Case No: QB-2020-002047
Neutral Citaton Number: [2022] EWHC 2237 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday 19 July 2022

BEFORE:

THE HONOURABLE MR JUSTICE ANDREW BAKER

BETWEEN:

MARK NIEMAN

Claimant

- and -

WITHERS LLP

Defendant

Joshua Munro (instructed by Campbell Courtney & Cooney) appeared on behalf of the Claimant
Amanda Savage QC & Amber Sheridan (instructed by Clyde & Co LLP) appeared on behalf of the Defendant

Hearing dates: 6, 7, 8, 12 July 2022

JUDGMENT
(Approved)

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MR JUSTICE ANDREW BAKER:

Introduction

1. This judgment follows a trial conducted over five days earlier this month. I have reviewed all of the evidence relied on at trial, including my recollection and notes of the cross-examinations. There were no daily transcripts. I have considered with care all of counsel's submissions, written and oral. Having come to a clear view, I listed the case for judgment today rather than reserve it further. I shall not set out the facts as fully or in as much detail as I might have included in a longer reserved written judgment. I shall not deal specifically with every point of contention or argument raised, although, as I say, I have reflected on all of them in coming to the conclusions I shall now be stating.

2. The claimant, Mark Nieman, married in June 2000 when he was 41. His wife, Jeanette, took Mr Nieman's surname during their marriage so I shall refer to her as Mrs Nieman, although the context for these proceedings is Mr and Mrs Nieman's subsequent divorce.

3. Mr and Mrs Nieman became a couple in June 1998, having met at work. Both then worked in London for UBS. They maintained separate homes in London until they were married, although they spent much time together at each home before then. When they married Mrs Nieman sold what had been her flat in Tower Hamlets, and what had been Mr Nieman's home in Clapham became one of two family homes.

4. In 1997, with a loan of £100,000 from his father, a further £100,000 realised from his mother's estate (she having died that year), and a £400,000 mortgage loan, Mr Nieman had purchased 170 acres of farmland with four cottages in Kent ("the Farm", "Cottages 1 to 3" and "Windy Corner"). The main farmhouse, which had no land to speak of, not even any real garden, had its own Land Registry title and was not part of that purchase. Mr and Mrs Nieman bought it together for it to become, and it became, the second family home. The net proceeds of sale on what had been Mrs Nieman's flat went toward the purchase. There was a £150,000 mortgage, and the balance (which may have been a similar amount to the mortgage; I do not have the evidence to find a

precise figure) came from the balance of Mr Nieman's share of his late mother's estate, by then realised.

5. Mr and Mrs Nieman were married at a church local to the Farm. The first night they spent at the farmhouse as owners was their wedding night. By the time Mr and Mrs Nieman separated in 2015, leading ultimately to a divorce and financial settlement in 2017, the farmhouse was the sole family home. For the divorce process, therefore, and also for this judgment, the farmhouse was the former family home ("FFH"). There is a significant complication there, but I shall come on to that.

6. Mr Nieman claims against the defendant firm of solicitors, Withers LLP ("Withers"), that by reason of negligence in the advice they gave in the context of his separation and divorce, the terms he agreed with Mrs Nieman by way of financial settlement upon their divorce were not as good for him as they should have been; alternatively, he lost a real and substantial prospect of securing terms that were better for him. He therefore seeks damages representing the difference in value between the terms in fact agreed and better terms that, as he says, should have been secured for him, or on the basis of the loss of a chance of securing such terms.

7. Withers acted for and advised Mr Nieman principally in the person of Brett Frankle, a partner. Withers instructed experienced counsel, Marina Faggionato, to represent and advise Mr Nieman at and following a first directions appointment on 4 May 2017 in the divorce proceedings. Ms Faggionato's involvement is material because her advice as to the financial settlement merits tells against the idea that Withers' advice was negligent. She was fully briefed as to the facts available to Withers. She was instructed to represent Mr Nieman at the hearing and to negotiate for him, which of course carried with it an instruction to advise on the merits in the context of and for the purpose of any negotiations, and she did so advise. She was plainly not, as Mr Munro sought to suggest, merely parroting Withers' view in dereliction of her duty as counsel.

8. Ms Faggionato's advice was in substance similar to Withers' advice but more favourable to Mrs Nieman as to the likely bottom line. As regards Withers' advice, although other fee earners were involved, in particular Julian Lipson (a senior partner) at the outset, and Sarfraz Ali (an associate) later on, including at the first directions

appointment, this was Mr Frankle's case as the partner with responsibility, he was active on the file and he gave or participated in the significant advice in the case. The claim is in substance a claim that Mr Frankle was negligent in the view he took and thus the advice he gave Mr Nieman as to the financial settlement merits of his prospective divorce.

9. Mr Frankle joined Withers in 2003, qualified with them, and joined their divorce and family team in 2005. In those early years he was involved in the leading case of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24. He has been in continuous practice since qualifying, with a case load predominantly of financial settlement matters in divorce cases, as an associate for ten years and as a partner since 2015. Mr Nieman's case therefore came to him when he was ten years' qualified and quite newly made up to the partnership.

10. There is also a counterclaim by Withers for unpaid fees of £35,730.39, plus interest at 8 per cent pursuant to a provision in Withers' standard terms, accepted by Mr Nieman for the retainer. Pursuant to those standard terms, Withers invoiced Mr Nieman on a monthly basis by detailed itemised fee notes. Mr Nieman paid as invoiced until April 2017 but then stopped paying. The counterclaim, therefore, represents the total invoiced to Mr Nieman, no part of which he has paid, under Withers' fee notes dated 30 April, 31 May, 1 July, 31 July and 31 August 2017. The only defences raised are, firstly, that Withers' liability in damages, if any, should be set off against the entitlement to fees and, secondly, that Mr Nieman "*is entitled to and claims an assessment of the invoices*".

Relevant Matrimonial Law

11. Part II of the Matrimonial Causes Act 1973 deals with financial relief in divorce cases. It gives the court wide-ranging powers to order a lump sum or periodical payments (section 23), the transfer or settlement of property (section 24), the sale of property (section 24A), pension sharing (section 24B), pension compensation sharing (section 24E). The court is duty-bound to have regard to all the circumstances of the case in deciding whether, and if so in what manner, to exercise those powers (section 25(1)),

the first consideration always being the welfare while a minor of any child of the family. Then section 25(2) provides that:

> "As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters -
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

12. The guiding principle is the achievement of fairness as assessed by the court, and in that assessment there should be no discrimination between roles, for example, as between spouses one of whom was or became the primary breadwinner and the other of

whom was or became primary a homemaker, because the court should not approach the exercise of its financial relief powers on the basis that the material and non-material contributions of the two spouses were other than of equal value to and in the marriage, and any departure from an equal division of assets always requires justification by reference to the circumstances of the particular case (see generally the leading cases of *White v White* [2000] UKHL 54; [2001] 1 AC 596 and *Miller v Miller* (supra)). The premarital origin of some or all of the assets may in any given case provide a justification for a departure from equality, but that factor properly carries little if any weight where one party's reasonable financial needs cannot be met without recourse to the originally premarital assets of the other (*White v White* at 610, reiterated in *Miller v Miller* at [23]).

13. In *Miller* Lord Nicholls continued thus, and this remains the applicable statement of principle at the highest level:

> "24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.
>
> 25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the *White* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs.
>
> 26. This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day. Similarly the 'equal sharing' principle might suggest that each of

the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate. The case of Mr and Mrs Miller illustrates this only too well.

27. Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case."

14. Following *White* and *Miller*, in the Court of Appeal Sir Mark Potter P summarised the matter as follows in *Charman v Chaman (No 4)* [2007] EWCA Civ 503 [65]-[68]:

"65 … It is clear that the court's consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take 'the sharing principle' to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not *from* the principle but takes place *within* the principle.

66. To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation … We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at 605 F-G and 989 respectively and in *Miller* at [24] and [26] Lord Nicholls of Birkenhead approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale of Richmond, that in *White* the House had set too widely the general application of what was then a yardstick.

67. Even if, however, a court elects to adopt the sharing principle as its 'starting point', it is important to put that phrase in context. For it cannot, strictly, be its starting point at all. As Coleridge J himself stated in the passage cited in paragraph 59 above, the

> starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in section 25(2) other than in the order there set out, a court should first consider, with whatever degree of detail is apt to the case, the matters set out in section 25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future. Irrespective of whether the assets are substantial, likely future income must always be appraised for, even in a clean break case, such appraisal may well be relevant to the division of property which best achieves the fair overall outcome …
>
> 68. In *Miller* the House unanimously identified three main principles which together inform the second stage of the enquiry, namely that of distribution: 'need (generously interpreted), compensation, and sharing', per Baroness Hale of Richmond at [144]; and see, similarly, Lord Nicholls of Birkenhead at [10] to [16]. The three principles must be applied in the light of the size and nature of all the computed resources, which are usually heavily circumscribing factors."

The possible "exceptions identified in *Miller*" to which Sir Mark referred at [66] would not have been relevant in the present case.

15. On the theme that for present purposes the importance of the source of assets may diminish over time, in *K v L* [2011] EWCA Civ 550 at [18], Wilson LJ identified three situations which came to mind, not suggesting that these could or should be treated as exhaustive, namely:

> "(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.
>
> (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.
>
> (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has -- as in most cases one would

> expect -- come over time to be treated by the parties as a central item of matrimonial property."

16. There are no hard and fast rules for determining whether it will be fair to ringfence and exclude from distribution some asset or assets or for determining how far away from equality it will be fair to move the distribution if some asset or assets is not to be ringfenced and excluded but nonetheless its premarital original is considered by the court in the circumstances of the particular case to justify an unequal division.

17. In some of the criticisms advanced against the view Mr Frankle took in the present case, and therefore the advice he gave Mr Nieman, Mr Munro seemed to me to be seeking to elevate explanations given in first instance judgments for the conclusions as to fairness reached in their particular factual circumstances into principles of law of more or less rigid application. For example, he advanced, as if a proposition of law of general application, that if income generated from a premarital investment asset owned by one spouse prior to the marriage had been used for family purposes during the marriage, treating that income as a joint asset, but the capital had not been touched, (a) the asset has to be treated as non-matrimonial and (b) the asset should be ringfenced and excluded from distribution unless sharing it was required to meet reasonable need. There is no such principle of law, although of course it may be that when considered in the factual context of the particular marriage in question, and all the circumstances of that case, the use only of the income generated from an asset might tend to make it fair, or fairer than it might otherwise have seemed, either to exclude it from distribution or to depart from equal sharing in relation to it, in recognition of a premarital origin.

18. In the years prior to and ending immediately after the resolution of financial terms between Mr and Mrs Nieman in this case, there was some debate within decisions at first instance as to the methodology by which, if it were decided that the premarital origin of certain assets should be reflected by departure from equality, that factor should be worked out. The two potential approaches considered in those various cases had been described as a "broad brush approach" of adjusting the percentage apportionment between the spouses from 50 per cent in relation to the computation stage, or the "formulaic approach" seeking to identify with a degree of apparent precision the scale of non-matrimonial property to be excluded, either by excluding particular assets or particular proportionate shares of certain assets, and then applying a

50/50 equal sharing principle to all remaining assets at the computation phase. Both approaches received criticism. During the course of Withers' retainer in the present case, it is fair to say (and Mr Munro submitted) that the formulaic approach was gaining a degree of greater traction than the broad brush approach at first instance (see, for example, the decision of Roberts J in *MCJ v MAJ* [2016] EWHC 1672 (Fam), discussing and following certain decisions in particular of Mostyn J).

19. In the event, in August 2017, just a month after the final resolution of financial matters between Mr and Mrs Nieman by consent order in July 2017, the Court of Appeal in *Hart v Hart* [2017] EWCA Civ 1306; [2018] 2 WLR 509 ruled that the characterisation of those approaches as two rival schools of thought between which the law was required to make a choice in principle was erroneous; they were each no more than methodologies the application of which in any given case ought to be likely to produce a materially similar outcome, and the choice as to the use of which, depending on the circumstances of the case, was merely a matter of reflecting properly the "degree of particularity or generality appropriate in the case" as assessed to exist by the judge in question, reflecting the guiding principle from *Miller* I have quoted already in full.

20. Some family lawyers talk of "needs cases" in supposed contradistinction to "sharing cases" but the usage is inexact. All cases are sharing cases in the sense that:

- the court's function is to achieve a fair outcome through the exercise of its powers under sections 23, 24, 24A, 24B and/or 24E of the 1973 Act in respect of the parties' assets;
- the effect of the exercise of any those powers will be to share assets out between the divorcing parties; and
- those powers extend to all assets beneficially owned by the parties or either of them.

On the other hand, all cases are *inter alia* needs cases, in the sense that, in exercising that function, the court must have regard to all the circumstances of the case but in particular those set out in section 25(2) of the 1973 Act and one of those is:

> "the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future." (section 25(2)(b))

21. More exactly, then, what I think a family lawyer means when they describe a case as a "needs case" is that they have a case in which, given the aggregate value of the available assets and the reasonable needs of one of the parties that ought, if possible, to be met, the court may prioritise those needs in a way that leads to a distribution of the assets that is more favourable to that party than might otherwise have been the case, to try to meet those needs. What they mean by saying they have a "sharing case" is really only that they do not have a needs case in that sense. In this case the aggregate value of the assets was comfortably more than sufficient to meet the needs of both parties. The only legal rule was that the court's powers had to be exercised in such a way that, having regard to all the circumstances, but always in particular those set out in section 25(2), which included the parties' reasonable needs, the court considered the resulting financial settlement to be fair.

Main Parameters of Mr/s Nieman's Case

22. Leaving aside the treatment of an obligation that Mr Nieman was keen throughout to accept, to fund school fees, there was never going to be any question of ongoing periodical payments in either direction in this case. There was always going to be a "clean break" financial settlement, whether it be on terms the parties managed to agree or on terms that had to be imposed by the court after a contentious hearing. Because of that, and because of the nature and history of some of the assets, any financial settlement was always going to be on the basis that certain assets were not in fact shared.

23. For example, there would never have been any suggestion that Mrs Nieman transferred to Mr Nieman any of her shares in The Oak & Rope Company Limited ("ORC"), the company through which she was operating a business that by the time of the separation and divorce was providing a substantial livelihood, whereby to share the company, even if it were regarded as a matrimonial asset the value of which should be shared. Or again, in this case Mrs Nieman was always going to agree to give up her interest in the FFH so it became wholly owned by Mr Nieman and no longer shared, even though

equally it was always going to be agreed or held that the FFH was a matrimonial asset the value of which should be shared equally.

24. This was therefore a case, as is typical, in which two different types of exercise would need to be done. One was an analysis, such as it is alleged that Withers negligently failed to undertake or undertook incompetently, of considering Mr and Mrs Nieman's various assets and assessing in each case, and other things being equal, the parties' respective claims to them or to a share in them. The other was an exercise in constructing a workable and fair distribution of the assets between Mr and Mrs Nieman to create the desired clean break that in aggregate value would reflect the output of the first exercise.

25. To illustrate by simple example, suppose the significant assets are a former family home in joint names worth £500,000, a second home in H's sole name worth £300,000, savings by way of a share portfolio in W's sole name worth £200,000 and cash in joint names of £200,000, with no borrowing, and suppose the conclusion of the first computation exercise is that all of those assets are fairly to be seen as joint assets the value of which should be shared equally (even if it may be that some of the them, in the particular case the second home and W's share portfolio, perhaps, had a premarital origin) and that an equal division of the available value would comfortably meet both parties' reasonable needs. The task in the second, distribution, exercise, if the aim is a clean break, would be to find a workable and fair distribution of those assets such that there was no joint ownership and the value left in each party's hands was £600,000. If, for example, it were agreed or determined that H should keep the former family home one possibility that no doubt might be considered would be a transfer to W of the second home and an equal split of the cash savings.

