

[12] On behalf of the reclaimer, Mrs Scott contended that this court should recall the Lord Ordinary's interlocutor in so far as it made no provision for payment of a separate capital sum in return for transfer of Mrs Foster's 30% shareholding in RRR. It was acknowledged, after discussion, that as orders for financial provision made in the case had been suspended by the marking of the reclaiming motion, the court would require to divorce the parties, make all of the other financial provision orders intended by the Lord Ordinary and add a second capital sum of £1,216,224 if the reclaimer succeeded. While an undertaking continued to be offered, senior counsel was ultimately content that an order be made for payment of the additional capital sum together with an ancillary order in terms of her tenth conclusion that Mrs Foster transfer her 30% shareholding to Mr Foster. She contended that any resources issues could be resolved by the second capital sum payment being made in four equal annual instalments of £304,056 commencing on 31 January 2024. She sought interest on the whole sum from 23 March 2023. The reclaimer's fall-back position was that the company would have to be sold. While that remained a far less satisfactory option, it would at least put an end to the dispute between the parties. The current situation was that Mrs Foster has been left with an asset nominally worth £1,216,224 at the date of proof which remained in the control of Mr Foster and which she had little or no reasonable prospect of realising. The situation in which she found herself had arisen as a result of an error of law on the part of the Lord Ordinary and on an incomplete assessment of the facts of the case.

[13] There were four chapters to the reclaimer's submissions. The first related to the provisions of the 1985 Act and the flexible powers of the court contained within it. The desirability of a clean break between a couple on divorce was emphasised. It had long been

recognised that where one or more of the matrimonial assets were less realisable in nature, there were a number of ways in which this could be reflected. Those included orders for transfer of such assets, deferred payment, discount from the total sum payable or an order for capital payable by instalments under section 12(3)- (*Little* v *Little* 1990 SLT 785 per Lord Hope at 789). In *Sweeney* v *Sweeney (No.2)* 2006 SC 82 the Extra Division had modified a capital sum and made it payable by instalments to reflect the balance between allowing the husband to continue to invest in his business and the need to pay a capital sum by instalments to the wife to effect fair sharing of the matrimonial property. Similarly in *W* v *W* 2013 Fam.LR 85, Lord Tyre had recognised the desirability of effecting a clean break by making an order for transfer of a wife's shares in her husband's company in return for payment of a capital sum by instalments. It was acknowledged that those instalment payments would be made from future profits generated by the company.

[14] In the present case the conclusion that a clean break between the parties was not possible was erroneous because it ignored the aim of finality. It omitted to address the solution of payment of a capital sum by instalments notwithstanding that section 12 of the 1985 Act had been discussed. The Lord Ordinary stated in paragraph 80 of her opinion:

> "I do not consider that there is a proper basis in the provisions of the 1985 Act for me to make an order that has the effect of releasing to the pursuer the monetary value of her shares."

That passage was indicative of an error of law as there was a basis in the legislation to permit the outcome sought by the reclaimer. If it referred to the factual position on affordability it was also erroneous.

[15] The second chapter related to the husband's criminal conviction. Mrs Scott submitted that this was a matter that fed into the need for finality in terms of separating the parties' financial business relationships. Mr Foster had insisted on going to trial on a summary

complaint alleging controlling behaviour. He had been convicted of a course of abusive behaviour under the Domestic Abuse (Scotland) Act 2018, section 1, over a period of many months. Where it was also now accepted that Mr Foster had unlawfully tried to remove his wife as a director of the company, albeit that he had failed to do so, there was sufficient evidence to support a conclusion that leaving the reclaimer with her shares would be highly unsatisfactory.

[15] The provisions of the 1985 Act had in the past been used flexibly to avoid a situation where one party attempted to defeat the other party's legitimate claims. In *Murdoch* v *Murdoch* 2012 SC 271 the Extra Division (para [22] at page 280) regarded it as:

> "…contrary to the objective of the Act to so construe its provisions as to place artificial procedural barriers in the way of achieving…[a fair division of the matrimonial property], and in effect to allow a party such as the defender to prevent the court from properly applying the principles…"

In the present case the evidence of both parties was that they were committed to releasing Mrs Foster from owning 30 % of the company in return for payment of capital. Mr Foster could not properly thwart that joint aim by his refusal to seek a section 8(2) order for the transfer of his wife's shares. Mrs Foster had received no dividends in respect of her shareholding since the parties separated. A partial dividend had been issued before that, but only to clear a director's loan.

