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Joy v Joy-Morancho & Others (No 3) [2015] *EWHC 2507 (Fam)*

Further judgment in long-running financial remedies proceedings in which the wife sought a lump sum of £27 million.

Neutral Citation Number: [2015] EWHC 2507 (Fam)
Case No: FD11D03744

IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
Royal Courts of Justice
Strand, London WC2A 2LL
Date: 28 August 2015
Before :
Sir Peter Singer
- -
Between :
Nichola Anne Joy Applicant
- and -
Clive Douglas Christopher Joy-Morancho First Respondent
- and -
Nautilus Fiduciary (Asia) Ltd
(the trustee of the New HuertoTrust) Third Respondent
- and -
LCAL Anthology Inc Fourth Respondent
- -
Mr Richard Bates (instructed by Sears Tooth Solicitors) for the Petitioner Wife
Mr Martin Pointer QC and Mr Nicholas Wilkinson (instructed by DWFM Beckman) for the First Respondent Husband
No representative appeared for either the Third or the Fourth Respondent

Hearing dates: 27 to 31 October, 3 to 7 November, 2 and 3 December 2014, 17 and 18 June 2015
- -
Judgment
Sir Peter Singer:
Introduction
1. Between 27 October and 7 November 2014 I heard evidence over what was intended to be the final 10-day hearing of this long-running financial remedies application by Mrs Nichola Anne Joy (W). Although I had made

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provisional provision for the application to continue into the following week that was frustrated by the unavoidable commitments of counsel in the case, and their written final submissions orally supplemented could not be concluded until 2 and 3 December. On 26 February 2015 I distributed this judgment in draft form to Mr and Mrs Joy and by mid-May the process of sifting proposals for revision was completed. I heard further submissions in relation to the form of the order, costs and Mr Joy's appeal permission application on the earliest available dates, 17 and 18 June. My conclusions on those issues are appended to the main judgment which I now hand down. I impose no embargo on publication of this judgment which, I suggest, should for ease of identification be cited as Joy v Joy-Morancho and others (No 3) to differentiate it clearly from my two interlocutory judgments in March and April 2014 which have been published respectively as [2015] EWHC 455 (Fam) and [2014] EWHC 3769 (Fam).

2. Between December 2014 and February this year I considered carefully the extent of the issues and evidence necessary to establish my conclusions on the principal issue of fact I have to decide. That is whether or not the situation described by Mr Joy (H) is accurate so that he is in truth and in fact able for the foreseeable future to pay only modest periodical payments to W and their three children, but nothing whatever by way of capital award. That proposition and that outcome depend upon whether H really faces the financial ruin he maintains overwhelmed him as a result of what he describes as the day of reckoning imposed on him by the trustees of the New Huerto Trust (NHT). Those trustees now pursue him and all those assets to which he can lay claim (and more), so he will be left without substance. His debts therefore exceed by far any assets available or likely to become available to him. His case is moreover that he has been permanently and irrevocably excluded from any potential future benefits from NHT.

3. NHT is a trust H (as settlor) established in the British Virgin Islands (BVI) in December 2002. The trust had until recently as its trustee a Hong Kong based management company Royal Fiduciary Group (RFG) of which Tim Bennett (TB) is a director. RFG has merged with or been acquired by the Third Respondent, another offshore trust corporation of which TB has become a director, but there is no need to distinguish between the two for present purposes. TB does very clearly emerge as the human face and mind of the trustees, taking the lead in speaking for them and in informing and forming RFG's decisions in relation to NHT and H. I do not believe I will in practical terms commit any error if for shorthand I refer to the trustee of NHT either as RFG or as TB: and do not refer again by name to the Third Respondent which has come but latterly on the scene. The protector of the trust is a long-standing Dubai-based friend of H, Mr Richard Smith (RS).

4. Neither the NHT Trustees nor TB nor RS have responded to these proceedings by participating in them as parties or directly as witnesses. TB on behalf of RFG has however made available some, and withheld much other, information and documentation.

5. Only after resolving where I believe the truth lies on that primary issue of fact – whether H's plight is genuine

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or a contrived facade - can I proceed to consider the by no means straightforward question what capital provision, if any, in the context of a global award should be made for W; and then how she may be able to receive it if, as seems inevitable in the circumstances of this case, payment is not facilitated by those who may seek to delay or to thwart her.

6. The documentation prepared for this hearing was voluminous and extended by its conclusion (including some supplemental bundles from an earlier hearing for which I myself had asked) to over 20 ringbinders. The conduct of the case would have been more comfortable for all if I had required one or even two core bundles to be prepared, and I blame myself for not including a pre-trial direction to that effect. My purpose in mentioning this is not to rail but simply to explain how it is that to make sense of the rival contentions on what I have described as the primary factual question there are many issues which might be construed to point in one direction or the other. But there are others, more limited in their number, which seem to me to be incongruously inconsistent with what might be expected. It is upon the latter that I will concentrate. I will quote rather more extensively from transcripts of evidence and from documents than is normal in a judgment such as this, because so often the flavour of what is written and was spoken has contributed to my overall sense of what is credible and what is not.

7. To put these issues into context it is necessary for me to describe a good deal of a convoluted and complex history, both of the marriage and of events since its failure, which I will attempt to do as succinctly as is practicable. But before I recite salient aspects of the procedural history and the sequence of developments which have emerged I will attempt a thumbnail of the nature and range of the dispute.

The Parties' aspirations

8. As formulated at the conclusion of submissions, W sought a lump sum pitched at £27m for a clean break, on the basis that the matrimonial acquest was at least £54m.

9. In order to assist her in collecting such a sum she asked me to declare that a collection of vintage and other collectable motorcars (which I shall refer to as the Car Portfolio) is beneficially owned by H rather than by the Fourth Respondent, a BVI company, LCAL Anthology Inc (Anthology) which is wholly-owned by NHT. As an alternative route to the same destination W at a very late stage of pre-trial preparation (indeed shortly after the pre-trial review in September 2014) applied to set aside pursuant to section 37 of the Matrimonial Causes 1973 what she asserts were dispositions of cars within the Portfolio made in favour of Anthology by H. It was for the purposes of the avoidance of disposition application that the trustees of NHT and the company Anthology were joined as respondents, but neither was represented at the hearing nor actively participated in the proceedings. The value of the Car Portfolio on the open market has not been established, but seems likely to be of the order of £20m. If a section 37 order were made W would then seek orders for the transfer or the sale of the relevant

cars; and would give credit against her lump sum award for any proceeds of sale she might realise.

10. With the same objective, to facilitate satisfaction of the lump sum award, W invites me to make an order securing it, subject to existing encumbrances, against what were referred to as the London Properties, namely 4-6 Milner Street and 32 George Street, both registered as owned by GPH Ltd, a BVI company which is also wholly-owned by NHT. Milner Street was, it seems, acquired in November 1999 and may have a negative equity; George Street was acquired in 2010. The residual value of these two properties might be of the order of £4.5m. No representative of GPH Ltd attended the hearing nor did that company participate in the proceedings.

11. W has not abandoned her attempt to demonstrate that NHT (or components within its structure) are susceptible as ante-nuptial settlements to variation pursuant to section 24(1)(c) of the 1973 Act.

12. The polarisation between the spouses' positions could not be more extreme. H's proposal is that a nominal spousal maintenance award is the only financial remedy W should receive, leaving it open to her to apply to the court for variation as and when H resumes employment.

The History

13. From that account of the parties' aspirations I turn to an outline of the course of their relationship, highlighting along the way some of the disputed financial and other factual issues.

14. H is now 56 and W 48. They first met in the spring of 2001 at a point when H had been living for some months in Bequia, an idyllic island in the Grenadines. Both his first childless marriage, his morale and his finances were at a low ebb. Although the state and the extent of H's relationship with his first wife Bobbie (W1) became the subject of some dispute before me in the context of the issue when it was that H and W's relationship became serious enough for marriage to be in contemplation, documents establish that W1 instituted divorce proceedings in England in March 2001 and that decree absolute dissolved their marriage and a clean break financial order was made in October of the same year.

15. After some years of living together (W says since 2001, with commitment even when apart from early on: H maintains intermittently only and not exclusively until 2003) they married in February 2006 but separated permanently in December 2011. Their home was primarily in Bequia but since about mid-2010 in the South of France. They have 3 sons ranging in age from 9 to 4. H still occupies the château (Château T) which was their final matrimonial home, a sumptuous 6-bedroom luxury residence on which much has been expended since its purchase. W lives nearby in rented accommodation, and the children have been spending time with them both as directed by extensive litigation concerning them which has taken place in the French courts, and which continues.

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16. W commenced divorce proceedings in London on 25 July 2011. H's response was to challenge the jurisdictional basis on which she relied, namely that they were both at that date domiciled in this jurisdiction. H's case as to his domicile in its final manifestation was that he had acquired a domicile of choice in Spain, and for that purpose it was for him to show by clear and cogent evidence that he had forsaken the country of his domicile of origin, ultimately conceded by him to be England, for Spain. That, if it had been found to be the case, would have deprived the English court of jurisdiction to hear the divorce proceedings and to embark upon the determination of financial remedies.

17. There thus followed an extremely complex and expensive jurisdictional issue which I heard over about five days at the end of 2012 and resumed in April 2013 with the advantage (in terms of distinguishing reality from presentation) of the production of previously strenuously resisted documentation from H's accountancy and taxation files gathered from a variety of advisers over a number of years. One of those advising H was TB. He had since some date in the early 90s (and thus for a considerable period before NHT was created) been one of H's tax and trust advisers and was much engaged in and was an active contributor to the discussions which over many years attended H's flexible and fluid rehearsal for presentations of his residence and domicile position to HMRC.

18. That phase of this case came to an end when H abandoned his pretence that he was domiciled in Spain. Decree nisi has since been pronounced.

19. I note in passing that it is only under the last indent to article 3(1)(a), and under article 3(1)(b), of the Brussels II Revised Regulation that the United Kingdom and Irish concepts of domicile become relevant when divorce jurisdiction is in question in a Member State of the European Union. No doubt there were what seemed sound reasons not to adopt the test which elsewhere prevails, where nationality (for these purposes) concludes any issue in a way which must be comparatively far faster and immensely less expensive to establish.

20. H in the course of that contest demonstrated a very significant lack of integrity and honesty in relation to their subject matter. The overall costs of the exercise were estimated to be of the order of £600,000. Since then financial issues have consumed the parties' and the court's time and much further expense.

21. The substance of the wealth in this family's background derives from H's business activities commenced since these parties first met and continued (if not indeed, as W would have it, commenced) during the period of cohabitation and marriage. The bulk of it originally came from operations conducted through an offshore company LCAL Inc (LCAL), the shares in which (TB noted) TB told Sofia Moussaoui (SDM, the partner at Beckmans who acts for H) at a meeting (their second, in Hong Kong in April 2014) had always been registered with RFG as trustees for NHT, and never in H's name.

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22. LCAL was incorporated in June 2004 as the vehicle through which H conducted (as the driving force, albeit initially with outside investors) an innovative and in due course very lucrative commercial airline leasing business. H's case is that it was not until about 2007 that the company began to make significant amounts of money. In May 2013 H estimated the value of the NHT assets to be £70m, subject to over £21m of contingent liabilities in respect of borrowing facilities with EFG Private Bank (EFG) which since about 2007 and still at that point were available to H.

23. Between 2004 and 2007 the family's home remained in the West Indies, and in October 2007 they first leased and then in 2008 purchased a property, Alta Vista, on Bequia. The purchase was made with NHT funds and taken in the name of a St Vincent company, Blue Orchid, wholly-owned by NHT. There appears to have been no formal agreement whereby the family had that property available to them, which they did until H's relationship with TB and the trust became (one would have thought, in the light of TB's actions) terminal in November 2013. TB, H maintains, in effect ordered him to go there for a week over the Christmas period in 2013 to clear the property of what was left of the family's possessions. W suggests that the property is worth US$4m, having been acquired (she maintains) for US2$m. However accurate these figures may be, Alta Vista is clearly a substantial property whether as a primary or (as latterly) just a secondary home. In May 2013 H maintained that he needed the ability to draw €3,000 per month for expenses related to Bequia.

24. Also in 2008 when H and W were contemplating making their home in Switzerland and for that purpose acquired residence there, H purchased land in Zermatt intending to develop it by building a home for them there. The funds for this were drawn down by H from a separate EFG facility, again backed by an NHT guarantee in turn supported by the back-to-back deposit of cash and/or securities. The property was purchased in his own name. It cost CHF2.6m. A contract for its sale for CHF2.55m was made on 28 September 2012 but with completion of the transaction ultimately deferred until 31 December 2014. In the events which have happened the entire net proceeds will go to NHT. In order to maintain his Swiss resident status H still retains the tenancy of a 4-bedroom flat in an apartment block at Leukerbad at a monthly rental of CHF2000, about £16,000 annually. He only very occasionally and for weekends stays there.

25. Until January 2009 H received a monthly salary from LCAL. His employment was then terminated but he continued to receive his salary for a further year until January 2010 despite that fact. His case is that, that salary of about £120,000 annually and unspecified bonuses apart, he has received nothing, ever, by way of distribution from NHT or any of the companies or businesses within its structure. His evidence was "I have never taken a distribution from the trust ever. I have only worked for the companies and got bonuses in relation to my work."

26. By the time the family moved to France in 2010 he had US$2.1m of his own funds deposited in an account with EFG against which he had a drawing facility of an equivalent amount. This arrangement, it should be

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noted, would thus make it appear to the casual observer (and perhaps, if enquiries were made, to the French fiscal authorities) as though he were living on overdraft so far as he drew down in reliance on that facility, whereas in fact the underlying funds were positive and were his. The plan was to hold half that fund to meet contingencies, and to draw down over the anticipated seven years of their French sojourn for the family's day-to-day living expenditure at the rate of €25,000 per month, the amount transferred to H's French banking account.

27. In October 2009 H paid £395,000 to acquire a 1928 Bentley tourer. It is indubitably the case that this vehicle was until very recently owned personally by H, was kept at Château T, and was maintained in roadworthy condition and used by H. The Bentley has been the subject of intensive litigation within these proceedings, to be described later.

28. It was in January 2010 that Château T was acquired in the name of a French property-holding company known as an SCI at an initial cost of €2.7 million. This came in part from H's own capital reserves and in part by way of drawdown from the EFG facility. The money spent by H has been treated as an interest-free loan (standing currently at some €2.5 million) to the SCI for a fixed period till May 2030. When their youngest son was about nine months old, in June 2011, the shareholding of the SCI was varied so that the three children between them own 90% and H only the remaining 10%. W has never held any shares in the SCI. If the property were now to be sold at the value which H attributes to it of €3.6 million it can be calculated that after the expenses of sale H's 10% would only produce something under £50,000. The amount owed to him by way of loan would he says be swallowed up in the claim which, in the circumstances which have arisen, NHT is pursuing against him and all the assets available to him for the formidable sum of US$7,060,000. And indeed it does seem that very recently Swiss lawyers acting for NHT have confirmed that NHT intends to pursue the entirety of H's (and it would seem also the children's) interest in the property.

29. Although no copy of the NHT trust deed as executed was made available within these proceedings it seems, from what can be deduced from references to its provisions, that W has never been within the class or classes of discretionary beneficiary. H remained a potential beneficiary (with their children) of NHT until the move to France. Fiscal considerations (about which TB amongst others advised H at a time when what he described as the 'French roadmap' was being charted) dictated that he (and indeed the 3 children) should be excluded from benefit, initially for a fixed (although revocable) period until 2017. He and they would thus be temporarily distanced from the trust and so should receive no benefits from NHT while that disentitlement remained operative. Planning for this was on the basis that H's sabbatical would be not for one year in seven, but for a full seven. The family's living costs would ostensibly be covered by monthly payments of €25,000 into a French banking account.

30. The payments into the French account and the overwhelming bulk of other expenditure were met over the years from the funds made available for H to draw upon at EFG. His overdraft at the bank (some £18m at the

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critical date at the end of 2013) was for the main part secured by the back-to-back deposit of NHT funds and assets, with a stipulated limit on drawings of CHF25m (increased from CHF20m on 20 January 2012 at a time when H and RFG apparently remained confident that his case on domicile would succeed and the threat of English financial remedy proceedings evaporate).

31. Having launched her divorce petition here in July 2011 W then instituted proceedings in France alleging domestic violence against H and seeking orders in relation to the children and in particular that he should leave Château T. W failed in this attempt and indeed (so I have been told) the French court determined that her allegations were unfounded and dismissed her application. In December 2011 she moved to live in rented accommodation nearby and the parties have since then not lived under the same roof. In January 2012 divorce proceedings instituted by H in France were stayed by the French court, no doubt to await the outcome of H's challenge to the English jurisdiction. For much of the rest of that year the parties engaged in largely parallel proceedings concerning interim financial provision and provision of legal fees, and the French court ordained that the children should spend equal time with each of them.

32. I have already described above the nature and the outcome of the jurisdiction challenge which I part-heard in December 2012 and, after an adjournment during which the accountancy and taxation files were gathered and considered, which resumed in April only to be abandoned by H.

33. In the immediate aftermath of the collapse of the domicile case, on 1 May 2013 I made an unopposed order which (in summary) restrained H and others with whom he is connected (including TB) from diminishing his worldwide assets below £35m, while allowing him to withdraw £145,000 monthly (to include payments to be made to W and the children, and up to £30,000 for his legal fees). On 12 June 2013 I ordered him to pay €14,700 per month to W for herself and the children for their general maintenance and rent (to include a French maintenance order in favour of the children for €3600 monthly), and provided moreover that he should pay £15,000 monthly for 8 months (a total of £120,000) to enable her to engage legal services. The intention was that this would enable W to fund her case through to FDR. W owns no assets of significance and does not have any income of her own. On the information that was available H's ability to meet these payments depended upon the continuation of his arrangements with NHT and EFG.

34. When in early July 2013 H served his Form E it annexed no documentation in relation to NHT. In relation to its historical and current assets, and in relation to all but some documentation provided very recently by TB, that remains the position. H asserts that he has no such documentation in his possession, power or control. It was not until receipt of H's answers to questionnaire in mid-January 2014 that W's advisers learned that RFG had (on an application to which RFG was the only party) on 28 June 2013 obtained from Bannister J who sits in the Commercial Division of the Eastern Caribbean Supreme Court an order absolving them of any obligation to provide H with any documentation in relation to the Trust, and moreover determining that "the settlor of the

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Trust, [H], has no present entitlement, either in possession or reversion, to any asset of the Trust; and ... has no right to require that any such entitlement be conferred upon him."

35. On 19 September 2013 a firm of Guernsey lawyers acting for EFG notified H that the bank regarded RFG as being in default of the trustee's guarantee of the facility afforded to H in that "RFG have now informed EFG that you were, in fact, excluded as a discretionary beneficiary of the Trust by way of a Deed of Appointment dated 31 August 2010, and that the effect of that Deed is that you are currently not a beneficiary of the Trust and have not been since 31 August 2010." The letter pointed out to H that neither he nor RFG had notified the bank of his changed status until 19 August 2013, and in particular that EFG was not informed of it when it entered into a guarantee dated 22 December 2011 whereby RFG guaranteed H's liabilities up to CHF25m nor when it agreed on 20 January 2012 to increase the facility from CHF20m to that higher amount.

36. The Declaration of Trust, as the Guernsey lawyers pointed out and quoted in the letter, "contains limitations on the powers of RFG as Trustee in applying NHT assets. Specifically, clause 7(f) of the Declaration of Trust provides that: 'The Trustee shall until the Vesting Day have the following additional powers ... (f) Power to make any property comprised in the Trust Fund available as security for any third-party advance or loan to any Beneficiary.'" RFG, the letter continued "no longer have 'full power and authority' to pledge the assets of NHT for the purposes of lending to you." From this it seems clear that the reasons why at that point EFG saw themselves as entitled to call in the loan were the trustees' failure to notify the bank that H had ceased to be a beneficiary in August 2010, with the necessary consequence that using trust assets to guarantee and support facilities of up to CHF25m to continue to be made available to H would constitute a breach of trust on the part of RFG/TB.