26. There were more assets and greater complexity in Mr and Mrs Nieman's case than in that simple example.

27. I start with the FFH. By 2015 it was a very different property from the farmhouse purchased in 2000 as Mr and Mrs Nieman were marrying. In 2002 the house in Clapham was sold for £800,000. The proceeds of sale were used to discharge the loan Mr Nieman had taken out to buy the Farm, and to extend the FFH. Some 5.25 acres,

part of the Farm, had been turned into a large family garden that was treated as part of the FFH but without altering the title boundaries at the Land Registry. An additional area of curtilage on the edge of the new garden and also part of the Farm title had also been incorporated *de facto* into the FFH, including Stables Cottage, an old building on the Farm that Mr Nieman had converted into a fifth cottage there in 1998, which, like Cottages 1 to 3 and Windy Corner, was leased to tenants.

28. That is part of the significant complication as regards the FFH to which I referred earlier. The rest of it is this. Mr Frankle took the view that the way the Farm and the FFH had been treated, used and enjoyed together by Mr and Mrs Nieman meant that the Farm would be treated as a joint asset, to which *prima facie* an equal sharing approach would likely be adopted. It was clear from his evidence at trial that he still takes that view, indeed that he does not regard the contrary view as realistically arguable. Mr Frankle's view says in substance that the family home had become the Farm and the FFH taken together, a family homestead or small estate of main house, rental cottages and farming land[1]. On that view, one could argue that the entire estate should be referred to as the FFH, not just the farmhouse plus garden and curtilage including Stables Cottage. However, since the allegation is that Mr Frankle was negligent to take that view, and since it reflects the way that discussions and asset valuations proceeded at the time, in the rest of this judgment when I refer to the FFH I shall be referring to the farmhouse as extended and developed, as it stood and was being used in 2015, including the garden, curtilage and Stables Cottage taken in from the Farm, and not to the rest of the farmland.

29. For simplicity, I shall round off when giving asset values, but taking care not to round off so crudely as to affect materially how a calculation of the overall effect of any given set of terms would turn out if expressed in percentage terms as a split of total assets. Greater precision in the arithmetic is not required in order to judge the negligence claim now made against Withers. The asset values I shall state represent my findings on the evidence adduced at trial as to what approximately Mr and Mrs Nieman's assets were probably worth when they were discussing and eventually

[1] As historical footnote by way of neat coincidence, 160 acres, a materially similar area of land to that which I am considering, was the acreage that could be allotted as a homestead under the US Federal Homestead Act 1862 so that in period usage the word "homestead" was used to denote a parcel of land of that size developed and used as a home with land.

agreeing financial settlement terms. Where in their discussions and correspondence Mr Nieman and Withers considered at the time the overall effect, expressed in percentage terms, of various putative asset distributions, they might have used different values for some of the assets. Those covering explanations should be borne in mind throughout.

30. The FFH was worth at least £1.5 million net of the remaining mortgage balance Mr and Mrs Nieman owed.

31. The Farm, including Windy Corner but excluding Cottages 1 to 3, was worth at least £1.5 million and was mortgage free.

32. Cottages 1 to 3 were worth £600,000 net of Capital Gains Tax ("CGT"), which is how they would have been valued for the purpose of considering the exercise of the court's powers under the 1973 Act. They were generating net income, after maintenance and other expenses and income tax, of £18,000 per annum. They were mortgage free when the couple separated and Withers were retained. In the spring of 2016, before the end of the 2015/2016 fiscal year, they were transferred into Mrs Nieman's name under an agreement reached between Mr and Mrs Nieman in March 2016 without Withers' involvement.

33. In September 2016 Mrs Nieman bought a five-bedroom house ("2MB") to be her new main residence, prior to which she had been renting while she and Mr Nieman were discussing financial matters. It was bought for a sale price of £850,000, at a total cost to Mrs Nieman of £950,000. Mrs Nieman mortgaged Cottages 1 to 3 and 2MB so as to complete the purchase without having received the £1 million or so in cash that Mr Nieman had promised her in their March 2016 agreement. The mortgage loans were for £510,000 and £290,000 respectively, so that by the time financial terms were finally settled and approved by the court, Mrs Nieman owned Cottages 1 to 3, but they had a much reduced net value of £90,000; and Mrs Nieman owned 2MB and its contents, worth, say, about £900,000 gross, about £600,000 net.

34. I turn next to a house Mr and Mrs Nieman had bought in Norway jointly with Mrs Nieman's parents in which Mrs Nieman's parents had taken up residence. Mr and Mrs

Nieman's half share was in Mr Nieman's sole name but it was common ground at trial, although this was not Mr Nieman's pleaded case, that the Norwegian house was rightly to be treated as a matrimonial asset the value of which should be shared equally, as Mr Frankle thought at the time. Mr and Mrs Nieman's half share was worth, net of CGT but including a loan to Mrs Nieman's parents associated with the purchase transaction, £100,000.

35. Mr Nieman held a share portfolio worth, net of CGT, £150,000 to £200,000. This was premarital in origin on Mr Nieman's side and was managed for him by a friend. To the extent it had grown in value during Mr and Mrs Nieman's marriage, if it had (I did not have sufficient evidence for a finding as to that), and to the extent it were felt appropriate to draw this distinction, that growth will have been passive and not the product of the couple's joint endeavours. However, both dividend income and capital had been used towards payment of school fees.

36. Mr and Mrs Nieman had small pension funds worth £60,000 and £50,000 respectively. More significantly, Mr Nieman had a pension from UBS that was in payment by the time the couple separated. It was paying £25,000 per annum, index linked, for life. It had a CETV of £850,000. The UBS pension came from Mr Nieman's 20-year city career, for only the last five years of which Mr and Mrs Nieman were married. However, Mr Nieman adduced no evidence as to how precisely the pension had been built up, so I am in no position to find, as Mr Nieman claimed, that only a very small proportion of his pension entitlement had been generated during the marriage. The CETV documentation suggests that perhaps 65 per cent of the pension fund had been built up after 5 April 1997. If one made a rough and ready assumption that during those eight years the pension build-up had been linear, that would suggest that about 40 per cent of the pension value may have been acquired during the marriage. That is not a finding, it is merely an illustration of how it cannot be found that only a very small proportion of the pension was from the matrimonial period. By way of finding, all I can say is that a substantial proportion of Mr Nieman's UBS pension fund was probably acquired while married to Mrs Nieman.

37. Mr and Mrs Nieman between them owned a majority stake in Chelsea Properties Limited ("CPL"), a buy-to-let property portfolio company established by Mr Nieman

with others in 1989 or so. By 1998, the shareholders were Mr Nieman, his sister and her husband, Joanna and Christopher Jillings, and a friend of Mr Nieman's, Nigel Snape (or it may have been Mr Snape and family members, it matters not). The Snape shareholding was bought out by Mr and Mrs Nieman and Mr and Ms Jillings in 2010. I shall come back to the detail, which matters somewhat, but for now, for simplicity of initial exposition, I say only that the majority shareholding owned between Mr and Mrs Nieman as they separated was worth £700,000 to £1 million. That asset value is net of CGT and net of loans from CPL for the acquisition of the shares. I shall come back to the detail of this but I note additionally here that, by the time the financial settlement was finalised and approved by the court in July 2017, Mrs Nieman's shares in CPL had been transferred to Mr Nieman pursuant to their March 2016 agreement. The net capital available in CPL was identified from the outset and throughout, in Mr Nieman's instructions to Withers, as having been earmarked by Mr and Mrs Nieman as their school fees fund.

38. Mrs Nieman owned ORC. Mr Nieman proposed various, widely varying, valuations for it in his instructions to and discussions with Mr Frankle. There is an unfounded pleaded complaint that Mr Frankle negligently failed to advise Mr Nieman to have ORC professionally valued. In fact, Mr Frankle made clear at the outset and repeatedly thereafter that if Mr Nieman wanted specific advice whether any given proposed distribution of assets created in overall effect a sharing of value that the court might realistically adopt or approve, there would need to be definitive valuation evidence that Mr Nieman was not in a position to provide for ORC. When the matter proceeded towards a court resolution in early 2017 Mr Frankle ensured that a direction was made at the first directions appointment for ORC to be independently valued by an appropriate business valuer.

39. In truth, it favoured Mr Nieman to negotiate without an independently fixed valuation of OCR. That allowed him plausibly to suppose that ORC should be regarded as worth much more than Mrs Nieman was suggesting. As I have noted already, any agreed or court-imposed asset distribution was always going to leave ORC entirely in Mrs Nieman's hands. But Mrs Nieman's position, had it needed to be fought out, was that ORC was worth only £125,000, net of CGT, as a capital asset. As Mr Nieman observed in an email to Withers after the first directions appointment in May 2017,

the upshot of which, as he saw it, was that although he had achieved what he wanted on the case management point (for example, who would be doing the valuations), it seemed like an agreed solution was now going to require Mrs Nieman taking more than he had been hoping, one option was to: "*proceed with valuations. I am sure this is our only slight win today but the valuations will move against us*". That comment, as I read it, was not directed only at how ORC might be valued, it also had in mind that Mrs Nieman, on her Form E, valued the FFH at £2.4 million and the Farm, including Cottages 1 to 3, at £2.25 million gross of the loans secured against Cottages 1 to 3, because Mrs Nieman's Form E treated that loan as suppressing the value of 2MB rather than Cottages 1 to 3 since it was taken out and used for the purchase of 2MB.

40. On a like-for-like basis, therefore, using the terminology I have been using, there was only a proportionately minor difference between the parties as to the value of the Farm and no difference between them as to the value of Cottages 1 to 3, but there was a significant difference of potentially up to nearly £1 million between them on the value of the FFH.

41. Returning to the value of ORC, Mr Munro in argument relied on a valuation of the goodwill in ORC at £500,000, in initial instructions and correspondence often erroneously referred to by Mr Nieman as having been £800,000. That value of goodwill of £500,000 was declared to HMRC as part of the accounting required when ORC was incorporated as successor in business to what had initially been a partnership between Mrs Nieman and a friend Mrs Nieman bought out in early 2015 using funds provided to her by CPL by way of loan. Mr Munro in closing invited me to say that ORC was worth and would have been assessed by the court as being worth £700,000, comprising that goodwill figure plus £200,000 for fixed assets and stock. However, the £500,000 goodwill figure was not current, and I could not say that it represented realisable value for the owners of the business even had it been current. In substance, ORC was Mrs Nieman's business, operating as a sole trader with a few employees, but established in corporate form, no doubt for the usual reasons of limited liability and tax efficiency. It was independently valued at only £160,000 when Mrs Nieman was buying out her former business partner in February 2015. Mr Nieman's case was that this was an artificially low valuation. There is no sufficient basis in the evidence at this

trial for a finding to that effect. According to her Form E, Mrs Nieman valued ORC in May 2017, net of CGT, at only £125,0000.

42. Aside from the value from time to time of any stock and unfulfilled orders that might be taken over, I could not say that there was any substantial realisable capital value for Mrs Nieman in ORC. ORC's accounts valued shareholders' equity at £180,000 at 30 October 2016 and £160,000 at 30 October 2017. In short, as a realisable capital asset, as distinct from Mrs Nieman's livelihood (source of income), it was probably not worth more than £200,000.

43. In relation to ORC as Mrs Nieman's livelihood, Mr Munro noted that she drew £150,000 from the company in the year to 30 October 2016, ORC's annual accounting date. However, there was evidence that that was an overdrawing, some of which was returned, so the proper figure was more like £125,000, and that was obviously exceptional drawing in the year during which Mrs Nieman needed capital to purchase 2MB. The evidence indicates to me on the whole, and I find, that Mrs Nieman had been generating a reliable gross income from ORC of £80,000 to £90,000 per annum and she was reasonably predicting that would continue. Given the nature of ORC as a business and the absence of business valuation evidence at this trial, I do not have any basis to find, as Mr Munro contended, that Mrs Nieman's then current and predicted income from ORC, assuming she continued the business, establishes a materially greater value for the business as a capital asset than its basic book value referred to already.

44. Mr Nieman had cash at bank of £275,000. Mrs Nieman did not have cash at bank great enough to be worth mentioning as material to an assessment of the claim now made against Withers.

45. Other than mortgage loans and loans from CPL associated with the acquisition of CPL shares which I have taken into account in stating values net of associated lending, likewise contingent CGT liabilities, Mr and Mrs Nieman had no liabilities that are significant in proportion to the value of the assets available for sharing. There was a tax liability of about £12,000 on the income from Cottages 1 to 3 that had been taken by Mr Nieman after the transfer of the cottages to Mrs Nieman in 2016 under a term of

their March 2016 agreement that Mrs Nieman would allow Mr Nieman to have that rental income for a period of 12 years. There was also a loan of £50,000 from CPL to Mrs Nieman, as I have mentioned already, used by her in buying out her business partner in ORC.

46. Mrs Nieman also claimed that she owed a former business advisor, who is now her husband, about £45,000 for funding she says he had provided to her during the time she was renting and/or in connection with purchasing 2MB. At the latest by the time of that purchase in September 2016, Mr Nieman believed that Mrs Nieman was in a relationship with her new husband (as he now is). That appears to have been one of a number of factors that contributed to a progressively more bitter attitude on Mr Nieman's part to the financial settlement process generally. I need make no particular findings, however, about Mrs Nieman's post-separation private life. It has no bearing on whether Withers gave negligent advice as alleged.

The Financial Terms Agreed

47. I mentioned when considering ORC that Mr Frankle made clear that he could not say whether a given asset distribution solution would be in line with a reasonable asset sharing computation without final valuations. In making that clear, Mr Frankle consistently explained that he therefore provided such views as he did on that topic by assuming and not giving advice on the asset values involved. One theme of Withers' defence became that this made it difficult for Mr Nieman to have any viable negligence claim at all. I do not agree that the point goes that far. Mr Frankle had sufficient basis to take a view and advise Mr Nieman on how the court might realistically say or would be likely to say that the various assets should be treated in any asset share computation.

48. Mr Frankle thought that too, and he took and expressed what he considered and still considers to be a reasonable view on that. It was that view which drove his assessment and advice that almost all the assets in this case were and would be treated by the court as matrimonial, to be shared as such and therefore subject to a principle of *prima facie* equal sharing. That view in turn drove his assessment and advice that, while in all the circumstances of the case Mr Nieman had serious prospects of achieving an asset distribution that was skewed in his favour away from equal sharing by value in overall

effect, realistically that was not so to a degree greater than 60/40 in his favour in overall effect.

49. The asset distribution ultimately agreed and formalised by consent order in July 2017 dealt with Mr and Mrs Nieman's assets as follows:

- the FFH and the Farm, apart from Cottages 1 to 3, went to Mr Nieman, value at least £3 million (and if Mrs Nieman was right about the value of the FFH, perhaps nearer £4 million);
- Cottages 1 to 3 and 2MB went to Mrs Nieman, value £600,000;
- the 50 per cent interest in the Norwegian house went to Mrs Nieman, value £100,000;
- Mr Nieman's share portfolio went to him, value £150,000 to £200,000;
- all of their shares in CPL representing the majority interest went to Mr Nieman, value £700,000 to £1 million;
- ORC went to Mrs Nieman, value, as I find, £200,000;
- the small pension pots stayed as they were, Mr Nieman £60,000, Mrs Nieman £50,000, and there was a pension sharing order transferring 46.14 per cent of Mr Nieman's UBS pension to Mrs Nieman (CETV £400,000 of £850,000), total values £510,000 to Mr Nieman, £450,000 to Mrs Nieman;
- cash at bank stayed where it was, value £275,000 to Mr Nieman, materially negligible value to Mrs Nieman.