[16] The third and fourth chapters related to issues of resources and payment by instalments. The Lord Ordinary's conclusion that a transfer of Mrs Foster's shareholding in return for a capital sum was not reasonable having regard to the respondent's resources was not justified by the evidence. Mr Foster had not said in evidence that he did not have the wherewithal to acquire his wife's interest in the company; his position was that he could only do so by another means such as setting up a new company to buy the shares. There

was evidence that the pursuer's shares could be bought back over a three to four year period. The onus had been on Mr Foster to show that he could not afford to pay his wife for his shares. He had put no such case on record and his evidence did not amount to one. He had said in evidence that the aim of the business was to complete a project and then declare dividends reflecting the profit. He had not done so. The respondent's expert witness, Alan Robb, in his report to which he spoke at proof, had produced appendices illustrating the company's ongoing projects. The anticipation in relation to one project was that post-proof, another 28 of the houses being built would be sold for profit. On another site there were substantial profits to be made on the remaining plots.

[17] There was no justification for the Lord Ordinary's conclusion that there was no evidence that RRR would in the foreseeable future be in a position to declare a dividend which on distribution would permit Mr Foster to purchase his wife's shares and that he had no other resources to permit him to do so. It was important that the present and foreseeable resources available to meet a capital sum were not linked to the nature and value of matrimonial property existing at the relevant date. They could include estimated future profits as well as current profit retained within the company. There had been a focus at proof on some of the tax implications of the realisation of Mrs Foster's' shareholding but this had been resolved by the recent amendments to the Taxation of Chargeable Gains Act 1992, at least if the transfer is made as part of an order of court.

[18] Mrs Scott anticipated that the respondent's position would be that this court could infer that the Lord Ordinary had considered payments by instalments which was the obvious method of dealing with the difficulties of realisation. However instalment payments were not mentioned in her reasoning and neither was the issue of future profitability addressed. The Lord Ordinary had looked at a scheme of division that rested

on relevant date valuations, other than the heritable property assets being transferred, where current values had been used. It was wrong to look at future payments as if they would be taken from the value of the assets at the relevant date.

[19] Finally, so far as remedies were concerned it was unreasonable to expect Mrs Foster to come back to court and litigate again in the different context of an application under the Companies Act for minority shareholder's relief. If the court considered that the Lord Ordinary had erred as contended for, the orders in the interlocutor of 3 May 2023 should be recalled and the court should look at the matter of new. While it was maintained that interest should run on any capital sum payment made by instalments it was acknowledged that the interest may be at a lesser rate than the judicial rate. A rate of 5.25% might be appropriate.

[20] A final piece of the jigsaw would require to be completed relating to the call and put option about which there was discussion at proof. The subscription shareholder and options agreement defined the parties as one of the named "buyers" under it. Mrs Foster accepted that her husband should receive all benefits arising from that agreement and would provide a written undertaking to the court in that respect.

Submissions for the respondent

[21] Senior counsel for Mr Foster submitted that the effect of the Lord Ordinary's decision was to leave both parties with their shareholdings in RRR. It was submitted that Mr Foster was left unsure as to what exactly Mrs Foster was seeking. She had not previously sought a sale of the parties' shareholdings as a clear fall-back position. Such a sale would be catastrophic for both parties and their children as the company provided their livelihoods. In any event the decision made by the Lord Ordinary was within the wide discretion

afforded to her by the legislation – (*Little* v *Little* 1990 SLT 785 at 787). This court had recently confirmed that an appellate division should be slow to interfere with the Lord Ordinary in cases of this sort (*A* v *A* 2020) Fam LR 139, *McCallion* v *McCallion* (No.2) 2021 Fam LR 30). It is not sufficient that this court might have reached a different decision from the Lord Ordinary, a material error would require to be identified.