37. Each party castigates the other for the steps the other took, each counter-asserts, which precipitated that Notice of Event of Default. I have little doubt that it is correct that service on the bank of the restraining injunctions I made on 1 May and 12 June would have unsettled EFG and led them to conduct a review of their security position (as indeed H was informed they would by Mr Stocker, his relationship manager of long standing at EFG and at previous of his bankers). Nothing to my mind for present purposes turns on this, but the fact is that the Guernsey lawyers' letter highlights what that review established, irregularities in the management of the trust.

38. Later, on 18 October, that firm again wrote to H to confirm that EFG had withdrawn the Notice "following confirmations provided by RFG" and had reactivated the facility "subject to compliance with the limits set by the English law Freezing Injunction Order of Sir Peter Singer dated 12 June 2013." That shows that, at least at that point, the limitations imposed by my orders were no longer a cause for concern to EFG.

39. Whatever the nature of RFG's "confirmations" they were not amongst the information revealed by TB to this court, but clearly they were at least temporarily effective to allay the bank's anxieties. However, the order to

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which EFG refer, and H's undertakings to like effect by which the order was later replaced, would immediately highlight that they authorised provision for payments from trust-guaranteed funds to non-beneficiaries: W as to €14,700 maintenance and £15,000 for legal costs each month; and H himself as to £115,000 per month (on the face of it "to meet his ordinary living expenses") plus a like amount "on his legal advice and representation."

40. (Pausing there, I have given some thought to some conclusions which it does seem to me are more likely than not to be well-founded, although I should make it clear that they were not voiced during the hearing before me and thus that I have not had the advantage of any contrary observations which Mr Pointer might make for H on the existing state of the evidence. Subject to that important reservation, this is what seems to me to be the dilemma which arises when one considers what stance and what observations TB/RFG could have advanced as a result of which EFG (albeit temporarily: see below) restored H's facility:

On 12 October 2013 TB in an email to H and to Jonathan Stocker, H's longstanding friend and personal banker at EFG, wrote that he (TB) "personally hand-delivered RFG's letter ["with the information they required in order to cancel EFG's suspension of the Facility"] last Friday 04 Oct in Guernsey." Logically one might expect that letter to maintain either that the trust provisions were not breached because all payments to H or made on his authority were in his capacity as NHT/Anthology's agent/representative and so not for his benefit; or would have explained how any irregularity would be corrected.)

41. Third thoughts however soon prevailed, as indeed understandably they might for EFG in light of the terms of the English order, and on 28 October 2013 the Guernsey lawyers wrote on behalf of EFG that "as advised in our second letter of 18 October 2013 the freezing order made on 1 May 2013 by the High Court of Justice of England and Wales (as further extended on 12 June 2013) has placed the Facility into default… You were advised in that letter that EFG fully reserved its rights in respect of such Event of Default," that H's facility to make further drawings had ceased, and all amounts were immediately repayable and demanded forthwith

42. In the letter of 31 October 2013 with which they sent W's then solicitors Withers a copy of that latest letter from Guernsey H's solicitors wrote that he was enquiring with EFG to ascertain whether an order discharging the injunction would be sufficient to convince the bank to continue the facility. In a later letter of 8 November 2013, in effect on the eve of the next hearing, they relayed that "there have been informal discussions between our client and Mr Stocker of EFG to see if the loan facility can be revived. As a result of the default Mr Stocker does not presently have the authority to restore the facility, however, he has indicated that if the injunction is discharged the bank is likely to reverse its call on the loan and allow drawings to continue to be made." It was H's case at the 11 November hearing that the position remained as stated in that letter, and that no further elucidation or confirmation had been or could that day be obtained. H at no point in the course of that hearing represented it as guaranteed that the previous arrangements would be reinstated. Thus it is that the order whereby I substituted H's undertakings for the freezing injunction was based "on the assumption that EFG will reinstate

the loan facility."

43. By the date of that next hearing, 12 November 2013, H had not met the requirements of the 12 June order. He paid from the beginning of September onwards only €3600 (thus remaining compliant with the French child maintenance order) and the rent; and after two £15,000 instalments none whatsoever in relation to the legal services order. That remained the position, and by the beginning of February his outstanding liabilities in relation to both elements of the June 2013 order amounted to some €60,000 and to £90,000. There then followed hearings in February, March and April 2014 into the detail of which I need not descend. Their upshot was that I suspended any enforcement applications by W in respect of arrears and at the same time suspended without discharging or varying H's liabilities to her under the English orders for maintenance pending suit, including legal services provision.

44. Meanwhile however on 15 November 2013 EFG determined not to reinstate the facility but rather to enforce the bank's security. In the process they took the US$2.1m deposited as back-to-back security in H's own name. Beckmans notified Withers of this by letter dated 26 November 2013 in which they stated that H's liabilities "have been reduced by approximately £12m and the trust assets had been reduced by the same amount."

45. Two days later Withers were forwarded by Beckmans a letter from TB also dated 26 November by which they and W became aware of steps taken very promptly by the trustees on the same day as EFG (as RFG in that letter described) "proceeded to set off against your liabilities certain assets provided by the Trust as security for your obligations to EFG." The letter also provides the first formulation of the loss to NHT and of the method used for its calculation in these terms:

"These events have unfortunately led to serious loss to the Trust in the amount of approximately US$18.9m. Further, as the Trustees understand it, the extinguishment of your personal liabilities without recourse to any of your own non-cash assets has in effect improved your own personal asset position by approximately US$7.06m. We will have to proceed to implement our back-to-back security charged over those assets immediately."

46. RFG's letter then announced that by deed of that date the trustees had excluded H from being a beneficiary of the trust on a permanent and irreversible basis. I propose to incorporate the major part of the rest of this letter in this judgment as it sets out the reasons given by RFG for the decision permanently to exclude H from benefit under the trust:

"The Trustees are obliged to act to protect the trust assets and in particular to safeguard them for all of the beneficiaries. The unwelcome developments of the recent past mean that the Trustees have no option but to consider whether to take measures to protect the trust assets from further losses which might arise as a result of the matrimonial proceedings.

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In particular, it is clear from the drafting of the freezing order (even though it has now been discharged) that your wife and indeed possibly the Family Division of the English High Court also, appear to take the view that certain assets which are assets of the Trust are either 'your assets' or in some way available to you. That view is entirely incorrect, but the Trustees are also concerned that the Family Division of the English High Court may continue to try to take this approach.

In fact, we have always understood that your clear intention, at all times from the establishment of the Trust, has been that capital was not to be distributed to you (albeit the Trustees might have regard to any income requirements you might have) but was instead to be kept for the benefit of your children, and in due course your grandchildren.

We have considered the recent developments carefully, and our duties as Trustees, and have taken appropriate professional advice. The Trustees have had regard to the following:-

1. your intentions as stated above;

2. the desirability of safeguarding the assets of the Trust, and indeed the duty of RFG as Trustees to do so;

3. the fact that you currently have, as a result of the actions of EFG referred to above, enjoyed an approximately US$7.06m improvement in your own net non-cash asset position;

4. that in any event you are presently excluded from receiving benefit under the Trust until at least 2017 (due to tax considerations arising from your residence in France); and

5. that you appear to intend to continue to reside in France indefinitely, such that the present exclusion will in all likelihood be extended beyond 2017.

Accordingly RFG as Trustees have determined that you should now be permanently and irrevocably excluded from benefit under the Trust. The minimal detriment that this may cause to you is outweighed by the benefit to the other beneficiaries under the Trust from your own exclusion. The Trustees have therefore executed a deed of appointment (a copy of which is enclosed) which has the effect of excluding you, as from the date hereof, from all benefit under the trust.

We hope that you will understand the reasons for this decision, even though it may be unwelcome to you, and we would be happy to discuss the reasons further should you wish. However, the execution of the deed is irreversible, and accordingly there is no question of undoing the exclusion.

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47. It was only some time later that it came to light that the plan to oust H permanently from all benefit from the trust was not rapidly hatched in the immediate aftermath of the EFG foreclosure. In mid-December 2013 Withers ceased to act and at the turn of the year Sears Tooth (ST) agreed to act for W. In March 2014 on the internet ST happened upon a judgment of Bannister J, sitting in the Commercial Division of the Eastern Caribbean Supreme Court, who, following an application (to which, again, RFG was the only party) heard submissions from counsel for the trustees on 16 October 2013 seeking approval for a proposed deed designed to exclude H permanently and irrevocably from any benefit under NHT. On 8 November 2013 Bannister J refused permission, but his judgment concluded: "If the Trustee considers that the reasoning in this judgment is fallacious, there is nothing to prevent it from executing a deed in the form of the draft and arguing for its effectiveness as against any party concerned to attack it. If it succeeds, no harm will have been done by this Court's refusal of sanction." Within 3 weeks of that determination RFG did just that on 26 November, executing a deed to the same effect but in somewhat amended form from the one of which Bannister J had disapproved.

48. On 3 December 2013 H and SDM attended a meeting convened in Hong Kong with representatives of RFG (led by TB) and with NHT's Protector RS. Withers were sent a copy of TB's redacted note of that meeting on 16 December 2013, together with a copy of a further letter to H from RFG dated 6 December. The letter, and indeed the meeting notes, reflect the same stance as to the trust's loss and H's enrichment ...

"... by approximately US$7.06m, represented by the following free assets in France (and in Switzerland):

- your 10% holding in the [Château T SCI] and the related Loan Account with the SCI;

- your Bentley car;

- the Piper Archer Aircraft (in France); and

- your land in Zermatt, Switzerland (or the future proceeds of sale thereof)."

49. It is clear that the plan to oust H from potential benefit from NHT was initiated by RFG before EFG withdrew facilities and set about enforcing its guarantees against H (in relation to his own US$2.1m deposits) and against the trust. The motive for that was transparently (and indeed was patently described by TB to H and SDM at that Hong Kong meeting in December) to protect trust assets from any risk of successful attack by W or invasion by English court order. The actions of EFG allowed RFG to go in effect one considerable step further, and for NHT itself pre-emptively to pursue those assets in H's name to protect them from similar attack or invasion.

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50. It is a necessary inference that neither H nor SDM at that meeting told TB of the defensive barrier which they had already cast round the Bentley: as to which see the next section.

51. The 6 December letter also enclosed a copy of what was described as "a formal counter-indemnity letter whereby you undertook to reimburse the Trust any and all amounts that may at any time in the future be paid to EFG by virtue of their enforcement of the Trust's guarantee of the Facility." The counter-indemnity letter describes the Facility as "the banking facility previously granted to me in [EFG's] facility letter dated 30 March 2010." TB's letter gave notice that RFG "will be instructing lawyers in both France and in Switzerland to seek immediate saisie conservatoire and to commence formal recovery ('poursuite') proceedings." The enclosed counter-indemnity bears the date 30 August 2010 which I observe is the day before the date of the deed of appointment (referred to in the preamble to the November 2013 exclusion deed) whereby the Trustees are said to have "revocably declared and appointed that the Settlor [H] (as "Class A Beneficiary") ceased to be eligible to receive benefits from the Trust for the period of seven years from [31 August 2010]." The counter-indemnity could thus plausibly be seen to fit into the rearrangements made to avoid exposure, on the family's move to France, to French wealth tax, the impôt de solidarité sur la fortune.

52. What the counter-indemnity does not do is to distinguish between "any and all amounts that may at any time in the future be paid to EFG by virtue of their enforcement of the Trust's guarantee of the Facility" (which RFG put at US$18.9m); and any lesser amount calculated as due from H after deducting any elements of the loan account used not for his own personal benefit but for the purposes of NHT, such as to purchase vehicles on behalf of the trust with funds from the facility or to make payments for other expenditure on behalf of NHT from that source. But it is on any view impossible, it seems to me, to construe the document as imposing on H liability to pay the trust a sum calculated by the suggested value of assets owned by him but purchased with funds from that source: as were those assets in France and in Switzerland which had become free of encumbrance to EFG as a result of the loan accounts being called in and the facility being discontinued.

53. H was able to salvage only €80,600 from the wreckage at EFG, and transferred those funds to his French banking account. His position was that he would continue so long as he could to pay the €3600 monthly representing the amount of the French child maintenance order, and the rent on their home. At the end of November 2013 H was said to be "now taking steps to find liquidity and will revisit the issue of maintenance again at that point. Unless your client agrees this interim position our client will have no other option than to make an application for a variation of the MPS order." I observed in passing in a judgment I handed down on 5 March 2014 that, if as H in correspondence and in his most recent filed statement suggested, he was down to his last few euros then it was hard to see how he would be able for long to afford life at Château T without recourse to extraneous resources. But who can say what TB and NHT will achieve in pursuit of the avowed intent to clear H out, if they can, of the £2.07m which the schedule shows as the combined worth of his 10% share in the SCI and his loan account with the company? As at the end of October 2014 his (negative) asset schedule includes bor-

rowings from friends, acquaintances and family totalling some €162,000 for whom repayment, on the face of it, would seem far distant if ever to be achieved.

54. To date, so far as I am aware, ST have received nothing from W in respect of their costs and disbursements. Her total legal cost liabilities now stand at a sum in excess of £500,000 (to include both sums outstanding to Withers and fees in relation to the French proceedings, near or as at the commencement of the hearing before me). As will be seen H, on the face of it equally indigent in cash flow terms, has been largely able to fund the bulk of his legal fees, certainly in this jurisdiction, although it seems to me that they are likely to have been substantially greater in total than W's. His asset schedule amongst his debts shows £166,000 as his outstanding indebtedness in respect of legal costs at the commencement of the hearing before me. Since the EFG/NHT tap was turned off in November 2013 the only source of significant liquidity available to H of which I am aware has been his 1928 Bentley. This is the point in the narrative where I should divert to describe what has happened to the vehicle.

The 1928 Bentley

55. The 1928 4.5 litre Bentley racer was purchased by H for £395,000 in October 2009. This H maintains was the only motor vehicle of significant value in his personal beneficial ownership as opposed to the significant number of others in the Car Portfolio (many of them of significantly more considerable value) which were just registered in his name but which never belonged to him. He apparently drove the Bentley regularly when at Château T. I have formed the distinct impression over the course of my dealings with H and this car that it was high in his affections, although not sufficiently in his mind when in May 2013 he failed to include it in a list of his worldwide assets worth more than £100,000, nor in July 2013 when he omitted to mention it in his Form E: an error however soon corrected on his behalf the following month.

56. In December 2011 EFG made £175,000 available to H via a personal loan facility "to assist with the ancillary costs related to your separation/potential divorce from [W]." The loan was to be secured by the deposit with the bank of the vehicle's registration certificate. This had the effect, while the loan subsisted, of reducing the realisable value of the vehicle to H, or indeed to W were she to seek to enforce any award against it. Yet it would have been open to H simply to make equivalent provision for this contingency from that very US$1m contingency fund which he had explained was covered by his own US$2.1m deposited back-to-back to secure his overdraft at EFG.

57. When EFG cashed out in November 2013 amongst other loans and accounts they recouped this one. Once EFG had called in the loan and repaid itself from NHT assets the full value of the Bentley once more became available to H. That was apparent to Withers who on 28 November sent a fax pointing out that "since we assume that your client's Bentley is no longer pledged to EFG and is a free asset, it is incumbent upon him to take all

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steps to sell the vehicle. We await hearing from you that this is in hand and by way of moving matters forward will have joint conduct of the sale. Although your client has valued the car at £400,000, we have evidence to suggest that it is worth closer to £1m." This was the same month that for H it had been written that he was "now taking steps to find liquidity." The suggestion was never taken up nor substantive response at that stage provided. That the Bentley was "free" seemed also clear to RFG as it features in the list of to-be-pursued assets referred to in correspondence and at the 3 December meeting.

58. On the same day, 27 November 2013, that word of H's permanent exclusion from the trust arrived from Hong Kong during the course of a consultation with Mr Pointer an oral agreement was reached whereby H charged the Bentley in Beckmans' favour, to secure his costs to date and his continuing costs of these proceedings. It matters not whether that arrangement was immediately effective, but on 13 December 2013 it was formalised by a deed between H and Beckmans. None of this was disclosed to W or her solicitors until the existence of the charge was, I must say inappropriately casually, described in a letter dated 31 January 2014. A copy of the deed was supplied on 3 February 2014.

59. By then events had moved on. On 23 January 2014 ST sought and obtained from Cobb J at a without notice hearing orders restraining dealings with the Bentley (and for that matter with the Piper Archer aircraft, with which I will deal separately). He also ordered delivery up of the Bentley to agents for W for the purpose of preserving the vehicle pending any further order which might be made at an on notice hearing before me which in the event stretched over a number of days in early February and early March 2014. It was thus just only shortly before the first day of those hearings on 5 February that W and ST were made aware of the charge H and Beckmans asserted the firm held over the Bentley.

60. At the February hearing I adjourned what by now had become a clutch of interlinked applications until early March, continued meanwhile the restraint against dealings but suspended the requirement to deliver up the car which Cobb J had ordained. When the question was again canvassed, on 5 March 2014 I reimposed the obligation to deliver up the vehicle. That led H to apply to the Court of Appeal for permission to appeal and he initially obtained a stay ordered on 11 March 2014 upon consideration by Patten LJ of the papers H lodged in support. On reconsideration at an inter partes hearing on 28 March 2014 he conditionally lifted the stay: the judgment he then gave is reported at [2014] EWCA Civ 520. By then, as recited at [8] and [12] of that judgment,

"... a more complicated issue is the intervention into the timetable of a claim by the New Huerto Trust (which I will refer to for convenience simply as "the Trust"), which took place on 19 March, after I had granted the stay, by the initiation of proceedings in the court in Aix-en-Provence as part of an attempt by the trustees to recover a debt from the husband ... The judge in Aix on 20 March put in place a saisie conservatoire (which, so far as I can judge from the translation of the order, seems to be something either in the nature of an injunction or some form of attachment) over the car, which, according to the terms of the order, requires the vehicle to be seized

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within three months of the making of the order. Mr Pointer QC has told me this morning that there has been some form of walk-in [walking?] possession, but that the car physically remains at the husband's house in Provence."

61. If the appeal is ever pursued then, subject to permission being granted, the principal issue it raises is the extent of the court's powers to grant interim remedies under FPR 2010, rule 20.2: but the outcome of the appeal is unlikely to have any impact on matters now under consideration, in the light of subsequent events.

62. The French saisie conservatoire proceedings similarly attached H's interests in the SCI and in the Piper Aircraft.

63. Over six days from 25 March 2014 I heard (amongst other applications) and decided against W's application under section 37 of MCA 1973 to set aside the Beckmans charge. Those proceedings are more particularly described in a judgment [2014] EWHC 3769 (Fam) which I handed down on 15 April 2014.

64. One might have thought that there would have been lively litigation in France to establish the priorities in relation to the Bentley as between Beckmans' charge and NHT's saisie. If H is accurate in his evidence that his oral communications with TB since he learned of his exclusion have been limited to the two occasions when, with SDM, in December 2013 and more recently in April 2014 they attended meetings with him in Hong Kong, then it would appear that the first TB learned of Beckmans' arrangement with H over the Bentley was at the very end of that second meeting on 10 and 11 April 2014, according to the Notes which TB prepared. On its final page TB "reminded SDM that the Trustees had recently secured injunctions in the French Courts (saisie conservatoire) over H's assets in France." He made plain, according to the Note, that RFG would continue vigorously to pursue enforcement in respect of the losses suffered by the trust at the time of "the EFG melt-down." The Note continues "SDM also informed the Trustees that the Bentley was already charged to Beckmans by way of a chattel mortgage against legal fees since November 2013."

65. But in fact what happened was that, five months later, H and Beckmans and NHT agreed a deal on 10 September 2014 whereby the vehicle passed into trust ownership for £650,000, payable as to £550,000 to Beckmans to release their charge (and pay H's outstanding and some of his prospective legal fees) and by an in effect notional payment of £100,000 to H by way of a £100,000 reduction in NHT's claims against him. ST were not informed that this second arrangement was being negotiated nor when it was concluded

66. I am at a loss to understand how H and Beckmans can have overlooked the fact that the Bentley was at this juncture still subject to the order I had made in March 2014, restraining H from disposing of or dealing with the vehicle. But I will say no more on that score having regard to the fact that W and her advisers at the pre-trial review on 26 September 2014 agreed not to pursue applications for committal against either H or SDM, and SDM

in turn agreed to swear an affidavit about the sequence of events leading up to the agreement with NHT.

67. In that affidavit sworn on 17 October SDM to the following extent and in the same terms reiterated what she had previously included in an earlier statement she had made on 17 September 2014. In both documents she described her understanding as being that in communications between the lawyers acting in France for H and their counterparts acting for NHT the latter were informed of Beckmans' prior charge. She continued that following that, in August 2014 "I was contacted by TB on behalf of the Trustees who informed me that they had been unaware of my firm's prior charge and therefore they had been actively looking for and have found a buyer for the Bentley at a price that exceeded the market value." Such an assertion as to the duration of TB's and RFG's state of ignorance of the Beckmans' charge would have been untrue, and moreover untrue to the knowledge of SDM, given what TB's own Notes of the April 2014 Hong Kong meeting recorded her as having then told him.

68. She then (unaccompanied by H on this occasion) for the third time travelled to Hong Kong for a meeting with TB. At that stage the negotiations related to the price at which RFG would buy out Beckmans' charge, but they became tripartite and H was necessarily involved when it emerged that the trustees were saying they had a buyer to whom they could sell on the vehicle and still make a profit over and above the ultimately agreed effective price £650,000. SDM in her affidavit said that the trustees were not prepared to disclose exactly how much they had been offered for the Bentley, and that she does not know the identity of the purchaser or the selling price. None of this was probed with SDM in oral evidence at the hearing, I should make it clear. The documentation in relation to the purchase by NHT was concluded on 10 September.

69. On 16 September 2014 it appears that the vehicle was collected from Château T by a garage in Antibes. The previous day as appears from a copy invoice from Anthology the Bentley was sold to a purchaser in New Jersey for US$1.06m, which may have provided the trust with some minimal profit. That document (and others previously withheld by TB) only became available at the beginning of December on the day before final submissions were to be made. The financial outturn for H and his solicitors was that Beckmans were able to take payment for outstanding liabilities from H amounting to over £192,000; to pay disbursements to counsel and others of just under £340,000; and to remit just under £17,000 to H. He does however have the additional benefit of knowing that he owes NHT £100,000 less than he otherwise might.

The Piper Aircraft

70. I have mentioned in passing a Piper Archer aircraft owned by H. It is in fact registered in the name of a foreign corporation which customarily holds title to such planes, Aircraft Guaranty Trust. H's case has for some time been that he wishes to sell it and hopes to carry forward discussions with a prospective purchaser, most likely the French company Busiflight to which it is currently chartered. The holding order agreed after the 6

February hearing provides that H may use the airplane to discharge existing contractual obligations and that he may enter into negotiations with the prospective purchaser in relation to its sale provided (i) no concluded agreement for its sale is made by him without either W's written consent or further order and (ii) H shall keep W informed of any offers made in respect of the airplane and of the gist of any negotiations for its sale. Nothing of substance had emerged, it seemed, by the time of the final hearing.

71. There must be some doubt whether the saisie ordered by the French court is effective, and thus whether RFG will be able to take this aircraft and to put its proceeds towards the asserted US$7.08m which H is said to owe the trust. In his Form E in August 2013 H gave its value in sterling as £185,794.64 and submitted in support of that a document suggesting an asking price of US$285,000 for just such an aircraft.

72. While on the topic of aircraft, I should mention that H shows as an illiquid asset US$250,000 which he has paid as a deposit against the much delayed delivery of a Honda Jet. The balance of the purchase price is US$4m. H expressed no anxiety in his current parlous circumstances (another global economic meltdown apart) in coping with this liability when it falls due. In evidence he said that the latest estimated delivery date was probably the first or second quarter of 2016, and that he had "set up a multi-billion dollar empire with very little capital. It is a question of leverage and investing partners." Asked whether he regarded operating a single jet as a viable source of income and livelihood he was optimistic describing it as "a big growth area of business especially if you have the latest jet technology."

The Swiss arbitration

73. In February 2014 lawyers in Switzerland instructed by RFG on behalf of NHT launched a claim against H for US$7.06m. In March Swiss seizure orders were served on H. In April H acceded to RFG's suggestion that the claim be referred to arbitration and on 13 October, 2 weeks before the commencement of the final hearing in London, the arbitration award became available requiring H to pay the amount claimed, plus interest from 6 December 2013, and costs. The advocate for the trust thereupon applied to seize the Zermatt land and it is likely by now, if as predicted the sale was completed at the end of the year, that the proceeds will have passed to RFG. H gave as his reasons for agreeing to arbitration that the process would be speedier, and cheaper, than being pursued through the courts.

74. I regard it as not without significance that on a number of occasions during the course of the award the arbitrator makes clear that the stipulated amount of US$7.06m is neither necessarily the be all nor more particularly the end all of NHT's claims against H. This first emerges from the way in which the claim is formulated at paragraph 10 of the document, not only for that amount and interest, but that H "should also, in this regard, be expressly liable to continue paying additional claims." The same words appear at paragraphs 2 and 44, and it is clear from paragraph 86 and from the even more recent letter from the Swiss lawyers dated 17 November 2014

(see below at paragraph 80) that RFG did and do indeed contemplate making further claims.

75. The arbitrator noted that the facts of the case were uncontested. In particular it is clear that the trust was not put to proof of the amount claimed, for instance as to how it was calculated. Nor did H contest that in November 2013 "EFG used assets that had been pledged by NHT in the amount of US$18.9m in total."

76. Paragraph 59 records that "according to the understanding of the trust, H promised that the trust would not incur any damages with regard to payments to EFG for 'all existing obligations between the Trust and EFG arising from the security agreement' with EFG. For the trust, the guarantee event covers all the amounts that the claimant has to pay to EFG on the basis of the guarantee." H's response to this is recorded in paragraph 61 as being that he did not foresee a situation such as has occurred, and that he could not nor should he be expected to have assumed that on the basis of the pledge given to EFG he should be encumbered with any demand whatsoever from the trust as if he were a guarantor, because in that case the trust would be able to enter into transactions of any arbitrary amount at his expense.

77. Paragraph 86 is in these terms:

"[NHT] has limited the actual amount it is claiming from [H] to US$7.06m with the reservation that it may make further claims. This is justified by NHT for the reason that this amount corresponds to the value of the still demonstrably existing assets in which [H] has invested. This is not contested by [H]. Such a contestation would, however, not be relevant because [NHT] its free to claim even just part of its total claim."

78. RFG's stance in the Swiss arbitration in leaving open a claim above and beyond US$7.06m requires consideration in the context of the confusion and imprecision, as I shall describe them, as to the method of calculation of that very precise amount, arrived at so rapidly (but "approximately … the exact amount will be confirmed") by the time of the 3 December Hong Kong meeting and since maintained as the loss which NHT is entitled to reclaim, and moreover with the casual if not indeed supine reaction of H to the amount claimed and whether or not it is the correct sum on any view.

79. The translation of the Swiss arbitration award into English took some time, and it only became available for distribution at a late stage of the oral evidence in November 2014. The translation confirmed what I suspected from looking at the German language original which had earlier been produced, namely that (as described above) NHT's claim against H in the arbitration proceedings was not limited to US$7.06m, but clearly contemplated additional claims. Questions were put to H to ascertain why not only the original US $7.06m had been unchallenged as a specific loss at that stage claimed, but also why it appeared that no point had been taken about the additional claims contemplated.

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80. In the weeks between those questions being posed and the commencement of submissions NHT's Swiss lawyers wrote a letter to their counterpart acting for H on 17 November 2014 which, after confirming their intention to proceed to the seizure of the Zermatt land, included yet another formulation of NHT's claim and its intentions:

"Additionally, we wish to notify you that our client also intends to enforce the award decided upon by the sole arbitrator on 13 October 2014 in France, by claiming the assets which originally triggered the proceedings against your client. These are the assets listed below, which your client acquired using the financial resources granted by EFG and for which our client provided securities:

- Land in Zermatt (2.5 million CHF)
- Château T (2.7 million euros)
- Loan account (2.7 million euros)
- Motor vehicle produced by Bentley (400,000 GBP)
- Aircraft produced by Piper (317,000 USD)

We assume that you are aware that the claim of our client asserted so far (regarding which the announced award was in excess of 7,060,000 USD) covers only the expenditure for 10% of the shares in Château T, as the residual financial resources went to the children for the purposes of acquiring the castle. However all of the resources from the acquisition of the castle belong to our client, pursuant to the Counter-Indemnity Letter dated 30 August 2010. [My emphasis]

At the moment our client is still minded to seek a pragmatic solution, as he does not wish to cause any harm to your client if this can be avoided. Our client's sole priority is to fulfil his obligations as trustee of NHT; specifically, to cover the losses to the Trust from which your client financially benefited to a corresponding level in return."

81. Mr Pointer submits that the use of those words "so far" cannot be stretched to imply any wider claim against the children's shareholding, or against H in respect of their value. But to me this does appear to represent, in the final weeks of this hearing, a significant upping of the ante on the part of TB and the trust. Until this letter only the value of H's 10% shareholding in the Château T SCI (but not the children's 90%) was being pursued. One can only speculate how H has reacted to what he must necessarily regard as a further stab in the back from TB, bearing in mind his hope to be able to retain that property long-term as a home for the children. I must of course ask myself which is more likely: further evidence of H being sidelined, or window-dressing.

82. Using the same conversion rates as Mr Wilkinson employed in creating an asset schedule for the final hearing, I worked out the US dollar equivalent of the amounts stated, converting CHF and euros into sterling, and

then the sterling total into dollars. The aggregate amount is US$10,174,718 or thereabouts: in any event a far cry way and above the US$7.06m until that point consistently (save in the Swiss Award) advertised by TB and RFG as the amount that NHT was entitled to reclaim from H.

The net effect of NHT's claim on H

83. On the face of it, H has been wiped out. Unless he manages to sell the Piper aircraft and to keep the proceeds immune from attack by the trustees he is left with no free assets of any substance but only a variety of more or less pressing liabilities. His income situation is as dire. That at least could be ameliorated were he willing and able to take up employment, but a number of obstacles stand in his way which he says prevent that from happening in the immediate future. Meanwhile he hopes to be able to continue living at Château T with the children, it would seem indefinitely, and spoke in terms of retaining it as the family home long-term, even though for fiscal reasons he might be spending more than half the year based in Switzerland or in Monaco or wherever, while the children in three years time also might be boarding full-time at schools in England. Quite how this scenario might be achievable without being underwritten, one way or another, from trust resources it is difficult to contemplate. As stated at the outset, I must decide whether this presentation represents reality. Along the way to my conclusion a number of issues both of fact and of law fall for decision.

The state of the parties' relationship before their marriage

84. This was keenly disputed. W claimed that they were more or less immediately committed to each other long-term after their first meeting in Bequia in April 2001, or at least at a very early stage thereafter, and that both from then on contemplated marriage. H on the other hand says that for his part he did not regard their relationship as potentially enduring until at least two years later after Easter 2003 (when together they visited his parents who were then staying in Miami) and after he says they commenced living together on a regular basis from (he puts it at) September 2003. They did not in fact marry until February 2006. The significance to each of them of this particular area of contention is twofold. W's prospects of establishing that NHT is an ante-nuptial settlement susceptible to variation in these proceedings might be enhanced if marriage was truly in contemplation when the trust was incorporated in December 2002; whereas if H is correct that proposition becomes less tenable. Furthermore, W must apprehend her case to share in the wealth produced by H is greater (were I to find that it is indeed wealth to which I can have regard in these proceedings) on her presentation of the relationship's history, whereas conversely he might hope to demonstrate that she was not for him a significant adult in the early stages of his wealth generation once LCAL, incorporated in June 2004, started business towards the end of that year.

85. In reaching any conclusion upon these divergent retrospectives I must of course form a view about the credibility of the parties, they being the only witnesses to the events to whose evidence I propose to pay regard, and

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there being nothing by way of documentary evidence to help establish the truth of their situation as it developed.

My assessment of W's credibility

86. The accuracy of W's recollection and the veracity of its presentation both came under intense fire in her cross-examination by Mr Pointer. My conclusion is clear. What she says must be subjected to close scrutiny and approached with a degree of scepticism having regard to the many extravagant and often inconsistent observations to which she committed herself. That of course is not to say that a great deal of what she told me was not true, or that it may not have contained some substance however exaggerated. Nor, self-evidently, does it follow that whenever H gave a different account I should take it as accurate. Both throughout these bitterly-fought proceedings have given no quarter, and each has consistently determined to win their corner. Many statements on either side have been clearly self-serving.

87. I shall allude in outline only to some of the areas of W's evidence which I found unsatisfactory, without descending into the detail. I do not believe that she believes that a loan she made to H of £5000 in 2002, which he repaid with interest, contributed in any way to the start-up of LCAL. I do not accept that many of the inconsistencies she betrayed resulted from losses in translation or from the fact that the subject of a line of questioning happened a long time ago. The topics in question ranged from what she was told by H and/or what she believed to be the progress of his divorce from W1; the year in which she became first aware of the existence of NHT; who threatened whom on a particular occasion and whether with a knife (large or small), a corkscrew or nothing at all; and whether or not, and then (having admitted it was not never) how often, she had abstracted emails or other documents online or from his computer which found their way into the French proceedings. I bear in mind (as part of the evidence in the domicile proceedings) her surreal presentation of an email exchange involving H and a woman he says was an innocent acquaintance as erotic when there was nothing remotely erotic to be read out of it, and the frenzy to which that belief drove her.

88. I should mention that I was invited on behalf of H to make findings adverse to W in relation to some tape recordings he had obtained, more or less covertly, of W and the children. In the end I drew back from making findings in an area of enquiry which seemed to me very much the province of the French court before which an active reinvestigation of the children's living arrangements has been sought by H. It was represented to me that there might be questions as to the admissibility of that evidence in the French proceedings, and I was anxious to do nothing which might by a side wind prejudice the French Court's investigation of any such objection. Furthermore I came to the view that neither in relation to my evaluation of W's financial entitlements nor in relation to credit would I be additionally assisted by reaching a conclusion on the issues raised by the recordings. In final submissions Mr Pointer urged me to reappraise that stance, but for the reasons stated I have determined not to.

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89. H's account of their sometimes joint but often several accommodation arrangements and travels during the period after they met until they visited his parents over Easter 2003 in Miami and then went on to Cuba is the more detailed and consistent. W repeatedly replied that she was at a loss to establish dates and durations, that she could not say or that she could not remember. She describes them as going on extended boat trips shortly after they first met at which point matrimony was already in the air even though references to it may have been more flirtatious than serious. H says that the sailing trips which she describes took place in 2003 rather than in 2001, and denies that he ever suggested that as captain of the boat he was in a position to celebrate their marriage at sea. I think it unlikely that he did so, but if indeed he did then at the stage of their acquaintance at which W places it I would not treat this as contributing any scintilla of nuptial element to the trust. But I am not persuaded either that for a period of about four months in 2002, after his divorce from W1 and its financial consequences had been resolved, he and W1 resumed cohabitation in Bequia to see whether they might restore their relationship, a proposition which he advanced for the first time only a fortnight before the final hearing and which (although she had not been on the island at that time) did seem to be the first which W had heard of it.

90. As to marriage, in my view there clearly came a stage when it must have seemed to both of them to be likely at some point, but I doubt whether they ever formed any mutual understanding of quite when that might be. External events and considerations however brought this to a head after their first child was born in September 2005 in Martinique. As neither of his parents is French he did not at birth acquire French citizenship. As both of them were born outside England and as the law then stood he did not at birth acquire English citizenship. He was stateless, and the marriage of his parents was one of the steps they had to take in order to be able to bring him to England. His British passport was issued the day after their marriage.

Was NHT from the outset nuptial?

91. The information available about NHT is limited because of the stance taken by TB/RFG and authorised by Bannister J's order of 28 June 2013, that RFG has no obligation to provide any information to H. That has not however seemed an obstacle which has prevented TB from releasing documentation when he regarded it as helpful to NHT to do so. Indeed he went so far, in his Note of the 3 December 2013 Hong Kong meeting, as to say that:

"the Trustees stated that they were however prepared to provide SDM/H with copies of all documents that positively benefit the Trust and the Trust position. Accordingly, the Trustees will provide all security-type documents which prove that specific assets that are in H's name are not beneficially his."

92. He did not do so immediately, nor when he said he would in relation to some specific documents, and not

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until the very end of the proceedings in the case of the great bulk of them. The flow has been sporadic and incomplete. This has particularly been the case in relation to the very late disclosure, effectively on the eve of the hearing and indeed at its conclusion, of documentation which has made clear the structure of the Car Portfolio with which I shall deal as the next topic. Mr Pointer's complaint that the section 37 application was in itself so late instituted does not meet this point, although he is it seems to me correct in asserting that until then the focus had primarily been upon the extent to which the vehicles constituted an available resource for H. The Special Agency Agreements (described from paragraph 128 below onwards), for instance, were documents only available at a very late stage which were key to an understanding of the arrangements documented between H and Anthology. Even before the fall-back section 37 application was instituted it was very evident that these arrangements and their effect were the subject of probing and pertinent scrutiny.

93. Thus no copy of the trust deed has been made available, nor any accounts or comprehensive list with regard to NHT's assets. Whereas one might have expected that letters of wishes from H to RFG (although not of course binding the trustees in the exercise of their discretion) might have supported various of the otherwise unsupported propositions upon which they have relied from time to time as to H's long-term intentions regarding the trust he had settled, reference is only made in passing to one of them, said to be the most recent, dated 18 October 2011 whereby H apparently notified RFG formally (although it is inconceivable that he had not told them earlier) of the divorce proceedings which W had commenced the previous July. One would suppose that something must have been changed in that expression of H's wishes by comparison with what they had been previously, but their latest version is said by TB to have reflected no change, and H maintained he did not know what was in the document he signed (as to which I do not believe him).

94. It is of course the case that trustees' duty is to their beneficiaries and that they may be entitled and even obliged (or at least as in this case authorised) to withhold information and documentation in situations such as this. They are also of course entitled and sometimes obliged to avoid involvement in proceedings such as these, conducted in what for the trust is an alien and must sometimes appear a hostile environment. NHT and its trustees have been entirely entitled to decline to submit in any way to this court's jurisdiction, and TB was free to decline (as he did) this court's invitation that he attend the hearing. But the fact that those duties and obligations, and the choice whether or not to attend, do exist does not render the trustees or TB immune from the court's findings drawn from such evidence as it does have available. Nor should a court shrink from drawing justifiable conclusions from that evidence which the trustees or TB may find unpalatable, nor abstain from expressing them because the distance they have kept from the enquiry entails that if they are criticised the trustees and TB were not here to speak in their own defence. I have had in mind the observations of Mostyn J (very much in line with what I have just stated), as to the inferences that may be drawn where trustees do not participate, at [18] in BJ v MJ [2011] EWHC 2708 (Fam), [2012] 1 FLR 667 (although he was there considering the different context of forecasting whether trustees will likely benefit their beneficiary if called on to do so).

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95. From a variety of sources I can be tolerably sure of the following very outline background history leading up to the formation of NHT in December 2002. That trust was preceded by another trust, the Huerto Trust (HT) settled by H in 1988 (or it may be in 1998). Little is known about HT except that it most likely contained within its structure GPH Ltd (the company which in 1999 acquired the Milner Street property). In 2001 TB/RFG took over as trustees of HT. H in his past written and oral evidence has been inconsistent in his assertions about the role which HT may have played in protecting assets from W1 at the time of their marriage breakdown. At times H has denied that HT fulfilled this function, whereas at others he accepted in his evidence what one of his professional advisers had noted to be the case some years ago, that HT did play such a defensive or deflective role.

96. By the date of H's divorce from W1 and the early months of his involvement with W in 2001 H was emerging from a protracted period of great financial strain. He had been involved in at least two punishing sets of arduous litigation arising from his commercial activities. He had retreated and withdrawn to live in Bequia at the end of 2000. After his financial settlement with W1 was finalised he was, he maintains, without capital or income. He was living a very simple life supported financially in part by his parents and (as it were) licking his wounds, recharging his batteries and on the lookout for fresh entrepreneurial inspiration.

97. Against that background and with advice and guidance from TB H settled NHT in December 2002. By that date his relationship with W (intermittent at least physically as for a number of periods they were not together in Bequia or elsewhere) has not been established, on my findings, as committed to the point where marriage was in contemplation save as an uncertain future contingency.

98. About NHT I can be tolerably sure on some of the evidence (and wholly sure from what derives from the judgment of Bannister J in November 2013) that:

• On 6 December 2002, NHT was established by H as a discretionary settlement with two classes of beneficiaries: H alone in Class A in his capacity as settlor, and H's children and remoter issue within Class B.

• W has never been nor could she become a beneficiary.

• On 26 June 2004 LCAL was incorporated and was from the outset and has throughout been owned by RFG as trustee for NHT. The shares, according to H's evidence, are bearer shares. H has never been nor has he been registered as a shareholder, per TB. The foundation of LCAL's fortune was not laid until the month following incorporation when contracts were agreed for the purchase of the aircraft with which the company traded.

• On 31 August 2010 a deed of appointment was executed under which H ceased to be eligible to receive benefits from the trust for a period of 7 years. The deed was revocable, and formed part of the "roadmap" planning whereby it was hoped to deflect potential liabilities to French tax.

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• On 10 September 2010 a similar deed for a similar period and for similar purposes was executed in relation to the interests of the Class B beneficiaries, the three children.

• On 18 October 2011 H signed his most recent Letter of Wishes, the terms of which neither he nor the trustees has divulged.

• On 28 June 2013 Bannister J in the BVI made an order recording that H has no present entitlement to benefit under the trust and no right to require any such an entitlement to be conferred upon him; and that the trustees have no obligation to provide H with any information.

• On 8 November 2013 Bannister J dismissed RFG's application for approval of the draft deed they submitted seeking irrevocably to remove H from all potential benefit under NHT.

• On 26 November 2013 RFG executed a deed which they maintain effectively and irrevocably removes H as a beneficiary of NHT.

99. TB and H both maintain that no distributions were ever made by NHT to H. He was paid a salary, H said, starting in about September 2007 and ending with the payment in January 2010. His starting salary was US$20,000 per month, and in addition he received bonuses from LCAL. H maintains that the business was not initially hugely profitable but that it became so from about 2008 onwards. It would seem to follow that the US$2.1m which H deposited with EFG on his own back-to-back arrangement with the bank from and upon which he intended to finance family expenditure in France for up to 7 years was accumulated from late 2007 onwards but predominantly in the last two or so years before the move to France in 2010. Given the amount of H's salary and the limited period of about 2 1/2 years during which it seems it was paid it would seem again to follow that the bonuses he was awarded were prodigious.

100. The full extent of the assets comprised within NHT has never been divulged, but apart from LCAL and Anthology it appears to encompass GPH Ltd (which now owns the two London Properties), Blue Orchid (the owner since 2008 of the erstwhile family home in Bequia, Alta Vista), and Orchard International (which owns or owned a sloop, to which a value of €700,000 was attributed in an early 2010 list of "Worldwide Property" adduced in evidence in the French proceedings involving these parties).

101. I must therefore ultimately have regard to the question whether H settled NHT in contemplation of marriage. I accept the formulation contained in Burnett v Burnett [1936] P 1 at page 16, that "in order to bring the section into operation, there must be a marriage which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made." The evidence I have

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heard and read falls short of establishing that matters stood thus between the parties in December 2002. Despite the breadth and diversity of arrangements which have been held to fall within the meaning of a nuptial settlement for the purposes of this provision, there must always be some nuptial element. Here that was lacking. The answer is as short and can be as simply stated as that and does not require further elaboration or citation of authority.

Has NHT since its inception become nuptialised?
102. This question arises because Mr Bates submits that I should adopt the reasoning described by Sir Paul Coleridge in the case of Quan v Bray & Ors [2014] EWHC 3340 (Fam).

103. The kernel of Sir Paul's proposition emerges from these three paragraphs from his judgment (with the same emphasis as is contained in the original):

58. I have also been addressed on the question of whether a trust , non nuptial at its inception, can later become nuptialised. (see Burnett v Burnett [1936] P1).

59. The essential features of a PNS [a post-nuptial settlement] seems to be an existing disposition in favour of, one, other or both parties to the marriage (in their capacity as husband or wife) and for their present or future benefit. An existing intention to benefit one of the spousal beneficiaries is obviously a prerequisite.

60. In my judgment on the authorities, a settlement which is non nuptial at its creation could itself later become "nuptialised" if there was, in fact, a flow of benefit to the parties during the marriage from the trust . Alternatively a later disposition from the trust can itself constitute a post nuptial settlement without the main or superior trust necessarily becoming nuptial.

104. He then asked himself these three questions, and gave himself these answers:

66. I have ended up with these essential questions (of law):

a. Neither party is identified directly on the face of the written instrument (in schedule 2), as a beneficiary of CTSAT. Only SCT UK. Can it nevertheless be categorised as a PNS and one or other of them as a beneficiary of that trust, merely because CTSAT, as a fully discretionary trust, is capable of being amended or adjusted (by adding trustees or terms) to make them such?

b. If not should CTSAT nevertheless be regarded as having become a PNS if there is, anyway by the time of the application to vary, an existing intention to benefit one or both of them which is evidenced by past receipts

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from the trust?

c. If the parties have not to date received such benefits is the mere intention (established by other evidence) to benefit one of the spouses in an unspecified way and at some unspecified time in the future sufficient of itself to constitute a PNS ?

...

69. My answers to the questions of law are as follows ;

a. (66a) NO. This is mostly agreed and straightforward. The mere fact that a trust is a conventional fully discretionary trust capable of being varied to add other beneficiaries including the parties does not of itself render it a PNS.

b. (66b) YES. If there has been a regular flow of receipts paid from CTSAT to the parties (in their capacity as spousal beneficiaries) for their benefit that could be evidence of a pre existing intention to benefit them whatever the instrument said on its face. It would evidence an existing disposition and render the trust a PNS

c. (66c) NO. In my judgment if all that is established is a vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways, that is not enough to turn a non nuptial settlement into a PNS. That cannot amount to an existing disposition.

105. In the light of the contextual facts which Sir Paul Coleridge found in that case he determined that that trust had not become nuptialised. Mr Bates invites me to apply the same principle but to find that on the facts of this case NHT has undergone that transformation. Leaving aside any impact from the acquisition of Alta Vista, he suggests that "it is plain that H and the family have been continuing to live off borrowing 'collateralised' by NHT since 2010" and thus that the Quan v Bray (66b) question should be answered affirmatively.

106. But before coming to the context I must ask myself whether I agree with the propositions of law. They are not of course binding upon me, although equally obviously entitled to respect and careful consideration having regard to their source. In the light of the result the judge's observations were obiter. But I have indeed reached the conclusion that they do not reflect the law.

107. Mr Pointer in response directs me to Burnett once more and also to K v K [2007] EWHC 3485 (Fam), [2009] 2 FLR 936. He argues that from the passage commencing on page 15 of Burnett (quoted below) is derived the proposition that the settlement under consideration for the purposes of establishing its susceptibility to adjust-

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ment at the time of the divorce must at the time of its inception (in the case of an ante-nuptial settlement) have been in contemplation of that marriage, between those spouses. Ergo if the marriage in question was not at that time in contemplation, that is to say not looked forward to, then looking back at it cannot retrospectively change the settlement's characterisation from non-nuptial to nuptial. And that certainly was the view taken in the later case of K v K which, for Mr Bates to succeed, I would need to find was wrongly concluded. In K v K the conclusion (at [79] and [82]) was that Burnett "clearly establishes that a non-nuptial settlement cannot become a nuptial one."

108. The passage in question in Burnett is the following, at page 15:

"[T]he principal settlement, in order to be 'ante-nuptial' within the meaning of s. 192 of the 1925 Act, must be made in contemplation of or because of a second marriage, although the settlor at the time when the settlement was made was already married. 1 do not think that s. 192 was intended to cover such a case as this. In order to bring the section into operation, there must be a marriage which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made. I do not think that the Legislature intended a spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement which is 'ante-nuptial' as regards such contemplated marriage, although at the time being he or she is married and, therefore, incapable of entering into a second marriage at that time. [My emphasis]

A second point taken on behalf of the wife on this petition to vary was that the appointment under settlement No. 3 by the settlor on his second wife under the powers confirmed by the original settlement No. 1 was clearly an ante-nuptial settlement within s.192. I think that this is so, but in my view the Court has no jurisdiction under s.192 of the Judicature Act, 1925, to vary an appointment in such a way that in the result the principal settlement is also varied although that settlement is not within s.192."

109. In the Court of Appeal decision in Charalambous v Charalambous [2004] EWCA Civ 1030, [2004] 2 FLR 1093 Arden LJ at [53] when considering the scope of the word "made" within the statutory context of a "settlement ... made on the parties to the marriage" reflected that "the word 'made' relates back to the moment of creation of the settlement. At that point in time it must be within the description 'made on the parties to the marriage.' It probably must also have been an ante-nuptial or post-nuptial settlement at the date of creation though it is not necessary to decide that point." In my view the question left open by the sentence I have italicised is answered conclusively (so far as previous consistent authority is concerned) by the meaning attributed to the second paragraph quoted from Burnett which was approved in K v K. Were it to be otherwise every truly dynastic settlement, bereft of nuptial character at the outset but providing benefits for an individual who subsequently becomes either a husband or a wife, would arguably become variable under section 24(1)(c) as soon as that individual, once married, received any benefits. I am satisfied that that is not the law, notwithstanding the

breadth of attribution historically afforded to settlements treated as nuptial.

110. For completeness I should add that in this case no circumstances arise, whether by virtue of any change of trustees or resettlement of the whole or part of NHT's corpus within a differently-constituted trust, which require consideration to be given afresh to ascertain whether the new arrangements of themselves give rise to a nuptial trust variable under this provision.

Did any property since acquired by NHT import a nuptial element?
111. This question arises as a result of the submission made by Mr Bates that one or more ingredients of the trust corpus may be susceptible to the variation of settlement provisions of MCA section 24 (1)(c) because of their own separate nuptial element. He invites me to decide that the acquisitions by NHT of Alta Vista and the London Properties were nuptial in character and thus that the trusts affecting them are variable under that provision.

112. As to Alta Vista, acquired by NHT in 2008 and held in Blue Orchid, the proposition adopts the conclusion reached by Coleridge J in N v N and F Trust [2005] EWHC 2908 (Fam), [2006] 1 FLR 856 which was considered and approved by Munby J (as he then was) in Ben Hashem v Al Shayif & Anor [2008] EWHC 2380 (Fam), [2009] 1 FLR 115. The question does arise whether that route to variability is open in the case of an asset held within a company, having regard to the impact of the Supreme Court decision in Prest v Petrodel Resources Ltd & Ors [2013] UKSC 34, [2013] 2 AC 415]. But it is not a question which I need resolve for present purposes. In Ben Hashem the element of the property which was arguably a nuptial settlement that was settled was not the property itself but only the husband's revocable right to occupy it. That as I have outlined earlier in this judgment seems also to be the only basis of H's ability to use this trust property as the family's principal and later its secondary home. The likelihood is that NHT's trustees have already terminated that licence, but even if not they have the ability to do so with relatively short-term and conclusive effect. No contemplable variation of settlement in relation to that (at best) transient and distant interest would hold realisable value for W even if firewall provisions in section 83A(13) and (19) of the (BVI) Trustee Ordinance did not frustrate the intent of any such order by restricting enforcement of foreign judgments arising out of matrimonial proceedings (as is the effect of those provisions according to Mr Pointer's final submissions).

113. As to the two London Properties, it would I believe be a reasonable assumption that Milner Street acquired in 1999 passed within the ownership of GPH Ltd from HT to NHT on the occasion of or soon after the latter's institution in December 2002, and thus for the reasons already stated would not then have qualified as nuptial in any event. But there was never on the evidence any way in which either property could be said to have benefitted the parties qua spouses. I can see no avenue for making any order from which W might derive benefit from these properties and thus rule that no jurisdictional basis has been established for me to charge them with

payment of any lump sum awarded to her, one of the suggestions made on her behalf.

Is (or was ever) the Car Portfolio owned by H?
114. H and TB/RFG say none of the Car Portfolio cars were ever owned by H and that none now is. If that is so then clearly I cannot declare them to be his, nor can I order their sale to provide a source for a lump sum for W or transfer them to her as part of her award. Moreover that would dispose in limine of the question whether any disposals by H might be reviewable under Matrimonial Causes Act 1973 section 37.

115. First however a few observations about this collection of very collectable classic cars.

• Although described at various stages of these proceedings as numbering 35, their total has fluctuated over the years since about 2009 when H says the process of acquisition seriously commenced.

• For present purposes neither the Bentley nor some more modest vehicles which H identified as personally owned either by him or by W are included in the generic description.

• No distinction is taken for present purposes between the earlier days when ownership may have been attributable to NHT, the middle period when cars purchased may have been attributed to the ownership of LCAL, and the more recent period since the incorporation of Anthology which is said to be the current beneficial owner of the entire Car Portfolio.

• Much time and energy was expended before and during the hearing in an attempt to establish more precisely the details and whereabouts of cars within the collection, but in light of what will be my findings I need say no more than that on that topic.

116. Investment in these vehicles has proved very profitable for their owner: H in his evidence clarified in relation to a list he had compiled at the beginning of October 2014 that the total of €22.2m was their cost price rather than, as he had put in this document, their "approximate value." In one case (which clearly would not be typical of the collection as a whole) a vehicle shown on the list at €2m had in fact by then already been sold for US$5.8m (equivalent at the date of sale to approximately €4.5m). A single vehicle, a particular Ferrari, bought in September 2012 cost US$8.5 million, and was the most expensive in the collection, according to H.

117. In the quest for evidence to assist in the attribution of ownership some factors must be regarded as neutral. In the case of vehicles registered in this jurisdiction (and so it is in some others) the fact that a car is registered to a particular individual expressly does not denote ownership: in England it is the keeper of the car whose details are kept by DVLA.

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118. Other factors require an explanation to discharge the presumption to which the exercise of the indicia of ownership may give rise. In the context of this case those considerations might be thought to apply to a whole range of factors.

119. For instance, in his evidence in the domicile proceedings H accepted in answer to questions from counsel then acting for W that the car collection was his, and he later at the beginning of May 2013 included €40,000 per month costs incurred on the cars in the amount of expenditure he would need to be free to make from the EFG facility while the freezing injunctions were in place. These answers too were unambiguous:

MR. LEECH: You accept, do you, that what is owned by the New Huerto Trust via companies is in reality yours?

A It was up until I moved to France, my Lord.

Q Okay. So for tax reasons ----

SIR PETER SINGER: "It was until I moved to France"?

A That is correct, my Lord. Until just prior to moving to France.

MR. LEECH: You will explain in a minute what you did when you got to France, but up until that point they were your assets?

A That is correct, my Lord.

And later:

... you own a huge car collection, do you not?

A I would not say "huge". I do have a car collection.

Q In terms of value it is huge.

A I do have a car collection, yes.

Q How many cars?

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A About 35.

Q They are owned through companies that are owned in turn by the [New] Huerto Trust?

A That is correct. Yes, my Lord.

120. He gave that evidence in April 2013, but as recently as at the final hearing he was still making comments in ownership mode, from which one might conclude that he continued to regard the Car Portfolio as very much his collection:

MR. BATES: And this particular Alfa Romeo, whilst we are on it, was a very special car for you, was it not?

A Not particularly. It was a very pretty car. It's one of the best cars to own. But it wasn't owned very long, so, if it was very particular, it would have stayed in the collection.

Q Really?

A You don't get rid of things if you're collector, if you love them. They would still be in there, which it seems it's not - been sold.

and he seemed not too downcast, just sour, at the effective expropriation and sale by RFG of his 1928 Bentley, remarking sanguinely in the course of his final recall for cross-examination on 2 December that although he was disappointed to lose it, he knew that TB and others at RFG had been looking to acquire a rather better and more authentic Bentley for some time, and indeed had in June 2014 purchased a 1930 model for £1.25m. He had not been aware of that until he saw documentation produced in the course of the proceedings, it was not of interest to him, it had nothing to do with him, and it would be wrong to suggest that when things between him and TB were patched up he might be able to use it as a replacement for his own.

121. Two of the particularly rare and exceptional vehicles in the collection, a McLaren F1 and a McLaren P1, sport the registration numbers F 1 JOY and P 1 JOY. At the beginning of October H showed their value (by which he explained he meant cost) at €2m and €1m respectively

122. It is clear from his evidence and from documentation gleaned from the internet that H is an extremely enthusiastic participant, both as a wheeler and a dealer, at each season's Grand Prix and Concours d'Elégance meetings in Europe and elsewhere. He is usually accompanied by a selection of wheels from the collection, and he prospects to find both potential sellers of desirable vehicles and possible purchasers at the right price of

those which are for sale. He was until it was closed in a position via the EFG facility to put down deposits or to conclude transactions. It is also very clear that, even if not exclusively, he is the person who largely organised car movements, maintenance and the logistics of their necessary paperwork. Château T is at least from time to time the arrival departure and storage point of vehicles on their way to and from their destinations. He is absolutely without a doubt centrally involved in this multi-million pound activity, or has been until recently (by which I mean to include much of the period since his November 2013 permanent exclusion from trust benefits). Indeed it is unclear to me how many of the transactions necessary for this business to continue could be taken over by someone else.

123. When considering what weight to give to such factors as these I must keep in mind that it is far from uncommon for businessmen and entrepreneurs to refer to their house, their car, their plane, their helicopter, their yacht, their racehorses and polo ponies ... as "mine" whereas such items then turn out to belong to the company, the anstalt or the trust.

124. Such laxity of expression may simply reflect self-aggrandisement, but can also prove revealing when one comes to assess the underlying realities, and to look (in this case) to find whether the cost of those cars which were paid for with the use of the EFG facilities (and it seems clear that most of them were, according to H) have been appropriately put down, as it were, as trust expenditure clearly distinct from the US$7.06m claimed back from H in the wash of the EFG meltdown.

125. Inferences may similarly be drawn from the lack of specificity and even more strikingly of differentiation with which schedules listing vehicles or worldwide assets have been drawn. H has always maintained that he does not have in his possession or have access to trust documentation, and asserts that he has been astute to have nothing available, even via his computer, in France which might link him with the trust or its assets. However, I have been shown documents put in evidence in the French proceedings some of which may well have been prepared before the move to France imposed such precautions. Some of them bear H's handwriting. They are:

• A typed schedule dated 16 January 2010 headed "Car Collection-Progress List" and bearing annotations H accepts he made. As well as 20 Classics the list shows vehicles said to be on order which include two shown as on order for the parties, and a range of what are described as utility vehicles which H confirmed belonged personally to the family and not to the trust, including a quad bike in Bequia.

• From the same period in early 2010, a typed and unannotated list spreading over two pages entitled "World Wide Property." It includes properties both owned and rented and their contents, vehicles, the sloop already referred to and its dinghy, without distinction between trust and personal property. It shows a total "value" of €23.3m

• An email in March 2010 from a private banking assistant at EFG addressed to Clive. She thanks him for sending photos of the most recent acquisition but warns him that he should be careful as "it does bear an uncanny resemblance to Mr Toad's car." She sets out balances on current accounts, deposits and loans at EFG in Guernsey and in London which H has (in his notes on the document) broadly converted to US dollars and then totalled to show the credit balances exceeding the debits by US$1.5m, "so US$1.5m still available." The lady at EFG ended her email with the question "Would you like the NHT and [GPH Ltd] as well?"

• Dating from December 2010 is an insurance schedule addressed to H at his Swiss residence. It lists 34 vehicles of which most but not all are within the Car Portfolio, the few others being those which H accepts belong to the family, including the Bentley. The insured value of all these vehicles together comes to some CHF24m. There is no reference to the trust or to any company on the document. H is described as the "Besitzer"of the vehicles, which I take in this context to signify no more than that he has an insurable interest in them. On the assumption that this document was issued on renewal of the insurance in October 2010 one would have expected some differentiation at least in the attribution as between H and NHT of the premium, bearing in mind that at this point neither he nor the children were entitled to benefit from the trust. This would be so whether or not the premium was paid from the EFG facility standing to H's credit. The amount due from H in respect of family vehicles would not have been inconsiderable, totalling roughly CHF1500.

• A similar insurance schedule, but dated 1 March 2011, bears H's annotations. The differences between this and the earlier version are immaterial for present purposes: the indiscriminate blending of trust and non-trust assets is repeated.

126. H did in his evidence proffer an explanation for the universal format of the global "World Wide Property" document:

Q There is apparently no distinction between cars or property which you say you own personally, as against those which you say are owned by LCAL Anthology or LCAL.

A Yes, not specifically on this document, but they're covered with an oral agreement that I had.
...

Q The very obvious inference is that it is all yours, with the possible exception of item 6 where Orchard Inc. is said to be the owner [of the sloop].

A That's not correct. That's not the reason this document was set up. This document was prepared to study what would be our exposure to maximum damage when we moved to France, so what could the French Fisc de-

termine to be possibly our maximum damage and that's why it was prepared and it was prepared in conjunction with the insurance. ...

SIR PETER SINGER: ... This is not a list of what is in the trust, is it?

A It's not.

Q No, it is not a list of what is in LCAL. It is not a list of what is in LCAL Anthology. It is a list of what is in the Joy family, is it not?

A No, it's a list of all items that would have had my name attached to it because, remember, I was the registered keeper of quite a lot of these vehicles and, therefore, they were to be included as part of the risk. Funds held by the trust in America would not be here because the French Fisc wouldn't have visibility on them, but this is what I was asked to prepare for that task, my Lord.

127. So far, taking all this together, one might be forgiven for beginning to think that the lack of appropriate boundaries between H's "mine" and NHT's "thine" could indicate that TB/RFG may not have been adopting normal trustee-like principles in their tutelage of the trust assets for the long-term primary benefit of the Class B beneficiaries, the children. I confess that the word sham does spring to mind, at least in the non-technical sense of things not being quite what they appear. But for what I judge to be understandable legal reasons Mr Bates did not run W's case on this basis; and indeed, were I to make a finding of sham in the technical fiduciary-related sense, the BVI Court (not least having regard to the firewall provisions of the BVI Trustee Ordinance to which I was and to which I have referred) might not be as accepting of so exorbitant a conclusion as was the Jersey Court in the Fountain Trust case [2005] JRC 099, agreeing to enforce the orders I had made consequent upon just such a finding in the case of Minwalla v Minwalla [2004] EWHC 2823 (Fam), [2005] 1 FLR 771.

128. However, by the onset of the final hearing TB had made available via SDM the key documents whereby the acquisition procedures for vehicles H acquired for the Car Portfolio became apparent. The documents in question are:

• What are described as Special Agency Agreements, dated 31 August 2010 and 8 April 2013

• Purchase Confirmation documents for completion and signature by H, and addressed to LCAL/Anthology

• Sale Confirmation documents to be completed and signed by H, similarly addressed to LCAL/Anthology.

129. By the conclusion of the hearing uncontested evidence had been supplied by the witness to H's signatures to

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support the proposition that the Special Agency Agreements were signed on the dates they bear.

130. It may help to illustrate the difficulties created by TB's late disclosure of documentation, and the degree of suspicion inevitably (as it seems to me) to which such unhelpful conduct gives rise, just to spell out that it was only in H's final statement of 10 October 2014 that there came the very first mention of such a thing as a Special Agency Agreement with LCAL/the Trust. On 13 October 2014 H's solicitors sent a document to W's solicitors under cover of a letter saying simply: "We attach copy documentation we received on [11 October 2014] which are relevant to your clients S37 application." This document was the Special Agency Agreement dated 8 April 2013 which appoints H as its special agent in relation to a new classic car business, Anthology. No annexures A or B were made available. Then on 21 October 2014, three working days before the hearing was due to commence, H's solicitors sent a further document, the earlier Special Agency Agreement dated 31 August 2010 whereby LCAL had appointed H as its special agent, this time with pro-forma Annexures A and B (the template purchase and sale confirmation documents). Also enclosed were two letters dated 8 April 2013 and signed by H referring inter alia to all UK registered and Swiss registered cars which previously belonged to LCAL as belonging henceforth to Anthology LCAL.

131. I shall ignore when I come to deal with them the complications that the Special Agency Agreement was signed twice over, once in relation to LCAL and later repeated in relation to Anthology; and the further refinement that different versions of the Purchase and Sale documents were to be completed depending on the country where the transaction took place.

132. The Purchase Confirmation recites:

"In accordance with my agency Appointment I hereby confirm that all legal and beneficial interests in and to the above car are held for and on behalf of LCAL Inc [or Anthology, or NHT] and that I am a nominee and bare trustee in respect thereof. Furthermore I hereby confirm that I will henceforth only deal with the above car as requested or directed by [...], and in the interim I do hereby formally pledge covenant and guarantee the foregoing."

133. The intended purposes of this documentation were, it seems to me, clear. It would enable H to demonstrate that in making such acquisitions he was acting as agent for NHT/LCAL/Anthology, rather than as principal on his own account, even though the vehicles might after acquisition be registered in his name (and for that matter, as appears to have been the case, insured in his name). The documentation might also serve to dispel any suspicion which could arise from the fact that purchase funds would in the majority of cases be drawn from a facility in his own name at EFG. No doubt one thought in the mind of the person who drafted these documents (it may have been TB, who is a qualified English solicitor) could be that they would help get round potential potholes along the roadmap's route as well as serve to get round any roadblocks should the French fiscal authorities pay a

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call and find Château T's forecourt filled with hyper-valuable classic and racing cars.

134. But the documentation might also be in this form because it genuinely reflects what the parties intended the ownership structure to be.

135. On 28 November 2014, just a working day away from the two days set aside for final submissions, an application was submitted on behalf of H to admit in evidence a bundle containing a further 300 pages of documentation in relation to the applications concerning the car collection which, his solicitors wrote, they had "prevailed" upon RFG to provide to them. These documents, produced very much at the last minute of the final hour, do support the proposition that the agency documentation was in fact used in relation to the purchase and sale cars in the collection.

136. Quite why there was such reticence and obfuscation in drip feeding and then deluging these documents into the court proceedings must be a mystery, but does very amply demonstrate the length and complexities to which TB will go in his mission to preserve NHT from attack by W and indeed the English Family Court. Yet these were documents (at least in the case of the purchase and sale documentation) of which he had twice in Hong Kong offered copies but then declined to do so.

137. So in the end I unhesitatingly conclude that notwithstanding the loose description by H of the Car Portfolio as "mine" and all the other indicia supportive of its ownership by him which I have described, these vehicles are owned by NHT via the company Anthology. But that finding gives rise to a very significant corollary. If a distinction was ever going to be drawn between the use made by H of the EFG accounts backed by the NHT guarantee/deposit arrangements which was for the benefit of the trust on one hand; and those funds drawn down against that facility which were used for Joy family acquisitions or expenditure: then one would have expected that as a matter of internal accounting an audit trail would have been established to maintain what in effect would have been the state of account as between H the individual, and H the special agent disbursing funds on behalf of and for the benefit of NHT.

138. A ledger maintaining a running loan account of this sort is commonplace for partners in practices and directors in businesses around the globe. Such an account would, one would suppose, be maintained on a running or periodic basis and would include not just the funds expended through H's NHT-backed EFG account on car purchases but also his more modest reimbursable expenditure in connection with travel and attendance at race meetings, and any bills met from the account for the general maintenance and upkeep of the vehicles (such as the €40,000 per month which in May 2013 H asked the court to allow him to continue to draw from this account). It is in such an account that one would expect to see the appropriation of vehicle insurance premiums between the Joy family and the Trust.

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139. Indeed, once H had, to fend off any French tax invasions, been temporarily excluded from benefit from the trust in August 2010 (and the children similarly the following month) it would surely in a properly conducted trust have been imperative to ensure that neither H nor the children received any further benefits. The necessary degree of supervision and control would in turn have made it essential for proper accounts to be maintained and, when necessary, for H to reimburse the trust for any of his personal expenditure facilitated by the trust back-to-back arrangements with EFG. He could have done so from the US$2.1m of his own money on similar back-to back deposit which he told me was an amount largely sufficient to meet his and the family's necessary expenditure, and contingencies, over their anticipated seven-year stay in France.

140. The need to maintain such an account to differentiate between trust and personal expenditure was all the more imperative in view of the provisions of the Special Agency Agreements. Clause 5.1, (under the rubric Responsibility and Indemnity) provided:

"The Company shall act as the funder and financier of all Purchases and of any commissions or fees relating thereto. It is acknowledged and agreed that from time to time and depending upon the circumstances it will be expedient for [H] to use his own resources (including his personal banking facilities outside France) to make any deposits, down payments or other payments and expenses, but strictly on the basis that his counter-indemnity dated 30 August 2010 shall not apply to those funds."

(The counter-indemnity there referred to is the one relied upon by NHT as the basis for the claim made in the Swiss arbitration proceedings, and is referred to at paragraph 51 above. That document, it will be recalled, on its face makes H liable for all losses sustained by the trust, namely the whole of the US$18.9m.)

141. I presume that it was in order to provide a sanitary cordon proof from prying eyes that the funds which it was envisaged H might use were described in this Agency Agreement as his "own resources" whereas in fact they were only available to him because NHT had guaranteed his liabilities under the facility and backed them with the deposit of trust resources.

142. If TB/RFG did maintain such an account then two things would have been possible. It could have been produced to demonstrate that there was no element of fiction or fluidity about any impermissible private expenditure by H of, in effect, trust funds once he was debarred from benefit on the move to France. But it would also have provided a much more logical and accurate method of assessment of the loss in fact incurred by the trust, properly recoverable from H, as a result of the EFG débâcle.

143. The significant doubt about the accuracy and method of calculation of US$7.06m as the measure of the trust's loss which H should reimburse was well advertised by the time the evidence on 7 November drew to its conclusion. The apportionment issue just described had been discussed and, in my judgment, H's evidence had

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not been at all effective in dispelling the mystery of how that amount was arrived at. TB proved willing and able to provide through SDM documentation which has indeed been helpful in support of the case presented as to ownership of the Car Portfolio. In view of the documents which were produced as to car ownership I do not regard it as an adequate explanation for the failure to disclose anything to establish the extent of H's liability that RFG were entitled to produce nothing as a result of the order made by Bannister J. It would have been very much in the interests of the trust to demonstrate propriety and accuracy in relation to the claims it has pursued against H which have had the effect of leaving him bereft of capital.

144. No one has satisfactorily shown how that very specific amount (even though it was said to be approximate in the 3 December 2013 Hong Kong meeting Note, and even though it was said "the exact amount will be confirmed" - which it never was) of US$7.06m can be derived from looking at the total value of those assets in H's ownership which TB said the trust would pursue. H during the course of evidence regularly referred when questioned on this topic to a schedule of assets he had produced back in May 2013. This document is of no help in arriving at US$7.06m, not least because it omits reference to the Bentley altogether, and overlooks the £2 million loan due to him from the Château T SCI.

145. In their skeleton argument for the final hearing Mr Pointer and Mr Wilkinson advanced the following proposition:

"the trustees [were] obliged to pay up under the guarantee: so that, it was said, H personally benefited to the sum of approximately $7m. It is understood that this has been calculated from the following assets:

£1,700,000 for the land in Zermatt
£2,550,000 for the purchase of Château T
£472,000 in respect of the Bentley
£185,000 for the Piper Archer aircraft."

If this is an attempt to demonstrate US$7.06m as the value of the personal assets acquired by H's use of the facility, then it fails. The list totals £4,907,000. In November 2013 the monthly spot rate for the dollar was 1.6383, so that sum then amounted to just short of US$8.04m.

146. H attempted a different formulation in his oral evidence. He suggested that the cost of purchases for the Car Portfolio made up "the bulk" of the US$18.9m which TB said was the extent of the loss sustained by NHT when EFG enforced its guarantee. Asked to estimate how much that component of the loss was, he replied about US$12m, and then agreed that he had arrived at that amount by deducting 7 from 19. He also claimed that at the December Hong Kong meeting he had been shown some paperwork demonstrating how the amount claimed from him was calculated, but that he had not paid attention to it. He was, I have to say, surprisingly re-

laxed about the way in which what was said to be his liability had been established both as to the method and as to the amount. RFG, he said, were very good at maintaining records. He was unable to say whether amounts other than for car purchases expended by him on or in connection with the Car Portfolio had been taken into account, but seemed to wave that aside on the basis it would only amount to some $5000 or so.

147. Indeed this lacuna in the evidence was fully evident to H and to his advisers by the collapse of the domicile proceedings in April 2013, yet the gap was no more satisfactorily plugged in the intervening 18 months or at the final hearing than then. This was because Mr Pointer in re-examination of H on 26 March 2014 had afforded him an earlier opportunity to explain how the US$7.06m was composed, which it must be said H similarly lamentably failed to clarify. Nor could he explain to Mr Leech how a number of very obviously car-related and large debits to the account secured against the deposit of his own funds were treated, if at all, by any process of accounting, other than to say he thought that "some of the items [and individual items totalling more than £250,000 had been identified] ought to be invoiced back to the trust." It was therefore obvious to all in court that H recognised that he should be given credit at some point against what he might otherwise owe in relation to the NHT-backed accounts. I asked him "how am I to know how much the trust owes you in relation to these huge amounts of money that they have never repaid you?" To which he replied "You could require me to do an exercise for you, my Lord, of analysis." But analysis came there none.

148. I am left with no alternative but to conclude, and I do, that the reason no breakdown of expenditure through the account was produced is because none had historically been maintained.

H's "Day of Reckoning"

149. H said that he had been caught out with an accelerated "day of reckoning" when EFG called in the loans. It was put to him that the reality was that he had never had any genuine expectation that he would have to repay whatever amount he ended up borrowing, in effect from the trust via the EFG facility. When it was suggested to him that but for EFG's actions and financial claims a time would have come when the loans were one way or the other discharged other than by repayment, he denied that. He said that he would have expected to be able to repay from earnings and commission working as Anthology's special agent. And indeed no doubt if the salary and bonuses were large enough they might be employed to wipe out the debt, as payments to an employee by a company within a trust might be made legitimately even though advances of capital to discharge a loan should not be possible without breach of trust.

150. H anticipated that even now he might be taken on to carry on as before assisting Anthology hopefully to make lucrative gains for the benefit of NHT. Certainly that expectation had been canvassed by TB at both the Hong Kong meetings, of which more below. Failing that, he had made millions before and expected to be able to do so again. In the meantime, as I have said, he hopes that the trustees would not force him and thus the chil-

dren to leave their home at Château T.

151. He repeatedly said that he was unable to take up employment while he remained living in France, but that once he could get the children into boarding school in England he would be free to go and establish a base somewhere (he mentioned Monaco or Switzerland) from where to work. Their youngest son will be just 5 next October. He proved wholly unable to advance any reason why he could not commence employment while living in France, resolutely relying upon his privilege to avoid explaining what advice he had been given on this topic by lawyers in Monaco. So I am left in the dark about that, and assume that potentially wider adverse tax consequences may be the reason. It is very clear that H orders his life and does not make a move without very full consideration of the tax implications, and that he and TB share two at least of the same horrors: paying anything that cannot be avoided to fiscal authorities, or to W.

152. The flavour and indeed I must say the improbability of what H appeared to have in mind emerge from these sample passages from his evidence:

MR. BATES: Your understanding, Mr. Joy: was the borrowing ever going to be repaid at any stage?

A Absolutely.

Q How and when?

A When we moved out of France and I was in a position to earn money and start working again.

Q And so what was your plan which was going to enable you to pay around about $25 million?

A Well, I wouldn't need to pay the $25 million; that would be the offset as to the value of the cars. If ten cars were sold, the debt outstanding to EFG may be less.

SIR PETER SINGER: Let us just assume, for present purposes, that seven million, or thereabouts, bearing in mind that you might need to draw down, had it continued, for your own personal use between now and the end of the seven-year period or however long before you left France, how were you going to pay off seven million?

A There was $2 million set aside for living in France; that was the living amount. I would go into business and start making money again. I've done it quite a few times before.

Q Making money for whom?

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A For myself, my Lord, through salary and through bonuses - part of a job. And the family, of course.

MR. BATES: Is not the situation actually, Mr. Joy, that, as you know perfectly well, it is quite common to borrow from trusts? You know that, do you not?

A I have never borrowed [from] trusts for personal gain. I mean, I've used, as you say, the credit facilities for business, predominantly. This day of reckoning came and caught us out. It was never supposed to happen, it was never supposed to happen.

Q You are very keen on the presentation that you have not had a capital distribution from the trust; that I understand. But what you have had is the benefit of a very large loan facility, have you not?

A I have a $7-million bill to show for that.

Q And there was no firm plan in place by which you were going to be able to repay that sort of figure, was there?

A It was never considered a problem. We've come out of a business that's made many millions of dollars, hundreds of millions of dollars. It was not conceived as a problem in the short, or even long-ish, term.

153. As for the position of RFG on the question of whether advances to H by way of loan might in due course have been forgiven, it appears clearly expressed in a passage in TB's Note of the December 2013 Hong Kong meeting:

"SDM asked the trustees why they were so exercised by the loss to the trust fund and whether it had always been in their contemplation that the facility would be repaid, one way or another, through the trust assets. The trustees responded that this was not within their foreseeable contemplation and was certainly not their intention at any stage. The trustees operate on the basis of full understanding of the concept of leverage in business finance and were well used to securing the borrowing facilities, this being a standard clause in most trust deeds."

154. I must consider how much credence I can give to what on the face of it is an improbable if not indeed an incongruous scenario. For that purpose I must say something about the extent to which I can credit H's evidence, and express my views upon the extent to which I am able to feel confident about what TB has written about these loans, and on other topics, in Notes so clearly produced for court consumption.

H's credibility

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155. H's cross-examination by Mr Bates in October did not begin well. I must explain that in the course of the domicile proceedings in December 2012 and April 2013 H gave me every reason to suppose that, in that context, he would say whatever appeared to suit whatever his case was for the moment, which was in itself a rapidly shifting and changeable set of propositions. He conceded that he was domiciled in England at the commencement of proceedings on 1 May. He had therefore had overnight to consider the impact of a most singular situation which had arisen immediately before the luncheon adjournment on 30 April 2013, in the light of which I asked him to consider his position.

156. The singular event was this. It became necessary to interrupt H's evidence to accommodate a witness who needed to travel back to Spain. Before the witness, Mr AC, was called Mr Leech asked H whether they had seen each other the previous evening. The answer was a straight "no." H said they had not discussed his wealth. He said that the last time he had seen Mr AC was at a family birthday party on the previous Saturday. Mr AC however from the witness box told Mr Leech that they had had dinner together the previous evening, and had discussed the case. H was of course present in court and heard his evidence. This is what then followed:

MR. LEECH: Would you like to tell us the truth now?

A Yes, I saw AC at my sister's flat yesterday. I saw him also at the birthday party of my niece.

SIR PETER SINGER: That was not the question you were asked. The question you were asked, quite specifically, was when did you last see him. So may I take it you lied?

A It seems that way, my Lord, yes.

Q Why does it only seem that way?

A Well, it is.

Q Why does it have to seem?

A Yes, I did.

Q All right. I think this is probably an appropriate moment to break for an early lunch. I would just like you to understand that, as I understand it, the concession having been made and so far no attempt to withdraw it, that you are domiciled ... [sc: your domicile of origin is]... England.

A Yes.

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Q You have to persuade me on clear cogent evidence that your case is accurate.

A Yes, my Lord.

Q I would like you to be thinking over lunch how at the moment, subject to whatever may yet emerge and the submissions that will be made to me, I would like you to think, if you were in my place, how I can begin to find your case ... as things are at the moment, given that you apparently are incapable of maintaining the same story, accurately and truthfully, on a number of other issues.

A Yes, my Lord.

SIR PETER SINGER: So shall we say 2 o'clock?

(Adjourned for a short time)

MR. LEECH (to the witness): Mr. Joy, the reason you lied about when you last saw your friend Mr AC was because you did not want to admit to the court that you had spoken to him about your will and the date on it. Is that not right?

A That is not correct, my Lord.

Q It is the only reason you would have lied, is it not?

A (No audible reply).

157. As I say, the following morning counsel then acting for him announced that H wished no longer to challenge the court's jurisdiction. Clearly there must have been overnight communications between H and his legal team notwithstanding that he was still subject to cross-examination. That in the circumstances I in no way criticise, and mention only because of what transpired in response to the first series of questions put to H by Mr Bates on 31 October 2014:

Q Mr. Leech ... asks you whether or not you saw one another the night before the hearing, that is you and AC. Do you see that at line 30?

A. Yes, I do, my Lord.

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Q. And the answer that you gave at line 31 was: "No, we did not."

A. That's correct, my Lord.

Q. But that was not true, was it?

A. Actually, it was.
...

SIR PETER SINGER: "It was true we had not seen each other the previous night." Line 10: "I saw AC at my sister's flat yesterday." Those two statements seem to be in flat contradiction.

A. They are, my Lord.

Q. Is there an explanation?

A. Yes. I did not see AC on that Monday night and I don't know, I was so shocked at what he said, I have no explanation as to why I said that.

Q. We do not actually have his evidence but my recollection of it is very straightforward.

A. Mine too.

Q. Yours too. So tell me if you think I have got this wrong. "When did you last see the husband? Last night at dinner. Did you discuss the case? Of course."
Is that about it?

A. That was not AC's complete evidence, my Lord.

Q. And he had also seen you the previous Saturday at the birthday.

A. That's correct.

Q. But we are concentrating on last night at the moment. ...Was he telling an untruth?

A. He was, my Lord.

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Q. He was telling an untruth.

A. And I spoke to him about it after the event.

Q. He was telling an untruth when he said (A) he had seen me last night; (B) had dinner together.

A. I don't think he said we had dinner because he said he went off with his wife for dinner.

Q. And that we had discussed the case.

A. I don't know if he said that either. That's what I can't remember. But the gist of it's there, my Lord.
...

SIR PETER SINGER: (To the witness) So you are saying that in any event, whatever was the detail, you had not seen him the previous night and he was lying when he said he had.

A. That's correct, my Lord, and I can go further to say that. Mr Leech asked him does he know where my sister lives and what address, and AC had difficulty remembering which, had he been there that previous night, he would have remembered because he knows my sister fairly well. He's a man in his 70s and he was confused. He had not seen me on the Monday night; he had seen me on the Saturday night. That's the truth. In the absence of AC I can't ----

158. As might be imagined, this was the first time this extraordinary explanation had been given: yet as might also be imagined, and as has been the case, the "AC lie" had in the intervening 18 months frequently been remarked upon in correspondence and in position statements for W as an instance of H's unreliability. I reject the explanation given by H as pure fiction, but as nevertheless indicative of the misguided lengths to which he will go to avoid responsibility: on this occasion not financial responsibility, but responsibility for having been caught out attempting blatantly to deceive the court.

159. The consequence is that I must approach every relevant and significant assertion made by H with extreme caution. He showed in the context of the jurisdiction proceedings the extent to which he would duck and dive, weave and contrive.

TB's role
160. I must also form a view about the extent to which TB is in truth either the stern and unyielding guardian of a trust whose primary objects are H's children, prepared to abandon H to debt-laden insolvency (with or with-

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out the benefit of Château T as the roof over his head); or whether I should conclude that he is capable of participating willingly and with determination in devising an elaborate protectionist facade to preserve H from responsibility towards W.

161. Their professional relationship goes back many years, back to at least 1997 when TB twice advised H and W1 on issues which included domicile. Their active involvement has at times has been quite intense, for instance during the course of protracted IR enquiries which involved the preparation and consideration of spurious scenarios considered for presentation to the tax authorities. H has clearly come to rely on TB not only for the financial and fiscal and trust advice which is his speciality, but also for guidance in how he should approach what he and TB by June 2010 had come to see as a troubled relationship between H and W. There is no doubt whose side TB took, and the note of a lunchtime meeting at Château T in June 2010 which he prepared evinces his clear dislike for her (sentiments which, I should say, she clearly reciprocated).

162. H explained that he had committed the management of the old HT to TB before the breakdown of his relationship with W1 at the end of 2000 and the beginning of 2001. He made the reluctant concession (fully supported however by contemporaneous notes of what he told her made by another of his professional advisers much nearer the time) that HT played a defensive part in the arrangements he made at the end of that marriage. It is also clear that since the establishment by H of NHT in 2002 TB has played a leading role in its management. He has thus been there to manage the trust and to advise and assist H throughout the wealth accrual years of LCAL when (according to the evidence of H) something like US$100m accrued to NHT.

163. The Car Portfolio stemmed from TB's belief that quality classic and racing cars were investments tipped to achieve healthy growth, said H. But the venture was also firmly founded and grounded on personal attributes of H which were available to NHT once LCAL ceased air chartering operations and H embarked upon what he expected to be a sabbatical of seven or so years duration, with the shift of residence from Bequia first proposed as Switzerland but then translated to France. H has a passion for collecting these vehicles, driving them, and for parading with them on their own fashionable international circuit. He undoubtedly regarded them as his collection.

164. The investment has proved lucrative for its owner. The example of the sale of one particular Alfa, purchased for US$2m and sold for US$5.8m, on its own establishes that. H let slip a comment in his evidence which I have highlighted in one of the extracts above (at paragraph 152) but was not picked up at the time: "If ten cars were sold, the debt outstanding to EFG may be less." Car sales would however only reduce NHT's guarantee liability if their proceeds were paid to EFG in reduction of overdraft balances on the relevant accounts – which there was no evidence to suggest had ever occurred, and was an eventuality which had never been previously mentioned as part of the scheme of things. If H meant that car sale proceeds would have reduced his overall debt to NHT then that suggests some profit-sharing or commission arrangement – which might possibly become

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payable via Anthology once H can resume his activities on a paid basis when these proceedings are behind him and he has sufficient time to do the job as TB would expect and require. It begs the question whether during his years in France, not able to be paid since he took up French fiscal residence in September 2010, he has built up any reserves of unpaid commission, for instance on the US$3.8m profit realised on that Alfa, sold in March 2013, to a man from Texas who conceived an instant desire to own that car when he saw it, with H beside it, at a race meeting.

165. H's activities in furtherance of the acquisition, the promotion, the racing, parading and the sale of cars within the collection continued alongside his French sabbatical, unpaid it would seem, without apparently infringing the afflicting embargo which precludes his employment while resident for tax purposes in France. That period in fact covers virtually the whole lifetime of the Portfolio as, as H recounts it, it was only in 2009 that acquisition of the collection got underway. So one can understand how during this period he would have received no formal remuneration notwithstanding the enormous contribution he made to the selection, negotiation of purchase or sale and day-to-day management and administration of assets worth over, and possibly well over, US$20m. I have to ask myself whether and when H's day of reckoning with NHT for that, but for W's claims, would have arrived, and by what method he would have been recompensed.

166. Against that background TB clearly conceived and took steps to put into operation the plan to exclude H permanently from all benefit under NHT in reaction to the threat posed by W's claims, and the risk that they might result in orders affecting trust assets. His and H's case is that he embarked on that without consultation with and without informing his long-term client and the settlor of NHT, the person who had made such valuable contributions to the development not only of the trust's first US$100m but also to the profits made through the Car Portfolio. It is clear on the evidence that this plan was hatched before and was independent of the EFG account closure (for instance having regard to the fact that the application for sanction of the proposed deed reached Bannister J in mid-October 2013). In the judgment he gave in November he recorded that the application "is designed to ensure that the assets of the Trust are not available to the Court in the English proceedings."

167. It is also against that background that in correspondence and at the meetings in Hong Kong TB has noted himself as saying things (with emphasis which I have applied) such as:

"The unwelcome developments of the recent past mean that the Trustees have no option but to consider whether to take measures to protect the trust assets from further losses which might result as a result of the matrimonial proceedings."

"[RFG] have determined that you should now be permanently and irrevocably excluded from benefit under the Trust. The minimal detriment that this may cause to you is outweighed by the benefit to the other beneficiaries under the Trust from your own exclusion." [Letter dated 26 November 2013]

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"The Trustees were confident that the [jurisdiction] issue would be determined in favour of H as they were aware that H was not domiciled in the UK, so the UK courts would therefore not have jurisdiction to hear the financial matters. The Trustees were relaxed about the outcome. However, at the hearings on 1 May 2013 the jurisdiction case collapsed, and full English Matrimonial Proceedings commenced. The Trustees went into 'panic mode.'"

"The Trustees ... considered the factual position very carefully, and in reaching the decision that they reached, did take the following additional matters into account:

a) H is currently excluded from benefit for tax reasons, and (on the present understanding of the Trustees) those tax reasons are likely to continue for the foreseeable future because H appears likely to continue to reside in France;

b) H has few other assets but is likely to take up a remunerated role in the Trust's car-related businesses...

c) On this basis it was not considered likely that H will have any significant capital or income needs;
...

i) ...v) Although the future is never certain, the Trustees do not consider that H is likely to have the need of benefit under the Trust due to the intended offer of employment within the Trust's business interests..."

"... The Trustees' expectation was that H would be able to begin work once again soon, which would assist the various projects held by the Trust to grow, yield capital appreciation and add overall value to the Trust Fund."

"The Trustees are willing to make an offer of employment to H in respect of the car businesses. The Trustee's position is that they are not hostile to H or to his position. The Trustees recognise that H needs an income. H has skills which are of huge benefit to the Trust and its various car-related ventures, and the Trust would like to retain the benefit of those skills."

"No specific employment offer can be made at this time." [Meeting notes of 3 December 2013]

"We call upon you to make immediate transfers and assignments to us (or to a designated nominee) of all of the above assets [10% of Château T SCI, the Bentley, Piper Archer, Zermatt land]. We will be instructing Lawyers in both France and in Switzerland to seek immediate saisie conservatoire and commence formal recovery ('poursuite') proceedings." [Letter of 6 December 2013]

"The Trustees well recognise that [permanent Exclusion] is a drastic step taken by them. However the trustees do not accept that it would be open to them to reinstate H after the conclusion of the divorce proceedings.... The permanent Exclusion is not a device. ... The permanent Exclusion has been executed and there is no power to reinstate H. This needs to be fully understood by all the parties and by the Courts. The Trustees believe they are acting in the best interests of the beneficiaries. No amount of judicial persuasion will result in the Trustees making distributions in breach of trust for the benefit of a non-beneficiary (namely W)."

"SDM asked if the LCAL car businesses were yet in a position to make H a formal job offer. TB noted that, to date, the Trustees have been unwilling to make H a firm job offer in relation to the car businesses, as they have been informed by the Protector that H's time is not his freely to dispose of, and that H is distracted by the seemingly never-ending rounds or matrimonial proceedings and the requirements to fly to London several times a month, often on very short notice. This inability to focus and to be available on a fixed full-time basis is crucial to the business plan. The executive position that the Trustees wish to offer H is full-time and is high-profile, and the Trust/LCAL expect to derive maximum value."

"SDM also informed the Trustees that the Bentley was already charged to Beckmans by way of a chattel mortgage against legal fees since November 2013." [Meeting notes of 10 April 2014]

168. For the most part supinely H accepted the prospect of this role, indeed enthusiastically looked forward to resuming these activities. He was optimistic that RFG would not enforce by proceeding against the SCI his dispossession from Château T. He would feel secure in his employment because no doubt there would be formal written arrangements. He showed only intermittent anxiety about becoming dependent, again, on TB of whom at one point he said: "My Lord, I'd just been deceived. I had been completely blindsided by my trustee, if I call him my trustee, a man I had known for 20-odd years." The shock of this had left him "catatonic."

Conclusion on the primary factual issue
169. At [32] and [33] of the judgment I gave in March last year, [2015] EWHC 455 (Fam) I summarised what, at that interlocutory stage, was the burden of W's case thus:

"It is in the light of this very unsatisfactory history that W invites me at this stage to take the most jaundiced view possible of H's and the Trust's and possibly also EFG's presentation. She invites me to conclude that what has been produced and presented is a stage-managed and crafted but fictional drama which has the underlying and collusive sub-text that H will when the dust settles return to a position where he has access, direct or indirect, to trust assets and to their value to meet his income and capital needs. She points to the hint in the 3 December meeting notes which suggest that when the time is ripe H may be taken on as an employee of the Trust or one of its businesses and paid a salary. She may have been surprised at the suggestion in those notes that were

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the children to be educated in England the embargo on their benefits from the Trust might be lifted so that funds could flow in their direction free from the ravages of at least French taxation. She might wonder what scope there may be, at a convenient time, for resettling this Trust in another which might more easily be able to meet H's needs. And she might remember that this "New" Trust itself replaced an earlier one to meet contingencies not yet fully made clear, but which prevailed at about the time of H's divorce and financial separation from his first wife.

At the final hearing it may be asserted that the gloom and doom now attending H are mere theatrical devices which some time after the curtain on these proceedings comes down will be confirmed as the improbable constructs which (W maintains) they are. But at this stage I must proceed with caution, bearing in mind that the evidence in the case is not yet complete and in particular that I have heard no oral evidence specifically directed to many of the issues now raised. It remains not beyond the realms of probability to imagine that the contrary case might be made out, that RFG has throughout acted as a trustee should in balanced protection of its potential beneficiaries' interests."

170. The evidence is now complete and so is my conviction that W's suspicions and her case against H and TB/RFG and the Trust are made out. Their position is an elaborate charade, the stage management of which has been conducted ruthlessly and without regard to cost. I do not need to speculate how TB plans to re-establish the access H enjoyed to capital and income which previously was his albeit via elaborate financial arrangements designed no doubt initially for fiscal purposes to distance him from their source. I do not need to consider whether the exclusion deed could or could not be upset, nor whether the undisclosed opinions taken from leading Chancery counsel on the topic by H are soundly based if, consistent with H's case, he could not even have made the trust deed available for their consideration. I am confident that when the time is ripe and there is the will to get H out of this impasse where seemingly he is stuck in what on any realistic view would be inextricable penury, TB will find a way.

171. I am of course conscious of the fact that very considerable professional effort on both sides was put into the preparation and presentation of documents and the collation of authorities representing the fruits of significant research into a number of topics with which, in this judgment, I have not dealt. That is because it has been unnecessary, in my view, to traverse the factual and legal issues to which they gave rise given what I regard as a clear route through to an informed estimation by me of the probable development of the future relationship between H, TB/RFG and NHT.

172. There may be other routes, but it does not follow that I must follow them. My conclusion is clear, that H will far more likely than not via car-related employment with an NHT entity once again within the foreseeable future be in a position to support a very affluent lifestyle. That conclusion does not depend on nor would it be affected by the outcome of any attempt on my part to evaluate, for instance, what might be the prospects of any

attempt in the BVI court to undermine the validity of the exclusion deed. Nor indeed need I, even if safely I felt that I should or could, try to form a view on the question whether Bannister J in his BVI Court might have reached a different conclusion in November 2013 if he had had the benefit of the submissions as to English trust law made to me, far less as to whether he might have approved the deed in the form in which it was so shortly thereafter executed.

173. I should explain, on that last topic, that disquisitions on that and other trust-related topics were included amongst 20 or so of the early pages of the closing submissions for H which were made available about noon on the day preceding final oral submissions in this case, for which H's matrimonial counsel paid tribute to the input of a silk and junior counsel drawn from the specialist Chancery bar. In bypassing their contribution for the reasons I have described I of course make no findings at all about whether any contrary view of the law might have been expressed if the time available had allowed Mr Bates and those assisting him to give detailed consideration to their propositions. It may well be that there would have been no contest, I do not know, but I do know that the propositions they state do not affect my conclusions about the underlying realities of H's case.

Conclusion

174. The determination with which NHT assets have been protected and the vigour with which TB has made clear that none will be either coerced or encouraged to go in W's direction are undeniable. Were I in a position to make orders directly against NHT or its assets (which on the findings I have made I do not believe, as a matter of law, I could) it is clear W would face an uphill and most likely doomed and interminably Sisyphean struggle to collect. Were I to make a lump sum order against H I can be sure that would not encourage TB and RFG to make the necessary funds available to him with which to meet that obligation.

175. So (as I canvassed I might during the course of the evidence and with Mr Pointer as he made his closing submissions) I shall adjourn W's claims for a lump sum and for any adjustment of property order (save that I will dismiss her claims to vary NHT on the basis it is a nuptial trust, and for the transfer to her of cars from the Car Portfolio which I have found are not his).

176. I am mindful of cases where it has been said that capital claims should not be left indeterminately unresolved, but there are hard cases (a category within which this case certainly falls) where fairness and justice must prevail over the normal desirability of finality in litigation. I refer as examples to Hardy v Hardy [1981] 2 FLR 321 and MT v MT (Financial Provision: Lump Sum) [1992] 1 FLR 362. In my judgment it is certainly foreseeable that an accommodation will be made to give H access to part of the millions held within NHT.

177. I am not deterred by the consideration that for the moment H maintains that he has neither an income nor access to funds for living other than by borrowing from friends and relatives who in due course he must repay.

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Although he has been reticent in the extreme in divulging what considerations prevent him from commencing employment while residing primarily in France, I conclude that they are fiscal. Paying some tax and having an income would appear to most people to be preferable to having no income upon which to pay tax.

178. It is a matter ultimately of choice for H, but clearly he has the faculty to make substantial earnings. He spoke of earning £120,000 a year at the point, until the beginning of 2010, when he embarked upon his sabbatical. TB clearly values him highly as a potential employee of Anthology. The Car Portfolio appears to have fared prodigiously well under his tutelage. The commercial worth to that business of his knowledge, his contacts, his experience and his enthusiasm must in my judgment be at least £200,000 a year at this stage, plus the prospect of whatever bonus arrangement is arrived at. I take his earning capacity at that figure as its minimum. [In the light of the application made by Mr Pointer at the June hearing for permission to appeal against the order for periodical payments, referred to below, it occurs to me that this last sentence lacks precision. H's earning capacity in Anthology's employ, the faculty upon which I have based that order, includes what I anticipate will be substantial bonuses: as to which, historically, see [99] above.]

179. The evaluation of W's entitlement to continuing provision by way of periodical payments has to be approximate and broadbrush for a number of reasons. Her case has not been presented on a needs basis. Where she will live appears uncertain (although H made it clear that, again for fiscal reasons, he would rather she did so outside France). She envisaged continuing to rent, and in current circumstances will have no alternative but to do so. Her attempts to establish a budget are now out of date. So the best I can do without anything much by way of evidence to go on is to fix on a figure which it would be very reasonable for W to have available to meet her living costs, and those of the children while in her care. The order will be for H to pay W maintenance pending suit until decree absolute and thereafter periodical payments at the annual rate of £120,000 per annum, payable monthly in advance during joint lives until she remarries or further order. H should continue to have credit for actual payments made in respect of her rent, if that is the system which still operates.

180. I wish to make it plain that this order is not intended to carry with it any element of capital adjustment: it is based entirely on maintenance provision and it is for that purpose that I make it.

181. The order will be backdated to 1 November 2014, and as before will be on the basis that W gives credit against it for such sum as she in fact receives each month pursuant to the French child maintenance order. I will formally adjourn the applications W makes for English orders for their benefit.

182. The order which I made for £14,700 per month pending suit maintenance (including £2200 in respect of her rent, and subject to credit being given for child maintenance paid by H under the French order) on 12 June 2013 was scarcely complied with by H, and was suspended by me on 15 April 2014. H's application to vary it remains unresolved, and meanwhile could not be enforced either in law or in practice. There is no immediate prospect of

it being paid and I shall have to hear submissions on the question whether the pragmatic solution may not be to start with a relatively clean sheet and a fresh order.

183. It follows that W will be in a position to restore her surviving applications for capital provision. Either party could also apply (when and if sufficient capital resources become available to H) to capitalise W's future maintenance pursuant to section 31(7A) of the 1973 Act. Such an application should however, if made, not be constrained by the approach to such applications advocated in the case of Pearce v Pearce [2003] EWCA Civ 1054, [2003] 2 FLR 1144 where the Court Appeal (at [37] and [38], in the words of the FLR headnote) stated that on applications for variation and capitalisation there three questions had to be decided: (i) what variation, if any, to make in the order for periodical payments; (ii) the date from which any variation should take effect; and (iii) when to substitute a capital payment, calculated in accordance with the Duxbury tables, for the income stream being terminated, albeit with a narrow discretion to depart from those tables to reflect special factors generated by the individual case. In this case, however, such an application should leave it open for the tribunal hearing it to make whatever lump sum award it might appear appropriate to impose in exchange for a clean break, without limiting the exercise by reference to the periodical payments order which might be in force, either then or after appropriate variation. In short, in the particular circumstances of this case the quantum of a lump sum should upon any 31(7A) application be at large.

184. I anticipate that I will be invited to deal with costs applications in due course. It will perhaps surprise no one that I do not regard this as a case where the "no order" principle should prevail. W has failed in a number of the specific applications she has made, but in light of my findings it is perhaps to be anticipated that in the overall balance it is H who may face a substantive costs order. I would like at this stage simply to observe that impecuniosity is no shield against the making of an order. Furthermore, if I determine not to assess costs summarily (as is my inclination) the power does exist to make an order for the payment of a reasonable sum on account of costs, and upon which interest at the current judgment debt rate of 8% can run.

Later: Decisions concerning the form of the order

185. 17 June transpired to be the earliest date available for a hearing to finalise the terms of the order to be made in light of my determinations, and also to deal with issues as to costs. At the conclusion next day of that hearing I repeated what I had made plain at the end of the previous hearing, that none of the time requirements in relation to any appellate applications were to start to run pending the finalisation of this judgment for it include my decisions on the outstanding issues.

186. The form of the order was largely settled in the course of submissions which took up most of the first morning of the June hearing, and which are reflected in the order which I shall direct to be drawn in the light of this composite judgment. Two matters in particular, other than costs, require explanation and decision.

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187. The first relates to the basis and terms upon which I shall adjourn W's capital claims. I was referred to the decision of Charles J in FG v MBW (Financial Remedy for Child) [2011] EWHC 1729 (Fam), an application where for reasons explained in his judgment it would be necessary to see how the father's economy developed before revisiting orders made for the interim and concluding the claim for a housing fund, notwithstanding the fact that, as put at [159] "There are naturally powerful arguments in favour of avoiding any adjournment or review and enriching finality. This is because litigation is costly in both financial and emotional terms and hostility exists between the parties."

188. At [166] Charles J took account of the risk that the father might take steps to deal with assets or income in ways of which the mother would be unaware and which might be to her disadvantage unless he imposed a regime to ensure that the mother and the court would be properly informed of relevant events. I have already given reasons why a similar outcome precludes a final determination of W's outstanding claims at this stage, and I intend similarly to impose a supervisory regime in an attempt to achieve some balance of fairness between the parties. I have drafted provisions of the order to cover this aspect which I hope will prove workable, without imposing too onerous a reporting obligation on H. I do so on what I hope will prove to be understood as a requirement that unless only for reasonable clarification this is not intended to encourage W to embark upon any further full-scale investigation, unless of course that is directed by the court in the light of the available information.

189. The Piper aircraft similarly provoked full debate, and in particular as to the appropriateness if at all of what is designed, in the event of its sale, to prevent W from having a fair opportunity as against other contenders (primarily, of course, NHT) to have determined the merits of any claim she might make to receive or to participate in the distribution of the proceeds. No one at that June hearing dissented from the proposition that the court would have power to regulate dealings with the aircraft and with its proceeds in the context of a costs order against H, if made, which remained unsatisfied in whole or in part. I will explain below the basis upon which I do indeed propose to make such an order, and indeed to supplement it with an order for payment on account to give rise to an immediate liability which, in all the circumstances of this case, I do indeed think it appropriate to protect by means of such restraints. Although in the course of the hearing I indicated that this was an issue which we might discuss on another day if I did indeed make such a costs order, I think that the reality is that it was accepted on behalf of H that I have that power. I am extremely reluctant to envisage the need for a further hearing. If the situation arises where competing interests fall for determination, then of course it is possible that some priority demand or some consideration of fairness may require that the funds in question should go to some third party or indeed to H, rather than to W: but the intermediate restraint appears to me to be not only reasonable but fully justified in the circumstances of this case. I have drafted the paragraph of the order which deals with this, and which includes provision for anyone affected to make application to the court.

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Costs: quantum

190. The Form H put in by Beckmans on behalf of H immediately prior to the June hearing showed £869,000 odd as the grand total of his estimated costs in relation to financial issues. But in fact that does not include the costs he incurred and has presumably paid when instructing his previous solicitors. So it would not be unreasonable to suppose that his costs of the financial proceedings come to about £1 million, of which £690,600 has been paid (£650,000 of which it will be recalled from payments made direct to Beckmans in discharge of their charge over the Bentley), leaving £178,500 still outstanding. Mr Pointer made it clear that H seeks no order for costs against W. He invites me to make no order for costs across the board, to include no order in relation to occasions when costs were reserved.

191. W by contrast has put a figure of £588,500 on the costs she has incurred in the financial proceedings with both Withers and Sears Tooth together of which all but £70,000 retained by Withers remains unpaid. It seems to be established that that £70,000 derives from H and formed part of the total of £353,000 which, over a period, he paid pursuant to A v A costs orders made in relation to the contested jurisdiction proceedings which concluded so ignominiously in April 2013 with an order that he pay the entirety of W's costs in relation to that dispute on an indemnity basis. The total costs on both sides of the jurisdiction dispute were estimated at approximately £600,000. The parties have therefore spent upwards of £2 million on costs in this jurisdiction, and unknown but no doubt significant amounts in France and in Switzerland.

192. Mr Bates on behalf of W has proposed a break down of the individual costs of the various strands of the financial dispute and of the various hearings. For reasons which will appear, I do not find it necessary to go into the detail of what can only be a "best effort" at achieving anything close to accuracy. But, in overall terms, he concludes and submits that in relation to elements of the dispute for which W's costs come to £170,680 the order made was "no order as to costs", behind which neither party can now seek to go. The amount of costs susceptible to orders I might now make on this basis totals £417,829: what has been described as W's "costs at large".

193. W's aspiration is accordingly to have H condemned in her costs of each of the occasions which gave rise to costs at large; for me to conclude that that assessment should be on an indemnity rather than a standard basis; and for me then to fix on the figure (he suggests 70% of the costs at large) which I should order H to pay on account within a short period, on which judgment debt interest should run from the date of the costs award.

The appropriate costs regimes

194. Mr Pointer and Mr Bates were agreed as to which costs regime applied to each constituent part of the financial case as it has developed.

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(i) ancillary relief costs strictly so-called, in relation to applications for financial remedies comprising also the First Appointment and subsequent directions hearings, two FDRs before Mostyn J, the PTR and indeed the main final [sic] and subsequent hearings: here the "no order principle" for proceedings within FPR 28 such as these is the general rule;

(ii) interim injunctions, including applications for freezing orders and applications under MCA section 37 to avoid dispositions, which are subject to a modified version of CPR Part 44 (as well as other CPR provisions not currently germane), where there is no presumption either that there be no order or that costs should follow the event so that the court's starting point is "a clean sheet";

(a) maintenance pending suit and the application for A v A costs allowances (at the time of the orders in this case, forming part of the maintenance pending suit evaluation) which are not subject to the "no order principle"; except that:

(b) that statement of principle is complicated by the fact that in relation to the first such hearing, on 1 May 2013, I ordered that the costs should be "in the financial remedy application";

(iii) on 15 April 2015 I made no order, as between H and W, in relation to the costs of W's unsuccessful application to set aside H's charge of the Bentley to Beckmans as security for their costs.

195. It will I hope be immediately apparent how complex an analysis (and indeed a detailed assessment) would be required were I to attempt to apply scrupulously these different regimes to the several components of this multi-strand and thoroughly entwined litigation. Fortunately it seems to me that there is a way through this thicket. For a number of considerations obviously apply whatever the court's point of departure is, and whether the judge is confronted with a clean sheet, or the presumption that there should be no order, or simply a discretion to be exercised judicially.

196. Moreover I ventured for consideration during the course of the hearing, and received no adverse response, the suggestion that it would be impracticable (and though I did not then articulate the thought, productive more of expense than clarity) to attempt an application-by-application or issue-by-issue analysis and assessment of the costs of this hydra-headed litigation. And so I have considered carefully all the propositions advanced to me during a full day of submissions on costs issues and propose, having weighed them, to stand back and address the global perspective with a broad brush.

197. The "no order principle" seeks to apply as the default outcome a situation where neither party should expect to recover costs from the other, in the hope no doubt that as a result they will be cautious about what each of them respectively ventures (or one might even say wagers) upon the uncertain event of the outcome of litigation

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in this sphere. Whether or not they incur that expenditure from their own separate sources the money ultimately comes from family resources, in the ordinary case, which may well fall for division. Thus, it is hoped, profligate expense will be less frequent. It has to be said that a number of cases in recent years indicate that this objective is often flagrantly not achieved, and this is indeed such a case. A peculiarity here however is that on the face of it a large proportion of the monies spent is said not to be available to either party: if one took his case at face value H's solicitors might well conclude there was little prospect of him being able to pay them that £178,500 which on their figures he already owes them, without even taking into account the prospective costs of the appeal against these orders which he has expressed the wish to pursue.

198. But even the "no order principle" is not inflexible: one would hardly suppose that it could be. The factors which a court should take into account when considering whether nevertheless to make a costs order are set out in the following excerpt from FPR 28.3:

(5) Subject to paragraph (6), the general rule in financial remedy proceeding is that the court will not make an order requiring one party to pay the costs of another party.

(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to -

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order.

199. PD 28A para 4.4 adds to rule 28.3 that in considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to

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help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case.

200. In the "clean sheet" situations referred to above, the following key parts of CPR rule 44.2 apply:

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

201. It is not easy to reconcile, in relation to two cases to which equally the "clean sheet" regime applied, comments of Ward LJ in Baker v Rowe [2009] EWCA Civ 1162, [2010] 1 FLR 761 at [35], on the one hand, with observations of Mostyn J which were approved by Ryder LJ in the Court of Appeal case of Solomon v Solomon [2013] EWCA Civ 1095 at [22]. In parallel situations, so far as the costs regime is concerned, Ward LJ observed:

"... costs do not follow the event. The judge making the costs order has, therefore, a wide discretion. He could not properly ignore the fact that one side had won and the other had lost but that is not determinative nor even his starting point. It is simply a fact to weigh but in the circumstances of this case it is a fact of overwhelming weight."

whereas in the view of Ryder LJ:

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"The judge correctly stated the general rule did not relate to the interim applications he had decided. Costs were then in the discretion of the court, and the principles set out in CPR Part 44 applied. The starting point for what are described as 'clean sheet' cases is that costs follow the event. To find that principle one need look no further than Gojkovic v Gojkovich (No 2) [1991] 2 FLR 233 (CA) where Butler-Sloss LJ (as she then was) said:

'there still remains the necessity for some starting-point. That starting-point, in my judgment, is that costs prime facie follow the event ... but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court.' "

202. But that is perhaps by the by: not least because I did not spot when referred to Solomon by Mr Pointer that Ryder LJ's judgment was given on the occasion of an unsuccessful application for permission to appeal, and thus falls into one of the categories referred to in paragraph 6.2 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 which "may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this Direction, that indication must take the form of an express statement to that effect." But, that notwithstanding, the juxtaposition of the two statements is perhaps an indication of how difficult it is clearly to formulate the differentiated guiding principles through whose hoops judges and practitioners must strive to jump.

203. I would though emphasise that the scope of the consideration to be given to questions of conduct is not confined to, but is expressed to include, the factors set out in rule 44.2(5), and thus would surely not exclude "any other aspect of a party's conduct in relation to proceedings which the court considers relevant" for the purposes of FPR rule 28.3(7)(e) in a "no order principle" situation.

204. Finally, in relation to maintenance pending suit orders (and those other types of potential applications not covered by FPR 28.3, which are subject to the CPR regime in unamended form, relevant considerations include as a factor that costs normally should follow the event.

205. Further, in relation to that Practice Direction, I will digress to draw attention to the provisions of its paragraph 8, in my experience universally disregarded, and so no particular criticism is intended of the advocates in this case who did no more than follow that universal disregard. Solomon was an additional transcript produced during the hearing to augment the 16 in relation to costs already in the agreed bundle. That paragraph reads:

8.1 Advocates will in future be required to state, in respect of each authority that they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition. If it is sought to cite more than one authority in support of a given proposition, advocates must state the reason for taking that course.

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8.2 The demonstration referred to in paragraph 8.1 will be required to be contained in any skeleton argument and in any appellant's or respondent's notice in respect of each authority referred to in that skeleton or notice.

8.3 Any bundle or list of authorities prepared for the use of any court must in future bear a certification by the advocate responsible for arguing the case that the requirements of this paragraph have been complied with in respect of each authority included.

8.4 The statements referred to in paragraph 8.1 should not materially add to the length of submissions or of skeleton arguments, but should be sufficient to demonstrate, in the context of the advocate's argument, the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument.

206. The requirements of that Practice Direction have of course since been buttressed by the additional requirement in paragraph 14 of the Revised Efficiency Statement issued on 1 July 2015 (after this hearing) that any bundle of authorities which has been agreed between the advocates should not contain more than "an absolute maximum of 10 authorities", in addition to which (I quote it simply for completeness) paragraph 15 requires that "where it is necessary to refer to an authority, a skeleton argument must first state the proposition of law the authority demonstrates; and then identify the parts of the authority that support the proposition, but without extensive quotation from it."

Conduct
207. At [169] of this judgment I harked back to the jaundiced view W at an earlier stage took of this saga as a "stage-managed and crafted but fictional drama which has the underlying and collusive sub-text that H will when the dust settles return to a position where he has access, direct or indirect, to trust assets and to their value to meet his income and capital needs. She points to the hint in the 3 December meeting notes which suggest that when the time is ripe H may be taken on as an employee of the Trust or one of its businesses and paid a salary." At [5] of this judgment I set out what I perceived as that primary issue of fact – whether H's plight [his asserted permanent and irrevocable exclusion from benefits from the trust] is genuine or a contrived facade – and at [170] on the entirety of the evidence I arrived at "my conviction that W's suspicions and her case against H and TB/RFG and the Trust are made out. Their position is an elaborate charade, the stage management of which has been conducted ruthlessly and without regard to cost."

208. It did seem to me, as I listened to many of the submissions as to costs made on his behalf that this message, and the inferences and conclusions that might be drawn from it as to H's conduct of these proceedings, were being ignored or brushed aside. His counsel, for instance, in written submissions made what looks on the face of

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it this generous concession:

"Naturally, we accept the findings made by the court that in a number of respects H's evidence was unsatisfactory. (We accepted in closing that H was a poor witness, at least in the sense of not properly addressing the questions that were put to him, in a way that is frustrating for judge and advocate alike.) But the critical question is as to his actual carriage of the proceedings. Thus:

(a) It cannot be said that H has been guilty of a failure to disclose assets.

(b) H has been vindicated in his case as to his ability to have access to the funds within the trust. That was always true up to 2017; and became true because of his permanent exclusion from the trust in the course of the case.

(c) It has not been demonstrated nor found that H failed to disclose documentation that was available to him. Of course it was the case that the trustees were reluctant to provide documentation to H (as they said, pursuant to the judgment of Bannister J) or to the court. However, when they were produced by the trustees to H, he made them available promptly."

209. It would be tedious were I to give even half an explanation why those three suggested virtues are not, in my view, even half-truths rather than the whole truth and nothing but. Who would think that my underlying conclusion was that there was throughout this case corrosive collusion between H and TB to distort the reality of the relationship between H and the millions in the Cand elsewhere within NHT, and that that conclusion could be dissipated by such bland assertions. One would think that H had throughout been meticulously compliant with the fundamental obligation to give full, frank and clear exposition of his financial situation: whereas the reality as I have found it to be is that from the very outset he has deliberately set about obscuring the true situation as to past, present and future.

210. H's blatant dishonesty in relation to these proceedings cannot so easily be finessed away. The brazen declaration in 2015 (for the first time) that not only had the witness AC been confused and mistaken in April 2013 as to when they had last met before that moment, but that he too had been so confused and mistaken as to admit that AC's evidence was correct and thus that he had lied, was breathtaking.

211. A comparison was drawn with the quality of the conduct evinced by the husband in US v. SR (No.3 needs) (Adverse influences/costs order reflecting litigation misconduct) [2014] EWFC 24 "where the costs award which was made was designed, in part, to reflect the court's opprobrium of the husband's conduct in the litigation. That was a case where the husband did not merely attempt to conceal assets. The court held that it was a deliberate and sustained concealment compounded thereafter by a fraudulent presentation advanced on the basis of

fabricated evidence. He misled the court, his former wife, her advisers and his own legal team. It is hardly surprising there that the 'conduct' trigger was met." This was suggested to demonstrate how much less weighty was H's conduct in this case. I do not agree.

212. It is trite to observe that each case turns on its own facts. Roberts J noted amongst other things: [at 69] "I cannot ignore the fact that virtually the entirety of these proceedings has been contaminated by the husband's failure to disclose"; and [at 71] "For all these reasons it seems to me that to proceed on the basis of an 'issue based' costs order is to ignore the contagion which has infected the last three years of this litigation"; and [at 74] "There is no formulaic or accurate weighing mechanism for determining how the respective misconduct of the parties should be reflected in any order for costs", and then in reference to M-T v T (Marriage: Strike Out) [2014] 1 FLR 1352, at [134] "Charles J described his knowledge of the case and his consequent ability to reach a fair conclusion as to the percentage of the overall costs burden which the husband should pay as 'having lived through the litigation'. In terms, I can relate to that experience 'having lived through this litigation'. There is little about its course, the underlying facts or the parties' involvement with it that I do not know."

213. All of those sentiments resonate for me in this case. Of course my obligation in defining costs liabilities (as throughout) is to achieve a result which is fair overall, to both parties. I would be being grossly unfair to W if I did not regard conduct as the prime touchstone in the very specific circumstances of this case, and in light of the stratagems employed by H as expressed and implied by my findings.

214. Next for H these points were made:

Nor has it been asserted by W nor found by the court that arrangements between H and the trustees are fake or a sham. [If the reference in para 170 to an elaborate charade is meant to suggest or imply that the trust arrangements are invalid then it cannot stand against that concession by W 1. The validity of the trust arrangements stands unimpugned at the end of this trial and the court is referred to the skeleton argument provided by H that addressed the duties of the trustees in relation to disclosure; a position that was rightly adopted by the trustees so as not to breach their fiduciary duty; and as such not something that H can be criticised for.

The issue where the court has found against H in this respect is as to Mr Bennett's true underlying motivation; and thus as to H's own expectation that he may benefit from the value of the trusts in due course in some fashion.

The issues: success or failure?
215. These points to my mind miss the point entirely. There is a clear distinction between the question whether a trust can be characterised as sham (which was, as rightly stated, not asserted at the hearing), and the conclusion

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which I reached that the case collusively advanced by H and TB was a rotten edifice founded on concealment and misrepresentation and therefore a sham, a charade, bogus, spurious and contrived. I do not shrink from applying to it the description fraud, a deliberate design to deceive, inflicted on W and on the court, and found by the court so to be.

216. Let me though start with a description and a consideration of those aspects of this litigation in relation to which W's own conduct is to be considered and weighed in the balance.

217. W is criticised for some of the initiatives that she took and some of the applications that she pursued, and these I will evaluate below for the impact they may have on the costs outcome. But what started the ball rolling down what became an increasingly slippery slope was, in my view, H's case designed to establish that the English court would have no jurisdiction to entertain the divorce, and in particular of course W's financial applications, because of his domicile in Spain alleged originally to be of origin, and subsequently of choice. Although in the circumstances of his acceptance that I should dismiss that challenge I delivered no judgment, I believe that within this judgment there are passages which clearly show what I concluded: that H with TB was engaged over a number of years in investigating how best an imaginative but fundamentally contrived and false case on his domicile could be made initially to the English tax authorities, and subsequently persisted in the in-court domicile enquiry. Such an attitude and an endeavour pursued with such vigour and at such expense inevitably provoke suspicion, so that it is hardly surprising that W's advisers and W herself did react. Slippery manoeuvres just as much as slippery slopes can be expected to bring out the truth of Newton's third law of motion: For every action, there is an equal and opposite reaction.

218. I would certainly not categorise the applications for freezing injunctions as overreactions to the situation as it stood on 1 May 2013 when first they were granted. Freezing orders were entirely appropriate protection for W's advisers to seek on her behalf in the immediate aftermath of the collapse of H's disingenuous assault on jurisdiction. They incorporated limitations on H's spending from the EFG facility, and it would be entirely normal as a matter of practice for the bank to be served with the orders. I have already explained why in my view it was when the bank found out that the trustees had not been entitled to make loans to H after he had ceased, albeit temporarily, to be a potential beneficiary in advance of the family's move to France (which they discovered only when they conducted a review of the facility, that review admittedly prompted by service of the order), rather than the service of the order per se, which led ultimately to the withdrawal of the facility. So the repeated attempt to blame her for the ultimate collapse of the facility upon which the family's finances were engineered fails, in my view, and what really happened it is impossible to ascertain without knowing quite what part TB played (as to which see [37 to 40] above).

219. In relation to costs incurred in respect of orders on and after 1 May 2013 made by me to do with applications for maintenance pending suit and A v A orders, and later for their variation or suspension, the suggestion

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is made that H should not have to bear the costs of awards "based on what has been found to be W's incorrect assumption that H could access the trust's assets". But the true analysis is that it has not been until the final hearing that upon all the evidence I have been able satisfactorily to conclude that in fact H will in the future have funds from the trust by way of salary and bonuses as an employee rather than as a beneficiary made available to him as he has in the past, and as to which what would have been proper disclosure has never been made. The conclusions which underlie my finding that H has the ability to tap into this source and thus the faculty to pay the maintenance I have ordered were not conclusions which it was open to me to make at interim stages of the proceedings.

220. Mr Pointer moves to firmer ground in relation to that part of the overall financial remedy applications whereby W sought to establish NHT as a trust susceptible to variation under MCA section 24. This was a very long shot, as evidenced by the great difficulty W and her advisers placed in formulating a basis for the proposition. I have found there to be no such basis, and that plank of W's case therefore sank. Moreover I have made plain my assessment of W's credibility in the section to that effect from [86] onwards, and it is correct that in general terms I preferred what H had to say about the development of their relationship towards marriage, relevant as that was to the settlement issue.

221. It is also correct that the considerable strand of W's case, the set aside application in relation to the Car Portfolio, foundered once relevant documentation was released by TB, belatedly in the context of the case some weeks after conclusion of the evidence and notwithstanding earlier repeated statements that such helpful documentation would be made available. H does still submit that TB's actions were not his responsibility and that they should not count against him when costs are considered: but again that ignores my finding that they were collaborators in the joint endeavour to do W down. This set aside application, and the associated alternative formulation that the Portfolio should be declared to be H's, both smack to me of the sort of reaction I have referred to above as to be expected if a wife (or a husband for that matter) is faced with a false presentation as gross as was here perpetrated.

222. And, finally and most fundamentally, the argument is urged that W has failed in her aspiration in her financial remedy application to obtain a multi-million pound lump sum award. She has certainly failed at this point to achieve a substantive capital award; but has for the time being achieved a periodical payments award of £120,000 more than the nominal order for which H contended, plus an adjournment of her outstanding capital claims. In my book the correct analysis is that neither party has won.

Costs: a principled approach

223. At the conclusion of the main part of this judgment at [184] above I advertised that "It will perhaps surprise no one that I do not regard this as a case where the 'no order' principle should prevail. W has failed in a number

of the specific applications she has made, but in light of my findings it is perhaps to be anticipated that in the overall balance it is H who may face a substantive costs order. I would like at this stage simply to observe that impecuniosity is no shield against the making of an order." That last was too unnuanced a statement, particularly (in situations to which FPR 28.3 applies) having regard to the requirement of rule 28.3(7)(f) that the court must have regard to the financial effect on the parties of any costs order. And so, it was submitted, that as W has failed to identify any source of funds with which to meet a costs award it would be plainly wrong to make an order against H, and moreover illogical and inconsistent having regard to my earlier observation [at 174] that to make a lump sum order against H would not encourage TB and the trust corporation to make the necessary funds available to him with which to me that obligation. The distinction is however that I have found that the flow of a salary and substantial bonuses will be reinstated (or another way found) so that H may maintain his living standards and meet whatever are his genuine liabilities, which as well as his costs liabilities to W will no doubt include those to his own lawyers. In short the requirement to have regard to the financial effect of a costs order on the parties has little if any impact in a case where the facts are found as here they have been. At least equal consideration, it seems to me, should in any event be given to the consequences, and the manifest unfairness, for W were I to accede to H's aspiration that I should make no order.

224. In the quite other context of an award of costs against a local authority at the conclusion of care proceedings it was suggested that a reason for not passing from the "no order" general rule was to be found in the observation of Lord Phillips in Re T (Children) (Care Proceedings: Costs) (CAFCASS and another intervening) [2012] UKSC 36, [2012] 1 WLR 2281 [at 44] that "the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice..." In that context, yes: but in this case I have no doubt that to categorise H's behaviour as reprehensible is accurately to describe his conduct of the case.

225. The conduct of the parties in relation to an application concerning their financial affairs is a relevant consideration whatever the format of the litigation, and whatever the particular costs regime beneath which their application or applications fall to be considered. Where one party hatches a wholly deceptive presentation, pursues it persistently to the conclusion, and is found to have done precisely all of that, then he or she should expect no quarter from the court when it comes to costs. Such conduct unravels all and can and should in an extreme case where the conclusions are clear have clear costs condemnation meted out as the court's response. Such cases are relatively few in number but this is such a case. Such cases should be fewer in number, and may become so if the costs outcome for such reprehensible conduct is clearly in prospective focus from the off.

226. Thus I conclude, when I stand back and address the global perspective of this litigation with a broad brush, that H should in principle take responsibility for W's costs "at large", that is to say those in relation to which there has not already been "no order". I do not believe that such an approach contains any punitive element: it is no less an outcome than such aberrant conduct deserves. I impose it in this case because it is what I believe to be

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the fair, just and deserved order. I do not as part of the process of arriving at it add in anything extra for deterrent effect on other cases which will come before the court, although it will be good if it does sound a stern warning.

227. The question next arises whether I should discount that order by some percentage or amount to reflect the discrete issues upon which W failed, and in particular in this context her application to vary NHT as a trust and her applications in relation to the Portfolio of vintage and collectable cars; and in respect of those aspects of her own evidence which were less than credible.

228. I have decided not to apply any such discount. The reasons for this are various. I have already made the point that one thing can lead to another, and in this case undoubtedly the extreme and extremely improbable and inherently untrue presentation made by H prompted self-defensive attempts which it is possible to categorise as last-ditch.

229. Next, I bear in mind that on the analysis advanced by Mr Bates the costs she has incurred in relation to which "no order" is already the order amount to some £170,000. Of these over £120,000 relate to the costs incurred in the flurry of litigation relating to the Bentley, the fact and the effect of its charge to Beckmans, whether H's solicitor had the requisite knowledge of H's intentions for the disposition effected by that charge to be set aside, the fact and the effect of its saisie conservatoire on the driveway of Château T, and whether it should remain there or be brought to England with a view to potential sale. These episodes are reflected in my judgments of 5 March 2014 [2015] EWHC 455 (Fam) and 15 April 2014 [2014] EWHC 3769 (Fam). In the former at [41] I said:

In this case my present inclination would be to regard the sale of the Bentley in appropriate circumstances as desirable quickly if, for instance, that sale would provide W with some urgent relief from the parlous risk she runs of finding herself unrepresented in these proceedings because of H's asserted inability to comply even in part with past orders without recourse to those proceeds.

In the April 2014 judgment at [14] and [15] I observed:

"The elements of H's evidence and of the way in which he has deployed his case, from first to last (within which I include the ill-fated domicile débâcle), have not thus far helped him to begin to persuade me that he is not driven by hostility towards W and does not harbour amongst his motives a desire to vanquish her financially. Nor am I yet prepared to conclude that many of the sharp and stark inconsistencies (I believe I am justified in referring to them as lies) in his evidence, and the shifts and twists in his position, are all down to vagueness, imprecision and the pressure of being subjected to questioning. ...

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H's evidence on the two days I heard from him last week was again, in my view at this juncture, replete with further examples [of lies]. So I remain to be persuaded that he is the victim of permanent exclusion at the instance of RFG, led by his long-term confidant and adviser Mr Bennett, and truly and validly divorced from access to any of the benefits of the £70 million or thereabouts which are the fruits of his business endeavours, now held within the New Huerto Trust. Nor do I yet accept as genuine RFG's expressed intention (now indeed set in train) to pursue H in every relevant jurisdiction to recover the equity standing to his name in the Bentley, the Piper aircraft, land in Zermatt and the loan due to him from the SCI which owns the château where he continues to live, unless it be to remove those assets at least for the time being from the risk of depredation by court order."

230. I cannot and do not seek to go behind the fact that I made no order as between the parties in relation to each of these sorties. With hindsight my better course might have been to defer decision and to reserve those costs until the conclusion of the main hearing. Nor have I lost sight of the fact that the appeal whereby Mr Pointer challenged whether jurisdiction exists to order sale of the Bentley in such circumstances was overtaken by events and that that issue has accordingly not been decided by the Court of Appeal. But I do bear in mind when considering whether to apply any discount to the costs order I shall now make against H that (the retained A v A £70,000 payment made by H apart) once H has met this order in full W will retain at least that £170,000 liability to her lawyers.

231. I have also considered whether or not I should make H some allowance for the fact that in the ordinary course of an orderly and honestly conducted application W would have incurred costs in relation to which the general "no order" rule might well have been applied. The same consideration might well have found reflection in the case of Thiry v Thiry [2014] EWHC 4046 (Fam) where I ordered the dishonest husband to pay 100% of the wife's costs on making a capital award which [in 2] I described as "restorative justice rather than any exercise of redistributive discretion, without involving (save to the self-inflicted extent that the husband's conduct of the litigation has inflated the wife's costs bill and thus my costs award against him) any punitive element". Despite its own very special features what that case does share with this is the scandalous and outrageous conduct and attitude displayed by each husband.

232. The outcome is that the costs order which I will make against H will encompass the totality of W's "costs at large".

233. W asks that any assessment of costs should be on the indemnity basis. H resists this, and invites my attention to a number of authorities down the years. I however regard it as self-evident that in the light of my principal judgment any assessment should be on the indemnity rather than the standard basis. But for anyone who might not agree, from the authorities to which reference was made I draw and rely upon a few quotations.

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234. In 2009 Coulson J in Noorani v Calver (No 2 / Costs) [2009] EWHC 592 (QB) stated [at 8 and 9] that:

"Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: see Reid Minty v Taylor [2002] 1 WLR 2800. However such conduct must be unreasonable 'to a high degree. "Unreasonable" in this context does not mean merely wrong or misguided in hindsight': see Simon Brown LJ (as he then was) in Kiam v MGN Limited No 2 [2002] 1WLR 2810.

In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the in a way which justifies an order for indemnity costs: see Waller LJ in Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879."

235. He went on to observe at [32] that "the claimant launched defamation proceedings either knowing that they were based on a lie or ... knowing that his case depended on a number of odd coincidences. ... And yet he maintained the claim until the third day of the trial ..." and continued at [33] "In those circumstances it is appropriate for the court to mark its great concern about the underlying claim and the claimant's conduct of it. One way in which that can be done is by requiring the claimant to pay the defendant's costs on an indemnity basis. This was a hopeless claim from the outset, and I find that the claimant knew it... The claimant acted unreasonably to a high degree by commencing these proceedings let alone maintaining them..."

236. Each of these descriptions, translated into the context of this case, fits H's conduct of this litigation, and stands in sharp contrast with the benign view taken by the same judge when rejecting an application for indemnity costs in Brit Inns Ltd v BDW Trading Ltd [2012] EWHC 2489 (TCC), [2013] 1 Costs LR 72. There at [84] he stated: "Because the claims were not deliberately exaggerated, and because there is nothing else in the claimants' conduct which might be regarded as so out of the ordinary as to warrant an express statement of the court's disapproval, it would not be appropriate to make an exceptional order for indemnity costs." In this case H's conduct certainly has displayed features which, happily, are out of the ordinary and which certainly warrant an indemnity order to mark the court's disapproval.

237. In reaching that conclusion I have borne in mind all the factors set out at CPR 44.2(4) and 44.2(5). I hope it is clear, in the light of the over-arching impact of my findings as to the reality of H's situation when contrasted with the presentation he pursued as a prime circumstance relevant in this case, why while having had what I regard as proper regard to them I have not given computational effect to the following considerations on W's side of the balance highlighted in these provisions:

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(4)(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(5)(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(5)(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(5)(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

Disposal
238. I will order H to pay all W's costs of and incidental to all proceedings between them in relation to financial matters heard on and since 1 May 2013, to include costs on any occasion reserved but to exclude all costs in relation to which it has already been ordered that there be no order, such costs (if not agreed) to be subject to detailed assessment on the indemnity basis.

239. Whereas previously the power to make an order for the interim payment of costs was discretionary, since 1 April 2013 CPR 44.2(8) stipulates that:

"Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

240. I have not in this case had the opportunity (as I did in Thiry) of considering a full and detailed breakdown of the costs incurred by W, and therefore feel obliged to leave open the option of what no doubt would be a lengthy, complicated and fully contested assessment. But I can, I believe fairly, diminish the prospects that time (not least court time) and expense will be taken up in such a venture by adopting the following approach. Having regard to the very considerable disparity between the costs liability incurred by H with his lawyers in the English finance-related proceedings (and recognising that they his team were more numerous than those employed by W) of about £870,000 overall, I will take the £588,500 estimate for the bill run up by W, and within it Mr Bates' sum of £417,829 for the "costs at large", as fair figures upon which to base my order. I take the view (which can only be impressionistic, but then in many ways that is of the essence of the broad and entirely fact-sensitive discretionary exercise which costs awards in this sort of situation must be) that H would be unlikely to achieve as much as a 20% reduction on detailed assessment, bearing in mind that the onus will be on him to establish unreasonableness rather than for W to surmount the test of proportionality.

241. I will therefore adopt 80% of £417,829 as the measure of the on account award I will make. This comes out as £334,263. I have decided against allocating the £70,000 received by Withers pursuant to the A v A order so as to

set it off against this cost award. The order will therefore require H to pay £334,263 to W within 14 days of this judgment being finally handed down. Interest at judgment debt rate will accrue from the date of the order, that is to say from the date of the costs award, pursuant to the provisions of section 17 of the Judgments Act 1838.

242. I am not blind to the fact that compliance with the order by the due date will not happen, and that compliance whether in whole or in part may be significantly delayed if ever performed. But that is no reason in my view for shrinking from making this order.

The application for permission to appeal
243. Mr Pointer and I were both content, at the conclusion of the June hearing, for him to make this application there and then. As to the periodical payments order, he referred to H as having no income as a reason why no order should have been made, and would like the Court of Appeal also to deal with the question whether in any event £120,000 per annum (with credit for sums actually paid in relation to the French child maintenance order, and in respect of W's rent) is excessive. He also raised as a ground of appeal the disregard which he rightly anticipated I would apply to his arguments based upon FPR 28.3(7) and what he terms the illogicality of a costs order when seen in the light of what in the main judgment I have said about the unlikelihood of TB making money available to H for the purpose of paying it over to W.

244. I believe that the reasons I have given for making the orders I have in relation to these matters sufficiently appear from the body of this judgment, and I am not persuaded that they arguably fall outside the bounds of my discretion. I therefore refuse permission to appeal.

245. In this connection, however, I should mention (in case the Court of Appeal is on any renewed application for permission invited to have regard to it) that on 16 June 2105, the eve of the costs hearing, I received an emailed letter direct from TB and from another of the trust company's directors. In it propositions were ventured which it was said the NHT trustees considered would assist to clarify misapprehensions in the draft judgment (effectively as far as [184] in this final version). I did not allow Mr Pointer to refer to or rely upon anything in the letter which I effectively therefore ruled inadmissible at that stage of the proceedings.

1 The F & BPs from W as to the exclusion of H as beneficiary state:
W has given careful consideration to the question as to whether the NHT was in and of itself a sham. W does not pursue this argument and does not intend to do so at this hearing.

Although W then purported to cast doubt on the subsequent trust transactions, we pointed out that (a) they are in accordance with the advice of counsel (b) valid under BVI law and that (c) in any case a trust was like the curate's egg: and could not be partly good and partly bad.