As I shall mention in a moment, Mr Nieman accepted a substantial lump sum cash payment obligation in favour of Mrs Nieman, but what I have just said is nonetheless the correct analysis of the disposition of the collective assets as settled by the consent order. Mrs Nieman was not granted any interest as such in Mr Nieman's cash at bank. He was free to fund his lump sum payment obligation from any source or sources available to him.

50. Using £3 million for the FFH and the Farm, excluding Cottages 1 to 3, rather than any larger figure, that is a total asset value of £5.985 to £6.335 million, or say (taking the midpoint) £6.15 million, of which only £1.35 million, 22 per cent, went to Mrs Nieman. However, the agreed terms and therefore the consent order also obliged Mr

Nieman to pay Mrs Nieman £695,000, taking Mrs Nieman to £2.05 million, 33.33 per cent. If ORC were treated as worth £700,000, other things being equal, Mrs Nieman's share would come out in that calculation at about 38.5 per cent. On the other hand, if the FFH and the Farm, minus Cottages 1 to 3, were worth £4 million, other things being equal, Mrs Nieman's share was only about 28.5 per cent with ORC valued at £200,000 (£2.05 million out of £7.15 million) or 33.33 per cent if ORC were thought to be worth £700,000 (£2.55 million out of £7.65 million).

51. On the liability side, leaving aside lending against assets, the responsibility for which went with the asset but the impact of which I have taken into account in the asset values I have stated (for example, Mr Nieman undertook sole responsibility as between himself and Mrs Nieman for the remaining balance of the mortgage on the FFH):

- Mr Nieman accepted sole responsibility for school fees. The value to Mrs Nieman of being relieved of a joint responsibility for funding school fees, if that is how one wanted to look at it, as a net present value, was about £300,000;
- Mr Nieman effectively took over the £50,000 loan from CPL to Mrs Nieman that she had used in buying out her former business partner from ORC;
- Mrs Nieman took sole responsibility for any debt to her former business advisor.

More Detailed Facts

52. I now turn at last, in slightly more detail, to the main events giving rise to the claim and counterclaim before me.

53. Mr Nieman was born in November 1958. He had a 20-year career from around 1984 as a stockbroker in the City of London, latterly with UBS. In 2005 Mr Nieman retired from the city to pursue the country life in Kent and less stressful interests.

54. Mr Nieman met Mrs Nieman, née Aurdal, in 1998. She was born in September 1974. She was and is a qualified accountant and she met Mr Nieman when she took up a position at UBS. In the early years of their marriage, as they were still both employed by UBS, they were earning substantial incomes: in Mr Nieman's case it may have been

£200,000 per annum or thereabouts, plus annual bonuses; in Mrs Nieman's case, around £150,000 per annum. They were married on 3 June 2000. At the date of marriage, therefore, Mrs Nieman was 25 years old and Mr Nieman was 41 years old. Two children were born to them, a daughter born in August 2003 and a son born in August 2007. Mrs Nieman left UBS in 2004 or 2005 to devote herself to the home and the children.

55. It was submitted by Mr Munro that Mrs Nieman had always insisted on being financially independent of Mr Nieman. It was suggested that this was evidenced by what was said to be an unusual feature, namely that the couple did not have a joint bank account. Not only is it by no means unusual in the 21st Century for a married couple not ever to open a joint bank account, but nor does a failure to do so evidence one way or the other the financial independence of the couple from each other in a sense that might be relevant to the exercise at some later date of the court's powers under the 1973 Act.

56. Mrs Nieman, it was submitted, had always wanted to fund her own lifestyle by her own means. In my judgment, no such thing has been established on the evidence adduced at this trial. Rather, doing the best I can on the evidence relied on for this action, the couple appear to have been enjoying over all of their married life together of some 15 years what was on any view a comfortable standard of living. Indeed, I apprehend, as Mrs Nieman described it in her Form E in due course, it was a very good standard of living, living as a married couple and family, living off their collective assets and income. It may be that, depending on one's yardstick for such things, their lifestyle was not, and certainly it was not regarded by them as, extravagant, but it was certainly not frugal as Mr Nieman has asserted. They were very well remunerated financial executives in the city until 2005 and thereafter they were living a very comfortable country life with large house, farmland, cottages, nanny, private schooling and expensive holidays.

57. Having both left the city, so far as I can see, for at least the period of 2005 to 2008 their sole income was generated by their savings such as they may have been at that stage and their other capital assets. I am not in a position even to begin to investigate the degree to which during those years their expenditure was met only out of items of

income as distinct from drawings of capital. From 2008 Mr Nieman commenced drawing down his UBS pension, having turned 50. From 2009 or 2010 Mrs Nieman created what became a substantial livelihood for the couple from the business she founded with a colleague that became ORC. The business produced and distributed high quality gifts made, as the name of the company might perhaps suggest, from oak and rope. The company became successful. Its products were popular. There were contracts with the John Lewis partnership and there was even a purchase by the Royal Family of an oak and rope swing as a birthday gift for HRH Prince George. As I mentioned earlier, strictly speaking, on the evidence, the business was established and developed initially as a partnership between Mrs Nieman and her colleague and later translated into the limited company.

58. ORC operated from a barn free of rent on the Farm initially, but after a few years, as it expanded, it moved to premises rented from a third party. In the early stage of its business ORC used some of Mr Nieman's late father's machinery before it was in a position to purchase its own equipment as it grew. One principal reason for employing a nanny was to enable Mrs Nieman to devote time to developing and growing the business.

59. Shortly prior to the establishment of ORC in about 2008, the Norwegian holiday property was purchased in Skodje, Norway. As I have mentioned, it was jointly registered in Mr Nieman's name and that of Mrs Nieman's parents, or it may be just Mrs Nieman's mother. Mr and Mrs Nieman regarded themselves, I have no doubt, as joint owners with Mrs Nieman's parents. Her parents expended a substantial sum to refurbish the house, in connection with which there was the loan to them to which I referred in making a finding as to the net value of Mr and Mrs Nieman's half share.

60. In 2010, by a deed of trust dated 22 March of that year, the registered ownership of the Farm was changed on advice from Mr Nieman's accountant in relation to the farm business, Jeremy Harrison, so that it became registered as jointly owned by Mr and Mrs Nieman. The deed of trust declared the beneficial ownership to be in 99 per cent and 1 per cent shares respectively held by Mr Nieman and Mrs Nieman. This was, on the evidence of both Mr Nieman and Mr Harrison, from whom I received evidence by way of a short unchallenged witness statement, for the resulting tax advantages that joint

ownership would bring, enabling the couple to take the income generated by the Farm in equal shares, that income moreover then being set against interest liabilities on the couple's mortgage on the FFH for further marital tax efficiency.

61. In 2011, as again already mentioned in general terms, Mrs Nieman became a registered shareholder in CPL. I had a short, unchallenged witness statement in relation to that aspect of the matter also, this time a statement of Mr Jillings, Mr Nieman's brother-in-law. As explained by Mr Jillings in that statement, the Snape family decided in 2010 to sell their shares and wanted to do so quickly to avoid what was going to be a change in Capital Gains Tax rates for the 2011/12 fiscal year. For tax reasons, that is to say efficient tax planning between a married couple dealing with their assets, it was decided that the proportionate share of the Snapes' share that would match Mr Nieman's existing shareholding should be taken by Mrs Nieman and registered in her name rather than by Mr Nieman. There was a loan from CPL granted for the acquisition of those shares enabling the Snape family to be bought out. The result was, as I have already indicated, that Mr and Mrs Nieman between them became majority owners, the shares respectively registered in their names representing 35 per cent (Mr Nieman) and 19 per cent (Mrs Nieman).

62. In 2012 Mr Nieman was diagnosed as suffering from a breast cancer which was treated by surgery. Thankfully, he was given the all clear in relation to that cancer later that year. However, and more seriously, in 2014 Mr Nieman was diagnosed with a stage 3 oesophageal cancer. This required very major surgery, accompanied by neoadjuvant chemotherapy. The chemotherapy and radical surgery left him fragile for at least, if not more than, a year immediately prior to the initial separation of the couple. Mr Nieman's health position has subsequently fluctuated, but the surgery was life-changing. He has never returned to what might be regarded as normal full health. On the other hand, he achieved a very good prognosis that has continued to improve as the years have gone by since. Whilst in some ways a trivial example, but for instance, by March 2016, at around the time of his negotiation and agreement with Mrs Nieman of what became the March 2016 agreement, it is evident that he was once again enjoying skiing holidays.

63. It was submitted and indeed Mr Nieman has consistently asserted that his health issues have left him unable, realistically, to earn any employed living such that his only option so far as income is concerned is to rely on his capital assets and pensions. I could not make a finding to that effect on the evidence before the court and having seen or observed Mr Nieman to the extent that allows any assessment at all, which may be limited. I have no doubt he was not and has not been in a position to return to a stressful city career even if, in his 50s, that would be a realistic option, which it might not be. But I am unable to accept the proposition that if he were required to do so, he would be unable to gain an employed position generating some reasonable income.

64. Adding to the family stresses, also in 2014, ORC's premises burnt down in a fire, that is to say the premises they were renting. Mrs Nieman moved the business operation back to a barn on the Farm and this time ORC paid for its use, such rental, I assume and infer, becoming part of the Farm accounts.

65. In early 2015 Mrs Nieman bought out her business partner, as I have mentioned a number of times already, becoming the sole shareholder and owner of ORC. I could not make any finding as to how much was paid.

66. A little later in 2015, and so far as Mr Nieman was concerned out of the blue, Mrs Nieman announced that she wanted to separate temporarily. The couple thus separated and, not long afterwards, Mrs Nieman indicated that she wanted to proceed towards divorce. That was around August 2015, and the couple treated themselves as definitively separated for possible later divorce proceedings from September 2015. Mr Nieman found all of that extremely distressing, and he was still somewhat frail due to his illness and surgery.

67. At the time of separation, as I effectively said enough already to indicate, Mrs Nieman was a 41-year-old householder, mother and businesswoman with ownership and control of ORC, a business which was doing well and generating pre-tax income of, as I have found, £80,000 to £90,000 per annum, which was likely to continue. Without dwelling on the detail, she had health problems of her own, albeit not as substantial as Mr Nieman had suffered. It is not the case, though, that it could be said she was in simple and full clean health, and one of her goals, as became apparent in particular

early in 2016, was to have a realistic path towards retirement at 55, the best part of ten years older in her life than the age at which Mr Nieman, for his part, had chosen to retire.

68. By this time, that is to say September 2015, Mr Nieman was 56, living in early retirement and with less than full health, albeit by this stage health that was improving from a low point. He was drawing on his UBS pension as one source of income. He also received income from his share portfolio and from CPL. Mrs Nieman no doubt will also have been receiving income from CPL. The couple received income from the Farm, including the Cottages and ORC's rental of the barn. The children were by then 12 and 8 and both at fee-paying schools. School fees of around £50,000 per annum were paid from a combination of income and, when required, capital realisations.

69. Mr Nieman first contacted Withers on 8 September 2015 to obtain advice to assist him in negotiating a settlement with Mrs Nieman. He intended to do that directly and amicably with Mrs Nieman if possible. Keeping legal costs down was a significant concern of his throughout. Mr Nieman, as a result, received advice from Withers, mostly in the background until matters in early 2017 moved towards court, but ultimately up until shortly after the parties reached their agreement as approved by the court in July 2017.

70. I agree with a submission by Ms Savage QC that a notable feature of the case is that Mr Nieman did not wish to instruct Withers to act on a wholesale basis, nor did he do so. He wanted them to advise him, and he obtained advice from them, from time to time in the background with a view to negotiating the divorce financial settlement terms with Mrs Nieman directly, as he mostly then did in discussions and correspondence between the two of them and/or using a mutual friend, George Yeandle, who was an accountant and tax specialist, as intermediary. Mr Yeandle played a significant role in the negotiations and played a major part in advising and assisting Mr Nieman, a more significant role in truth than Mr Nieman sought from Withers or had them play. One consequence of that is that the fact and detail of Mr Nieman's direct discussions and negotiations via Mr Yeandle were not relayed to Withers either at all or until after the fact, including where the fact would include concessions made by Mr Nieman without seeking advice first.

71. Mrs Nieman commenced the formal divorce process by petitioning in December 2015. In late March 2016, as I have mentioned a number of times already, the direct negotiations between Mr and Mrs Nieman, with the assistance of Mr Yeandle, resulted in them reaching an agreement between themselves. Withers was not informed of that agreement until after the event. It was incomplete in respect, in particular, of details and mechanisms for payments and transfers, but its principal substance was to the effect that Cottages 1 to 3 were to be transferred to Mrs Nieman, Mrs Nieman was to transfer her shares in CPL and the Farm other than Cottages 1 to 3 back to Mr Nieman's sole name, and Mr Nieman was to pay Mrs Nieman a cash lump sum of £1,050,000 and to undertake sole responsibility for funding school fees.

72. In due course Mr and Mrs Nieman were unable, either directly or through the solicitors, to agree the detailed working out of that informal accord, substantially as a result of Mr Nieman's instructions to Withers to renegotiate heavily – in reality, to row back from – the obligation to pay as large a cash lump sum as £1 million or thereabouts. That led directly to Mrs Nieman issuing her claim for financial relief by a Form A filed and served in February 2017, by which time Mr Nieman was 58 and Mrs Nieman was 42.

73. Negotiations continued intermittently and informally in the lead-up to the first directions appointment heard in Canterbury County Court on 4 May 2017, at which both parties were represented by experienced junior counsel specialist in matrimonial matters. The parties, as well as sorting out matters of initial case management, exchanged offers through counsel at court and progressed with further discussions in the aftermath of the hearing, again mostly informally rather than through solicitors, in order to reach finally a comprehensive agreement in May 2017. That was converted into a consent order and approved by the court in July 2017.

74. Though it lengthens the judgment I am now delivering so as to test the patience of the legal representatives listening, I do wish to mention in a little more detail some of the main events along the way in that final divorce chronology.

75. The initial introduction of Mr Nieman to Withers was in fact to Mr Lipson, whom I mentioned at the outset. A telephone conference was set up for 8 September 2015

between Mr Nieman, Mr Frankle and Mr Lipson. Mr Nieman provided a very brief overview of his and his wife's history together, and their assets, by an email that afternoon to inform Messrs Lipson and Frankle for the purposes of that telephone conference. As is noted in Withers' attendance note of the telephone conference, amongst other things Mr Frankle confirmed that he wanted to meet and discuss a financial resolution directly with Mrs Nieman, as he put it, around the kitchen table. He would tell her that he was taking independent legal advice and what he wanted was "*some legal advice to understand the broader ideas and process*". His instructions were that he had been focusing particularly on the fact that most of the assets by value had been acquired by him originally prior to the marriage, that Mrs Nieman was a lot younger than he was and, as things then stood, had higher earnings as a result of the success, as it had become, of ORC. There was a suggestion that he might sell enough of the farmland to raise about £1.2 million and that he would offer Mrs Nieman that sum, once raised from farmland sales, and half of the value held between them in CPL, which he put as being "*basically an additional £500,000*", generating an offer to resolve matters by providing to Mrs Nieman effectively cash of £1.7 million to £1.75 million, which he would seek to justify in discussions with her on the basis that he had made the proportionately far greater contribution by way of resources to the marriage from assets built up by him prior to 2000.

