SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 32

EDI-F1504-18

JUDGMENT OF SHERIFF ALISON STIRLING, Advocate

in the cause

X

Pursuer

against

X

Defender

Act: Hayhow, Advocate; Gibson Kerr
Alt: McAlpine, Advocate; SKO Family Law Specialists

Edinburgh, 15 October 2020

The sheriff, having resumed consideration of the cause:

FINDS THE FOLLOWING FACTS ADMITTED OR PROVED:

The family

[1] The pursuer resides at L Avenue. The defender resides at L Street.

[2] The parties were married in Scotland in 2003.

[3] There are two children of the marriage, Emily and Kate (not their real names).

[4] Since the date of the marriage, the defender has committed adultery with the paramour. The pursuer first learned of the defender's adultery when the defender left him in order to live with the paramour and pursue that relationship. That was on 27 April 2018. The parties have not lived together since. There is no prospect of reconciliation.

Assets and liabilities

[5] At the relevant date the matrimonial property comprised:

(a) the matrimonial home at L Avenue, held in joint names. The value of the matrimonial home at the relevant date was £575,000. It is burdened with two standard securities in favour of Coventry Building Society, for which the parties are jointly and severally liable. The current value of the matrimonial home is £625,000. The current outstanding mortgage is £256,085;

(b) the contents of the matrimonial home, valued at nil;

(c) the pursuer's pension with Hargreaves Lansdown HL Vantage SIPP account ending 1516 with a relevant date value of £20,597;

(d) the defender's pension with Legal & General with a Cash Equivalent Transfer Value at the relevant date of £6,747;

(e) each party's 42% shareholding in Company A3. At the relevant date the value of Company A3 was £653,000;

(f) the pursuer's 51% shareholding and the defender's 49% shareholding in Company A2. At the relevant date the value of Company A2 was £68,000;

(g) the pursuer's 49% shareholding and the defender's 51% shareholding in Company A1. At the relevant date and at the current date the value was nil;

(h) the pursuer's Jaguar XF with a relevant date value of £19,275;

(i) the defender's Mazda CX5 with a relevant date value of £12,825;

(j) the pursuer's number plate with a relevant date value of £600;

(k) the defender's number plate with a relevant date value of £526;

(l) the pursuer's Smile account ending 9944 with a relevant date balance of £1,136.23;

(m) the pursuer's HSBC account ending 2465 with a relevant date balance of £129.88;

(n) the defender's Smile account ending 4314 with a relevant date balance of £1,350.62;

(o) the defender's RBS account ending 9063 with a relevant date balance of £114.59;

(p) the defender's RBS account ending 9055 with a relevant date balance of nil;

[6] At the relevant date the matrimonial debts comprised:

(a) two mortgages over the matrimonial home with outstanding loan balances of £210,361.33 and £70,355.07;

(b) the pursuer's MBNA account ending 3985 with a relevant date debit balance of £17,146.33;

(c) the pursuer's American Express account ending 53004 with a relevant date debit balance of £7,156.28;

(d) the pursuer's Smile Visa account ending 3872 with a relevant date debit balance of £7,655.14;

(e) the debt to the pursuer's father of £12,000;

(f) the debt to Company A3 of £129,124.

[7] The following payments were made by the parties after the relevant date:

(a) direct debits totalling £554.97 taken from the pursuer's account on 30 April 2018 in respect of telephone, council tax, life insurance, gas and electricity bills incurred prior to the relevant date;

(b) £3,540 paid by the pursuer in respect of a boiler which was known by both parties to be faulty before the relevant date;

(c) mortgage payments of £41,114.13 for the period from April 2018 to September 2020 paid by the pursuer;

(d) costs of £7,741.60 on items required to maintain the matrimonial home including estate factor payments, building maintenance, life and critical illness cover in both parties' names, boiler checks, burglar alarm checks, roof maintenance and home maintenance for the period from May 2018 to September 2020 paid by the pursuer;

(e) director's loan interest of £7,483.69 incurred in the period from April 2018 to May 2020 and paid by the pursuer;

(f) loan interest of £900 on the loan to the pursuer's father incurred in the period from April 2018 to May 2020 and paid by the pursuer;

(g) fees paid by the pursuer to Private School 1 of £13,416.87 for the spring term 2019, £6409 for the summer term 2019, £8467.10 for the winter term 2019 and £17,091.91 for the spring term 2020;

(h) fees paid by the pursuer to Private School 1 of £712 for the violin for Emily and cello for Kate in April 2019 and £1,330 for the school laptop for Emily in August 2019;

(i) fees paid by the defender to Private School 1 of £13,143.82 for the winter term 2018 and £14,874.63 for the winter term 2019;

[8] In preparation for leaving the pursuer and moving in with the paramour, the defender spent £1450 towards the deposit and £1250 towards the rent of L Street, thereby reducing the value of the total matrimonial assets at the relevant date.

[9] On 28 April 2018 the defender met the pursuer and asked if she could continue to use his credit card. The pursuer agreed. The defender spent £3,772.87 on the pursuer's credit card. That was a loan, not a gift. It requires to be repaid.

[10] The value of Company A2 has decreased since the relevant date because the defender sold Company A1's client book, worth £51,000 at the relevant date, to her Company C1 for £10,000, rendering Company A1 unable to repay its loan to Company A2 in full.

[11] The pursuer's father lent the pursuer £6,000 on 7 October 2010 and a further £6,000 on 24 April 2015 at a rate of 3% interest per annum, with interest being payable in October each year. Interest payments were made as agreed. On 1 April 2020 the pursuer repaid both the loans and the accrued interest.

[12] Both the director's loan and the loan from the pursuer's father were used to fund marital expenditure.

[13] The parties are jointly and severally liable for the children's school fees and other costs in terms of their contract with Private School 1.

[14] The heritable creditor has offered to transfer the mortgage over L Avenue to the pursuer's sole name.

The companies (none of the names is real)

[15] Company A1 was originally a firm Mrs X & Associates, set up by the defender as a general accountancy practice in 2007. It was incorporated in 2010. The defender was the sole director of Company A1. The defender had a 51% shareholding and the pursuer had a 49% shareholding in Company A1. Company A1's client book was valued at £51,000 in November 2019.

[16] Company A2 was incorporated in 2010 to provide general practice accountancy services and to focus on special purpose vehicles. The defender was the sole director of Company A2. The pursuer had a 51% shareholding and the defender had a 49% shareholding in Company A2.

[17] Company A3 was incorporated in 2009 to provide financial modelling for renewable energy projects, for which the pursuer had expertise. The pursuer was the sole director of Company A3. The parties had shareholdings each of 42% and the remaining 16% of shares were owned by the pursuer's father.

[18] From November 2010 to May 2018 the pursuer was the sole director and employee of Company A3. The pursuer stopped undertaking chargeable work from Company A3 when the parties separated. He was not prepared to continue providing his own services and expertise at a sub-market rate, given the defender had a 42% share in the company. In May 2018 he set up Company B and provided his services through that company. No contracts were assigned or transferred from Company A3 to Company B. The pursuer was solely responsible for generating new work for both companies. These are his only sources of income. The core offering of both companies is financial modelling and advisory support services to standalone projects within the renewable energy sector. Until 2017 the pursuer was busy with projects coming from professional contacts, but since then the number of new mandates won and income from the core services had fallen. This is primarily due to the removal of key energy subsidies, which has resulted in a significant reduction in the number of new projects that require modelling and advisory support. The main form of subsidy, the Renewable Obligation, provided a subsidy to any project built within the timeframe. It was available to sites built by 31 March 2017. The main form of subsidy for smaller projects, the Feed in Tariff, remains in place and while it was not the subject of sudden change, it has

declined significantly over time. For a 5 megawatt wind farm it declined by over 90% since 2010. In the year ending 31 May 2017, 727 new wind and hydro generating stations were commissioned in Great Britain, but only 43 were commissioned in the year ending 31 May 2019. The latest subsidy, the Contract for Difference, involves an auction process whereby bids are received and only some of the applicants are successful. In the past 5 years there have only been three auctions. Onshore windfarms were eligible to apply only in the first auction, and 15 larger windfarms got the subsidy. By comparison thousands of renewable energy projects obtained the previous subsidies. Windfarms were not eligible to bid in the second and third auctions. The fourth auction is scheduled for mid-2021 and while onshore wind will be included, only a small number of larger wind farms are expected to be successful. Because the pursuer's reduction in income is due to structural changes in the sector, his income from these services will continue to decrease.

[19] Brokerage contracts are not part of the core services of Company A3 or Company B but since 2015 two of the pursuer's long standing clients asked him to act as their agent in connection with the sale of their shares in four wind farm companies. The pursuer had worked for the first client to raise bank finance and subordinated finance to build the first wind farm in 2011. He provided the same services to that client on two further projects. Unlike almost all the pursuer's other clients, these clients were true developers, investing with a view to selling the projects about two years after they had been built. Those clients then brought the agent to the pursuer to sell the wind farms. The clients proposed generous fee terms based on a percentage of the sale price. The value of the windfarms increased, to the advantage of the pursuer. The pursuer has no other clients like this. Most of his clients are farmers with a turbine on their land, who do not wish to sell the land, or community groups, whose aim is to build long term revenue for the future. These projects have now

been sold. Neither client has any further shareholdings in similar projects and the pursuer has no other similar developer clients. He is not a corporate finance specialist, he is not a Financial Conduct Authority approved person and neither is Company A3 or Company B, which limits the pursuer's activities in brokerage and also makes him less appealing to potential new clients. He had obtained the four brokerage contracts on the strength of his personal relationship with the syndicate despite not being as qualified for the role as others. It is extremely unlikely that he will secure any further brokerage contracts.

[20] Company A3 has accepted an offer to sell C Lane for £330,000 and the transaction is expected to settle in early October 2020. The proceeds of the sale net of sale costs of £8540 will be £321,460. In order to declare and pay a dividend, Company A3 will pay corporation tax of £17,377 due on the sale, corporation tax overdue since 1 March 2020 of £57,894 and the loan to Company B of £73,000. The cash available for distribution as dividends is £173,189. The parties will each receive £72,739 for their 42% shareholdings. The pursuer will require to pay at least £23,640 income tax on that, leaving him with net cash from the sale of £49,099.

[21] The value of Company A3 after distribution of the proceeds from the sale of C Lane will be £259,357. That includes heritable property at C Road, with a current net value of £104,946. The parties will be due £108,930 each representing their 42% shareholdings. This is likely to be distributed as dividends, on which the pursuer will incur income tax at 32.5% amounting to £35,402. The balance of the proceeds will be £73,528 but the pursuer will need to repay his loan of around £68,000 to Company A3 to allow dividends to be paid. The value of the pursuer's shareholding in Company A3 will then be £5,528.

[22] Company B declared a dividend of £525,000 on 29 February 2020. The dividend was declared because the pursuer required funds. He had paid over £96,000 in legal fees relating to these divorce proceedings, over £45,000 in school fees, had incurred around £11,000 of

interest on loan balances, and repaid over £60,000 of his loan to Company A3. That loan required to be repaid to make the dividend distribution from Company A3 agreed at the court hearing on 24 December 2019. The pursuer also repaid £30,000 of credit card debts and the £12,000 owed to his father. He paid his tax bill of £227,268. This is the same way in which the parties had funded most of their costs and living expenses since 2010, namely by accruing debt from the company throughout the year and clearing it using an annual dividend. Had he declared 50% of the dividend in the following tax year, the difference in tax payable would have been minimal.

[23] The defender has incorporated four companies since the relevant date: Company C1, Company C2, Company C3 and Company C4.

[24] Company C2 was incorporated in December 2018. It commenced trading in February 2020. It provides forensic accountancy and financial investigation services.

[25] Company C1 was incorporated in January 2019. Company C1 offers services only to small and micro businesses in Edinburgh. It started trading in September 2019. In December 2019 Company C1 paid Company A1 £10,000 for Company A1's client book. The defender was the director of both Company C1 and Company A1. She did not attempt to find any other buyer for the client book.

[26] Company C3 is a non-trading dormant company.

[27] Company C4 was incorporated in June 2020. It operates as a social enterprise on a not for profit basis to support local small businesses. It provides Company C1 and Company C2 with a business address and a meeting space.

Income and resources

[28] The pursuer's normal expenditure on ordinary living costs excluding school fees and legal fees was £70,372 for the year ending 31 May 2020. His projected normal expenditure for the following six years is £78,227. His projected income for those six years based on a salary of £12,000, equity release from Company A3 of £18,155 from the remaining £108,930 in Company A3 following the sale of C Lane, equity release from Company B of £5,089 and future net profits from Company B of £57,285 is £92,529. After payment of personal tax each year of £12,734 and repayment of the director's loan of £11,424 each year, the pursuer's forecast net income will be £68,371 for each year. After deducting his normal expenditure there will be a shortfall each year of £9,856 before school fees are considered.

[29] The pursuer has no capital resources from which school fees can be paid. His dividends from Company A3 following the sale of C Lane require to be used to pay the defender a capital sum and to pay legal fees.

[30] The defender is a fully qualified chartered accountant with nearly 20 years' experience. She has the potential to earn more as an employee in an accountancy firm than she has been earning since separation. She has not sought that work. She has chosen instead to run companies. They are not profitable.

[31] The defender has operated Company A1 and Company A2 since the relevant date, but both are being wound up and Company A1 is apparently unable to pay its debts. Company A2 has only one client, who is billed at £650 a month.

[32] Company C1 made a loss of £24,363 in the period from incorporation in January 2019 to 31 August 2020. In that 20 month period Company C1 generated income of £46,519 against a cost of sales of £56,315 and with administrative expenses of £20,281.

[33] Company C2 made a net profit of £1,267 in the period from incorporation in January 2019 to 31 August 2020. In that 20 month period Company C2 generated income of £6,250, with administrative expenses of £4,686. The income generated came from two clients.

[34] The defender's salaried income is approximately £11,600 a year. In the year ending March 2020 she received dividend income of £132,000 from Company A3. She is likely to receive a dividend of £72,739 on the sale of C Lane. Her likely income from Company A3 in future will be £18,115 for each of the six years from 1 June 2020 based on equity release from Company A3. Tax may be payable.

[35] The defender's normal annual expenditure on rent, household expenses, car expenses and personal expenses is £19,549.60.

[36] The defender cannot pay Private School 1 fees from her own income. She used an inheritance of £7,567.76 which she received in June 2018 to pay school fees. The defender's mother paid the school fees of £13,143.82 for the autumn term 2018. The defender repaid her mother in full by April 2019 on receipt of a dividend. The defender's mother lent the defender a further £10,000 which the defender's mother paid directly to Private School 1 directly in August 2020 in respect of outstanding fees from the summer term 2020 to allow the children to return to Private School 1 at the start of the academic year 2020 - 2021. The defender raised the remaining £4,000 for the summer term 2020 by borrowing from her businesses. The fees for the autumn term 2020 have not yet been paid.

[37] The defender has no capital resources from which school fees can be paid other than the dividend £72,739 expected to be received from Company A3 following the sale of C Lane and her divorce settlement.

[38] Each party has incurred legal costs of around £100,000.

Cost of school fees

[39] Emily is currently in Year 4 at Private School 1, and if she is to remain there she will require fees to be paid for four more years until she finishes Upper 6.

[40] Kate is currently in Year 2, and would have six more years at Private School 1.

[41] Private School 1 fees generally increase each year by about 5.4%. In light of the Covid 19 pandemic Private School 1 has set the fees for the year 2020 - 2021 at the same level as in 2019 - 2020. The fees for the academic year 2020 - 2021 are £29,925 for children in Year 3 and upwards and £17,310 for children in the lower years. If the children are to remain at Private School 1, the fees for each of them will be £29,925 excluding any inflationary increase. Private School 1 offers a sibling discount of 5% for the second child.

[42] Both children have music lessons at a cost of £26 a lesson for each instrument, ten lessons a term for three terms. Emily plays three instruments, but she has a music scholarship and the parties only pay for one. Kate plays two instruments.

[43] The cost of fees and music lessons for both children to attend for the academic year 2020 - 2021 are £48,710. Assuming inflationary increases of 5.4% each year the costs will be £63,982 in 2021 - 2022 because Kate will be in Year 3, £67,449 in 2022 - 2023, £71,103 in 2023 - 2024, £38,883 in 2024 - 2025 because Emily will have left school, and £40,990 in £2025 - 2026. The fees do not include the cost of school trips or uniforms.

[44] If the pursuer were to be solely liable for the Private School 1 fees of £48,710 for the current academic year, Company B would need to generate an additional profit of £89,089. This would be subject to corporation tax of £16,927 and income tax at 32.5% of £23,453. The additional profit required for subsequent years is £117,023 for 2021 - 2022, £123,363 for 2022 - 2023, £130,047 for 2023 - 2024, £71,117 for 2024 - 2025 and £74,970 for 2025 - 2026.

[45] The parties do not have the income or resources to be able to fund the children's attendance at Private School 1.

The dispute over education

[46] The pursuer sought to discuss the affordability of Private School 1 school fees with the defender in the summer of 2018. The defender refused to do so. Fees were paid late from 2018 onwards. In November and December 2019 the pursuer sought to discuss moving the children to less expensive private schools with the defender but she refused. Following the November 2019 request, the defender collected the children from school and told them that they would not have to move.

[47] The pursuer was concerned that he would not be able to pay the school fees. He sought permission from the court for the children to sit entrance exams for less expensive private schools with a view to their starting their new schools in August 2020. Starting the new schools in August 2020 would have allowed Emily to start the National 5 curriculum and would have meant that her preparation for the National 5 exams would not be interrupted, as opposed to starting the GCSE curriculum at Private School 1 in the autumn term. It would have allowed Kate to start at the beginning of S1, when there is traditionally a large intake for schools. Both children required to sit entrance exams before places would be offered. The fees at these schools were less than half the fees at Private School 1. The defender opposed the pursuer's requests to have the children sit entrance exams for Private School 2, Private School 3 and Private School 4. She refused the pursuer's proposal to make a joint application for a bursary to Private School 1. Following the discharge of the April 2020 proof, the defender refused the pursuer's proposal of arbitration which would have allowed the matter of the children's education to be determined before the start of the

academic year. She opposed the pursuer's attempts to make arrangements for the children to attend state schools. Her actions have resulted in a situation whereby the children are unable to attend Private School 2, 3 or 4 and will require to move schools during the academic year.

[48] The defender now agrees that applications should be made to Private School 1 for bursaries. She now agrees to the children sitting exams at the Private School 2, 3 or 4.

[49] Even if the parties were able to afford the fees for two more years at Private School 1, it would not be in the children's best interests to remain there in the hope that bursaries could be obtained or entrance exams sat at less expensive private schools. That would necessitate Emily sitting GCSE's in the English system in the summer of 2022 and starting at a new school in August 2022 and having to catch up with the Scottish syllabus in time to sit her prelims in early 2023 with her Highers in the summer of 2023.

[50] The uncertainty about the children's future schooling has been a source of anxiety for them for almost a year. The parties have been unable to resolve the issue of their children's education to date. If the matter is not decided definitively now, it is likely that the disputes will continue to the detriment of the children.

The children

[51] The parties share the care of the children. The children reside with the pursuer from Sundays until Wednesdays and every alternate Saturday, and with the defender at other times. Holidays are split between the parties on an ad hoc basis.

[52] Emily is academically very able. She has just started her GCSE courses, taking subjects in English language and literature, maths, biology, chemistry, physics, Chinese, economics, music and PE studies. If she were to remain at Private School 1 her mock exams

would be in February 2022 and her final GCSE exams in May 2022. She received the music exhibition award at Private School 1 in recognition of her musical abilities and participation in violin, singing and piano. She is an all round sportswoman and is particularly talented in hockey. Emily is very happy at Private School 1 and would like to board there. Emily feels part of the Private School 1 community. Private School 1 has provided stability for Emily throughout the two years since the parties separated. She has found the separation and divorce proceedings very difficult emotionally.

[53] In January 2020 Emily saw "no harm" in sitting the exam for Private School 2 in case she required to move school and she preferred to do this than to have no "back up". She had a mild preference for staying at Private School 1 as opposed to returning to Private School 2. She had a strong preference to move to another private school rather than a state school, such as State School 2 or State School 1, which she described as a "big shift".

[54] Kate is very academic, sporty and musical. She is in the scholarship class, which would give her the opportunity of obtaining a scholarship in the senior school. She plays cello and piano. She has a good group of friends at school. She is mature, well-mannered and very organised. Kate is very happy at Private School 1. She has not sought out her form teacher to discuss the parties' separation.

[55] In January 2020 Kate had "nothing against" sitting the entrance exam for Private School 3 "as a backup plan" in case she could not remain at Private School 1. She thought it would be "good to do the entrance exam" to have Private School 3 as a second choice, as she would not like to go to State School 1 or State School 2.

[56] Both children very much want to stay at Private School 1. Both children find the prospect of transferring to a state school daunting.

[57] State School 1 is a good school. It is in the top 10% of Scottish schools for exam achievements. It offers extra-curricular activities including hockey and music. It offers trips, such as treks to South America for final year pupils. It is within walking distance of the matrimonial home.

[58] Emily will catch up quickly with the National 5 and Higher curriculum. She is keen on hockey and plays for a local club. She can continue playing hockey at the local club along with pupils from across the city if she leaves Private School 1. State School 1 offers hockey and has at least one other pupil in Emily's year who plays in the regional team.

[59] Kate is younger and does not face the issue of changing curriculums.

[60] It is in the children's best interests to start at State School 1 immediately after the October break 2020. That will allow Emily to change from the GCSE curriculum to the National 5 curriculum as soon as possible. It will allow Kate to join in with the many new pupils coming together at S1 stage at an early stage in the year when friendships are being made. It will allow the children to have certainty.

FINDS IN FACT AND LAW

1. This court has jurisdiction.

2. The marriage has broken down irretrievably as established by the defender's adultery with the paramour.

3. The parties separated on 27 April 2018, which is the relevant date in terms of the Family Law (Scotland) Act 1985.

4. There are special circumstances which justify a departure from the equal sharing of the matrimonial property in favour of the pursuer in terms of section 10(6) of the Family Law (Scotland) Act 1985.

5. Orders for transfer of the matrimonial home and the furniture and plenishings therein by the defender to the pursuer in return for a capital sum payable by the pursuer to the defender are justified by the principles set out in section 9(1)(a) of the Act and reasonable having regard to the pursuer's resources.

6. The orders sought regulating the payment of school fees are not reasonable having regard to the needs and resources of the parties, their earning capacities and all the circumstances of the case.

7. It is in the best interests of the children that they transfer from Private School 1 to State School 1 to enable them to start at State School 1 immediately after the October mid-term break 2020.

8. It is better for the children that orders regulating their school attendance are made than that none should be made.

9. There is no apprehended wrong requiring the protection of interdict.

THEREFORE:

1. sustains the pursuer's 1st, 2nd, 4th, 7th, 8th and 9th pleas in law and sustains in part the pursuer's 6th plea in law; sustains the defender's 1st and 2nd pleas in law in part; *quoad ultra* repels the parties' pleas in law;

2. divorces the defender from the pursuer;

3. orders the defender to transfer to the pursuer the defender's whole right, title and interest in and to the property known as L Avenue, and the furniture and plenishings therein; and ordains the defender to sign and deliver to the pursuer a valid disposition of her whole right, title and interest in and to the property known as L Avenue, within 28 days hereof, which failing dispenses with the signature of the disposition by the defender and

directs the sheriff clerk to sign the disposition or any other documentation necessary to effect transfer;

4. grants decree against the pursuer for payment to the defender of a capital sum of THIRTY THOUSAND SEVEN HUNDRED AND EIGHTY FOUR POUNDS AND EIGHT PENCE (£30,784.08) STERLING payable on the date of transfer of L Avenue, with interest thereon at the rate of eight per cent a year from the date on which the same falls due until payment;

5. makes a specific issue order directing that notice of termination of studies shall be given to Private School 1 forthwith in relation to the attendance there of the parties' children Emily and Kate; and directing that the children shall commence attendance at State School 1 for the furtherance of their secondary education when term resumes after the mid-term holiday in October 2020;

6. reserves the question of the expenses of the cause to a hearing on a date afterwards to be fixed.

NOTE

[1] This is a divorce action in which the main issues between the parties are the extent of the capital sum to be awarded to the defender and whether the parties' two children should continue to attend Private School 1.

[2] The action has a lengthy procedural history, with a series of contested hearings about where the children should go to school.

[3] On 24 December 2019 the court refused the pursuer's opposed motions to allow the children to sit the entrance exams for Private School 2 or Private School 3. On that date the pursuer gave an undertaking to the court that he would pay the fees for Private School 1 for

the next term but that he was not setting a precedent regarding payment of school fees. He also gave an undertaking that Company A3 would issue a dividend to the defender of £30,000 on or before 30 March 2020, following which the defender dropped her motion for payment of the school fees and aliment of £1,300 a month. On 14 January 2020 the court refused the pursuer's motion for Emily to sit the entrance exam for Private School 2 and Kate to sit the exam for Private School 3 in January 2020. On 31 January 2020 the court refused the pursuer's opposed motion to allow the children to sit the entrance exams for Private School 4 on 3 February 2020. On 24 March 2020 the five day proof set down for 27 April 2020 was discharged in light of the Covid pandemic. On 5 August 2020 the pursuer gave an undertaking that the children would not be taken to State School 1 pending the determination of the defender's opposed motion to interdict him from doing so. On 12 August 2020 the court granted the defender's opposed motion and interdicted the pursuer *ad interim* from removing the children from the school roll at Private School 1 and from taking any steps whatsoever to enrol the children at State School 1.

[4] The cause called before me for proof on 28 September 2020 and the four following days. The pursuer gave evidence himself and led Greig W Rowand, Chartered Accountant, as an expert witness. The pursuer also relied on his own affidavits, the affidavit of his father and the affidavit of Calum McLennan, private investigator (number 5/6 of process). The defender gave evidence and led Iain D C Webster, Chartered Accountant, as an expert witness. She relied on her own affidavit and affidavits from her mother and from two teachers at Private School 1. Parties had also entered into a joint minute of admissions. I also had available to me a report from Marion Foy, the curator ad litem appointed to the children on 12 August 2020. On 2 October 2020 having heard submissions I made avizandum.

[5] During the course of the proof the children had asked to board at Private School 1, rather than spend half of the week with each parent while they were litigating against each other.

[6] Having heard all the evidence it seemed to me that the children might have to leave Private School 1 and continue their education at State School 1 for financial reasons. If that were to happen, then preliminary steps required to be taken with each school on a provisional basis to allow any transfer to take place at the start of the half term following the October break and for the transfer to be as smooth as possible. An early start date would be required to allow the older child as much time as possible to catch up with the transfer from the English system of GCSEs to the Scottish system of National 5s. Having raised the matter with counsel, I appointed the pursuer alone to be responsible for contacting the schools, standing the evidence I had heard about the defender's lack of cooperation with applications for bursaries and entrance exams, and I recalled the interim interdict granted on 12 August 2020. This is in the children's best interests. It is also in their best interests to be told now what might have to happen. Again, having regard to the evidence I heard about the defender's response to previous developments, whereby she pre-empted a discussion the pursuer was going to have with the children by removing them from school in November 2019, I took steps to try and make sure that the pursuer was the person who spoke to the children first. Parties reached agreement that he would collect the children from school the following day and tell them, and that the defender would not discuss it with them in advance. I did not consider it appropriate to ask the curator to do this, standing the terms of her report in which she appears to have prejudged the financial issues and concluded that the pursuer is able to pay the fees. I recalled her appointment having regard to the stage of the proceedings.

Submissions

Pursuer's submissions

[7] Counsel for the pursuer spoke to his written submissions and his proposed division of the matrimonial property. He invited me to grant decree of divorce, order the transfer of the matrimonial home to the pursuer, make a specific issue ordering that the children should leave Private School 1 and attend State School 1, and find the defender entitled to payment of a capital sum of £30,130.

[8] Counsel submitted that decree of divorce should be granted having regard to the pursuer's affidavit para 2 and the affidavit of Calum McLennan.

[9] Having regard to the law on financial provision, Counsel referred to the Family Law (Scotland) Act 1985 sections 8, 9, 10, 27. He referred to *Little* v *Little* 1990 SLT 785 at pp786L-787C, *Whittome* v *Whittome* (No 1) 1994 SLT 114 at p126, *Jacques* v *Jacques* 1997 SC (HL) 20 per Lord Jauncey at 22 paras 2 and 3 and Lord Clyde at 24 paras 2 and 3, and *Watt* v *Watt* 2009 FamLR 62 at para 160 and in the commentary by Ms Dowdalls. Both parties agreed that a fair division would be achieved by an equal sharing of the matrimonial property, but the pursuer argued that special circumstances existed arising out of the sale of the Company A1 client book to the defender's new firm at undervalue and the defender's use during the marriage of matrimonial funds to pay rent and deposit for her post separation flat she shared with her boyfriend.

[10] Regarding the issue of the schools, Counsel referred to the Children (Scotland) Act 1995, section 11. He referred to the paramountcy of the children's welfare, to the no order principle and to the requirement to have regard to the children's views. If court were to decide that the children could remain at Private School 1, it would be necessary to

consider how the fees should be paid. That is an alimentary issue, for which the court retains responsibility in terms of the Child Support Act 1991 section 8(7)(a). The rules applicable to decisions about school fees were those governing the payment of aliment between parents and children generally, as set out in section 4 of the 1985 Act. The parties' respective needs and resources, their earning capacities and the whole circumstances of the case required to be considered. There was no order of liability between two or more persons owing an obligation of aliment.

[11] Counsel then considered the curator's report. He accepted the curator's findings that the children are old enough and mature enough to have views about their schooling, that they have views and that they would much prefer to remain at Private School 1 if it could be afforded. He submitted that the weight to be attached to children's views was very limited because they did not have the information or the wider perspective necessary to be able to decide which school to attend. In particular they did not appreciate that continued attendance at Private School 1 would necessitate the sale of their home. The pursuer had not discussed this with the children because he did not want to make them anxious.

[12] Counsel submitted that all that could properly be taken from the curator's report was her recording of the children's views, and the rest of the report should be rejected. The curator had expressed further views in the report but these exceeded her remit. In terms of the interlocutor of 12 August 2020 appointing her, her role was to take and comment on the views of the children and consider how best to safeguard their interests. Instead she had adjudicated on the issues in dispute between the parties as to finances when she was not in a position to do so, and furthermore she had entirely misunderstood the pursuer's position and misrepresented it in several important respects. She had not understood that in seeking the authority of the court for the children to sit entrance exams for Private School 2, Private

School 3 and Private School 4 in December and January, the pursuer was not seeking their immediate removal but rather their transfer 9 months later when their education would suffer the least disruption. Nor was the pursuer prevented from preparing his case for proof (originally expected to take place before the start of the academic year) by establishing that places existed at state schools, that being a central issue between the parties. He had a legal obligation to educate the children, there were arrears of fees to Private School 1 preventing their return in September 2020 and he was correct to have enrolled them at State School 1. The pursuer had been entitled to apply for places at a state school and the curator's description that his explanation "stretches credulity" displayed a failure of understanding of the chronology of events, or of the whole background or both: the interlocutors prevented him applying to private schools to have the children sit entrance tests. Tests are not required for state schools. She had also sought to judge the central issue in the proof on the basis of some financial documents she had seen. In her report she had come close to usurping the function of the court at proof, particularly in relation to credibility and reliability. Reference was made to pages 16, 29 and 30 of her report.

[13] Counsel invited me to accept the pursuer's evidence in his entirety. He gave his evidence in a manner which was conspicuously fair, balanced and measured. He did not assume that the defender was lying about the existence of her director's loan to Company A1, saying that she might be mistaken. He conceded points against his own interest, accepting that the pastoral care at Private School 1 was good and that it had helped the children after the separation. His evidence was thoughtful and considered, and his position as to future income was justified by objective independent evidence.

[14] Mr Rowand gave his evidence honestly and straightforwardly, restricting it to areas in which he had the necessary expertise, and his evidence should be preferred to that of Mr Webster.

[15] The defender was not a reliable witness. The pursuer's evidence should be preferred in all cases where there was a factual dispute. Her evidence was tainted by her antipathy towards the pursuer. In cross-examination she claimed that she could not say that the pursuer loved the children. She rejected the possibility that the pursuer could be motivated by the best interests of the children. She had refused the pursuer's proposals for arbitration as a means of resolving the school fees issue which would have allowed the matter to be decided before the commencement of the academic year. She had irrationally refused to allow a joint application in 2019 to Private School 1 for a bursary to see if the fees issue could be resolved that way, claiming that the offer was made in bad faith as a trap for her in the litigation. She accepted in cross examination that a bursary application might now be successful based on hardship to the children arising from the divorce. She had deprived the children of the option of bursary funding, and this was not in their best interests. Her opposition to the children sitting tests for Private School 2, 3 or 4 was similarly irrational and detrimental to the best interests of the children as it removed the option for the children to be educated at less expensive private schools. She rejected the pursuer's financial position. She declared that she did not believe the pursuer would obtemper any award of school fees made against him. His vouching "represented nothing that is real". She said he had deliberately manipulated his finances in a complex "course of conduct" over many months to deprive himself of liquid funds and to show he could not pay school fees. She believed the notice to quit from Company A3 to Company A1 and Company A2 was motivated by the pursuer's desire to cause her difficulties, notwithstanding the letter sent setting out

reasons which she had to accept were valid. Where the extensive financial evidence produced by the pursuer did not fit with her goal, she rejected it as rigged by him to achieve his ends, and yet expected her own position to be accepted without objective justification or vouching. Throughout the litigation the defender had reacted to everything with opposition, and often attributing malign motives to the pursuer. She thought she was right and had never opened her mind to any alternative. She had blinded herself to the possibility that the pursuer has the best interests of the children at heart and might be right.

[16] Mr Webster was a wholly unsatisfactory witness and his evidence should be rejected in its entirety. He had given evidence in *Watt* v *Watt* and had been criticised for lacking the necessary independence, having made assertions without checking facts, expressing views beyond his area of expertise and acting as an advocate for his client, resulting in his evidence being rejected by Lady Smith. He had fallen into the same errors in this proof. He had erred by valuing Company A3, Company A2 and Company A1 on the basis of his understanding of the specific proposed arrangements for the transfer of shareholdings in those firms between the parties rather than carrying out a valuation on the basis of a notional sale. His initial valuation of Company A3 had wrongly included the whole net asset value of Company B and was motivated by a desire to improve the price which might be paid to the defender on transfer to the pursuer, which the pursuer had sought at the time of the first report. His justification for the subsequent removal of the Company B assets was illogical: if litigation were required, it would have been required at either date. His failure to comment on the transfer from Company A1 to the defender's new company, Company C1, of the Company A1 client book at a price substantially below the market value was a significant omission. He initially suggested that he knew nothing of the sale when he completed his second report, but eventually accepted that he had had information which

would have allowed him to comment prior to its completion. He had no specialist knowledge or expertise from which he would be entitled to provide expert evidence as to the pursuer's future income prospects in the renewable energy field. The evidence he gave about there "not being any slowing down in the activity in the market" was explicitly contradicted by the very articles he produced in support of his proposition. He eventually accepted that he was not in a position to gainsay the pursuer's evidence as to his projected income. By offering evidence on that subject he had shown a complete lack of understanding of the difference between the objectivity and specialist knowledge required of an expert and the role of an advocate for one of the parties. He had no specialist knowledge or expertise which would equip him to comment on the pursuer's income and expenditure, and he had misunderstood the nature of the productions to which he referred in his attempt to do so. His second report contained arithmetical and computational errors, and was the vehicle for conjecture and advocacy in support of the defender's position in numerous areas.

[17] The nature and value of the whole matrimonial property at the relevant date was agreed with the exception of whether the pursuer owed his father £12,000 and whether the defender owed a director's loan to Company A1 and if so, how much. Counsel made oral submissions on the loan to the father with reference to the father's affidavit and to the defender's evidence. As regards the alleged Company A1 director's loan, the evidence as to its existence and amount was entirely unsatisfactory. The defender had produced a single page of accounts for Company A1 (6/9/20) which did not vouch the existence of a loan, and the note did not explain it. Mr Webster's evidence of a loan cannot be relied on.

Mr Rowand appeared to have been provided with an analysis of transactions on the director's loan account and used a figure of £40,827 corresponding to the figure on

production 6/9/43, but he could not say what the adjustments referred to and he could not recall how he came to the view expressed in his report. Production 6/9/43 is virtually illegible. It has no opening or closing balance. It is not in chronological order. It is insufficient to establish whether any sum was due or how much. The defender offered no explanation of the purpose of the loan, such as a car or a holiday, and when it was taken and in what instalments. The evidence was insufficient to allow a finding that there was a loan outstanding at the relevant date.

[18] Counsel referred to his possible scheme of division. Various adjustments were proposed to the sum notionally due to the defender for an equal share. The defender should be allowed half the share of the increase in the matrimonial home post separation, the half share being £25,000. The pursuer should be reimbursed £3772.87 for the spending on his credit post separation by the defender, he having agreed she could use the card provided he was reimbursed. The pursuer should be reimbursed a half share of the costs of post separation maintenance of the matrimonial home including the mortgage. The mortgage payments were not aliment: the defender had not insisted on aliment, and she was sharing her living costs with her boyfriend. The defender had benefitted from his payment of the mortgage by sharing in the equity in the property which had increased due to his payments. Parties should be reimbursed half shares of their expenditure on school fees. Both the mortgage and the school fees were joint and several obligations. The pursuer should be credited with having paid for boiler repairs required before separation but paid for after separation. He needed the boiler to be repaired for the children and also to maintain the property and its value. Other bills were incurred before separation and there was no basis for the defender to avoid responsibility for them. The defender had used matrimonial funds to pay towards a deposit and rent for the flat she had rented in contemplation of and in

preparation for her new life with her boyfriend, and the pursuer should be reimbursed that sum. He should also be reimbursed his 49% share in the £41,000 underpayment by Company C1 for Company A1's client book. The defender had made no effort to maximise its value by advertising it for sale. She had produced no vouching that clients had been leaving the firm or to support the value of £10,000 she attributed to it. Even Mr Webster was not prepared to say that the price paid for it was the true price.

[19] Parties were agreed that if there were sufficient funds from income and resources to keep the children at Private School 1 until the end of their secondary education, that should be done. There were none. The pursuer's income forecasts depended significantly on his analysis of the market for the accountancy services he provides in the renewable energy sector. He has acknowledged expertise in this niche area. The highest value work which he had had (brokerage) was generated by his personal relationship with certain individuals who had no future projects. He had prepared detailed forecasts and produced vouching showing the reduction in his work stream since 2015, his income forecast from Company A3 and Company B, his anticipated disposable income from employment, and the shortfall in his anticipated income measured against the school fees required each year until Kate completed her education. All but £2,160 of his income had been expended as at 16 September 2020. He has no savings. Both the defender and Mr Webster recognised that they did not have the necessary expertise to comment on the level of his projected income. His income is insufficient to allow the pursuer to pay Private School 1 fees.

[20] His other foreseeable resources were in the release of value in Company A3 to the parties. The pursuer regarded Company A3 as insolvent as it was unable to pay its debts as they fell due. He considered that he had no right to declare and pay a dividend before paying Company A3's creditors. His tax advisors advised him that corporation tax was due

and should be repaid. He followed that advice. This was prudent and responsible corporate management. The defender's position involved Company A3 ignoring its obligation to pay its creditors, HMRC and Company B. Mr Webster considered that the tax bill could be ignored but that Company B should be paid. The defender's view was that £127,000 could be paid as a dividend to her if the creditors were ignored, but no computation of this was provided by her. It was not clear how the pursuer would obtain payment of that dividend, though she suggested it might be applied to his loan account. Her proposal ignored the pursuer's statutory responsibilities as a director. In any event that sum would not meet the fees of Private School 1.

[21] The defender had no future income or resources to pay the school fees. She currently earns about £11,600 a year. She claims to be able to earn £100,000 - £200,000 a year with an accountancy firm, but has not done so. She operated Company A1 and Company A2 since the relevant date, but both are being wound up and Company A1 is apparently unable to pay its debts. Of her new companies, Company C1 is loss making and Company C2 made £6,000 in 20 months. Her forecasts as to her future income are not vouched. As an accountant herself, one would have expected that she could have produced management accounts, bank statements and ledgers, all of which ought to be readily available and the like but there was nothing. The court should be very slow to accept she would ever be in a position to contribute to the costs of school fees from income. Her proposals to "contribute" to fees were unspecific and meaningless.

[22] The court could not be satisfied that the parties can meet the school fees. The children have to leave Private School 1. Their options have been limited by the defender's refusal to apply for a bursary and by her refusal to allow the children to sit tests for Private Schools 2, 3 and 4. The remaining option is State School 1, which is an excellent school. The

children are likely to adapt and thrive quickly. The defender's proposal that the children should remain at Private School 1 for a further two years was the worst of all worlds. It would foster uncertainty and cause further anxiety. Emily might require to change from GCSEs under the English system to the Scottish system. It will almost inevitably lead to future disagreement and litigation, causing emotional turmoil and expense. In any event it cannot be afforded.

Defender's submissions

[23] