

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2021] SC ABE 40

ABE-F681-15

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

JENNIFER ALLAN OR SCOTT, residing at [ ] Torphins AB31 4GR

Pursuer

against

DUNCAN McRAE SCOTT, residing at [ ] Norway

Defender

**Pursuer: Mr Hayhow, advocate;**  
**Defender: Miss Cartwright, advocate;**

Aberdeen, 1 June 2021

The sheriff, having resumed consideration of the cause, finds in fact:

1. The parties are husband and wife, having been married on 28 May 1988.
2. The parties were habitually resident in Scotland for a period of one year immediately preceding the raising of this action. The pursuer was resident in this Sheriffdom for a period exceeding 40 days immediately preceding the raising of this action. There are no proceedings pending or continuing in Scotland or elsewhere which are in respect of the marriage or capable of affecting its validity or subsistence.
3. The parties separated on 17 May 2014 (“the relevant date”), since when there have been no marital relations. There is no prospect of a reconciliation.
4. As at the relevant date the matrimonial property of the parties consisted of the following assets with the values shown as at the relevant date unless otherwise

stated (where no value is shown there was no evidence or no satisfactory evidence from which to ascribe a value):

- The matrimonial home at [ ] Torphins which had a value of £475,000.00 at the relevant date and has a value of £450,000.00 currently.
- The furnishings and contents of the matrimonial home.
- The parties' joint shareholding in the limited company known as Intervention Well Resources Limited (hereafter referred to as "IWR") which the pursuer valued at £679,229.00 and which the defender valued at £641,280.00.
- The defender's shareholding as the sole shareholder in the limited company known as Subsea Wellpartner Limited (hereafter referred to as "SWP") which had a value of £113,132.00.
- The defender's shareholding as the sole shareholder in the limited company known as Subsea Wellpartner (Contracting) Limited which had no value.
- The defender's Kvaerner Pension having a value of £113,934.00.
- The defender's Scottish Equitable Pro-save Pension having a value of £9,942.00.
- The pursuer's National Health Service Pension having a value of £97,329.00.
- The pursuer's SERPS having a value of £6,674.02.
- The defender's SERPS having a value of £43,159.37.
- The defender's Suzuki motor car having a value of £4,000.00.

- The defender's jeep vehicle having a value of £4,000.00.
- The defender's Range Rover motor car having a value of £26,000.00.
- The parties' joint Clydesdale Bank Account ending 940 having a value of £76,364.00.
- The parties' joint Clydesdale Bank Account ending 067 having a value of £140.90.
- The pursuer's Bank of Scotland Account having a value of £513.88.
- The pursuer's ISA having a value of £13,498.23.
- The defender's NPI pension ending 46X having a value of £25,313.76.
- The defender's NPI pension ending 50P having a value of £11,070.52.
- The defender's Friends Life policy having a value of £1,663.52.
- The defender's Halifax ISA having a value of £8,917.33.
- The pursuer's premium bonds having a value of £10,300.00.
- The defender's Zurich pension ending 083 having a value of £24,103.24.
- The defender's Personal Zurich pension ending 274, having a value of £16,507.58.
- The defender's Standard Life Shares having a value of £5,100.00.
- The defender's secured loan to the parties' daughter Rebecca having a value of £220,000.00.
- The defender's savings account with Barclay's Bank having a value of £51,081.00.
- The pursuer's Zurich Life Assurance Policy having a value of £9,316.03.

- The parties' joint TSB account having a value of £1,925.00.
- The defender's Zurich Adaptable Life Plan having a value of £806.08.
- The pursuer's Friends Life Policy having a value of £579.65.
- The pursuer's Honda CRV motor car.

The total value of the matrimonial assets at the relevant date, in so far as the value can be ascertained was either £2,049,600.11 or £2,011,651.11 depending on the value of IWR.

5. As at the relevant date the matrimonial debts of the parties were as follows:
- The parties' mortgage secured over the matrimonial home in the sum of £31,127.00.
  - The pursuer's M & S credit card debt in the sum of £321.61.
  - The pursuer's tax liability in the sum of £25,111.55.
  - The defender's tax liability in the sum of £23,886.00.
  - The outstanding price of the defender's Range Rover motor car in the sum of £26,000.00.

The total value of the matrimonial debts as at the relevant date was £106,446.16.

6. The net value of the matrimonial assets at the relevant date, in so far as the value can be ascertained, was either £1,943,153.95 or £1,905,204.95 depending on the value of IWR.

7. As at the relevant date the defender had an American Express credit card debt of £1,376.76 and a Bank of Scotland credit card debt of £6,282.19. These debts are accounted for in the valuations of IWR and SWP respectively.

8. Repayment of the parties' joint mortgage secured over the matrimonial home was effected out of the parties' joint account with Clydesdale Bank ending 940 to the

extent of £19,324.42 and out of the defender's savings account with Barclay's Bank to the extent of £11,802.58.

9. Both before and after the relevant date the defender, by way of financial assistance, indulged the parties' son Kristopher in his hobby of owning and renovating expensive motor vehicles. This included a total of £34,542 paid to Kristopher out of funds belonging to IWR after the relevant date.

10. On the relevant date the defender purchased a Range Rover from the parties' son Kristopher. This was a matrimonial asset at the relevant date. Part of the price was paid by direct transfer to Kristopher's bank account from the parties' joint account with Clydesdale Bank ending 940 on the relevant date, although it was not debited to the joint account until after the relevant date. The balance of the price was paid out of the parties' joint account with Clydesdale Bank ending 940 after the relevant date. As at the relevant date the price of the Range Rover was a matrimonial debt. That debt was settled equally by the parties by virtue of the price of the car having come out of the joint account.

11. After the relevant date the defender caused payments to be made into the joint Clydesdale Bank Account ending 940 from the resources of IWR. These payments were treated in the books of IWR as if they had been withdrawn from IWR by the parties equally. Both parties withdrew funds from the joint account after the relevant date. The net result of these transactions was that of the relevant date balance of that account, after settlement of the purchase price of the Range Rover motor car, the pursuer withdrew £14,604.97 and the defender withdrew £35,759.03. The defender's withdrawals included withdrawals used to pay fees to his legal advisers in the sum of £3,500.

12. At the start of the accounting period ending in July 2013 the balance at credit of the directors/shareholders loan account in IWR was £259,321.03. During that period sums amounting to £31,693.78 were credited to the loan account. During that same period a total of £499,831.91 was abstracted from the company and debited to the loan account.

13. The sums extracted from IWR included the sum of £223,804 in respect of the purchase of a flat for the parties' daughter, Rebecca, in respect of which she granted a standard security in the sum of £220,000 in favour of the defender. The secured loan thereby created belonged to the defender at the relevant date and was a matrimonial asset.

14. The deficit in the loan account at the end of the accounting period ending in July 2013 was £208,817.10. As at the relevant date that sum was a matrimonial debt. It would have remained a matrimonial debt but for the declaration of a dividend of £210,000 by IWR backdated to that accounting period.

15. The dividend of £210,000 was allocated equally between the parties due to the fact that they were equal joint shareholders of IWR. No cash was extracted from the company in order to pay the dividend. The declaration of the dividend was an accounting device to clear the debt represented by the directors/shareholders loan account from the books of IWR. Any debt standing in the name of the pursuer in the books of IWR was cleared or reduced by her share of the dividend.

16. The declaration of the dividend resulted in both parties being assessed to tax. The amounts owed in tax as a result of these assessments fell to be regarded as matrimonial debts.

17. The pursuer went to the expense of successfully challenging the tax assessment upon her for the particular tax year. By letter dated 12 March 2020 addressed to the pursuer (production 5/12/7) HMRC confirmed that they had cancelled the assessment to tax on the pursuer in respect of her share of the dividend because the assessment had been made in respect of the wrong tax year. They identified the correct tax year and confirmed that no assessment would be issued in respect of that year. Therefore, the pursuer's tax liability as at the relevant date falls to be left out of account in the calculation of the division of the net value of the matrimonial property.

18. IWR could have employed a different accounting device, namely the declaration of a salary to the defender backdated to the accounting period, to write off the debt. This would have resulted in a tax charge upon the defender which would have fallen to be regarded as a matrimonial debt. That tax charge would have exceeded the sum of the tax assessments upon the parties as a result of the declaration of a dividend.

19. The declaration of a dividend rather than the declaration of a salary resulted in an overall saving in tax from which both parties stood to benefit.

20. By marrying the defender and contributing to the marriage by looking after the home and the parties' children the pursuer lost earnings and suffered a reduction in the value of her pension rights compared to the position she would have been in had she not married the defender. She thereby suffered an economic disadvantage.

21. During the marriage the defender contributed considerably more than the pursuer to the household finances and during the periods when the pursuer was out of employment the defender supported the family on his own. The defender

maintained the family in and to a good, if not high, standard of living. The defender thereby suffered an economic disadvantage and the pursuer thereby enjoyed a corresponding economic advantage.

22. As at the relevant date the value of the pursuer's right to a fair share of the net value of the matrimonial property exceeded the value of what she could have accrued by her own efforts if not married to the defender.