76. The initial indicative advice given in the telephone conference by Mr Lipson is recorded in this way in the attendance note:

> "JDL explained that the starting point is the assets built up during the marriage will be shared equally and assets built up outside of the marital union could be considered non-matrimonial, but that argument made less difference the longer the marriage was. JDL thought that in your case most people would say there should be a departure from equality. You queried whether a 70/30 split would be fair. JDL said that 70/30 was quite ambitious but 60/40 would not necessarily be unrealistic. It could be 70/30 but you would not do better than that if you litigated, and one would also need to take into account tax et cetera in order to determine what the net value was because family lawyers work on net figures. There may also be CGT advantages to doing the tax year of separation, which could be looked into, depending on the deal to be done."

It was made clear even at the outset in this telephone conference that to give meaningful final advice as to an appropriate asset distribution Withers would require a balance sheet with full details of where the assets were and identification of what would be regarded as marital, what might be argued to be regarded as non-matrimonial, and proper valuations.

77. The initial telephone conference was soon followed by an email from Mr Nieman to Mr Frankle on 13 September 2015, indicating that he was being invited by Mrs Nieman to assist with acquiring a new home. He reported that Mrs Nieman was saying that:

> "She is not greedy but has been advised there is one bite of the cherry and that's it, so don't rush into settlement that's less than optimal … basically will go for as much as the law entitles her to get, which is dawning on me slowly."

The indication was, though, that she, like Mr Nieman, wanted to try to resolve matters directly between them, as he put it, by way of a kitchen table discussion.

78. Mr Frankle in reply reiterated, as Mr Lipson had said, that advising as to appropriate settlement terms was extremely difficult in isolation without full detail of and valuation of assets. He also commented that:

> "It is also true that arguments regarding premarital money (ie money acquired before marriage) or inherited money (money received during marriage from an external source) can be had depending on what there is in total. Those sorts of arguments seek to provide reasons to depart from an equal division of the assets and they are made stronger if the money/asset in question has not been put into joint names. For these reasons I do not entirely agree with [Mrs Nieman] here."

That last sentence was an observation in response to a comment by Mr Nieman in his email that Mrs Nieman had said, "*Who owns the asset is irrelevant, it's the totality of the marriage that's important?*"

79. By 22 September, principally again in emails between Mr Nieman and Mr Frankle, Mr Nieman was pursuing the thought of providing finance to Mrs Nieman in the

immediate term to assist her with the purchase of a house, which he envisaged was likely to be a £900,000 house, for which she might be in a position to raise £500,000 for herself and wanted, it was said, a loan from Mr Nieman of £400,000, which he might be in a position to arrange through Mr Jillings and CPL. Mr Frankle, with admirable patience, it might be thought, reiterated the difficulties of advising like this, piecemeal, on particular thoughts thrown at him by Mr Nieman in circumstances where Mr Nieman was not asking for or providing the information to enable comprehensive advice as to an appropriate asset distribution.

80. In due course, following further brief exchanges by email, the principal meeting at which advice was given, the gist of which remained Mr Frankle's advice throughout, was between Mr Frankle, Mr Yeandle and Mr Nieman for just under an hour-and-a-half on 6 October 2015. For the purposes of that discussion, meeting and advice, Mr Nieman provided a fuller review of the assets held variously by Mr Nieman, by Mrs Nieman or jointly, and gave instructions as to the historic and planned future uses of those various assets had it not been for what was now going to be the divorce. In the meeting Mr Frankle advised that, based upon those explanations as to the history of the assets in the family, he, Mr Frankle:

> "thought that there was good reason to depart from equality, given your pre-existing wealth and the fact that you need your capital to provide you with an income. 60/40 was the best possible outcome. A 50/50 division was not out of the bracket, though, and the correct answer probably lay between the two, ie 55/45."

81. There was, again, discussion of what the values of different assets might be and what therefore, by reference to such overall end results as Mr Frankle was advising were likely, various possible distributions of assets would compare. It was, again, reiterated that, without financial disclosure, all Mr Frankle could do as regards the bottom line at which Mr Nieman might end up arriving, was give a guide by way of percentages. It is clear in my judgment that advice ultimately articulated in that form was what Mr Nieman was looking for and was going to find helpful in trying to do what he did, which is negotiate directly with Mrs Nieman against the background of an understanding of the likely approach if matters had to be fought.

82. Mr Nieman, for his part, reiterated that he really wanted to try and do a deal directly with Mrs Nieman over or around the kitchen table. He appreciated that there would need to be financial disclosure even for that, but he would be speaking to Mrs Nieman about the degree to which that was going to be needed for the purposes of doing a deal informally. Mr Frankle, as the attendance note records, then went through all the procedural options that would arise if matters proceeded formally. Mr Nieman insisted that he would involve lawyers only in the background, if possible, because he wanted to try and do a deal with Mrs Nieman himself.

83. There is finally, then, this in the attendance note:

> "BAF explained the law from the case of *White v White* to *Miller* and *McFarlane* and *Jones v Jones*. You said that you had done some research online as well and felt that you were in a good position to see if progress could be made."

Unsurprisingly, given the nature of that attendance note, it does not descend into particularity or detail as to the advice that was given. However, having had the chance to assess him in giving evidence, I have no doubt that Mr Frankle had an accurate and good, indeed expert, working knowledge of the principles established by the leading cases, as I have sought to summarise them myself in this judgment, and that he will have run through those in a form and manner that was useful to and readily comprehensible by Mr Nieman, leading to the observation that Mr Nieman felt well-equipped to go and do his deal.

84. A formal engagement letter followed dated 14 October 2015 and in due course accepted by Mr Nieman. It recorded the scope of Withers' engagement as follows:

> "We shall advise you on the issues arising from the breakdown of your relationship, including the divorce and financial implications arising and issues relevant to the children, and we shall represent you in any related court proceedings. Please note that our advice is limited to the current law of England and Wales."

85. Immediately following that advice meeting, on 15 October 2015 Mrs Nieman sent Mr Nieman directly by email a without prejudice offer, saying that it was clear to her

that they needed to find a way forward, that her lawyer was finding it difficult to get a full picture of the couple's financial affairs without them both filling out a Form E, but then saying that if Mr Nieman wanted to avoid all of that greater formality and presented a settlement proposal drafted by his lawyer in the region of £2.2 million to £2.5 million (obviously, that meant, total value for Mrs Nieman) they might be able to do a quick deal. She added it would have to be with a strict timeframe of, say, six months, with 25 per cent within three months.

86. Mr Nieman forwarded that email to Mr Frankle, copied to Mr Yeandle: "*I suspect you need to see this. How do I handle it, please?*" Unsurprisingly, Mr Frankle responded, and responded promptly, saying, amongst other things:

> "Absent financial disclosure, I cannot advise you fully, but I cannot see how these numbers are viable on what you have told me."

The basis of that, simply put, was that on the various valuations of assets that Mr Nieman had been suggesting to Mr Frankle, if what Mrs Nieman was now suggesting was that she receive cash or cash equivalent of £2.2 million to £2.5 million, also presumably keeping ORC entirely in her name, that struck Mr Frankle as more favourable than anything that the court would be realistically likely to grant to Mrs Nieman.

87. A week later, 22 October 2015, by email, Mr Nieman sent to Mr Frankle, a colleague at Withers, and copied to Mr Yeandle, a draft for a long email by which he might respond to Mrs Nieman's approach. Mr Frankle commented admirably promptly in response the same day by email. He raised a number of questions on the asset schedule that Mr Nieman had also forwarded in the hope that it would help inform Mr Frankle's responses and offered drafting comments with a view to helping Mr Nieman present the sort of package he had in mind to present at that stage.

88. The primary features of that possible proposal were to establish more formally the value of CPL as a school fees fund and, in one form or other, to earmark that, which Mr Nieman would propose to present to Mrs Nieman as effectively a granting to her of value of £350,000 (a half share of £700,000), together with £1 million to buy and set

up a house, the half-share in the Norwegian house which Mr Nieman put at £100,000, indicating a total value being given to Mrs Nieman, in Mr Nieman's way of thinking, of £1.45 million, but of course leaving her also with sole ownership and control of ORC.

89. Against that background, and as part of commenting on Mr Nieman's draft, Mr Frankle commented that he was:

> "inclined to go with the grain in terms of the numbers. [Mrs Nieman] was very firm in her email that she wishes to have an offer from you in the region of 2.2 M to 2.5 M. You should work with that …"

That is to say, as Mr Frankle made clear in his evidence was his intention, and in my view is plainly enough the meaning of what was said in its context, if Mr Nieman wished to make the offer he had in mind to make, but could realistically and sensibly present it as amounting to a package worth to Mrs Nieman £2.2 million to £2.5 million, then it would be helpful to present it in that way so as to appear to be doing that which she had asked him to do, namely put forward such a package.

90. After some additional exchanges that take the matter materially no further for my purposes, a proposal was made along the lines thus being discussed by Mr Nieman, by email from him to Mrs Nieman on 27 October 2015, presenting that what would be granted to Mrs Nieman amounted to £1.45 million so that, valuing ORC at £800,000 to £1 million, the offered package as a whole took her to the range she had suggested. The £800,000 to £1 million suggested for ORC amounted to Mr Nieman's erroneous £800,000 goodwill figure that should in any event have been £500,000, plus potentially £200,000 described by him as the current net asset value of the company.

91. So far as material to any possible complaint against Withers, and although much was happening not involving Withers but directly between Mr and Mrs Nieman and/or through Mr Yeandle, with also advice being given to Mr Nieman by Mr Harrison, the Farm accountant, nothing then happened until March 2016, when, essentially somewhat out of the blue as it will have been for Mr Frankle, Mr Nieman emailed on 11 March 2016, apologising for the radio silence, as he put it, saying that he had been:

> "plugging away with [Mrs Nieman] who has moved from Stowe [her original solicitors] and I feel we have a basis of agreement which I will run through with you."

92. The basis of agreement Mr Nieman described was: a settlement in favour of Mrs Nieman of £1,050,000, in respect of which he said the £50,000 part was the loan to her from CPL which he, Mr Nieman, would take on; the three cottages, that is Cottages 1 to 3, to be transferred to Mrs Nieman at that point, March 2016, but the income to be used for 12 years to pay school fees, following which Mrs Nieman to take the income as well; Mr Nieman to pay school feels with help from the cottage income; Mr Nieman to take over all of the ownership of CPL; and, so far as the lump sum cash was concerned, Mrs Nieman to get an amount of £600,000 as soon as possible that he had in mind to raise by way of a loan against the farmland, with the balance perhaps a year or so later from liquidating CPL.

93. Mr Frankle responded by a brief telephone discussion the following day, 12 March 2016, of which there is an attendance note. He indicated that he could not advise without financial disclosure. He noted that what Mr Nieman was now suggesting had been perhaps agreed or was in the process of being agreed was not what Mr Frankle and Mr Nieman had discussed. He confirmed again that transfers of property within the tax year of formal separation would not crystallise a CGT liability, and in that context, therefore, Mr Frankle indicated that if any properties were transferred, Mr and Mrs Nieman could avoid crystallising that tax. It was left on the basis that Mr Nieman would revert to Withers once he had negotiated further with Mrs Nieman this possible deal.

94. Mr Nieman did not in fact revert further to Withers in any meaningful sense, nor did he seek any advice from them, bearing in mind that Mr Frankle had told him that he was not in a position to give advice about this possible deal, but rather, after multiple exchanges and discussions directly and involving Mr Yeandle, Mr Nieman drafted a letter from him to Mrs Nieman, signed by Mr Nieman, dated 25 March 2016. It provided, attaching a copy of the loan terms for the loan to Mrs Nieman from CPL associated with the buying out of the Snape family from CPL, the following substantive terms:

> "4. Following an agreement between us for a divorce settlement, and as part of your obligation under that agreement, in which I transfer to you three cottages (subject to an income clawback for 12 years from the divorce date), and £1,050,000 in cash, and [accept] liability for children's school fees, you are transferring the shares in CPL to [our daughter] and me, I accept all the liabilities in exchange for that transfer for the loan referred to in the attached agreement."

The letter concluded by paragraph 6 that it was:

> "made prior to a formal agreement between us as we have been advised that the transfer needs to be done in the tax year we separate to qualify for interspousal CGT relief."

I have inserted the word "accept" in square brackets into clause 4 to supply the meaning that is evident in the clause but in respect of which the verb was omitted so that, as in fact drafted by Mr Nieman, the reference to liability for children's school fees within the subclause concerning what he would be doing is not fully grammatical.

95. By an email of 12 April 2016, Mr Nieman informed Mr Frankle that he would need to finalise things at some stage and discuss where he had got to. He told Mr Frankle that he had transferred the three cottages to Mrs Nieman already but on the basis that he was to keep the income from them for 12 years from the date of divorce, and that he was to give her £1.05 million as well and to pay school fees. He noted:

> "That's it. I don't know whether it's good or not. I have little income in 12 years' time. It is way above our first stab at this."

He then introduced, even at this earliest of stages, the first of what became a succession of attempts to row back from what he had agreed, proposing that since Mrs Nieman had a joint liability on the balance of the mortgage on the FFH, he was:

> "tempted to ask she settles 50 per cent of that. She is fully aware of the mortgage in the asset breakdown and it would make things fairer, in my view."

96. In one of the relatively few moments of self-awareness in his evidence in the witness box, Mr Nieman accepted that from the outset and throughout, that was a disingenuous proposal on his part. In fact, he appreciated full well that in his discussions with his wife leading up to the letter she had asked him to draft and he had drafted, and therefore in signing that letter, the unstated assumption on both sides was that, of course, as part of receiving from her the full ownership of the FFH, he would take responsibility for the mortgage.

97. More importantly from Withers' point of view (it can now be said with hindsight), it will be noted that Mr Nieman did not inform Mr Frankle that this was far more than an idea in principle that needed to be sorted out and drafted up by lawyers and turned into something more concrete, but rather he had in fact drafted it up in writing, signed it and it was liable, therefore, to have created at the very least real and legitimate expectations on Mrs Nieman's part that they were now already close to a final resolution and, most importantly, that she would be, in the near term, in receipt of £1,050,000 in cash.

98. Mr Frankle's advice, one hand at least tied behind his back by the lack of proper information from Mr Nieman as to what he had actually done, was to note that if what Mr Nieman had described was a deal he had done, he would have saved himself the stress and aggravation of litigation and the costs of divorce lawyers, but explaining that he was saying 'if' because it seemed to him there were wrinkles to iron out, one of which he picked up was the question concerning the mortgage on the FFH which, to Mr Frankle, not having been privy to the discussions at all, seemed in the abstract "*fair just to bring the numbers closer together*".

99. Much to-ing and fro-ing followed, involving, amongst others, email exchanges between Mr Nieman and Mr Frankle, discussing the effective value of this possible deal in principle apparently done, what percentage split overall it might be thought to create, but most significantly, on Mr Nieman's instructions, how Mr Nieman might seek to reduce the need to pay the full amount in cash as promised; all of that without Mr Nieman disclosing to his solicitors the way in which he had, on the face of things, it might be said rather more formally, set the deal out in writing between himself and his wife.

100. By without prejudice letter of 14 July 2016 Mrs Nieman's then solicitors, Whitehead Monckton, who continued to represent her through then to the end of the process, contacted Withers to indicate that they were informed that terms were broadly agreed between the clients and the parties should move towards the formulation of a draft consent order for approval. They added, though, that:

> "ahead of drafting an order, our client will be willing to attend a round table meeting to agree the finer details and mechanics of the terms agreed and already put in motion by our respective clients."

They asked for confirmation of willingness and availability.

101. Mr Nieman, when provided with that letter, emailed Mr Frankle on 15 July 2016, indicating what he envisaged would be the finer points and that they were likely, in truth, to be "*not overly fine*". He said he reckoned they were:

> "(1) 75 K share of mortgage I want off her.
>
> (2) I have given her three cottages, the income from those are mine for 12 years. I want a clean break and that income capitalised and deducted at the outset. She should agree but we will squabble as to how we value that.
>
> (3) Norway house. I said I'm not prepared to fight her over that but very much hope that she sees reason. If she doesn't take it, so be it, I'll have to deal with her parents over it till I die or they do.
>
> (4) The outstanding on the parents' 30 K loan.
>
> None of this seems solvable around a table … but you may disagree. Anyway, let's do nothing until they tell us what they feel we have agreed and what the finer points are."

102. It is again astonishing, at all events with hindsight (I suggest even at the time), for Mr Nieman to be writing in those terms to his solicitors without providing the written agreement document that he will have been well aware Mrs Nieman and her solicitors were, on the face of things, simply seeking to perfect and implement. What it demonstrates in the clearest of terms, though, is how Mr Nieman's firm instructions

were not to honour that agreement but to seek to renegotiate its most substantial element, namely the £1 million or so cash sum, by finding ways to suggest that he either had given or would give something equivalent to capital value to Mrs Nieman that would then be used in place of paying her cash.

103. In accordance with those instructions, Withers, on 19 July 2016, initially simply put the ball back in Whitehead Monckton's court, asking them to indicate what their client believed was agreed and what she believed remained to be finalised. They responded on 29 July 2016, stating that they had signed documentation from Mr Nieman of 25 March 2016 with the substantive elements I have described as being the effect of clause 4 of the March 2016 agreement letter. They noted that the transfers of CPL shares from Mrs Nieman to Mr Nieman and of Cottages 1 to 3 from Mr Nieman to Mrs Nieman subject to the agreement that the income go to Mr Nieman for 12 years, had been put into effect prior to 5 April 2016. They continued:

> "In addition, reliance was placed upon the above by our client so that she completed a transfer document pertaining to the farmland, placing it from joint names into Mr Nieman's sole name at the same time. The terms being reached by Mr and Mrs Nieman were intended to achieve a clean break between them of all claims arising during lifetime or on death. With regard to the 'finer details and mechanics', we understand the following items have been identified by your client …"

104. They then referred to Mr Nieman's apparent desire to reflect on how they might deal with the 12-year income provision, his desire to deal with the Norwegian house, and his desire to receive some credit, in effect, for having sole responsibility for the mortgage on the FFH. In that last regard, Whitehead Monckton said, in my judgment entirely accurately, as Mr Nieman knew full well:

> "All calculations leading to the parties' agreement as above were done in reference to the net equity, consideration already being made for your client having to take on the mortgage. Latterly, your client has suggested to our client that she should pay half the mortgage, which was not part of their terms and is not agreed."

105. By email of 5 August 2016, having been provided with that letter, Mr Nieman sent to Mr Frankle an unsigned, undated draft version of the letter he had dated and signed for Mrs Nieman on 25 March 2016, saying:

> "Brett, this, I think, is the letter [Mrs Nieman] is referring to when she speaks of an agreement between us."

106. Mr Frankle, Mr Nieman and Mr Yeandle therefore met to discuss these developments on 1 September 2016, after which Mr Frankle followed up on matters by email on 12 September 2016. In doing so, he included a draft for, in effect, a renegotiation offer, in keeping with Mr Nieman's instructions as to how he wished to proceed, the effect of the terms in which, if accepted by Mrs Nieman, would be to reduce the cash sum to be paid from just over £1 million to a little over £400,000. He asked for Mr Nieman's comments and observations once he had had an opportunity to review the draft letter. Entirely in keeping with Mr Nieman's instructions to Withers as to what he wished to try to achieve, the proposed renegotiation offer amounted to a somewhat creative, albeit not on its own terms entirely unreasonable, attempt to reduce the cash payment obligation by offering a range of different benefits for Mrs Nieman such as giving up the 12 years' income on the cottages and attaching to that benefit a capitalised net present value.

107. There was a degree of further internal to-ing and fro-ing between Mr Frankle and Mr Nieman as to the possible drafting of such an offer, and a revised version was provided by Mr Frankle on 17 October 2016. There was then another long effective hiatus so far as Withers' involvement was concerned until the Christmas and New Year period 2016 to 2017, following which, and finally, a version of the renegotiation offer letter was sent on Mr Nieman's instructions by Withers to Whitehead Monckton dated 18 January 2017. In its final form, Mr Nieman, with Mr Frankle's help, had got the creative attempt to renegotiate a £1 million cash payment down to a lump sum payment of £328,600 to be paid within six months, and a range of other benefits put forward as equating to the aggregate value of the original agreement.

108. The response to that, by letter dated 3 February 2017, from Whitehead Monckton to Withers, was to say, correctly, that:

> "The proposals now put forward by your client are a significant departure from the letter dated 25 March 2016 signed by your client. Consequently, our client cannot agree to your client's proposals nor does she consider a meeting is likely to achieve a resolution. The lump sum payment detailed in the document dated 25 March 2016 our client understood would come to her through farmland sales during 2016 [I interject that that indeed, on the contemporaneous correspondence now available, is what Mr Nieman had told Mrs Nieman at the time]. As the year progressed, she learned of your client taking steps, as a result of her transfer of shares in the Chelsea Property Limited, to liquidate his interest in those assets instead [I interject again that appears to be borne out by the fuller contemporaneous correspondence that is now available which Withers did not know about at the time]. As issues pertaining to tax regarding Chelsea Properties was the reason for a delay in hearing from you, we had expected your recent communication would shed more light on this. During the time that our client has patiently waited on your client to provide the lump sum agreed, she is concerned that circumstances have changed for which there is no disclosure."

Their advice to their client, they indicated, had been that she should proceed with the Form A process, and that duly followed later in February 2017. With that without prejudice reply letter of 3 February 2017, Whitehead Monckton provided Withers, for the first time so far as Withers were concerned, a copy of the signed version of the March 2016 agreement letter, but that was also then provided through open correspondence at around the time of the Form A filing.

109. An exchange of Forms E duly followed, and a first directions appointment was listed for 4 May 2017. For that, as I indicated at the outset, Ms Faggionato was instructed. I shall not take time going through her brief in full, but it was detailed, indeed materially fulsome, as to the factual background, setting out more than ample factual information as to the nature of the assets and the way they had been dealt with between the divorcing couple, and also the history of Mr Nieman's direct dealings with Mrs Nieman and the March 2016 agreement and his subsequent attempt to renegotiate that.

110. At court, Ms Faggionato, having introduced herself to Mr Nieman, attended on the day, as again I noted at the outset, by Sarfraz Ali from Withers, explained that the first directions appointment hearing itself was a conventional first hearing within the financial relief application and was in the nature of a housekeeping exercise. She

added that, as a result, she was on the one hand there briefed to represent Mr Nieman before the court in relation to those matters of housekeeping and directions. However, she noted also that, on the other hand:

> "once that exercise has been dispensed with, then she is also here, if W is amenable to it, to discuss and try and negotiate a settlement."

I am quoting there from the Withers attendance note of the afternoon, as it was, at court.

111. As will be typical for such a hearing, there was, to use this phrase again, much to-ing and fro-ing, including the court allowing time for discussions on the potentially contentious items of directions so that, if possible, the parties might move towards agreement on those too.

112. By around 3.30 pm, and after those matters had been essentially ironed out pending going before the district judge for approval, Ms Faggionato explained that Mrs Nieman's solicitors had asked if Mr Nieman was going to be making an offer. A discussion ensued in private between Sarfraz Ali, Ms Faggionato and Mr Nieman, discussing and considering the asset schedule and the offer that Mr Nieman might instruct his legal representatives to make. After that discussion there was agreement that what would be offered was something that could be presented as paying cash or cash equivalent to Mrs Nieman in the region of the £1 million to be consistent with the March 2016 agreement. Mr Nieman indeed suggested going over and above £1 million. Perhaps, he suggested, a lump sum of £700,000 plus half his UBS pension.

113. It was ultimately agreed that the offer would be that the ownership of the FFH be regularised so that all aspects of it were held by Mr Nieman, as was plainly always intended on both sides, but with Mr Nieman to pay the costs of transfer; Mr Nieman to transfer the half share in the Norwegian property to Mrs Nieman; Mrs Nieman to pay any transaction costs or tax on that transaction; Mr Nieman to pay a lump sum of £600,000, half within 28 days of agreement and half following receipt of CPL liquidation proceeds (by this time, as was implicit in the earlier letter from Mrs Nieman's solicitors to which I referred, Mr Nieman with Mr Jillings had put CPL into

voluntary liquidation so that Mr Nieman could realise the capital); and finally, Mr Nieman to grant a pension share for a CETV of £400,000 and have sole responsibility for funding school fees going forward; all this to represent a clean break of income and capital.

114. After the parties had then appeared for 15 or 20 minutes or so before the district judge to gain approval of what had become their agreements on the matters of directions that had been under discussion, Ms Faggionato gave the advice to which, again, I referred in summary right at the outset, namely advice similar in substance to that which Withers had been giving throughout but, if anything, slightly more pessimistic from Mr Nieman's point of view as to overall likely effective end result. As noted in the attendance note, her advice is recorded thus:

> "MF, SEA and you were discussing the capital split that would result from your offer on the basis of your figures. The capital split is still skewed towards you. MF said that a 60/40 split is the absolute best that you could hope for and ultimately is unlikely to be achieved. A 55/45 split in your favour is more realistic, given the length of your marriage and the extent to which the assets have been intermingled."

It is that advice and the offer that Mr Nieman in the light of that advice made that day that led back to the email from him that evening to Mr Frankle and Sarfraz Ali to which I referred in passing when discussing the asset valuations.

115. Mr Nieman in short expressed the view that, as he saw it, things were "*not going well*" with "*Marina talking 55/45*". That was, he suggested, "*way out from where I was thinking*". He expressed the view that he was now in:

> "a situation I had hoped not to be in given the agreement we had, and I was quite mad not to give her the million. She is now at 1.75. There is nothing to fight for from here unless I am missing something, and Marina not even happy they were premarital assets …"

116. In response (and I will not lengthen this already lengthy oral judgment yet further by quoting this email at length), Mr Frankle sought to reassure Mr Nieman by email of 8 May 2017 that if he analysed what then appeared to be the values of the assets, what

was being proposed and had been offered, assuming those values were appropriate, was still in line with what he had been saying all along, namely:

> "that we should be pushing for 60/40 and, when I look back on our note of our first meeting and subsequent meetings since, has always been said by me to be the very best you could hope for. I said a judge may well come in closer to 55/45 but I would not be suggesting that as a starting point."

Depending, as ever, on exactly how one did the calculation and which values were taken (and whether those values were accurate), Mr Frankle was able, in my judgment, perfectly sensibly and reasonably, to demonstrate to Mr Nieman that what had been offered was still in line with what Mr Frankle had been saying consistently was the likely bracket within which any asset distribution settled by the court would ultimately leave the parties.

117. The counteroffer made by Mrs Nieman by this point had been essentially to propose an acceptance of Mr Nieman's terms but with cash at £870,000 rather than the £600,000 offered. It now suffices to set the scene for the claim made against Withers to say that that offer and counteroffer themselves set the scene for the deal ultimately done, splitting that difference somewhat favourably to Mr Nieman, at £695,000 by way of cash, thus down from the £870,000 counteroffered by Mrs Nieman but up from the £600,000 offered by Mr Nieman at the first directions appointment. Matters of detail and drafting followed between the solicitors, with the negotiation of the consent order, leading eventually to it all being done and settled in July 2017.

The Claim

118. It is in those main factual circumstances that Mr Nieman claims that if properly advised by Withers, his allegation being that their advice to him was negligent, he would have secured by agreement or, if necessary, after a contested hearing, the same asset distribution as was in fact agreed and formalised by the consent order, except that, so he says, there would have been no pension sharing order in respect of his UBS pension and a cash payment obligation of only £100,000. Alternatively, he says that he lost by reason of Withers' negligent advice, as he alleges, a real and substantial chance of securing such terms so that he should be awarded damages valuing that lost chance.

119. Mr Nieman was the primary witness in support of that claim. He was an unsatisfactory witness. I consider that he was honest with the court, but it was clear from cross-examination that his recollection was both poor as to chronology and detail and also seriously unreliable, even as to significant episodes. A good example of the latter was what he perceived as recollection that Mrs Nieman had pressured him, bullied him even, into transferring Cottages 1 to 3 to her in haste prior to the end of the 2015/2016 tax year so as not to crystallise the CGT liability they carried. The contemporaneous documentary evidence, however, shows that that was driven by Mr Nieman, encouraged and advised by Mr Yeandle. Mr Nieman did not involve Withers at all, and he, not Mrs Nieman, was the one putting all the pressure on, successfully in the event, to get the transfer done by 5 April 2016. Mr Nieman was good enough to acknowledge, after being taken through that correspondence, that that is indeed what it showed. However, the contemporaneous correspondence also includes Mr Nieman asserting to Mr Frankle after the fact, but as he was variously misreporting and incompletely reporting to Mr Frankle what he had negotiated and agreed with Mrs Nieman without Withers' involvement, that the pressure had come from Mrs Nieman and that he had felt pushed into it. I was not asked to consider, and do not find, that Mr Nieman was being mendacious with Withers, but his seeming inability, even much nearer the time, to give an accurate account of relatively significant and memorable matters reinforces the clear conclusion I reached that he is not a reliable historian of the material events.

120. Another significant instance was Mr Nieman's UBS pension. In relation both to basic matters concerning the pension itself, for example, whether Mr Nieman knew it had a capital transfer value and could be shared with Mrs Nieman, and in relation to why it came to be used in the financial settlement, including whose idea it was to make use of it in that way, Mr Nieman's recollection was badly out of step with the contemporaneous evidence. What is more, that resulted in a claim against Withers that they were negligently at fault in causing or allowing him to agree to a pension sharing order as part of the final resolution. In fact, the idea to offer a pension share as *quid pro quo* for a reduced cash lump sum obligation came from Mr Nieman, it may be originating with advice from Mr Yeandle, not from Withers. Mr Nieman at all times regarded it as a very efficient arrangement, beneficial to both parties, because he firmly believed that the CETV that was available to be shared with Mrs Nieman overvalued

the pension substantially as an income stream entitlement of his, which is all it was in his hands.

121. By reference to the documentary record, that separate claim against Withers in my view ought never to have been made. Indeed, I consider the true position to be that, so long as any financial package for Mrs Nieman would involve, other things being equal, a substantial payment from Mr Nieman to Mrs Nieman, Mr Nieman would probably have preferred and offered a pension share in respect of his UBS pension in place of some or all of a cash payment obligation, and I think the likelihood is that Mrs Nieman would have been content with that too, so long as it did not prevent her from being established and, if she wanted to be, debt-free in a good new home, in the event 2MB.

122. Further, in relation to Mr Nieman as a witness, his trial witness statement was unacceptable. It ran to 108 pages, substantially comprising argument with much commentary upon and quotation from correspondence and other documents. I structured the trial to provide a break between opening statements and Mr Nieman's evidence to give Mr Munro an opportunity to identify, as he then did by highlighting, how much of the statement he sought to adduce as witness evidence. I directed that although, when called, Mr Nieman could be asked in the normal way to identify and verify the statement as a whole, I would accept as his evidence in chief only the highlighted text, save for a lengthy final section (paragraphs 372 to 389, under a heading "**Why I allege negligence and loss against Withers**") that Mr Munro had highlighted but which comprised either argument or repetition or both. The highlighted text without that excluded section still contained much argumentative or otherwise inappropriate content, but it would not have been proportionate, tempting though it was to do so, to engage in an exercise of scrutiny paragraph by paragraph so as to make further exclusions.