[22] Ms Brabender submitted that it was important to acknowledge that the evidence relating to the company's fortunes was now 2 years out of date. The most up to date management accounts used at proof were those from September 2021. The delays since the proof was heard in May 2022 were not all attributable to the respondent. The difficulty that had arisen after proof and held matters up further related to the title to a portion of land. The bank would not have continued to lend without security over the whole property.

[23] It was important to look at the totality of the relief sought by the reclaimer as without the company, there was no source of funds for any financial provision. The whole scheme of financial provision was dependent on the company continuing to trade. While a clean break was desirable it could not take precedence over achieving fair financial provision on divorce. The evidence of both Mr Stirling, the company accountant, and Mr Foster was that a new company or management buyout would be the preferred method for buying the pursuer's shares. That was a different proposal to the idea that dividends would be declared to pay Mrs Foster a capital sum by instalments. In order to meet a payment of £1.216 million by instalments Mr Foster would need to declare dividends of £1.871 million on an assumption of liability to income tax at 35% on those dividends. The Lord Ordinary was aware of that difficulty and it was referred to in her opinion. All of the evidence supporting a purchase by Mr Foster of his wife's shares was in the context of a new company created for that purpose or a buy back after 5 July 2023. Evidence that it could be done in about 4 years was given in

that context. It was accepted that a company buy back or the creation of a new company could not be achieved by court order, but the evidence about that had been led to illustrate whether the remedies sought by Mrs Foster were feasible and reasonable having regard to resources. It was acknowledged that there was no evidence that by grossing up the figure to £1.8 million the purchase of Mrs Foster's shares would become unfeasible in principle.

[24] Counsel submitted further that although reliance on present and foreseeable resources permitted the court to look prospectively, the increase in value between the relevant date and the proof did not illustrate an ability to declare dividends. UK had made a loss to March 2021 and to September 2021 although Aberdeen had made a profit. While Mrs Foster's accountant had given evidence of there being £1.5 million of available reserves as at 30 September 2021, Ms Brabender contended that the context of that was also the setting up of a new company to buy Mrs Foster's shares. At proof there had been no disagreement between the two accountants that the whole scheme of financial provision was dependent on borrowings. By May 2022 costs were already increasing and the cost of building each property to be sold by the company had significantly increased which would reduce profit. It was said that the respondent had been unable to produce projections for the company going forward by the time of proof. On questioning by the court about why details of the current financial position of the company had not been provided, counsel submitted that this would only be relevant if the court was minded to grant the reclaiming motion.

[25] In the event that the reclaimer succeeded and there was to be a transfer of her shares to the respondent for a capital sum, it was contended that section 10(3A) of the 1985 Act would require the court to apply the value of the company at the date of the making of the order. In order to do so the court might have to hear further evidence. It was not accepted

that section 10(3A)(b) would apply so as to allow the valuation date to be "such other date as the court shall determine" as there were no exceptional circumstances to justify that. It was acknowledged, however, that the material the Lord Ordinary had was the best available to the court although some submissions were made in relation to the company's current financial position and accounts were tendered to the court at the end of the hearing.

[26] Counsel accepted that the effect of the 2023 amendments to the Taxation of Capital Gains Act 1992 was that if this court made an order under section 14(2)(k) for transfer of the shares or conditional upon payment of a capital sum, no capital gains tax charge would arise. Ms Brabender explained that she had not submitted to the Lord Ordinary that it would be incompetent to make the orders now sought by the reclaimer and she accepted that if something such as a share transfer was ancillary to the principal order (in this case the capital sum) it would be competent. Her contentions were rather that whether to make any such order remained a discretionary decision and it was not a reasonable one in this case having regard to resources. It was submitted that, notwithstanding the lack of reference in the Lord Ordinary's opinion to payment by instalments as a potential solution, it could be inferred that consideration had been given to that. In the passage cited by the reclaimer's counsel from paragraph 80 of the Lord Ordinary's opinion, in relation to there being no basis in the Act for the making of the order, the Lord Ordinary had fallen short of stating that it was incompetent. It was clear that she considered it was unreasonable having regard to resources.

[27] In each of the authorities on which the reclaimer had relied such as *W* v *W* 2013 Fam LR 85, *Jacques* v *Jacques* 1995 SC 327 and *Sweeney* v *Sweeney (No.2)* 2006 SC 82 there had been sound reasons for granting the orders sought by one of the parties to the case. In the present proceedings Mr Foster had not sought an order for transfer of the shares because he had

insufficient resources to acquire them. However, he had given evidence of his commitment to secure the purchase of the reclaimer's shares by a new company or a buy back after 5 April 2023. It was submitted that the scheme of division presented to the Lord Ordinary and to this court in relation to the whole matrimonial property remained relevant. If the company was taken out of account, there were no other resources from which payment could be made. Any increase in the net asset value of the company between the relevant date and the date of proof or beyond could not give rise to an inference that the company could declare dividends of the magnitude required. At proof the suggestion on behalf of Mrs Foster had been that she would offer an undertaking to transfer the shares in return for a capital sum. It had never been made clear whether the undertaking was to transfer on receipt of the full capital sum or otherwise, albeit that the position had been clarified during the reclaiming motion.

[28] It was also noteworthy that the declaration of dividends would reduce the net asset value of the company. There was nothing in Mr Stirling's evidence that could give rise to an inference that the company could have declared dividends sufficient to enable the purchase of Mrs Foster's shares from the date of proof onwards.

[29] Even if the court was satisfied that there had been an error by the Lord Ordinary so as to justify interference with her decision, the remedies now sought by Mrs Foster were not justified having regard to the evidence. The reclaimer had made no argument in terms of section 11(7) of the 1985 Act in her pleadings or at proof in relation to the relevance of the respondent's conduct in terms of the domestic abuse conviction such that it should be taken into account in awarding financial provision.

Decision and reasons

[30] Neither party ultimately contended that there was no mechanism within the Family Law (Scotland) Act 1985 to make an order for a capital sum payment reflecting the value of Mrs Foster's shares and an ancillary order that she transfer all of those shares to the defender as a pre-condition of that payment. It may be useful, however, to reiterate the statutory basis for so doing. In *Murdoch* v *Murdoch* 2012 SC 271 there had been competing claims in relation to the matrimonial home. The wife wanted her husband's interest in the title transferred to her but her husband sought an order for sale. The evidence before the sheriff supported the payment of a capital sum to the husband on the basis that the transfer of property order would be granted, but he had refused to insert a crave for that. On the basis that the statutory scheme gives considerable flexibility in relation to the orders that can be sought, especially where an order may be regarded as ancillary to the court's primary decision, the Extra Division allowed an amendment to achieve the result supported by the sheriff's findings. It can thus be seen that the court was willing to take a pragmatic and flexible approach.

[31] In the present case, Mrs Foster has conclusions both for a capital sum and for any ancillary order under section 14(2)(k) which the court regards as necessary to give effect to the principles in section 9 of the Act or any order made under section 8(2). No doubt the respondent's decision not to seek a transfer of the reclaimer's shares was consistent with his contention that such an order would not be reasonable having regard to the parties' resources. However it does not sit easily with the evidence at proof, which we have considered, to the effect that both parties sought to effect a clean break, part of which involved Mrs Foster relinquishing her shares in return for payment. It is clear that there is a mechanism within the provisions of the 1985 Act for the court to make orders that would

achieve that outcome if it is justified by the principles of the Act and reasonable having regard to the parties' respective resources. Read together, sections 8, 9 and 14(2)(k) are clearly designed to give the court power to make such range of orders as the circumstances of the case require.

[32] Turning to the errors said to have been made by the Lord Ordinary that would permit this court to look at the matter of new, we consider that there is force in the reclaimer's submission that no proper consideration was given to an instalment-based scheme by means of which the reclaimer could receive capital in return for her shares. There is no mention of instalment payments being considered in the decision part of the Lord Ordinary's opinion. We do not accept that the references to payment of a dividend in paragraphs [78] and [79] or the conclusion that the court was " … not satisfied that the defender has or will have resources to permit him to purchase the shares" at paragraph [80] are sufficient to yield an inference that consideration was given to the reclaimer's submission that section 12 of the 1985 Act could be utilised to order payment by instalments over a period of several years. This was a crucial issue because it was clear from the evidence that the only practicable way in which a fair division of matrimonial property could be achieved was to allow a period of time for payment to be made in exchange for the transfer of Mrs Foster's shares to Mr Foster.

[33] We have considered the evidence relating to the payment of a dividend or dividends to Mr Foster to enable him to acquire Mrs Foster's shares in return for a capital payment. There was evidence from Mr Stirling, the company accountant, that a dividend of around £1.87 million have to be declared were Mr Foster's date of proof value of the shares accepted such that the price to be paid to the reclaimer for her shareholding was £1.216 million. There was no evidence that the company could not declare that level of dividend, nor was there

any acknowledgement by the Lord Ordinary that what was contemplated was not the declaration and application of a single dividend but rather annual payments over several years while the company would continue to trade. The notion that Mrs Foster's proposed outcome would result in a marked imbalance in the assets ultimately retained by the parties to Mr Foster's detriment disregards the significance of Mr Foster securing the whole shareholding in RRR. The respondent's scheme of division may have distracted attention from the obvious point that after transfer of Mrs Foster's shares to him, Mr Foster would have an income generating asset worth over £4 million net at date of proof values. There was no basis for concluding that the matrimonial assets would be divided unfairly were the share transfer to occur.

[34] There was no appreciation by the Lord Ordinary of the need to direct attention to the prospective nature of resources, particularly when the principal asset was the parties' shares in a private limited company. The requirement to consider all of the relevant provisions of the 1985 Act includes the need to consider instalment payments where the circumstances so demand. Self-evidently, if Mrs Foster transfers her shares to Mr Foster, his present and foreseeable resources will include 100% of the shares in the holding company. He will thereafter have complete control in terms of the organisation of the affairs of the company. The focus at proof was primarily on valuation issues. Evidence about setting up a new company to buy back the shares will have obfuscated the need for the court to determine the *respondent's* ability to pay rather than that of the company. His position both at first instance and in written submissions before us remained that he was committed to secure the purchase of the reclaimer's shares. Throughout the proceedings he has sought to control the method by which that would be done, for reasons, among others, of tax efficiency.

However, at no point was it suggested on his behalf that the parties remaining as shareholders and directors in the company after divorce was a desirable outcome.

[35] It seems to us that as the parties had been unable to achieve a pragmatic solution by agreement and so locked horns at proof, the proper focus had to be on the orders that the court could make. The time for creative solutions had passed because the court was restricted to granting orders against the parties to the action. What the court required were alternative illustrations of the necessary prospective resources required by Mr Foster as an individual depending on the result of the valuation dispute. Detailed projections of the future maintainable earnings of the business would have been a most useful starting point and these were not provided. It was for the respondent to demonstrate a lack of resources if he maintained that he was unable to meet his wife's claims over a period of time; he produced nothing to show that he could not do so.

[36] The section 8(2)(b) requirement to consider how the fair financial provision on which the court has alighted using the principles of section 9 will be implemented is an extremely important final stage of the court's analysis. It is not simply a discretionary exercise, but requires a careful examination of the evidence to see how fair financial provision could reasonably be achieved through orders of court. The court has considerable flexibility in deciding how difficulties with resources may be taken into account. Deferred payment of a counter balancing capital sum, payment by instalments and on occasion reduction in the level of capital sum are always available options worthy of exploration.

[37] The absence of an analysis of how the lack of immediately available resources could be addressed is a sufficient basis for this court to open up the matter for reconsideration. However, submissions were made also on two matters that we regard as interrelated; the need for finality/a clean break between the parties and the background of the domestic

abuse conviction. As already mentioned, the respondent was convicted after trial of engaging in a course of behaviour that was abusive of Mrs Foster over a seven month period in 2019. That behaviour included sending her abusive, aggressive and controlling text messages and uttering threats of violence towards her, shouting, swearing and uttering derogatory remarks. We acknowledge that the 1985 Act is designed to separate issues of conduct from the assessment of fair financial provision on divorce and to leave a party's behaviour out of account in relation to the latter, the exceptions to that in section 11(7) being extremely limited. The relevance of the respondent's conduct in this case is not in the assessment of the level of financial provision for the reclaimer that would be fair; it is in the desirability in the circumstances outlined, of securing an outcome that avoids the parties having to engage with each other in future in relation to business and financial matters. At the time of the proof, a non-harassment order prohibiting the respondent from contacting the reclaimer was in place, but by the date of final orders it had expired and this had been anticipated in the Lord Ordinary's opinion. Against a backdrop of Mr Foster's attempts to remove her as director of the company and the domestic abuse conviction, Mrs Foster was entitled to emphasise the need for finality through her early exit from the company. That this matter was overlooked has served to fortify our conclusion that the issue of the disposal of the parties' claims must be revisited.

[38] As outlined above, the evidence in this case clearly supported an outcome that would involve payments to Mrs Foster over a number of years. Mr Foster and the company accountant stated in terms that a period of about 4 years to buy the reclaimer's shares would be manageable, with any shorter a period being more challenging. What the court required to do was to consider whether in principle Mrs Foster should relinquish her shares in return for counter-balancing payments. If so, decisions about the precise level of those payments,

the timing of any instalments and interest on those instalments required to be made. A decision to make no order in relation to the parties' shareholdings in the face of an acceptance that Companies Act remedies would be complex and expensive, has resulted in there being no division of the single most substantial item of matrimonial property. In the absence of an analysis within the opinion of how payments for Mrs Foster's shares could reasonably be made, we require to consider the matter of new.

[39] We have concluded that it would be unnecessary and highly undesirable to go to the expense of hearing further evidence in this already protracted litigation. In *Sweeney* v *Sweeney (No.2)* 2006 SC 82 the court did its best to make a broad brush assessment when allowing a reclaiming motion that required a fresh decision to be made. In that case there had been a lack of disclosure and cooperation on the part of the husband. The present case has presented this court with similar challenges. Notwithstanding the respondent's contention that if the shares were to be transferred to him the court would have to use the value at the date of the making of the order, no information about the current financial position of the company was produced until during the hearing of the reclaiming motion. We intimated to parties prior to the hearing that we would require to be addressed on that issue. Mrs Foster has not been provided with any accounting information since the diet of proof. Submissions were made on behalf of Mr Foster at the hearing about the company's affairs and that has been followed up with the provision of some accounts. As we explain below we have done the best we can on the limited information now available. We are not in a position to conduct a fresh valuation exercise but have reviewed the material to avoid the injustice that would arise had the company's fortunes fallen so significantly that the date of proof valuations could no longer be used as a starting point for current value.

[40] The consolidated accounts of what is described as "Snowdrop Developments", taking into account business activities at the time of the proof and subsequently, indicate fluctuating turnover; for reasons that were not explained, no up to date accounts for RRR or the individual subsidiaries were produced. In the financial year ended 31 March 2022 the turnover of what seems to be the operating subsidiaries was £7.6 million and in the financial year ended 31 March 2023 the turnover was £11.12 million. Many properties included in a schedule to the valuation report of Alan Robb comprising work in progress were successfully sold after the proof, perhaps as many as 28 houses. The company has continued to make progress with other developments. That said, as a result of increasing costs the gross profit remained about the same in March 2023 as the previous year at about £1.5 million. On the face of the accounts now tendered, it seems that the book net asset value of the operating subsidiaries remains at over £4 million. The business clearly remains profitable and there was no suggestion that it would do anything other than continue to operate as it had previously. Senior counsel for the respondent emphasised various difficulties including pressure on the cost of materials since the outbreak of war in Ukraine, the financial crisis emanating from the September 2022 Budget, inflation and increased costs of borrowing. It was said that there had been a significant slowdown in sales. No dividends had been declared, although that has been the position since the parties separated in 2019.

[41] While we must rely primarily on the evidence given at proof under oath and tested by cross-examination, we have taken account of this new material, tendered on an ex-parte basis. It supports a general conclusion that the company continues to generate profits that can be used at least in part to make payments to Mrs Foster in return for her shares. We are not persuaded that evidence given by Mr Foster and Mr Stirling about the company's ability to pay dividends to fund an alternative buy back solution is irrelevant to the funding of a

transfer of Mrs Foster's shares directly to Mr Foster. The company holds significant reserves. It has retained profit for a period of almost four years since the parties separated.

[42] The effect of the recent amendments to the Taxation of Chargeable Gains Act 1992, in summary, is that if as a consequence of a court order or agreement between parties an asset is transferred by one divorcing party to the other, no immediate charge to capital gains tax will arise, with any accrued gain being held over until a subsequent disposal of the asset by the transferee. This removes the concern that existed at proof about capital gains tax being payable by Mrs Foster on a transfer of her shareholding, at least if an order is made for that. We consider, however, that a relatively small downward adjustment on the award that the Lord Ordinary would have made at proof had she used current values at that time is required to reflect some of the more recent challenges facing those running businesses such as that operated by the respondent. Accordingly, we intend to reduce the amount of £1,216,224 that would be due to the reclaimer for her shares using proof date values to £1,100,000.

[43] There was some discussion at the hearing about the possible impact on other orders made by the Lord Ordinary. We see no need to revisit those orders insofar as they reflected asset values either at the relevant date or (for the heritable property transfers) the agreed date of proof values. The new order for payment of a capital sum that we shall make relates only to the sum due to Mrs Foster for the transfer of her shares. However, as all of the orders made on 3 May 2023 are currently suspended, including decree of divorce, we must make all of the necessary orders of new. We shall allow the reclaiming motion and recall the Lord Ordinary's interlocutors of 3 May 2023. We shall grant decree of divorce, together with the transfer of property and other orders relating to liability for costs and repayment of mortgage all as intended by the Lord Ordinary. We shall, in addition, make orders for a

capital sum in two parts; 1) £132,500 payable in exchange for the reclaimer relinquishing her interest in Snowdrop House and 2) £1,100,000 payable in four annual instalments of £275,000 each, with the first instalment being payable on 31 January 2024 and the second, third and fourth instalments being due for payment on 31 January 2025, 2026 and 2027 respectively. Interest will run on the sum of £1,100,000 or any part unpaid at the rate of 5 per cent per annum from the date of the order of this court, with interest at 8 per cent per annum on any instalment due but remaining unpaid. We shall make an ancillary order for transfer by Mrs Foster to Mr Foster within 28 days of decree of divorce of her whole shareholding in RRR. Periodical allowance at the rate set by the Lord Ordinary £3,750 per calendar month, will be ordered, payable monthly until the later of 31 January 2025 or the payment of the second instalment of capital. This differs from the Lord Ordinary's decision to reflect the fact that although her shares are to be transferred immediately following decree of divorce, Mrs Foster will require some time to become financially independent. Again taking a broad view, the receipt by her of the second instalment of capital should be sufficient to allow her to achieve that independence. Finally, we have noted the terms of the undertaking now given by the reclaimer in relation to the shareholders option agreement referred to at paragraph [20] above. We shall record that undertaking and make a further ancillary order providing that Mr Foster must indemnify Mrs Foster in respect of all and any liability under the said Agreement.

[44] Counsel for the reclaimer submitted that if the reclaiming motion was allowed this court could deal with the expenses of both the Outer and Inner House stages of the proceedings. The Lord Ordinary had heard an argument on expenses but had reserved her position. We will reserve meantime all questions as to expenses. Should any party seek an order for expenses, a motion thereof should be accompanied by written submissions.

Postscript

[45] As indicated above, this litigation has been an unnecessarily protracted one and we have regarded it as essential to approach matters in a way that will bring it to an end. Some of the later delays in the case arose because of a title issue in relation to the heritable property to be retained by the respondent, which was noticed while the Lord Ordinary had the case at avizandum. It was ultimately resolved before orders were made on 3 May 2023. However, the procedure in the case became unduly complicated and unsatisfactory as a result of the Lord Ordinary having decided to issue a draft opinion; this was in circulation for some months without any final signed version being issued. This approach has caused unnecessary difficulties for the parties and for the court. There are many cases, whether in the sphere of family law or otherwise, in which the judge sets out his or her findings and conclusions in an opinion, but leaves over for consideration at a By Order hearing some fine points of detail; examples include the exact terms of the court's order or questions of interest or expenses. There is no need to issue a draft opinion. An unsigned draft opinion should never be issued to parties. A Lord Ordinary's opinion is the judge's final word on the issues litigated at proof or debate and cannot be altered once issued.