23. The pursuer has had the sole rent-free use and enjoyment of the matrimonial home since the relevant date.

24. The defender has never been excluded from the matrimonial home by court order or otherwise.

25. In September 2017 the defender as director of IWR caused the company to encash a Prudential Bond worth £140,976.00. This encashment is recorded in the books of the company.

26. Also recorded in the books of the company are the cash withdrawals made by the defender since the relevant date and both prior to and after the encashment of the bond. All cash withdrawals from the company were correctly recorded in the company's books as between business expenses and personal expenses.

27. Since the relevant date, on the instructions of the defender and without the consent of the pursuer entries were made in the books of IWR creating a debt due to the company by the pursuer by virtue of a shareholder's loan account in her name. All of these entries derived from the cash withdrawals made by the defender. Some of the entries related to transfers into the parties' joint Clydesdale Bank account. Others related to "interest on overdrawn loan", transfers to the parties' son Kristopher, credit cards and the defender's accommodation costs in Norway.

28. Cash withdrawals from the company to the extent of at least £70,000 were incorrectly set against the pursuer in the company's books.
29. The cash withdrawals made by the defender and debited to his director's/shareholder's account were taken over by SWP. SWP is thereby indebted to IWR.
30. Other than in respect of the accounting period ending 31 July 2019 the pursuer has not challenged the accounts of IWR by seeking that the accounts of the company be audited.
31. The parties are desirous that IWR be liquidated with the funds being distributed in accordance with the shareholding. The parties are agreed that they will deal with that issue independently of these proceedings and are, therefore, desirous that the value of IWR be left out of account in determining the issue of financial provision.
32. The net value of the matrimonial assets at the relevant date, excluding the value of IWR and the pursuer's tax liability, was £1,289,036.50.
33. The parties have received an equal share of the funds at credit of their joint Clydesdale Bank account ending 067 and their joint TSB account.
34. Other than as already indicated the parties have each retained those items of matrimonial property which belonged to them respectively as at the relevant date and have settled those items of matrimonial debt in their own names respectively. In the case of the defender the property retained includes the Suzuki motor car and its whole value on sale.
35. Taking all of the foregoing into account and assuming that the defender's share of the matrimonial home is transferred to the pursuer at its current value the

balancing payment due to the pursuer from the defender to effect an equal sharing of the net value of the matrimonial property as at the relevant date, so far as it can be ascertained, is £38,153.34 as shown in the following table:

Matrimonial Assets	Joint	Defender	Pursuer		Total
Matrimonial Home	475,000.00	237,500.00	237,500.00		475,000.00
Furniture and Contents					
Intervention Well resources					0.00
Subsea Wellpartner Ltd		113,132.00			113,132.00
Subsea Wellpartner(Contracting) Ltd	0.00	0.00	0.00		0.00
Defender's Kvaerner Pension		113,934.00			113,934.00
Defender's Scottish Equitable Pro-save Pension		9,942.00			9,942.00
Pursuer's NHS Pension			97,329.00	*	97,329.00
Pursuer's SERPS			6,674.02	*	6,674.02
Defender's SERPS		43,159.37			43,159.37
Defender's Suzuki		4,000.00			4,000.00
Defender's Jeep		4,000.00			4,000.00
Defender's Range Rover		26,000.00			26,000.00
Joint Clydesdale Bank A/C ending 940	76,364.00	48,759.03	27,604.97	*	76,364.00
Joint Clydesdale Bank A/C ending 067	140.90	70.45	70.45	*	140.90
Pursuer's BOS Account			513.88	*	513.88
Pursuer's ISA			13,498.23	*	13,498.23
Defender's NPI Pension ending 46X		25,313.76			25,313.76
Defender's NPI Pension ending 50P		11,070.52			11,070.52
Defender's Friends Life Policy		1,663.52			1,663.52
Defender's Halifax ISA		8,917.33			8,917.33

Pursuer's Premium					
Bonds			10,300.00	*	10,300.00
Defender's Zurich					
Pension ending 083		24,103.24			24,103.24
Defender's Personal					
Zurich ending 274		16,507.58			16,507.58
Defender's Standard Life					
Shares		5,100.00			5,100.00
Defender's loan to					
Rebecca		220,000.00			220,000.00
Savings Account with					
Barclay's Bank		51,081.00			51,081.00
Pursuer's Zurich  Life					
Assurance Policy ending					
274			9,316.03	*	9,316.03
Joint TSB Account	1,925.00	962.50	962.50	*	1,925.00
Defender's Zurich					
Adaptable life plan					
ending 082		806.08			806.08
Pursuer's Friends Life					
Policy			579.65	*	579.65
Pursuer's Honda CRV					
Total Assets		<u>966,022.38</u>	<u>404,348.73</u>		<u>1,370,371.11</u>
Matrimonial Debts					
Pursuer's M & S Card			-321.61	*	-321.61
Pursuer's tax liability				*	0.00
Defender's tax liability		-23,886.00			-23,886.00
Purchase price of					
Defender's Range Rover	-26,000.00	-13,000.00	-13,000.00	*	-26,000.00
Mortgage	-31,127.00	-21,464.79	-9,662.21	*	-31,127.00
Total Debts		<u>-58,350.79</u>	<u>-22,983.82</u>		<u>-81,334.61</u>
Net Totals		<u>907,671.59</u>	<u>381,364.91</u>		<u>1,289,036.50</u>
Total Net estate			1,289,036.50		
Pursuer's one half share			644,518.25		
Less					
House		462,500.00			
Items marked *		<u>143,864.91</u>	<u>606,364.91</u>		

Balancing Payment due by Defender to Pursuer	£38,153.34
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36. Both parties suffer serious ill health. The cost of medical treatment for their respective health conditions would be a significant financial burden on the parties if not covered by the National Health Service or by private medical insurance.

37. The pursuer is in employment for which she receives a salary. She continues to work despite her serious ill health. She is also in receipt of PIP (personal independence payment). The pursuer's net monthly income is a minimum of £2,200.00.

38. With the exception of her SERPS and NHS pensions and £13,498 in her Bank of Scotland ISA account, the liquid assets in name of the pursuer as at the relevant date have been exhausted. She has had to encash her Zurich Life Adaptable insurance plan. Since the relevant date the pursuer has accrued significant debt. She has had to borrow from family and friends in order to support herself. In particular, the pursuer has a debt to her mother of which £40,000 remains outstanding; a debt to her daughter of £5,500; and a debt to her sister of £20 000. In total she owes her family members £65,500. She has credit card debts with Halifax and M&S Credit totalling £8,220. In addition, she has a commercial loan from AA of which £12,145 was outstanding in December 2020. She has a credit card debt with MBNA in the sum of £10,000 and a further credit card debt with Barclays in the sum of £5,500. A significant proportion of the pursuer's debts is accounted for by the fact that she has been paying legal fees in the sum of £3,000 per month.

39. The pursuer's outgoings are such that she is unable to meet them from her earnings.

40. The pursuer has been in receipt of interim aliment of £1,900 per month from the defender since April 2019. The pursuer has been dependent to a substantial degree on the financial support of the defender both before and after the relevant date.

41. The pursuer's monthly outgoings include a sum of £3,000 in respect of legal fees which she continues to pay to her lawyers in connection with these proceedings.

42. The pursuer's monthly outgoings are more than if she were to choose to live in a more modest and more easily and cheaply maintainable property.

43. The defender's ability to work, and thus his earning capacity, is restricted due to ill health. All of the pension investments and SERPS and the secured loan to the parties' daughter in the defender's name as at the relevant date remain intact. In addition he has bank accounts in Thailand with a credit balance of at least 1,300,000 Thai Bhat, which equates to approximately £30,000. The defender also has interests in bank accounts in Norway the value of which has not been established. The defender's outgoings include maintenance payments for his Thai girlfriend and her daughter.

44. The pursuer will have access to a significant amount of capital from the liquidation of IWR. The value of the Metlife Bond hereinafter referred to forms a significant proportion of the value of IWR.

45. The parties entered into a joint minute number 39 of process in terms of which they agreed that the Metlife bond held by IWR be encashed and that the funds, after deduction of the amount required to appoint an auditor to carry out an

audit of IWR's accounts for the period ending July 2019, be consigned to the Court.

The cost of the audit will be in the region of £5,000 to £10,000. The parties further agreed to release of the funds a) once the company is liquidated, at the request of the liquidator or b) by mutual agreement in writing of the parties. The value of the Metlife bond is approximately £140,000.

46. But for the Covid 19 pandemic these proceedings would have come to a conclusion at least one year earlier.

#### Finds in fact and law:

1. This court has jurisdiction.
2. The marriage of the parties has broken down irretrievably.
3. 17 May 2014 is the relevant date for the purposes of the Family Law (Scotland) Act 1985.
4. It is expedient to make an ancillary order in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985 to ensure that the net value of the matrimonial property as at the relevant date, so far as it can be ascertained, is shared fairly between the parties. The ancillary order should be to the effect that the amount shown in the books of IWR as being a loan due by the pursuer to the company is, to the extent of the sum of £70,000, to be treated instead as a loan due to the company by the defender.
5. The allocation of cash withdrawals to a shareholder's loan account in the pursuer's name without her consent prior to the relevant date and the allocation of a dividend to her are special circumstances justifying an unequal division of the net value of the matrimonial property in favour of the pursuer to compensate her for the

cost of taking action to challenge the charge to tax resulting from the declaration of the dividend. This can be achieved by an ancillary order to the effect that the pursuer is entitled to retain her Honda motor car and the furnishings and contents of the matrimonial home as her sole absolute beneficial property without taking their value into account in calculating the financial provision due to her by the defender on divorce.

6. The pursuer has not suffered any economic disadvantage that requires to be redressed by an unequal division in her favour of the net value of the matrimonial property as at the relevant date.

7. The parties' resources are not such as to preclude the defender's share of the matrimonial home being transferred to the pursuer or the payment of a capital sum by the defender to the pursuer to effect an equal sharing of the net value of the matrimonial property as at the relevant date.

8. A fair sharing of the net value of the matrimonial property as at the relevant date, excluding the value of IWR, will be achieved by the ancillary orders, by transfer of the defender's share of the matrimonial home to the pursuer and by payment by the defender to the pursuer of a capital sum of £38,153.34.

9. The orders, transfer and payment set out in finding in fact and law number 8 are sufficient to satisfy the requirements of section 8(2) of the Family Law (Scotland) Act 1985 without making an order for periodical allowance in favour of the pursuer.

Finds in Law:

1. It is competent for the court to make an ancillary order in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985 without a specific crave and without a plea in law for an order in particular terms by either of the parties.

Therefore:

1. Sustains the pursuer's first plea in law to the effect of granting her crave one and divorces the defender from the pursuer.
2. Sustains the pursuer's second plea in law to the effect of granting her crave two and ordains the defender to transfer his whole right, title and interest in the property forming the former matrimonial home at [ ] Torphins, AB1 4GR and the furniture and plenishings therein to the pursuer; ordains the defender within six weeks of the date hereof to deliver to the pursuer a valid disposition of said right, title and interest in the said property and such other deeds as may be necessary to give the pursuer a valid title; in the event of the defender failing to execute and deliver the said disposition and other deeds, if any, as aforesaid, directs the Sheriff Clerk at Aberdeen to execute the same in the pursuer's favour, all as adjusted at her sight.
3. Sustains the pursuer's third plea in law to the effect of granting, in part, her crave three and ordains the defender to pay to the pursuer a capital sum of £38,153.34 within six weeks of the date hereof with interest thereon at the rate of 8 per centum per annum from the date hereof until payment.
4. *Ex proprio motu*, to reflect the parties' common stated desire that Intervention Well Resources Limited be liquidated, (i) directs parties to do everything in their

power to effect and secure the liquidation of the company and the distribution of the free proceeds thereof as expeditiously as possible; and (ii) directs parties to do everything in their power to effect and secure the encashment of the Metlife bond, which is the subject of the joint minute number 39 of process, and the distribution of its proceeds as expeditiously as possible without incurring avoidable tax consequences, the court having noted the defender's assurance that the bond is still in existence but that the bond documentation has been lost.

5. Notwithstanding the absence of a plea in law, grants the defender's tenth crave and (i) in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985, as ancillary to the orders set out in paragraphs 2 and 3 hereof, directs that the pursuer is entitled to retain her Honda motor car and the furnishing and contents in the matrimonial home as her sole absolute beneficial property without their value having been taken into account in calculating the capital sum hereinbefore ordered; and (ii) in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985, as ancillary to the order set out in paragraph 4 (i) hereof, directs that, without prejudice to any claims that the pursuer may have in relation to the affairs of Intervention Well Resources Limited in the liquidation thereof but to be taken into account towards settlement of any such claims, the amount shown in the books of that company as being a loan due by the pursuer to the company is, to the extent of the sum of £70,000, to be treated instead as a loan due to the company by the defender;

6. *Quoad ultra* repels the parties' remaining pleas in law.

7. Reserves meantime the question of expenses and directs parties to intimate to the court within 3 weeks from the date hereof whether or not they are content to

proceed as regards expenses on the basis suggested in the last paragraph of the note annexed hereto or whether they require a hearing to be fixed to determine the issue.

## NOTE

### **Introduction**

[1] This action of divorce commenced in late 2015 and came to proof before me commencing on 20 November 2019. The pursuer was represented during the proof by Mr Hayhow, advocate and the defender was represented during the proof by Miss Cartwright, advocate.

[2] The proof occupied 10 days of court time from 20 November 2019 until the evidence concluded on 29 January 2021. The proof was interrupted for the best part of a year due to the coronavirus pandemic.

[3] The latter 5 days of proof were conducted via the Cisco Webex platform, which proved to be perfectly adequate, despite the fact that I participated from my home, that most of the participants, including a shorthand writer, were scattered throughout Scotland and that the defender took part from Norway; and despite a substantial amount of documentary productions having to be shared on screen. I had no difficulty in seeing the documentary productions. Nor had I any difficulty in assessing credibility and reliability.

[4] The following witnesses gave evidence for the pursuer in addition to the pursuer herself:

- The parties' son, Kristopher.
- The parties' daughter, Rebecca.

- Miss Susan Ardblaster, a Rehabilitation Case Manager specialising in the provision and coordination of vocational services in connection with personal injuries.
- Gordon Steele, Chartered Accountant

The following witnesses gave evidence for the defender, in addition to the defender himself:

- Robert Anderson, Chartered Accountant.
- Kenneth Tait, Chartered Accountant.

[5] Unfortunately, throughout the proof the pursuer displayed very great antipathy towards the defender which often gave rise to a very tense atmosphere. The pursuer's attitude was understandable, but only to an extent, given that the defender had, as brought out in the evidence, treated her very badly by abandoning her for a Thai girlfriend.

[6] The atmosphere was not helped by the way in which the defender conducted himself whilst giving evidence. Often he came across as being evasive and obtuse whilst at other times he gave unnecessarily long winded, convoluted and confusing answers which were difficult to understand.

[7] For these different reasons I have treated the evidence of both parties with caution. Fortunately, however, parties were wise enough to agree the bulk of the matrimonial assets and liabilities and their values by way of a joint minute. Although parties remain in dispute about the value of IWR, in which they have an equal shareholding, and led contradictory expert evidence, that issue has become academic because both parties in submission have agreed that the value of that company should be left out of account in determining the issue of financial provision on the basis that they are agreed that the company be liquidated and the liquidated funds be split between them in accordance with their shareholdings. For that reason I do not require to prefer one expert over the other. To the extent that the parties

otherwise remain in dispute I have been able to resolve the issues by relying on other evidence supporting one or other of the parties, so that the credibility and reliability of the parties has not been critical to my task.

[8] Kenneth Tait was called as a witness for the defender. He was the accountant who prepared the accounts for IWR. The defender was critical of his credibility and reliability. Part of Mr Tait's evidence in chief was given by way of an affidavit. Mr Hayhow criticised this on the basis that it was done in order to provide Mr Tait with a script. I reject that criticism. With regard to scripted evidence I do not see any difference between, on the one hand, having the witness provide an affidavit and, on the other hand, precognosing a witness and letting him see the precognition prior to his giving evidence. The affidavit was given on oath. Mr Tait was offered up for cross examination so that Counsel for the pursuer had the opportunity to challenge his evidence whether given in the form of affidavit or verbally from the witness stand. Counsel was able to be far more prepared for cross examination by virtue of having advance sight of the affidavit than he would have been had the affidavit not been sworn. Mr Hayhow took the opportunity to cross examine Mr Tait and put him to the test - rather severely in some respects I thought. I found Mr Tait to be an honest witness. He did not seek to present matters other than as they were. He was candid in disclosing that some of the facts and figures he was presenting originated from information given to him by the defender. Any unreliability in the information given by Mr Tait in his evidence stems from that fact rather than from his being inherently unreliable. I did not view Mr Tait as being other than a professional man of integrity. In my view, he was entitled to seek information from the defender as the sole director of the company and to take that information into account when preparing the company accounts. As I will discuss later, I accepted his evidence about the declaration by the company of a dividend as

an accounting device and his evidence about the defender's tax liability as at the relevant date.

[9] The parties' children Kristopher and Rebecca also displayed animosity towards the defender. For that reason I also approached their evidence with caution. Again, I have been able to resolve the outstanding issues without having to rely solely on their evidence.

[10] No issues of credibility and reliability arise in respect of any other witnesses.

[11] At the conclusion of the proof I requested counsel to provide written submissions which they did. They are in process. These submissions were supplemented by oral submissions on 19 May 2021. I do not intend to rehearse counsel's submissions in detail but I am happy to say that I found their submissions to be very helpful in arriving at a decision. I am grateful to them.

### **Divorce**

[12] The action commenced life, less than two years after the relevant date, by relying on the defender's behaviour as the cause of the breakdown of the marriage. This was changed by amendment to reliance on separation for a period in excess of two years. I am aware of contrary shrieval opinion expressed in the cases of *McNulty v McNulty* 2016 Fam LR 145 and *Douglas v Douglas* 2019 Fam LR 12 but I adhere to the view that I expressed in the case of *Ray v Ray* (2017) 9 WLUK 31 that the date of the allowance of the minute of amendment is the date of raising the action for the purposes of section 1(2)(e) of the Divorce (Scotland) Act 1976. I am satisfied that it is competent to grant decree of divorce in this case. I am satisfied on the evidence of the pursuer and her daughter Rebecca that the parties' marriage has broken down irretrievably. I have granted decree of divorce.

**Financial provision and fair sharing of the net value of the matrimonial property**

[13] The pursuer's final position in submissions is that she seeks:

1. The transfer to her of the defender's interest in the jointly owned matrimonial home.
2. The transfer to her of the defender's whole interest in his Trafalgar House (formerly Kvaerner) Pension trust scheme.
3. Payment to her by the defender of a capital sum of £239,319.00.
4. The payment to her of a periodical allowance of £1,900 per month for a period of 3 years or until she has received her whole entitlement from the liquidation of IWR.

[14] The defender's final position in written submissions was that he opposed the pursuer's claims and sought:

1. An order for the sale of the matrimonial home.
2. Despite there being no craves therefor, ancillary orders ordaining the defender to assign to the pursuer the standard security which he holds, and his rights in terms of a relative minute of agreement, in respect of property of which the parties' daughter is the owner.

During the hearing of submissions on 19 May 2021 the defender sought leave of the court to amend her pleadings so as to incorporate craves relating to the orders at paragraph 2 above.

The defender's motion was opposed by the pursuer. I refused the defender's motion whereupon he withdrew his motion for the orders at paragraph 2. At the hearing on 19 May 2021 the defender successfully moved the court to allow amendment of his crave for sale of the matrimonial home to be amended so that the net free proceeds of sale should be divided

between the parties in such proportions as the court might deem appropriate rather than equally.

### *The law*

[15] There was little dispute between the parties as to the applicable law. The main areas of dispute were as to the question of transfer of the matrimonial home and, initially, as to the competency of making an order against a party which neither party has craved. The latter dispute was resolved by the defender's acknowledgement that he required to have specific craves for what I regarded as specific stand-alone orders.

[16] The statutory provisions governing the issue of financial provision on divorce are to be found in the Family Law (Scotland) Act 1985. The provisions which come into play on the basis of the orders sought by the parties are:

- Section 8(1)(a) – order for payment of a capital sum.
- Section 8(1)(aa) – order for transfer of property.
- Section 8(1)(b) – order for periodical allowance.
- Section 8(1)(baa) – pension sharing order.
- Section 8(2)(a) and (b) – court shall make such order, if any, as is justified by the principles set out in section 9 of the Act and reasonable having regard to the resources of the parties.
- Section 27 – “resources” defined as “present and foreseeable resources”.
- Section 9(1)(a) – net value of matrimonial property to be shared fairly between the parties.
- Section 9(1)(b) – fair account to be taken of economic advantage derived by either party from the contributions of the other, and of any economic

disadvantage suffered by either party in the interests of the other party or of the family.

- Section 9(1)(d) – person dependent to a substantial degree on the financial support of the other person to be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of decree of divorce, to the loss of that support on divorce.
- Section 9(2) – for definitions of “economic advantage”, “economic disadvantage” and “contributions”.
- Section 10(1) – net value of matrimonial property is shared fairly when it is shared equally or in such other proportions as are justified by special circumstances.
- Section 10(2) – net value of the property to be the value of the property at the relevant date (date of separation) after deduction of debts incurred by the parties during the marriage which are outstanding at that date.
- Section 10(3A) – value of property transferred to be the value at the date of transfer rather than the value at the relevant date.
- Section 10(4) – “matrimonial property” means all property belonging to the parties or either of them at the relevant date which was acquired by them (otherwise than by way of gift or succession from a third party) either before the marriage for use as a family home or furnishings and plenishings for such a home or during the marriage but before the relevant date.
- Section 10(6) – non- exhaustive list of examples of “special circumstances”.

- Section 11(2)(a) – balancing of the economic advantages or disadvantages sustained by either party against the economic advantages or disadvantages sustained by the other party.
- Section 11(2)(b) – regard to be had to the extent to which any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.
- Section 11(4) – for the purposes of section 9(1)(d) (adjustment to loss of support) court to have regard to the age, health and earning capacity of the claimant; the duration and extent of the dependence of that party prior to divorce; any intention of that party to undertake a course of education or training; the needs and resources of the parties; and all the other circumstances of the case.
- Section 13(1) – court may make an order for periodical allowance under section 8(2).
- Section 13(2) – order for periodical allowance not to be made unless the order is justified by the principle set out in section 9(1)(d) and the court is satisfied that an order for payment of a capital sum or for transfer of property or a pension sharing order would be inappropriate or insufficient to satisfy the requirements of section 8(2).
- Section 14 – incidental orders, in particular section 14(2)(k) which provides for the making of any ancillary order expedient to give effect to the principles of section 9 or to any order made under section 8(2).

[17] The cases referred to by the pursuer were:

- *Little v Little* 1990 SLT 785 – for the proposition that the matter of financial provision is essentially one of discretion aimed at achieving a fair and practicable result.
- *Jacques v Jacques* 1997 SLT 459 – for the proposition that merely because a special circumstance is made out it does not follow that the court must necessarily depart from an equal sharing. The extent to which a special circumstance might justify departure from an equal sharing of the net value of matrimonial property is a matter for discretion of the court depending on the facts before it
- *Wilson v Wilson* 1999 SLT 249 – for an illustration of an order to correct an imbalance of economic advantage/disadvantage, albeit from non-matrimonial property.
- *Watt v Watt* 2009 Fam LR 62 – for the application of section 10(3A) (value of transferred property to be value at date of transfer instead of value at the relevant date).

[18] The cases referred to by the defender were:

- *Buchan v Buchan* 2001 Fam LR 48 – for the proposition that for dissipation of property to be established there has to be “an element of deliberate and positively wanton conduct”.
- *Jacques v Jacques* – for the proposition that special circumstances arising from dissipation of property requires proof of the act of dissipation as a fact and proof of why that justifies an unequal division of the matrimonial property.

- *Louden v Louden* 1994 SLT 381 – for the proposition that where there are no “special circumstances” an unequal division of matrimonial property may be justified by some other section 9 principle.
- *Coyle v Coyle* 2004 Fam LR 2 – for the proposition that, in general, section 9(1)(b) (economic advantage/disadvantage) is not engaged where there is substantial matrimonial property.
- *De Winton v De Winton* 1998 Fam LR 110 – in which section 9(1)(b) was engaged where there was little matrimonial property and one party had expended non-matrimonial property in improving non-matrimonial property owned by the other party.
- *Vance v Vance* 1997 SLT (Sh Ct) 71 – for the proposition that section 9(1)(b) is in effect a provision that is operable where there are in existence non-matrimonial funds in relation to which the party who does not own the funds seeks to make a claim.
- *Adams v Adams* 1997 SLT 144 – for the proposition that before granting an order for the transfer of heritable property the court ought to consider whether the party seeking a transfer is in a financial position to take over the house in order to be satisfied whether the order sought is reasonable having regard to the parties’ resources.
- *Murdoch v Murdoch* 2012 SC 271 – for the proposition that a party can seek an ancillary order against himself and that the court has the power to make an ancillary order in terms of section 14(2) in the absence of craves seeking such an order if such an order is required to ensure that substantial justice between the parties is achieved.

*Resolution of matters in dispute between the parties*

[19] The bulk of the matrimonial assets and liabilities and their values as at the relevant date have been agreed by joint minute.

[20] As confirmed in findings in fact 31 neither party seeks an order in respect of IWR, rendering the value of that asset academic. That value has been left out of account in my calculations.

[21] There remain a number of issues which need to be decided by me. I will deal with them in no particular order.

*The IWR dividend*

[22] The issue of the dividend declaration by IWR was hotly contested. The pursuer maintains that the evidence discloses that the dividend, in the sum of £210,000, was extracted from the company and wholly retained by the defender and that she received none of it despite the fact that the dividend certificates prepared by the company disclose that one half of the dividend was allocated to her.

[23] The document 6/9/7 of process deals with a directors/shareholders loan account in IWR during the accounting period ended July 2013. It must have been prepared after the end of that period since it shows the dividend of £210,000 which, according to the evidence which I accepted, was not decided upon until the company accounts were being prepared sometime in 2014. Extrapolating from that document, at the start of the accounting period the balance at credit of the loan account was £259,321.03. During that period the sums credited to the loan account amounted to £31,693.78. During that same period a total of £499,831.91 was abstracted from the company. This included the sum of £223,804 in respect

of the purchase of a flat for the parties' daughter, Rebecca, in respect of which she granted a standard security in the sum of £220,000 in favour of the defender. This created a deficit in the loan account of £208,817.10. As at the relevant date that sum was a matrimonial debt. It would have remained a matrimonial debt if the dividend of £210,000 had not been declared and backdated to that accounting period. The matrimonial debt would have been the joint and equal responsibility of the parties. To that extent it really does not matter how the debt was recorded in the books of the company or that the figures in 6/9/7 of process were recast in the document number 6/9/8 of process so as to allocate the cash withdrawals and the dividend between the parties. The debt was written off by IWR by retrospectively declaring the dividend for the accounting period ending July 2013. The parties were equal shareholders of the limited company. For that reason, the dividend was allocated between the parties equally. This was all done on the instruction of the defender without the consent of the pursuer. I can see why the pursuer in her evidence by reference to her email correspondence with Mr Tait suggested that Rebecca's flat was paid for by the dividend but it is crucial to understand, and I accepted Mr Tait's evidence to this effect, that no money was withdrawn from the company in respect of the dividend and it was not paid in cash. The flat was purchased using the cash reserves of the company, from wherever they came. That contributed to the debt due to the company. Mr Tait explained, and I accept, that the declaration of the dividend was an accounting device to clear the debt represented by the directors'/shareholders' loan account from the limited company's books. I accepted Mr Tait's evidence that this was a legitimate device to employ. The effect of employing this accounting device was that the parties repaid the debt to the limited company equally, as would have been required for the purposes of financial provision on divorce, despite it having been done without the consent of the pursuer. The pursuer suffered no prejudice

thereby. Any debt in her name was created but then cleared by the accounting device. If the debt due to the limited company had not been allocated to any extent to her and had been cleared from the books of the company by the device of retrospectively showing the defender as having received a salary of an equivalent amount the pursuer could have taken no exception. The net effect on financial provision on divorce resulting from such an accounting device would have been the same as that which resulted from the device of declaring a dividend. The retrospective clearing of the debt results in both the debt and the dividend falling out of account in the calculation of the net value of the matrimonial property as at the relevant date.

[24] Had the withdrawals not been allocated to any extent to the pursuer and had it been decided to allocate a dividend to the defender to cover all of the withdrawals made by him it would have been necessary to allocate an equivalent dividend to the pursuer. The pursuer's dividend could only have been paid to her by withdrawing further cash from the company. That would have been a withdrawal after the relevant date which, in my opinion, would have to have been allocated to the pursuer towards her share of the net value of matrimonial property as at the relevant date. It could not have been left out of account in calculating the fair sharing of the net value of the matrimonial property as at the relevant date and the amount of any capital sum to be paid by the defender to the pursuer.

*The pursuer's tax liability*

[25] The allocation of dividend to the pursuer left her with a tax liability. Since that liability related to the period prior to the relevant date it would have fallen to be taken into account in arriving at the net value of matrimonial assets as at the relevant date had it not been for HMRC having ultimately resolved not to issue an assessment on the pursuer in

relation thereto. The alternative to writing off the debt by declaring a dividend would have been for a salary to be allocated to the defender, also backdated to the accounting period ending in 2013. Had the alternative salary route been chosen then, although there would have been no tax liability on the pursuer, the evidence was that the tax liability on the defender would have been significantly more than the sum of the tax liabilities on the parties under the dividend route. The defender's tax liability would also have fallen to be taken into account in arriving at the net value of matrimonial property as at the relevant date. This would have resulted in the net value of matrimonial property being less than it actually was under the dividend route.

[26] The net result is that although the way that the defender went about matters without the prior agreement of the pursuer could be criticised both parties stood to benefit from the lower overall tax liability.

[27] Although her judgment in this matter was most probably clouded by her antipathy towards the defender it is, nonetheless, understandable that the pursuer should have queried the dividend and the consequent tax liability on her. It is understandable that she incurred costs in fighting her corner with HMRC. I think it only fair that she be compensated for that. In addition, I bear in mind that the defender has benefitted to the same extent as the pursuer from the pursuer's success in having the tax assessment upon her cancelled. The pursuer sought a sum of £20,000 in this regard over and above an equal sharing of the net value of the matrimonial property. I have, rather, taken a broad axe to compensate the pursuer by making an ancillary order, providing that the pursuer be entitled to retain her motor car and furnishings and contents within the matrimonial home without their value being taken into account in the calculation of financial provision.

*Encashment of IWR's prudential bond and withdrawal of funds from IWR*

[28] The defender caused IWR to encash a Prudential bond in the sum of £140,976.00.

The parties were at odds as to whether or not the pursuer consented to this. I accept the pursuer's evidence that she did not. It was quite clear from the evidence in general that the defender considered that he was entitled, as the sole director and controlling mind of the company, to instruct company transactions as he saw fit without recourse to the pursuer.

The defender accepted in evidence that cash was withdrawn from the company which derived from the proceeds of the bond and was used, at least in part, for his own purposes.

My view is that it is irrelevant to enquire as to how the funds were actually used by the defender. It is nobody's business but his. What is relevant and important is to ascertain how the cash withdrawals were recorded in the books of the company. I am satisfied that the cash withdrawals, whether deriving from the encashment of the bond or not, were properly dealt with, that is to say that in the company's books they were properly ascribed either to legitimate company expenditure or to personal expenditure. But, the allocation of cash withdrawals as personal expenditure of the pursuer is a different matter.

[29] Cash withdrawals partly ascribed to the pursuer included payments made to the parties' son Kristopher and payments in respect of the defender's accommodation costs in Norway. If I understood Mr Hayhow's submissions correctly he made no specific issue of this but I am satisfied that these payments were made and were ascribed to the pursuer without her prior approval. That is not fair. I will explain later why I think that these payments ought to have been ascribed wholly to the defender. On the other hand, there were payments made from the company to the parties' joint bank account. The pursuer will have derived some benefit from that, for example by part of the mortgage repayment

coming out of the joint account, although to what extent it is not possible to determine with any degree of accuracy.

[30] I have found it impossible to determine precisely to what extent the defender has benefited, or rather might benefit, from the treatment of the cash withdrawals in the books of the company to the disadvantage of the pursuer. As I understood Mr Hayhow's submissions, he suggested that, in acknowledgement of a special circumstance, I should award the pursuer a sum equivalent to one half of the proceeds of the Prudential bond over and above an equal sharing of the net value of the matrimonial assets. I see the exercise, rather, as being to try to determine to what extent the matrimonial assets have been taken over by the parties and thus to determine what orders are required to ensure, as best as can be done, that each of the parties receives a fair share of the net value of those assets. The withdrawals of cash from the company are intimately tied up with the affairs of the company. They are represented by loans due to the company by the parties which will need to be taken into account in determining the share of the proceeds of liquidation to which each of the parties will be entitled in due course. The benefit or disbenefit arising from the allocation of these cash withdrawals will not crystallise until the liquidation process is complete. At this stage the pursuer has not suffered any loss in the sense that she has had to expend any money. The matter can be redressed before any such loss occurs. In my view, the best approach is to make an ancillary order that the amount shown in the company's books as being owed by the pursuer should, to a specified extent, instead be treated as a debt due to the company by the defender. The debt due to the company by the pursuer will thereby be reduced. The pursuer will receive one half of that sum when it is repaid to the company by the defender. She will also receive one half of all other sums which have already been allocated in the books of the company to the defender (as opposed to being

shown as legitimate company expenses) and which he, or his company SWP, will also have to repay to the company. I do not know the extent to which the pursuer may have claims against the defender in respect of his dealings with the assets of the company which are quite separate from these proceedings, although there was no evidence of the pursuer having made a challenge apart from requiring an audit of the Company's accounts for the accounting period ending in July 2019. The orders that I have made in these proceedings have to be seen as being without prejudice to any claims that the pursuer may otherwise have in relation to IWR. In framing the ancillary order in the way I have and in selecting a figure of £70,000, I have again employed the broad brush to achieve what seems to be fair and reasonable in these proceedings. For the avoidance of doubt this takes account of my view, which I explain later, that the payments to Kristopher and the payments in respect of the defender's accommodation in Norway ought to have been ascribed wholly to the defender.

*Dissipation of property*

[31] The pursuer maintains that the defender has dissipated matrimonial property, principally by encashment of IWR's Prudential Bond and the utilisation of the proceeds for his own benefit. She maintains that this is a special circumstance entitling her to an unequal division of the net value of the matrimonial property in her favour. I do not accept that that is the case. I have already explained that I am satisfied that the cash withdrawals from IWR were properly recorded in the books of the company as between legitimate business expenses and personal use. That being the case, there can be no question of the value of the company having been eroded because the money shown as having been expended for personal purposes (whether ascribed to the pursuer or to the defender) falls to be taken into

account as a debt due to the company in the liquidation process. To the extent that the “defender’s share” of these withdrawals has been transferred to SWP they will fall to be repaid to IWR as a debt by SWP.

*The Range Rover*

[32] The pursuer makes a claim in respect of the Range Rover motor car which was agreed to be purchased, and in respect of which part of the purchase price was paid, on the relevant date. She claims that the defender should simply be ordained to pay to her one half of its relevant date value which equates to the purchase price. The defender maintains that it should be left out of account altogether. Neither party is correct. My analysis of this issue is that if the vehicle is deemed to have been purchased on the relevant date but before the actual separation of the parties, then it becomes a matrimonial asset which has to be taken into account. The other side of the coin is, though, that the whole of the purchase price would need to be taken into account as a matrimonial debt to take account of the facts that the first part of the price paid on the relevant date was not debited to the parties’ joint Clydesdale Bank account ending 940 until after the relevant date (and thus the amount shown as being at credit of the joint account at the relevant date would otherwise be overstated by that amount) and that the balance of the purchase price was not paid out of the joint account until after the relevant date.

[33] In any event, I am satisfied that the defender retained the Range Rover as his own property and that his dealings with it, and with his son, Kristopher, in connection with it, had nothing to do with the pursuer. Therefore, in the calculations that I have made the Range Rover has been shown in the table at finding in fact 35 as having been retained by the defender.

[34] The alternative way of dealing with the Range Rover would have been to show the defender as having made withdrawals from the joint account for its purchase as his asset after the relevant date. In that instance it would not have been shown as a matrimonial asset and nor would the price have been shown as a matrimonial debt. What would have been shown would have been the whole of the purchase price having been extracted from the joint account by the defender for his own purposes. The net result in terms of the capital sum to be paid by the defender to the pursuer would have been the same - as is demonstrated by the table which I have produced at paragraph [37] hereafter.

*Transfer of the matrimonial home*

[35] The pursuer seeks a transfer to her of the defender's share in the matrimonial home. The defender seeks an order for its sale on the basis that it is obvious that the pursuer cannot afford to stay in it. He refers to the case of *Adams v Adams*. I do not see any reason in principle why the matrimonial home should not be transferred to the pursuer. If she chooses to live in a house which she cannot afford that is her decision. The transfer to the pursuer of the matrimonial home will not result in the pursuer receiving more than one half of the net value of the matrimonial property. I cannot see why the defender would be prejudiced thereby. The only possible advantage to the defender deriving from a sale would be if the property were to be sold for a price higher than its current day valuation. But that involves a degree of speculation. The property might equally achieve a price on sale which is lower than its current valuation. The circumstances in *Adams v Adams* were quite different from the circumstances in this case. In *Adams* there was only a modest amount of matrimonial assets over and above the matrimonial home. Transfer of the matrimonial home to the wife would have resulted in an unequal division of the matrimonial property in

her favour which she was unable to redress. That is not the position in this case. I do not see *Adams* as being authority for the proposition that in all cases the court has to be satisfied that a party can afford to live in the matrimonial home before it can make an order for transfer of it to that party. I have made the order sought by the pursuer.

[36] The way in which I have dealt with the transfer of the matrimonial home in the table at finding in fact 35 adopts the approach taken by Lady Smith in the case of *Watt v Watt* and has the same effect as the pursuer's approach of calculating the division on the basis of the relevant date value and then awarding the pursuer one half of the reduction in value since the relevant date. But, in fact, Lady Smith could just as well have adopted the approach advocated by the pursuer in *Watt*, namely that the value of the asset transferred should be taken at its present day value throughout the calculations. That would have produced the same result, as is demonstrated by the table that I produce in the following paragraph.

*Alternative table*

[37] This is the table referred to in paragraphs 34 and 36 above.

Matrimonial Assets	Joint	Defender	Pursuer	Total
Matrimonial Home	450,000.00	225,000.00	225,000.00	450,000.00
Furniture and Contents				
Intervention Well resources				0.00
Subsea Wellpartner Ltd		113,132.00		113,132.00
Subsea Wellpartner(Contracting) Ltd	0.00	0.00	0.00	0.00
Defender's Kvaerner Pension		113,934.00		113,934.00

Defender's Scottish Equitable Pro-save Pension		9,942.00			9,942.00
Pursuer's NHS Pension			97,329.00	*	97,329.00
Pursuer's SERPS			6,674.02	*	6,674.02
Defender's SERPS		43,159.37			43,159.37
Defender's Suzuki		4,000.00			4,000.00
Defender's Jeep		4,000.00			4,000.00
Defender's Range Rover					0.00
Joint Clydesdale Bank A/C ending 940	76,364.00	61,759.03	14,604.97	*	76,364.00
Joint Clydesdale Bank A/C ending 067	140.90	70.45	70.45	*	140.90
Pursuer's BOS Account			513.88	*	513.88
Pursuer's ISA			13,498.23	*	13,498.23
Defender's NPI Pension ending 46X		25,313.76			25,313.76
Defender's NPI Pension ending 50P		11,070.52			11,070.52
Defender's Friends Life Policy ending 378		1,663.52			1,663.52
Defender's Halifax ISA ending 591		8,917.33			8,917.33
Pursuer's Premium Bonds			10,300.00	*	10,300.00
Defender's Zurich Pension ending 083		24,103.24			24,103.24
Defender's Personal Zurich Pension ending 274		16,507.58			16,507.58
Defender's Standard Life Shares		5,100.00			5,100.00
Defender's loan to Rebecca		220,000.00			220,000.00
Savings Account with Barclay's Bank		51,081.00			51,081.00
Pursuer's Zurich  Life Assurance Policy ending 274			9,316.03	*	9,316.03
Joint TSB Account	1,925.00	962.50	962.50	*	1,925.00

Defender's Zurich Adaptable life plan ending 082		806.08		806.08
Pursuer's Friends Life Policy ending 509			579.65 *	579.65
Pursuer's Honda CRV				
Total Assets		<u>940,522.38</u>	<u>378,848.73</u>	<u>1,319,371.11</u>
Matrimonial Debts				
Pursuer's M & S Card			-321.61 *	-321.61
Pursuer's tax liability			*	0.00
Defender's tax liability		-23,886.00		-23,886.00
Purchase price of Defender's Range Rover			*	0.00
Mortgage	-31,127.00	-21,464.79	-9,662.21 *	-31,127.00
Total Debts		<u>-45,350.79</u>	<u>-9,983.82</u>	<u>-55,334.61</u>
Net Totals		895,171.59	368,864.91	1,264,036.50
Total Net estate			1,264,036.50	
Pursuer's one half share			632,018.25	
Less				
House		450,000.00		
Items marked *		<u>143,864.91</u>	<u>593,864.91</u>	
Balancing Payment due by Defender to Pursuer			£38,153.34	

*The value of the furnishings and contents*

[38] This was a contentious issue. Only the defender offered a suggestion as to the value of the furnishings and contents. He has no expertise in such valuation. I am not prepared to accept his valuation in the absence of expert input. Nonetheless, the furnishings and contents have a value. I have dealt with the furnishings and contents elsewhere, taking a broad brush approach

*The pursuer's loss of earnings etc/economic disadvantage*

[39] The pursuer led evidence from Miss Ardblaster to demonstrate that she suffered an economic disadvantage in the interest of the defender and the family. I have no hesitation in accepting that to be the case. The pursuer puts her economic disadvantage at £169,294 and claims one half of that, £85,647, in addition to her half share of the net value of the matrimonial property. However, it has to be borne in mind that during the marriage the defender contributed considerably more than the pursuer to the household finances and during the periods when the pursuer was out of employment the defender supported the family on his own. The defender maintained the family in and to a good, if not high, standard of living. This is exactly the position faced by Lord Gill in the case of *Adam v Adam* (referred to by the defender for a different proposition). I adopt Lord Gill's approach. The pursuer has a right to capital which outstrips by some margin what she could have hoped to accumulate on her own had she not been married to the defender. In my view, the pursuer has derived economic advantage from the defender's contributions which outweighs the economic disadvantage sustained by her. Another way to look at it is that any economic disadvantage sustained by the pursuer is balanced by economic disadvantage suffered by the defender. Taking fair account of both the economic disadvantage suffered by the pursuer and the economic advantage derived by her as directed by section 9(1)(b) of the Act – or having regard to the extent to which the economic disadvantage sustained by the pursuer is balanced by the economic disadvantage sustained by the defender as directed by section 11(2) of the Act – the pursuer is not entitled, in my view, to any additional payment in respect of economic disadvantage.

*The defender's tax liability*

[40] Kenneth Tait gave evidence by way of his affidavit that as at the relevant date the defender had a tax liability. Pursuer's counsel suggested that I should attach no weight to that evidence and should not factor the tax liability into my calculations. This was on the basis that Mr Tait was not a credible and reliable witness and further on the basis that the vouching for this debt consisted of a single line statement in an email sent by Mr Tait. I have already indicated my view as to the integrity of Mr Tait. In his affidavit, he deponed that the liability was based on a number of different factors. I see no reason to think that Mr Tait, as the defender's accountant, was not aware of these various factors and of the resultant tax liability before swearing his affidavit. I accepted his evidence.

*Rebecca's standard security*

[41] The defender is the creditor in a standard security for the sum of £220,000 over a flat belonging to the parties' daughter, Rebecca. He initially sought an order ordaining him to transfer his interest in that secured loan to the pursuer. He also initially sought an order ordaining him to assign to the pursuer his rights and liabilities in a relative minute of agreement between him and Rebecca to the pursuer. There were no craves for such orders on record. At the hearing of submissions on 19 May 2001, the defender conceded that it was necessary to have specific craves for the orders sought. This concession was well made, in my view, because the orders sought could not be described as being ancillary orders authorised by section 14(2)(k) of the 1985 Act, that is of a kind which the case of *Murdoch v Murdoch* suggests can be made in the absence of a crave. Rather, they were stand-alone orders. The defender sought leave to amend the record so as to incorporate such craves. This was opposed by the pursuer. I refused the defender's motion on the basis that it came

far too late. In any event, in view of the orders that I have decided to make there is no need for a transfer of such magnitude by way of a balancing payment or for any other purpose. In evidence, the defender insisted that he did not wish to contemplate calling up the standard security because he viewed the flat as Rebecca's inheritance. The defender's suggestion of a transfer of this asset to the pursuer would appear to have been a blatant attempt by the defender to realise for himself the value of the asset without having to be the one to call up the standard security and deprive Rebecca of what he sees as her inheritance. It would appear that he wanted to put that onus on the pursuer. It appears to have been a deliberate attempt to cast the pursuer in a bad light with Rebecca. Even if the defender had appropriate craves for the orders that he sought I would not have granted them.

*The Suzuki motor vehicle*

[42] Parties were in dispute as to the destination of the sale proceeds of the defender's Suzuki motor vehicle. There was no dispute as to the circumstances of its sale. The defender had agreed with Rebecca that she would clean the car in preparation for sale and that in return she would receive one half of the sale proceeds. The car was sold whilst the defender was abroad. The purchaser came to the matrimonial home where he was met by the pursuer. A price of £4,000 was agreed and was paid in cash by the purchaser. The pursuer gave him a receipt for that amount. According to the pursuer's evidence, which I accept, the sum of £2,000 in cash was given to Rebecca and the balance of £2,000 in cash was placed in the defender's bureau to await his return from abroad. The defender claimed in evidence that he never received the balance of £2,000 and that it must have been appropriated by the pursuer. The pursuer disputed that she had appropriated the cash. I accept her evidence on this point. If the defender did not receive the cash then I can only

speculate as to what happened to it. The arrangements made by the defender for the sale of the vehicle were cavalier. They were also very indulgent of Rebecca. If the arrangements resulted in the defender not receiving any part of the sale proceeds then that is something that he requires to suffer. He cannot lay that at the pursuer's door. I have made my calculations on the basis that the defender retained the Suzuki motor vehicle and its whole value on sale.

*The defender's Zurich pension policy ending 274*

[43] The pursuer ascribes a value of £16,507.58 to this asset. The defender ascribes no value. By letter dated 12 October 2015 (number 6/1/9 of process) Zurich valued this asset as at the relevant date at £59,647.20, the value being split between Non Protected Rights £16,507.58 and Former Protected Rights £43,139.62. The defender points to a letter from Zurich dated 17 November 2017 (number 6/10/7 of process) which, he says, suggests that this asset, in fact, had no value at the relevant date because funds had been transferred out prior to that date. The defender also points to paragraph "t" of the joint minute of agreement, number 37 of process, which narrates the asset but ascribes no value to it. The defender's position is not tenable. Close scrutiny of the letter 6/10/7 of process reveals that it was only the Former Protected Rights funds that were transferred out. This is confirmed in a further letter from Zurich dated 16 April 2018 (number 6/11/1 of process). The joint minute does not agree that this asset had a nil value. It agrees that the asset existed as at the relevant date but does not ascribe a value to it. I am satisfied that the pursuer is correct to insist on the inclusion of this asset as a matrimonial asset at the relevant date with a value of £16,507.58.

*The defender's accommodation costs in Norway*

[44] I have come to the conclusion that it was neither reasonable nor appropriate for the defender to attribute half of his accommodation costs in Norway to the pursuer within the books of IWR. Those costs were incurred because it was the defender's choice to work in Norway. He had to maintain accommodation there before the relevant date over and above maintaining the matrimonial home. Had he continued to live in the matrimonial home after the relevant date he would still have had to provide accommodation for himself in Norway. He would have had to pay for the accommodation even whilst he was in the UK. The cost to the defender of living in the Norwegian accommodation full time after the relevant date appears to me to be no more than the cost to him of living there for the majority of the time before the relevant date. The main reason for the defender having to provide accommodation for himself in Norway was because he was working in Norway not because he had to find alternative accommodation after the relevant date.

[45] There was, in fact, no evidence that the defender could not have continued to live in the matrimonial home after the relevant date. It might have been difficult and uncomfortable for both parties but the defender could have continued to reside there even though the pursuer was also residing there. It was the defender's choice not to continue to live in the matrimonial home after the relevant date. There was no exclusion order preventing him from doing so.

*The pursuer's rent free occupation of the matrimonial home*

[46] The fact that the pursuer continued to reside in the matrimonial home on her own after the relevant date was as much to do with the defender's choice as it was to do with the pursuer's choice. There is no requirement in law, absent an agreement between the parties,

for the pursuer to pay rent for the privilege of residing in a property of which she is a *pro indiviso* proprietor. For these reasons and for the reasons set out in paragraphs 44 and 45 above I am not persuaded that I should take any account of the fact that the pursuer has lived rent free in the matrimonial home since the relevant date.

*Payments to Kristopher out of the funds of IWR*

[47] In his evidence, which I accepted, Kristopher said that the cost of doing up a Subaru motor vehicle, which he had purchased after the relevant date was between £30,000 and £40,000. He said that the majority of that, probably £20,000 to £30,000, came from the defender. He said that the defender seemed to be “quite loose” with money after his parents separated. He had received a lot of money from him but had not heard from him since 2016. I have already referred to the defender’s attitude to instructing transactions with IWR’s funds without recourse to the pursuer. I have come to the view that the transfers to Kristopher out of the funds of IWR and amounting to £34,542 (as recorded at page 5 of production 6/9/5 of process) in the period from May 2014 to May 2016 were effected by the defender without the agreement of the pursuer. That being the case they have to be seen as gifts or advances by the defender to Kristopher. For that reason no part of those transfers ought to have been ascribed to the pursuer in IWR’s books.

*Kvaerner pension*

[48] The pursuer seeks transfer of the defender’s Kvaerner pension but that might only have been appropriate if the amount that I found due to the pursuer from the defender to give her a fair share of the net value of the matrimonial assets was of the order sought by the pursuer. In the event, there is no need for such a transfer.

*Withdrawals from the joint Clydesdale Bank account ending 940 post relevant date.*

[49] After the relevant date there were both deposits into and withdrawals from the joint Clydesdale Bank Account ending 940. In due course all of the funds were withdrawn. I have found it impossible to determine with any degree of accuracy to what extent the balance at credit of the account as at the relevant date was withdrawn by each of the parties individually. I am prepared to take the pursuer's analysis which is found at 5/11/9 of process as the starting point. However, it requires to be adjusted, firstly to properly reflect the withdrawals totalling £26,000 in respect of the purchase price of the Range Rover and secondly to properly acknowledge (as I think parties accept) that the payments into the account derived from payments from IWR which were allocated equally between the parties in the books of the company. I have explained elsewhere how the issue of the Range Rover falls to be dealt with. If one strips out the purchase price of the Range Rover the defender can be seen to have withdrawn a total of £58,759.03. He also withdrew one half of the purchase price of the Range Rover in the sum of £13,000 but on the other hand he contributed one half of the funds deriving from IWR in the sum of £23,000. The net position is that he withdrew the sum of £48,759.03 of the sum at credit of the account as at the relevant date. This means that, including her share of the price of the Range Rover in the sum of £13,000, the pursuer withdrew the sum of £27,604.97 of the sum at credit of the account as at the relevant date. These are the figures that I have employed in my calculations.

*The defender's legal fees*

[50] The pursuer claims that she should be awarded the sum of £1,750 over and above an equal sharing of the net value of the matrimonial assets to compensate her for the fact that the defender withdrew a total of £3,500 from the joint Clydesdale Bank Account ending 940 to pay towards his legal fees. These withdrawals are included in the spreadsheet at 5/11/9 of process (which is referred to in the immediately preceding paragraph) and I therefore decline to make this further award on the basis that to make such an award would involve double counting.

*The defender's American Express card account*

[51] The defender confirmed in evidence that he had an American Express card as at the relevant date but that this was to do with SWP. He also confirmed that the card was mainly used for business travel purposes. It is a reasonable inference that the spending on this card would have been accounted for in the books and accounts of the company and will thus have been reflected in the value of that company as at the relevant date. For this reason I have not taken any account of the debit balance on this account as at the relevant date.

*The defender's Bank of Scotland credit card account*

[52] As at the relevant date the defender had a Bank of Scotland credit card account with a debit balance of £6,282.19. In evidence, the defender testified that this account was used for expenditure on furniture, his son, his daughter, a flat, his son's car and food, including for stocking up the fridge, purchased from Spar and Iceland. In his pleadings he confirms that this account was sometimes used for business expenditure. Again, it is a reasonable inference that the business expenditure would have been accounted for in the accounts of

one or other of the two limited companies in which the defender had an interest and will thus have been reflected in the valuations of those companies as at the relevant date. If one looks at the credit card statement 6/1/17 of process one can see that there are several expenses incurred in Stavanger, including taxi fares. Some or all of that expenditure may have been for business purposes. It is not possible to say how much. But, whatever the position, production 6/9/8 relating to the Loan Account in IWR shows that sums reimbursed to cover credit card spending was allocated to the parties equally. This was all bound up in the dividend declaration that has already been discussed. In these circumstances I have left the debit balance on this credit card account out of account.

*Repayment of the mortgage over the matrimonial home*

[53] Although it did not appear to be in dispute I should nonetheless explain the redemption of the mortgage over the matrimonial home. The final mortgage redemption statement (number 6/2/4 of process) confirmed that the amount required to redeem the mortgage was £11,802.58. This was paid out of the defender's savings account with Barclays which was tied to the mortgage account. The evidence was that the mortgage was otherwise paid out of the joint Clydesdale Bank account ending 940. In my calculations I have therefore shown the pursuer as having settled the mortgage to the extent of £9,662.21 and the defender as having settled it to the extent of £21,464.79.

**Ancillary Orders**

[54] I have made ancillary orders. The defender's crave 10 is in the following terms:

“To make any ancillary order necessary to give effect to the principles of Section 9 of the Family Law (Scotland) Act 1985”

The defender's crave 11, allowed to be added by amendment in December 2020, is in the following terms:

"To make an ancillary order ordaining the pursuer to withdraw her notice of 11 June 2019 requiring that Intervention Well Resources Ltd instruct an external audit"

Her plea in law number 6, allowed to be added by amendment at the same time, is in the following terms:

"The ancillary order being justified with regard to the section 9 principles and reasonable having regard to the parties' resources should be granted as craved"

The parties ultimately agreed matters relating to the audit of IWR by way of the joint minute number 39 of process and crave 11 became redundant. Plea in law 6 remains on the record but I assume that it was intended to relate to crave 11 rather than to crave 10, which otherwise has no related plea in law. I have made the ancillary orders notwithstanding the absence of a plea in law. It will very often be the case, as here, that parties will be unable to predict what ancillary orders will be seen by the court as being necessary to give effect to the section 9 principles and thus impossible for the parties to frame appropriate craves and pleas in law. In *Murdoch v Murdoch* the court opined:

"..... we are not required to decide whether an order for payment such as that made in this case would be competent as an ancillary order under sec 14(2)(k) in the absence of a crave at the instance of either party to that effect. We are, however, inclined to the view that such an order would be competent."

On the basis of the indication given in *Murdoch v Murdoch* I consider that such ancillary orders are competent in the absence of any crave and, consequently, in the absence of any supporting plea in law at all. I am satisfied that the ancillary orders that I have made are competent.

**Periodical allowance**

[55] The pursuer seeks an award of periodical allowance. I have to decide whether it is reasonable to make an award of periodical allowance to enable the pursuer to adjust to the loss of the defender's financial support on divorce, having regard to the factors set out in section 11(4) of the 1985 Act.

[56] In terms of paragraph (a) of that subsection it is relevant to note that the pursuer was age 57 at the commencement of the proof and would now be at least 58 years of age. She is in poor health. Her earning capacity is modest. Her monthly income, including PIP is in the region of £2,200 and no more than £2,600.

[57] In terms of paragraph (b) of the subsection the pursuer has been dependent to a substantial degree on the financial support of the defender both during the marriage and since the relevant date. She has been in receipt of interim aliment of £1,900 per month since April 2019.

[58] In terms of paragraph (c) of the subsection there was no evidence that the pursuer intends to undertake a course of education or training.

[59] In terms of paragraph (d) of the subsection I have taken note of the needs and resources of the parties;

(a) In addition to normal living costs the pursuer has maintenance costs for a large house and an obligation to pay substantial sums in legal fees. She has income as stated at paragraph [56] above. She is in receipt of interim aliment from the defender of £1,900 per month. She has an ISA with a value of £13,498. Apart from this and her NHS pension and SERPS she has expended all of the liquid matrimonial assets that were in her name as at the relevant date. After the relevant date she has incurred debts to family members and others amounting to nearly £101,000.

(b) In addition to normal living costs the defender requires to pay rent for living accommodation. He supports his Thai girlfriend and her daughter. He is in bad health. He will probably require to pay for medical treatment. His ability to work, and thus his ability to earn a living, is curtailed. He has substantial amounts invested in pension policies and a sum equivalent to approximately £30,000 in bank accounts in Thailand. He may also have access to bank accounts in Norway.

[60] In looking at the pursuer's outlays it cannot escape notice that the pursuer is expending a sum of £3,000 per month towards her legal expenses in these proceedings. That is a very significant proportion of her income. Section 22 of the Family Law (Scotland) Act 1985 provides that the expenses incurred by a party in pursuing an action of divorce are not to be regarded as necessities for which the other person is liable. But, that is simply a provision which abolishes an old rule that the provider of legal services to a married person could recover those expenses directly from the other party to the marriage who owed the person a duty of aliment on the basis that the legal services were necessities. It does not detract from the fact that the pursuer is making those payments. It does not detract from the fact that the pursuer has been dependent to a substantial degree on the financial support of the defender in the form of interim aliment. I would not discount the payment of legal fees on account of section 22.

[61] Looking at all the other circumstances of the case in terms of paragraph (e) of subsection (4) there are three circumstances which, all else being equal, I would have taken into account in deciding the appropriate period for the payment of periodical allowance. The first is that these proceedings have been delayed for the best part of a year by the Covid pandemic. But for that, decree would have been granted by that much earlier and the pursuer would have been receiving periodical allowance (if awarded) rather than interim

aliment. The second is that the pursuer chooses to live in a house that is too big for her and, by reason of its age, not cheaply or easily maintainable. The pursuer could improve her financial position by selling the matrimonial home and moving to a smaller, more cheaply and more easily maintainable property. The third is that I consider it to be highly unlikely that the pursuer will continue to have the burden of legal expenses to the tune of £3,000 per month for anything like a period of three years following divorce, especially considering that she has been paying those expenses at that rate for some considerable period of time already. It would, of course, always be open to the pursuer to seek to renegotiate the amount of the monthly payments to her lawyers.

[62] In all of the circumstances and all else being equal, I would have awarded periodical allowance for the period of one year from the date of decree at the rate currently paid as interim aliment, namely at the rate of £1,900.

[63] However, I am making an order for payment of a capital sum of £38,153.34, a not inconsiderable sum. In addition to this the pursuer will receive a substantial amount from the liquidation of IWR. The pursuer accepts in submission that she will have no need for financial support once she has received her full entitlement from IWR, although I accept that this was against an expectation that she would receive a far higher capital sum than I am awarding. That notwithstanding, the pursuer will have capital of more than £500,000, leaving aside her SERPS and NHS pension, once she receives the capital sum that I have awarded. In the fullness of time, which need not be very long, she will receive a further substantial sum from the liquidation of IWR. She will meantime have in the region of £51,651 from her ISA and the capital sum immediately available to tide her over until then. That is equivalent to £1,900 for approximately 27 months. I would not expect the liquidation of IWR to take anything like that period of time. If it were to do so then that

might be indicative of one or other of the parties not doing his or her best to effect the liquidation as expeditiously as possible. That might raise issues of contempt of court, standing the order that I have made in regard to IWR. The pursuer's monthly outgoings will decrease dramatically once she is free of the burden of legal expenses and, as I have said, it is open to her, in any event, to seek to renegotiate these payments. Given that the defender's ability to earn a living is currently curtailed and that he might well require to fall back on capital for his outgoings I do not consider it to be unreasonable to expect the pursuer to do the same. In all of these circumstances I am of the view that the orders which I have otherwise made are sufficient to satisfy the requirements of section 8(2) of the 1985 Act and that there is no reason to award a periodical allowance to the pursuer.

#### **The current position with the Metlife bond**

[64] The pursuer has expressed concern about the delay in encashment of the Metlife bond, which is the subject of the joint minute number 39 of process. She has expressed concern that the defender may already have surreptitiously encashed the bond and utilised the proceeds for his own benefit. The defender, at the hearing on 19 May 2021, advised the court that the bond was still in existence but that the relevant documentation had been lost and that paperwork was circulating between the parties to address that issue. The pursuer suggested that I should delay issuing this judgment until it has been established whether or not her concerns are well founded. I do not see any merit in that suggestion, given that parties have already agreed that they will deal with IWR independently of this action. It is not clear to me what I could do in the context of this action to address such an issue beyond making the ancillary order that I have made.

**Expenses**

[65] Counsel requested that I reserve the question of expenses and I have done so. I have not as yet fixed a hearing on expenses. I am, of course, happy to hear parties on the issue if necessary before making a final decision but my inclination would be to find no expenses due to or by either party on the basis that there has been mixed success and that each party has been responsible for the need to have a proof by virtue of the stances which they adopted respectively. If parties are content to dispose of expenses on that basis then they should indicate that to the sheriff clerk as directed in the interlocutor and I will pronounce an order accordingly. If parties require a hearing such will be fixed.