123. The service of a trial witness statement that, unless otherwise ordered, will stand as a factual witness's evidence-in-chief, is both an obligation and a privilege. It is an obligation out of fairness to the other party to the litigation and in the interests of the efficient administration of justice to disclose well ahead of trial the evidence by way of witness testimony that a party intends to adduce. It is a privilege because it saves the party from having to conduct an examination-in-chief. The obligation is not properly

discharged and the privilege is abused if what is served does not represent the honest testimony that the court would receive from the witness if examined properly in chief without leading questions, except with the agreement of the opposing party or the leave of the court, and subject to the strictly limited scope at common law for refreshing memory (as to which, for a succinct statement of the common law rule, see *Phipson on Evidence* (20th edn) paragraph 12-09).

124. CPR PD 57AC does not apply in this case as it is not in a court or list within the Business and Property Courts ("BPCs") as they are defined in the CPR. But I take the view that paragraph 2.1 of PD 57AC is a truism not limited to the BPCs, *viz* that:

> "The purpose of a trial witness statement is to set out in writing the evidence-in-chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement."

Mr Nieman's trial witness statement, I am satisfied from its content and from having presided over Mr Nieman's cross-examination, was nothing close to a written record of the testimony he might have given if I had directed Mr Munro to examine him in chief without reference to the statement, bearing in mind that it was dated 21 December 2021 and so was not a document from which Mr Nieman could have refreshed his memory.

125. Of course, there was much in Mr Nieman's statement or his oral evidence that was not contentious, and I can safely take those matters as fact because of that. On contentious matters, however, I do not regard it as safe or satisfactory to treat what Mr Nieman says he recalls or believes as reliable evidence where it is not supported by the contemporaneous documents and therefore liable to be proved by them in any event.

126. Mr Nieman also adduced as factual evidence, as I have mentioned, two short witness statements, one from Mr Jillings and one from Mr Harrison. Mr Harrison acted as the Farm's accountant from 2009 until sometime after Mr and Mrs Nieman's divorce. Ms Savage QC confirmed at the end of the second day of trial, as she was nearing the completion of her cross-examination of Mr Nieman, that she did not have any cross-examination for either of those witnesses. Their evidence, to the extent it is factual, therefore went in unchallenged and I have treated it as reliable.

127. Mr Frankle was the only witness called by Withers. I would not say his trial witness statement is a model example as it does contain some unnecessary quotation and some argumentative commentary. To be clear, given the nature of this case, I am not in that respect criticising Mr Frankle's citation of, and in places quotation from, matrimonial case law where that was part of his evidence of fact as to what he says he recalls taking into account at the time. My criticism, though, can be illustrated by this example:

> "33. In the particulars of claim the claimant asserts that the advice I gave him by email on 22 October 2015 was negligent and wrong on the basis that 'there was no justification or proper basis on which to advise that [JN] was entitled to 2.2 M to 2.5 M from the claimant'.
>
> 34. I did not advise the claimant that JN would be entitled to £2.2 million to £2.5 million. Rather:
>
> > 34.1. on 15 October 2015 the claimant forwarded to me an email from JN in which she said she would consider an offer in the region of £2.2 million to £2.5 million;
> >
> > 34.2. in my response to the claimant on 15 October 2015 I explained that I could not advise her on the quantum of the proposed settlement because I needed first to know what the assets were worth and what the tax position was. I also explained that if the assets were worth as much as the claimant had told me they were worth, I could not see how JN's numbers would be viable;
> >
> > 34.3. on 22 October 2015 the claimant sent me a draft offer to the claimant and asked for my comments; and
> >
> > 34.4. In my response on 22 October 2015 I explained again that in the absence of being able to verify the details in respect of the claimant and JN's assets, I could not advise on the terms which the claimant was proposing to put forward to JN."

128. With respect, the relevant testimony in chief would surely have been along these lines:

> "Q: Do you recall a figure of £2.2 million to £2.5 million being discussed at an early stage?

A: Yes [either without help or perhaps after legitimately refreshing memory by being shown the 15 October 2015 email, depending on the quality of Mr Frankle's unaided recollection].

Q: Do you recall whether you advised Mr Nieman that Mrs Nieman was entitled to such an amount?

A: I did not give any such advice."

129. The documentary narrative given in paragraph 34 of the witness statement aimed at bolstering that denial could and should have been left to counsel. It is argument. It leaves the reader ignorant as to whether Mr Frankle recalls that detail unaided (in this case possible but unlikely), recalls that detail having had his memory refreshed by the correspondence cited (in this case more possible), or in truth does not recall that detail even seeing that correspondence (in this case also quite possible, and quite understandable if true). Yet that is what the court would want to know, if counsel wanted to take Mr Frankle in chief beyond his basic evidence that he did not advise Mr Nieman that Mrs Nieman was entitled to £2.2 million to £2.5 million. In that case, that is also what Mr Nieman and his legal representatives were entitled to know so as to consider whether there was any basis for and interest in challenging Mr Frankle's evidence on this aspect.

130. To complete the illustration, which is not the biggest of points in the case but is a helpful illustration of the proper and improper use of trial witness statements in modern litigation, Mr Frankle's statement goes on at paragraphs 35 to 38 to deal with his suggestion to Mr Nieman, in the last of the emails in his short narrative, that he should "*go with the grain*" on numbers, to which I have referred already. For present purposes, I note that that evidence in the witness statement was different in kind and perfectly proper. Mr Frankle gave evidence by it as to why he wrote what he wrote and what he was intending by it. In the particular circumstances of this case, given the relevant specific allegation against him, that was relevant. It would thus have been evidence within paragraph 3.4(2) of the appendix to PD 57AC had that applied.

131. The moderate degree to which Mr Frankle's trial witness statement strayed beyond proper bounds did not mean the statement gave me concern as to the honesty or reliability of Mr Frankle's evidence to the extent it was evidence of fact. Having

presided over his cross-examination also, I concluded that he had a reasonably good recollection of the main events and chronology and some of the detail, and that where he did not, that was no more than the understandable effect of the passage of time.

132. I consider that Mr Frankle showed himself to be a careful and knowledgeable matrimonial solicitor, expert and experienced as both legal advisor and litigator. If he went wrong here, it would have to be because he had a negligently incorrect understanding of the effect of the 1973 Act as explained and developed by the case law or because he reached an unreasonable conclusion as to how it would or realistically might be applied by the court in Mr and Mrs Nieman's case. It will not be because he failed to approach the task of advising and representing Mr Nieman with proper diligence and care.

133. The pleaded particulars of claim at [63] is that a reasonably competent solicitor would have:

(a) advised Mr Nieman as to the applicable law;

(b) analysed Mr and Mrs Nieman's assets thus, in terms of matrimonial and non-matrimonial property, namely that:

> "all of the assets had been purchased by [Mr Nieman] from funds or property acquired outside the marriage and were non-matrimonial properties, save for ORC, [Mrs Nieman's] pension and a very small proportion of [Mr Nieman's] pension";

(c) analysed Mr and Mrs Nieman's needs thus, namely that:

(i) Mrs Nieman had a growing and successful business with excellent earnings and earning capacity and she was relatively young (40 years of age when the couple separated and in good health) but needed to purchase a home and was looking to purchase a property with an asking price of £875,000, in due course in fact purchased for an agreed price of £850,000.

Though the pleading does not say so, it was accepted at trial Mrs Nieman's reasonable housing need would be assessed on the basis of being able to buy and set up, free of borrowing, a substantial family home;

(ii) Mr Nieman needed a home and adequate income in retirement. The pleading claims that Mr Nieman's income need should have been assessed at £68,600 per annum, plus about £50,000 per annum for school fees while the children were of school age, against a then current income of just under £60,0000 per annum;

(d) "*advised Mr Nieman accordingly as to the parameters of reasonable settlement in accordance with the relevant law*";

(e) advised Mr Nieman that appropriate provision for extending time should have been made in the consent order to avoid a position whereby he could not make instalment payments due to delays in the liquidation of CPL; and

(f) negotiated an appropriate consent order in light of the above and what Mr Nieman alleges as to what he would have offered and Mrs Nieman would have been willing to agree.

134. It is not obvious to me in concept what "*parameters of reasonable settlement in accordance with the relevant law*" means in pleaded element (d). In any event, the particulars of claim do not identify what such parameters it is said Withers should have given Mr Nieman by way of advice. For any given set of settlement terms offered by Mrs Nieman or proposed to be offered by Mr Nieman, the decision for Mr Nieman was whether he was consent to settle on those terms. Mr Nieman was entitled, having retained Withers, to make such decisions informed by their carefully considered and competent advice, as best they could give it to him on the information provided to them, as to the realistic range of outcomes that might be obtained if there was no agreed settlement, factoring in, as always, the cost, time and stress of the necessary legal process that that would entail. In that light, I interpret the pleading as an

allegation that a competent solicitor would have made a reasonable assessment of and advised Mr Nieman as to the realistically possible outcomes absent an agreed settlement to assist him in deciding whether to accept or make any given offer or proposed offer.

135. Mr Frankle gave Mr Nieman advice of that kind at the outset and reiterated that advice from time to time during the retainer, his considered view being that it remained sound. The gist of that advice was that: an outcome the overall effect of which would be to split the couple's aggregate wealth 50/50 was a realistic possibility; an outcome the overall effect of which would be to split that wealth 60/40 in favour of Mr Nieman was realistically the best Mr Nieman might hope to achieve; and in Mr Frankle's view the most likely outcome would be one the effect of which overall would be a 55/45 split. As I have noted, counsel's view was similar in substance but she was somewhat more pessimistic as to the chances of securing an outcome that would go as far away from 50/50 in Mr Nieman's favour as 60/40; so she was a touch firmer than Mr Frankle in advising that 55/45 was in her view where matters would likely end up.

136. Mr Nieman correctly took that as indicating that counsel was more concerned than Mr Frankle had been or was as to whether, if it came to it, the court would be persuaded to move away at all from an arrangement that amounted to equal sharing. But I do not accept his evidence that she said that in her view there was no reason it would not be 50/50. The contemporary record is far more likely to be reliable; and it is that counsel said that in her view 55/45 was the right overall end result. It is easy to imagine that counsel might have said there was a real risk that *the court might say* that there was no sufficient reason to depart from equal sharing, and that Mr Nieman is now misremembering that as counsel's own view. That is not a specific finding of fact. There is not the evidence for that. But it illustrates how Mr Nieman's recollection could well be at fault even were he a reliable witness generally, which he was not.

137. Mr Frankle's advice to that effect was not, as Mr Munro submitted, founded upon a misguided view that a judge would decide the case by picking a percentage split and working backwards from it:

> "It is … wrong in principle to adopt a purely arithmetical approach by considering what proportion of the total assets should be allocated to the wife."
> (*Dart v Dart* [1996] EWCA Civ 1343 at [17] per Thorpe LJ quoting Ormrod LJ in *Preston v Preston* [1982] Fam 17; see also *Dart v Dart* at [16]: "The judge must direct himself by reference to the section 25 criteria and not use fractions other than within the context of a broad analysis of outcome.")

138. I find that Mr Frankle was well aware of, and considered the case by reference to, the need to assess Mr and Mrs Nieman's asset position item by item, but he was also aware of the need, then, to step back and consider the fairness in its overall effect of any putative solution for how the assets were to be dealt with, in which the percentage split of total value created thereby is a highly material factor. Therefore, and in any event, Mr Frankle rightly considered that Mr Nieman would want, and I find that indeed Mr Nieman did want, to compare any possible settlement terms against realistic contested outcomes by comparing overall effects in percentage terms, alongside, no doubt, all the other considerations of practicality and workability by reference to his and Mrs Nieman's needs that would have to be considered in relation to any proposed distribution of the assets.

139. In my judgment, it was sensible, appropriate and helpful, and exactly what Mr Nieman wanted to have, for the advice Mr Frankle gave as to how matters might realistically turn out after a contested process to be translated into and expressed to Mr Nieman in terms of overall effect, to give him a sense check or yardstick against which to assess, as he wanted to do for himself, with Mr Yeandle's help, whether the terms he would or might offer or be offered were out of line with an outcome that might be imposed in the absence of agreement.

140. Mr Nieman and Mrs Nieman, on the natural assumption that she would probably be in receipt of broadly similar advice as to likely or realistic prospects from contested proceedings, were each free to choose whether to settle only within the parameters of realistic contested outcomes, as indicated by the advice they received, or to settle on terms more favourable to the other than that.

141. By the March 2016 agreement, and subsequent indications that she just wanted Mr Nieman to implement it in full, there is some justification for a finding that, until

she served her Form A to proceed with a financial relief application before the court, Mrs Nieman may have been willing to settle on the terms in substance of that agreement. As Mr Frankle and Mr Nieman both appreciated at the time, those terms were, if anything, more favourable to Mr Nieman than the best realistic outcome Mr Frankle had advised that Mr Nieman might obtain from a contested hearing of the application.

142. This does not indicate, as Mr Munro argued, that Mr Frankle's advice was "*not just impermissibly facile, it was also dead wrong*". Rather, it is consistent with the more plausible proposition that, at all events until she ran out of patience and moved to the formal process, Mrs Nieman was content not to press for as good a result as she might expect from the court, if matters could be resolved simply and amicably. On the evidence as a whole, that is my finding as to Mrs Nieman's approach. The March 2016 agreement unravelled as the possible substance of a final resolution, even if at the same time elements of it had become, for practical purposes, irreversible, for example the transfer of Cottages 1 to 3 to Mrs Nieman, because of Mr Nieman's failure to pay the agreed £1.05 million in cash and his attempt then to renegotiate substantially that element of the deal.

143. I reject the submission that Mr Frankle gave, as it was variously put by Mr Munro, lazy, simplistic, facile or pub-style layman's advice. Mr Frankle gave careful, considered advice upon the basis of the information provided by Mr Nieman concerning his and Mrs Nieman's assets, assessing for the purposes of that advice how, as it seemed to Mr Frankle, those assets would be viewed by the court in the light of the case law on sections 21 to 25G, especially section 25, of the 1973 Act, and the distinction between matrimonial and non-matrimonial assets that can be drawn. He formed the view on that basis that virtually all of Mr and Mrs Nieman's assets would be considered matrimonial either in origin or having been, as the court would consider it, mingled, shared, treated as joint property. The possible exception, as Mr Frankle considered things, was Mr Nieman's UBS pension, which Mr Frankle thought might be viewed, in Mr and Mrs Nieman's circumstances, as just an income source for Mr Frankle, to be left with him and not accounted for in any asset sharing assessment.

144. It is not arguable that Mr Frankle was negligent in moving from that conclusion to the advice he therefore gave Mr Nieman, namely that:

- there was a real prospect the court would settle upon a disposition of the various assets that achieved a clean break and shared the assets between Mr and Mrs Nieman equally or approximately equally by value;
- there was a reasonably good chance it might be moved away from that in Mr Nieman's favour, given his greater need for capital to generate income and the extent to which the assets had a premarital origin on his side of the marriage; but
- an asset distribution the effect of which overall, standing back to assess fairness, was 60/40 in Mr Nieman's favour by asset value was the best that realistically might be achieved.

145. There can only have been negligence in this case, therefore, if Mr Frankle's view that almost all of Mr and Mrs Nieman's assets should and would be treated as mingled and shared so as to be regarded as joint assets, with consequent starting point for each of them of the equal sharing principle, was an unreasonable view that no competent solicitor considering the case with care would have formed. It is convenient to consider whether that is the position as part of a discussion of the elements of the pleaded allegation as to the advice that ought to have been given (paragraph 133 above), but re-ordering those elements so as to come to the nub last.

146. Element (a): Mr Frankle should have advised Mr Nieman as to the applicable law, and he did so. The significant features of the law for the purpose of Mr and Mrs Nieman's case were all well understood by and familiar to Mr Frankle. It is not credible that his walkthrough of the important case law with Mr Nieman would not have summarised them, and I am confident it will have done so. They were that:

- There are no hard-edged rules, the only firm principle being that the court must exercise its powers, which extended to all of Mr and Mrs Nieman's assets, however held by either or both of them, in such a way as to produce a result that it adjudges to be fair in all the circumstances of the individual case, and the

only firm rule as to how the court is to get there being that it must consider in particular the circumstances set out in section 25(2);

- it follows that it is not possible to predict with certainty the outcome of a contested hearing. It is possible only to express a view as to the range of outcomes that realistically the court might consider fair;
- a distinction may be drawn between matrimonial and non-matrimonial property;
- pre-marital assets, i.e. the wealth that each spouse brings with them pre-acquired into the marriage, are non-matrimonial in origin but may be treated, recognised or dealt with during the course of a marriage in such a way that they should be considered as having become matrimonial, i.e. joint assets of the marriage partnership;
- unless this would not satisfy the reasonable needs of one of the parties, there is a strong presumption that, to be fair, matrimonial property should be shared equally. The non-matrimonial origin as premarital assets of what has become matrimonial property may provide reason to move away from equal sharing but there are no fixed rules about that;
- non-matrimonial property, such as premarital assets that have not been mingled, shared or treated as joint assets, are not outside the asset sharing powers of the court, but might be dealt with differently depending on all the circumstances of the case. They might be shared unequally, indeed they might not be required to be shared at all, but, again, there are no fixed or certain rules and, in any event, satisfying reasonable needs on both sides, if that is possible, is likely to override considerations of source even where those considerations might otherwise have steered the court away from sharing or equal sharing.

147. Element (c): Mrs Nieman's reasonable need to be met in any asset sharing outcome should have been, and was, assessed by Mr Frankle as at all events including a need for capital to purchase and furnish a good quality family home and to be able to be without debt. She might choose to keep a mortgage even if she had the capital to be without one, given the fiscal efficiency of mortgages for mortgagors in recent years, but that is obviously a separate point. As is implicit in that way of expressing Mrs Nieman's reasonable need, there was no reason for concluding, and Mr Frankle did not think, that

her need extended to the provision of income during the remainder of her working life. That is to say, more precisely, she was rightly not considered to need the exercise of the court's asset sharing powers under the 1973 Act to provide a means to generate such an income assuming, as was always the position, that however those powers were exercised, she would be retaining sole ownership of ORC.

148. I said Mrs Nieman's reasonable need should have been and was assessed by Mr Frankle as at all events including capital for a debt-free new and good quality home. From, at the latest, the beginning of 2016, in exchanges ultimately leading to the March 2016 agreement, Mrs Nieman was in substance putting forward the proposition that she should be treated as having a reasonable need, bearing in mind the family history and circumstances of this marriage, to be able to retire at 55, in 12 or so years' time. As it seems to me, there was a potentially significant argument in her favour to that effect if push had come to shove at a contested hearing.

149. As regards Mrs Nieman's being able to be debt-free, there was of course Mrs Nieman's liability to ORC for £50,000 and her claimed liability to her now husband of about £45,000. The ability to discharge the former plainly was a reasonable need. I make no finding one way or the other as to the reality of the latter, about which Mr Nieman had his suspicions but in respect of which I do not have the evidence to investigate the position in any detail.

150. As regards other reasonable need or arguable reasonable need for cash capital, by the time it came to her Form E, Mrs Nieman also put forward the claim that 2MB would need near-term expenditure on maintenance and renewals to the extent of £100,000 or so. Likewise, I am not in a position to make any firm finding as to the reality of that, let alone as to the effective net need that that might represent if real, factoring in any degree to which the expenditure would be suggested to improve the realisable value of the home. It is, however, another indication that there were not immaterial uncertainties at the edges of the simple proposition that her reasonable need at all events included a reasonable need to be established in a good quality new home, debt free.

151. I agree with the pleaded case that Mr Nieman's reasonable need to be met by any asset sharing outcome should have been assessed by Mr Frankle, and indeed it was, as a need for a good quality family home, if workable and possible the FFH, the ability to be debt free or service and in due course discharge any debt, and the ability to generate a reasonable income. As the pleaded figure of £68,600 per annum, at which it is said Mr Frankle should have assessed that income need, was not subjected to any particular scrutiny at trial, it can be assumed in Mr Nieman's favour, for my purposes.

152. I do not agree, however, that an assessment of Mr Nieman's reasonable need in terms of section 25(2) would or should have included a need for an additional income of £50,000 per annum for school fees while the children were of school age. That is for two reasons. Firstly, Mr and Mrs Nieman always had in mind to draw on capital to at least some significant extent to fund school fees. That was an element of how they had chosen to set up their family life. Secondly, as a matter of reasonable need under section 25(2), funding school fees represented a joint need in view of the mutual parental desire for the children to go to private schools.

153. Now, Mr Nieman's instructions from the outset and throughout were that any settlement should be on the basis that he would take on sole responsibility for that funding, but that is a different point, because that would itself be an element of the financial provision order made, whether as a consent order if there was an agreed settlement, or as settled by the court if the matter were contested. That element of the settlement was always likely to be given effect, as it was in the event, by a periodical payment order in favour of Mrs Nieman, susceptible, at least in principle, to subsequent variation, discharge or suspension under section 31 of the 1973 Act upon sufficient cause being shown. Its fair impact, logically, was that it ought to skew in Mr Nieman's favour what might otherwise have been the asset distribution to be adopted, to reflect the fact that he was, in effect, taking on Mrs Nieman's 50 per cent share of that responsibility. It might be thought useful notionally to capitalise the expected future school fees to a net present value and net it off the aggregate net value of the assets left with or transferred to Mr Nieman in any proposed, or the actual, asset sharing settlement as part of any final stage of stepping back and considering the overall effect of that solution. Indeed, that is how the school fees burden was looked at between Mr

Nieman and Withers when analysing and discussing the effect of possible and the actual terms.

154. Regarding element (d), I have said what needs to be said about this part of the pleaded case already. My conclusion is that there is nothing to criticise in the advice Mr Frankle gave if his primary conclusion was reasonable, namely that virtually all of Mr and Mrs Nieman's assets would be treated as matrimonial, notwithstanding the premarital origin on Mr Nieman's side of many or most of them by value. That is the subject of element (b), to which I turn last.

155. Regarding element (e), I am content to assume in Mr Nieman's favour that Withers should have advised him that appropriate provision ought to be included in the consent order to allow for the possibility that he might need more time to pay and what was in the event paragraph 22 of that order. That paragraph required him to pay Mrs Nieman £400,000 by 31 July 2017 and a further £195,000 "*by 1 June 2018 when [Mr Nieman] is expected to receive his final distribution from [CPL]*", on top of £100,000 that was to have been paid on or before the signing of the order. The consent order included appropriate provision, in that (a) it contained a liberty to apply, and more time could have been sought by application even without an express liberty, and (b) Withers secured the language I have just quoted so that the order recorded on its face the basis on which the 1 June 2018 final payment date had been selected, setting the ground favourably for an application for more time if it was based upon delay in finalising the liquidation of CPL.

156. Furthermore, Withers advised Mr Nieman at the time, i.e. when the consent order terms were being drafted and negotiated, to ensure he was confident the agreed terms would give him ample time to put himself in a position to pay and, in particular, to check that the liquidation of CPL would release funds to him in time. This element of the claim against Withers, therefore, was misconceived.

157. In his oral evidence Mr Nieman advanced an entirely different complaint; in substance, that though there was nothing wrong with the terms of the consent order, Withers were to blame for his failure to make an application for more time, long after their retainer had ended, because they did not explain to him that if he failed to pay on time, as

ordered by the court, that could result in enforcement action being taken against him rather than just an obligation to pay interest. Further, it became apparent that the pleaded assertion that Mr Nieman had incurred £20,000 in costs dealing with some enforcement action taken against him due to a failure to pay on time, an assertion to support which no documentary evidence at all was adduced before me, probably had no basis in fact.

158. Mr Nieman's oral evidence, to the extent he claimed any meaningful recollection at all, which was limited, seemed to be that he had incurred substantial costs because of problems connected with the pension sharing order and the pension trustees, not in any enforcement action in respect of a failure to pay on time under paragraph 22 of the order. In that Withers was not negligent, no loss was satisfactorily evidenced, and there was no evidential basis for a finding of causation anyway, this distinct allegation and any claim based on it must fail.

159. Regarding element (f), the final pleaded element adds nothing. There is no basis for a suggestion, nor on analysis was any suggestion made, apart from the misconceived point just dealt with about time for payment, that Withers did anything other than a good and careful job in negotiating and agreeing, subject to Mr Nieman's instructions, the terms of the consent order, given the substantive terms of settlement agreed between the parties. The viable complaint (viable in concept, at any rate) is that, because of negligence on Withers' part, those terms were materially worse for Mr Nieman and better for Mrs Nieman than would otherwise have been achieved through settlement or contested hearing, or alternatively Mr Nieman lost a real and substantial chance of achieving terms that were materially better for himself, worse for Mrs Nieman.

160. Element (b), then, is the issue in the case: how Mr Frankle saw the likely or realistically possible treatment by the court of Mr and Mrs Nieman's assets, and the likely or realistic impact, if any, of the extent to which they had a premarital origin on Mr Nieman's side. The pleaded allegation is not arguable, namely that Mr Frankle should have concluded and advised Mr Nieman that only ORC, Mrs Nieman's pension and a very small proportion of Mr Nieman's pension would be treated as matrimonial property. It is indeed an extravagant and outrageous plea that the FFH would not be

regarded as matrimonial in this case or even, on the facts of this case, that it might not have been subject to the equal sharing principle in computing the parties' claims. Mr Frankle should properly have considered, and I find that he did consider, a possible argument that the Farm might not be so regarded, which is why I have kept my limited definition of the FFH to avoid begging an issue; but that is a quite separate point.

161. Further, it will be apparent from my discussion of the assets that the claim that Mr Nieman's pension was non-matrimonial in origin apart from a very small proportion has not been made good. In any event, Mr Frankle was not provided with any clear basis for assessing it in that way. His exception of Mr Nieman's UBS pension as being at least arguably not to any extent matrimonial in the way he viewed things at the time, was, if anything, an error in favour of Mr Nieman, as it were. Further again, it was never arguable that the 50 per cent share of the Norwegian house, though held in Mr Nieman's name, would not be treated as a joint asset subject to the equal sharing principle.

162. Mr Munro in closing sought to develop a different and un-pleaded case as to how Mr Frankle should have assessed matters. No application to amend the plead was made and I would not have regarded it as fair to allow such an application at trial. Furthermore, I agree with an overarching submission made by Ms Savage QC to the effect that, at best, the new case laid out an argument that it might be suggested could perhaps have been put forward if there had been a contested final hearing of the financial relief proceedings in the divorce. It did not attempt to show that every reasonable solicitor in Mr Frankle's position would have concluded that it was a correct analysis or at least a sufficiently strong argument that they would not have given Mr Nieman the advice Mr Frankle gave him.

163. Out of respect for Mr Munro's industry in preparing and presenting the argument, and for that matter Ms Savage QC's effort and skill responding as best she could to what was a moving target at trial, let me nonetheless consider the argument briefly, asset by asset, as it was presented in closing.

164. It was first submitted that the vast majority of the "original kitty" at the time of marriage came from Mr Nieman, around, it was said, 95 per cent. The "vast majority"

may or may not be accurate. It perhaps depends on what one means by that. Certainly I could not find on the evidence that 95 per cent of the material value in the marriage partnership at the date of marriage came from Mr Nieman. There has been no attempt in this case to create or provide the evidence to enable the creation of an opening balance sheet adequate for that purpose. As Mr Munro's submission itself went on, Mrs Nieman is likely to have had savings from very substantial earnings in the years leading up to the marriage.

165. It was next submitted that the original contribution on Mr Nieman's side continued to form, as it was put, the lion's share of the "final kitty". Mr Nieman put this at around 90 per cent. As to that, the lion's share, as a concept, is probably true if the focus is a narrow one, upon a separation balance sheet and the question of traceability back to an originally premarital source. But the submission that that is how the matter would be viewed by the court, as it seems to me, is oversimplistic and in substance ignores the contributions, material and non-material, over 15 years of marriage to which the court would have regard.

166. Furthermore, in the circumstances of this case, as it seems to me, and as it seemed to Mr Frankle at the time, that way of attempting to look at matters overlooked entirely that this was a case in which, by 2005, Mr and Mrs Nieman had in substance retired to the country to live from their collective assets, it may be the significant majority of which could be said to have had a premarital origin on Mr Nieman's side, whereby to live the comfortable country life that I have described. Mr Munro may be correct that a concept of this kind has not been used very frequently in the first instance cases to the extent they have been researched. It seems to me, however, that there is no principle of law as to what must be demonstrated before a conclusion is formed that the collective joint wealth of a marriage will be treated and enjoyed by the family as the foundation for their family and economic life. Where that conclusion is justified by the facts, as in my view it plainly would have been in this case, there is a powerful argument, exactly as Mr Frankle considered, that, save for any particular assets in respect of which one can see the married couple taking a different approach, all their collective wealth, by the time they separate after 15 years of marriage, should be regarded as joint matrimonial property presumptively subject to the equal sharing principle.

167. Turning, in that light, to at all events the most significant of the assets by value, Mr Munro is correct to submit that an important consideration, where they could be said to have had a premarital origin on Mr Nieman's side, was the way in which they had been treated or used during the marriage, with the concept, as it is sometimes referred to, of mingling or sharing, the couple treating the asset, in other words, as their joint wealth. The Farm was, in the ways I have already described on the facts, plainly treated in significant ways as Mr and Mrs Nieman's joint asset. They had taken a significant, even if in percentage terms proportionately small, part of the total parcel of the land itself and developed that into an aspect of the FFH as enjoyed by them, likewise Stables Cottage and what was referred to as the farmhouse curtilage. Moreover, they had transferred the Farm into their joint names as it is said, and accurately so, 'for tax purposes', that being the treatment of an asset as the joint property of a married couple so as to be disposed between them as best suits them such as may precisely evidence, depending always on all the circumstances of the case, its treatment as joint.

168. The decision to register the beneficial interests in 99:1 shares rather than in some other proportions would be a factor to be taken into account, though it may well have been more to do with having an eye on future matters of inheritance for the children than anything else. But overall, I do not regard it as arguable that, as Mr Munro put it, Mrs Nieman had only a weak and flimsy potential claim in respect of the farmland and its associated, as he called it, off-lying residential properly. To my mind, there was a clear and strong argument in favour of the Farm and its associated elements being regarded by the court in a contested hearing as matrimonial property the subject of the equal sharing principle, but a reasonable argument, precisely as Mr Frankle had always proposed, that the premarital origin, and it may well be the declaration of trust as to beneficial interests, were reason to move somewhat from an equal division in the computation of the parties' claims.

169. I have dealt already with the submission that Mr Nieman's UBS pension had been almost entirely built up prior to the marriage, and in any event the fact that, if anything, Mr Frankle, as it were, assumed in Mr Nieman's favour that it might, other things being equal, be capable of being ring-fenced in any computation of the parties' claims.

170. As regards CPL, similarly to my observations in relation to the Farm, the couple had (a) been making use of CPL as part of the bedrock or foundation of their financial life, (b) earmarked, or, as Mr Nieman put it in his initial instructions to Withers, side-lined it in their family plans as their school fees fund, and for tax reasons, such as makes sense only between a married couple who are treating the relevant asset as joint, decided to have the extension of their interest in CPL when the opportunity arose to buy out the Snape family interest registered in Mrs Nieman's name. I do not agree with the submission by Mr Munro that there was "*no decent argument available to [Mrs Nieman] that she should have a share in Mr Nieman's shareholding in CPL*". There was, as with the Farm, no better for Mr Nieman than a decent argument available to him that its premarital origin and his greater need for capital going forward was reason not to divide the value of CPL equally between Mr and Mrs Nieman in the computation of their claims.

171. Mr Nieman's share portfolio on one view might have had the strongest of the possible claims to be treated differently, bearing in mind my observation that it seems to have been a relatively passive asset. On the other hand, it was again one of the elements of collective capital by reference to which the couple had set themselves up to live the country life in 2005, a fiscal situation that would otherwise have continued entirely as thus set out but for the success Mrs Nieman later had with establishing and developing ORC. Income and indeed capital had already been used from the share portfolio for, as Ms Savage QC rightly put it, one of those totemic elements of family expenditure, that is joint matrimonial expenditure, namely school fees.

172. So, with, perhaps, a degree of greater strength in the argument as to whether in the computation of a claim the share portfolio might have been moved away from equal sharing, overall, in my judgment, Mr Frankle's assessment here again was correct and in any event not unreasonable, namely that it was plausibly liable to be treated as a joint matrimonial asset subject to equal sharing, but there was a reasonable argument for moving away from that somewhat in Mr Nieman's favour.

173. I am not in a position to say, this going back to the nowadays misplaced submission that the name on the bank account tells all, that because there were substantial cash savings in a bank account solely in Mr Nieman's name, that meant in the relevant sense

that they had not been mixed or mingled for the purposes of the exercise of the court's powers under the 1973 Act. I have no reason on the evidence to find, to the extent I could express any provisional conclusion, that that cash savings balance was other than the remainder of the cash savings with which the couple had commenced the phase of their life that they commenced in 2004 or 2005 when both quitting the city.

174. Overall, the submission made was that:

> "In summary, [Mrs Nieman] had a good potential claim to 50 per cent of (a) the farmhouse curtilage property … (b) ORC and the Norway property interest
>
> [I interject, in the context of this submission, that Mr Munro was proceeding on the basis that, of course, the FFH would be regarded as subject to a good 50 per cent claim on the part of Mrs Nieman],
>
> [Mrs Nieman] had a much weaker and flimsy potential claim in respect of the Farmland, off-lying residential property, CPL, Mr Nieman's pensions, share portfolio and Mr Nieman's cash".

I do not accept that submission. In my judgment, it expresses the relevant balance of realistic outcome exactly the wrong way round. That is to say, in fact, Mr Nieman had a reasonable claim, varying a little in a strength it may be as between certain of the assets, to move from a principle of equality of division in the computation of the parties' respective claims in relation to those assets in respect of which Mr Munro wished to contend that Mrs Nieman had only a weak and flimsy potential claim.

175. The effective rival submission, that is to say Withers' positive case in support of the view or at all events the reasonableness of the view Mr Frankle formed, was articulated in this way in Ms Savage QC's written opening:

> "It is clear from even a superficial analysis of the factual matrix that at the conclusion of the relationship enduring for almost two decades, Mr Nieman and [Mrs Nieman] had entwined their financial lives together comprehensively and that the provenance of much of the asset base, originating as it did from Mr Nieman, was a factor of limited weight. A proper analysis of the facts as conducted by Withers at the time militates strongly in favour of a finding that almost *all* of the assets had been 'nuptialised' [not a verb I would use]."

176. Ms Savage QC's written summary of Withers' positive contention continued in terms with which my observations, just expressed significant asset by significant asset, concur. She observed that:

> "From the point at which he retired in 2005, Mr Nieman had to have recourse to both the income generated from and the capital element of assets that he brought into the marriage by reason of the fact that he was no longer employed [I would add, and indeed Mrs Nieman was no longer generating any livelihood until she got ORC going four or five years later]. When Mr Nieman left UBS he was earning circa £200,000/annum. He deposes in his Form E to total income of circa £60,000/annum. This was insufficient to meet the family's income needs, as in his initial instructions to Mr Withers, Mr Nieman stated that he had to 'dig into capital' to fund, for example, school fees. Mr Nieman seeks to characterise CPL and his shares [ie his share portfolio] as non-matrimonial. He fails to recognise that the use to which such capital was put [had] 'blurred the lines' sufficiently so as to render any non-matrimonial arguments nugatory … Mr Nieman would not have been able to maintain any argument that CPL or the shares were non-matrimonial assets [again, I add, as distinct from a fair argument that the premarital origin on his side of many of the significant assets and his greater need for capital might be sufficient justification for a departure from equality]."

177. Thus, finally, as Ms Savage QC submitted:

> "Taken holistically, the facts demonstrate that, notwithstanding the provenance of the assets, the use to which they were put throughout the course of 17 years of marriage/relationship, denuded them of their non-matrimonial character, they were shared by virtue of [Mrs Nieman] acquiring an interest in certain assets, they were applied to totemic items of family expenditure such as the children's school fees, nothing was kept sacrosanct, and the total pot was therefore likely to be regarded by the court as subject to the sharing principle … The above is supported by the advice from counsel at the first appointment."

178. In that the pleaded claim was not arguable and the revised argument presented in closing came too late and failed, in any event, to persuade me that Mr Frankle came to any unsound or unreasonable view, or therefore that he gave Mr Nieman any negligent advice, I conclude that the negligence claim against Withers fails.

179. In the circumstances I shall deal more briefly with questions of causation and loss. It is nowadays trite law and was common ground that it was for Mr Nieman to plead and prove what he would have done differently, if anything, had he been given different advice. Mr Nieman's evidence was, to put it bluntly, all over the place as to what he now says he believes he would have done differently. I do not reject any case on causation on that ground alone, however. A claimant's factual testimony may or may not be capable of assisting much with such a counterfactual, i.e. hypothetical, point. A claimant might remember, and so be able to say in honest testimony, that they were going to take or not take some particular action, upon an initial understanding they had that matches what is later found should have been the advice they then received, but acted differently because of advice to some different effect later held to have been negligent advice in fact received, but that is a rarity in practice. The question of what a claimant would probably have done is a question of judgment for the court informed by the evidence available, including as to the character, attitudes, and motivations of the claimant at the time. It is not fatal to a claim that a claimant would probably have acted in some pleaded manner that is different to how they acted at the time, had different advice been given, that the claimant may find it difficult to articulate for themselves, let alone claim to be sure about, what they would have done.

180. Here the pleaded claim is that, differently advised by Withers as to the financial settlement merits, Mr Nieman would have offered Mrs Nieman Cottages 1 to 3, the 50 per cent interest in the Norwegian house, plus £100,000 in cash and an acceptance by Mr Nieman of sole responsibility for school fees. It is alleged that such an offer would have represented value to Mrs Nieman of over £1.5 million and would have been approved by the court as an appropriate financial settlement. I take it to be implicit that Mr Nieman would assert no claim against (the value of) ORC and the value of ORC is obviously not intended to be included in the pleaded value of £1.5 million for what Mr Nieman alleges he would have been offering to give to Mrs Nieman by those terms. I take it also to be implicit that the offer would have been for Mr Nieman to take or keep anything else other than any cash at bank in Mrs Nieman's name and Mrs Nieman's pension.

181. No part of that pleaded claim was made good at trial:

- the suggested value in Mrs Nieman's hands rests upon (i) a false claim that Cottages 1 to 3 had an agreed value of £820,000, and (ii) false accounting that treats Mr Nieman's putative sole responsibility for school fees as worth £600,000 to Mrs Nieman rather than the notional capitalisation of what would otherwise have been her half share, say £300,000;
- the value of the suggested offer in Mrs Nieman's hands, in the pleaded sense of the value of what Mr Nieman claims he would have offered to give her, was in fact only £1.1 million;
- it is alleged the pleaded offer would have been more than ample to meet Mrs Nieman's needs enabling her to buy a house for £850,000. However, firstly, Mrs Nieman sensibly needed something much closer to £1 million for that purpose. Secondly, only £800,000 of the £1.1 million of value would have been available to Mrs Nieman potentially for use to buy a house, since £300,000 of it would have been a notional capitalisation of being relieved from her share of school fees over the ensuing eight or nine years, depending on the date on which it would be assumed this imagined offer would have been made. Mr and Mrs Nieman's younger child will complete school and turn 18 in the summer of 2025;
- even that £800,000 would only have been available if Cottages 1 to 3 were immediately sold, something which Mr Nieman would not have wished to trigger and would have prevented Mrs Nieman from looking to them in the future for a retirement income, and the Norwegian house likewise were immediately sold and Mrs Nieman's parents' debt repaid, even though they, the parents, were living in the house and there is no evidence that they would have been happy to sell up;
- I do not regard it as even arguable that the court would have regarded this imagined offer as a fair settlement, having regard to the circumstances of the case including the section 25(2) factors in particular.

182. Faced with the reality that the pleaded claim was hopeless, Mr Munro valiantly attempted, implicitly in some of his questions to Mr Frankle, explicitly in his closing argument, to invent a different case on the hoof. Also in oral opening he seemed to float an alternative case that Mr Nieman, if differently advised, would still have

concluded the March 2016 agreement with Mrs Nieman, presumably, again, without Withers' involvement, but would this time have performed it fully, leading to a final settlement upon its terms, subject to ironing out details that would not have affected the financial substance. Again, no application to amend the pleadings was made and I would not have considered it fair to Withers to move the goalposts like that so late in the process.

183. Had I been persuaded that Mr Nieman would have made the imagined but obviously unacceptable offer that is the pleaded counterfactual, I would have concluded that, without doubt, it would have been rejected by Mrs Nieman and would not have been approved by the court if persisted in by Mr Nieman. If I had held that Withers' advice was negligent as alleged, as to the proper treatment of Mr and Mrs Nieman's assets, and that Mr Nieman, properly advised in that regard, would have made that offer, there might perhaps have been a coherent case to the effect that:

- Mrs Nieman would presumably have received similar advice, i.e. advice similar to that which I would have held Mr Nieman should have received. It is obvious on the contemporaneous record that she did not receive such advice, but that tends only to reinforce my primary conclusion that Withers were not negligent. It does not affect what I have just said for the counterfactual;
- Mrs Nieman might well then have been willing to agree, and/or the court realistically might have approved, a settlement that ensured she kept ORC while also meeting her reasonable need for capital with Mr Nieman, as throughout, accepting a sole funding responsibility for school fees;
- there would have been a real chance that Mrs Nieman's reasonable capital needs might have been assessed to be met by Cottages 1 to 3 as effective retirement capital, plus £1 million for a debt-free home, or slightly more if the court were persuaded she had an immediate need for £100,000 for work on 2MB;
- the terms in fact agreed, under which Mr Nieman paid only £695,000 but also gave Mrs Nieman the pension share with CETV that Mr Nieman regarded as somewhat nominal of £400,000, and the 50 per cent share in the Norwegian house, could not be said, in my view, to be materially or measurably worse for Mr Nieman than all of that, except that I can see an argument that in this counterfactual world, where need had become the primary driver, because Mrs

Nieman had been assessed as having no significant claim other than on the basis of need, the March 2016 agreement that Mr Nieman take rental income from Cottages 1 to 3 until Mrs Nieman reached 55, but with a responsibility to indemnify her for the income tax on that income, might have been achievable for Mr Nieman to supplement his income.

184. Thus, at its highest, in my view, in the doubly hypothetical world in which (a) Withers' advice was negligent as alleged, and (b) Mr Nieman would then have made the imagined offer, I might have been persuaded to award damages for the loss of a chance of retaining the net rental income from Cottages 1 to 3 until Mrs Nieman turned 55. That would have been a relatively insignificant award of damages, albeit not nominal only, in the context of litigation in which the claim form asserted that Mr Nieman sought damages in excess of £1.3 million, and his particularised claim was for, in round terms, £1 million plus interest. For example, a lost 30 to 40 per cent chance of not having given up 12.5 years, say, at £18,000 per annum net, might mean damages of £67,500 to £90,000, subject to what might have been a knotty little quantum point on how, if at all, to factor in rent inflation, actual and/or prospective.

The Counterclaim

185. I turn finally to Withers' counterclaim. The ability of a defendant, here Mr Nieman as defendant to the counterclaim, to resist judgment on a detailed and itemised invoice from their solicitor, charging for time spent at agreed rates plus disbursements incurred, to resist judgment by asserting an entitlement to have the bill assessed, was considered recently by Butcher J in *Devonshires Solicitors LLP v Elbishlawi et al* [2021] EWHC 173 (Comm). In that case the claimant firm sought and obtained summary judgment. The judge analysed the decision of the Court of Appeal in *Turner & Co v O Palomo SA* [2000] 1 WLR 37, which in turn analysed and applied earlier decisions, in particular the decision of the Court of Appeal in *Jones & Son v Whitehouse* [1918] 2 KB 61.

186. The conclusion of that analysis, applied by Butcher J in granting summary judgment, was that a client sued by their solicitor for the amount of the solicitors' charges is entitled to challenge the reasonableness of the sum claimed, though the time for applying for statutory assessment has passed, whereby to resist judgment on the

solicitors' invoices, but in the case of a fully particularised bill that gave the client a fair opportunity to identify any grounds of challenge, only upon showing to the court that there was some plausible ground for challenging the claim upon any assessment.

187. I respectfully agree with and adopt Butcher J's analysis and conclusion. Its consequence of substance is that there is no absolute entitlement to resist judgment by invoking a wish to have a solicitors' bill assessed. Mr Munro conceded that, apart from Mr Nieman's damages claim and any consequent set-off which has fallen away, Mr Nieman could not resist judgment for a sum to be assessed. That is to say he did not suggest that Mr Nieman could sensibly ask that the counterclaim be dismissed. He submitted, however, that the decision in *Devonshires Solicitors* should be distinguished on the basis that it was an application for summary judgment whereas this was a trial, and Mr Nieman had not been asked to particularise any grounds of objection to Withers' charges. That is a surprising submission, contending as it does that it is easier in a case of this kind to obtain summary judgment than judgment after a trial. It is a submission that elevates form over substance, and it is a submission that overlooks Mr Nieman's obligation, as defendant to counterclaim, to plead his reasons for denying the claim, if he had any.

188. Withers are not be criticised for failing to ask Mr Nieman to particularise a case he did not plead. He pleaded, in substance, a bare and unqualified entitlement that he did not have, to have Withers' bill assessed before judgment could be given on it. *Devonshires Solicitors*, confirming the effect of and following *Jones v Whitehouse* and *Turner v O Palomo*, says, and I agree, that there is no such entitlement. As Butcher J noted at [26], the outcome may be different if the solicitor has provided no breakdown of their bill allowing specific items to be challenged so that in practice all the client can do is express dissatisfaction as to the reasonableness of the total claimed, but that was not the case in *Devonshires Solicitors* and it is not this case.

189. Indeed, as it seems to me, it is almost certainly only because of the primary claim that has failed, which, if it had had merit, might well have given rise to set-off, that Withers did not seek summary judgment on the counterclaim, which, on its own merits, would have been a good application. Mr Nieman having identified no suggested grounds of challenge, whether to any individual item or to any of the resulting totals, separately

invoiced by Withers' monthly bills, there will be judgment on the counterclaim for the full amount of £35,730.39.

190. Withers also claimed interest at 8 per cent, which counsel calculated to be £14,348.07 to 4 July 2022, the first date of the listed trial window, continuing until judgment or payment at £7.83 per day. If the rate is correct, the current daily rate of continuing interest is correct. I shall ask counsel for assistance as to whether there is any issue over the rate or over the interest calculation up to 4 July 2022.

191. In conclusion, and for the reasons I have given, and with grateful thanks to the legal representatives for sitting through what has been a long oral judgment, the claim is dismissed, the counterclaim succeeds in full, and there will be judgment for Withers on both accordingly.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge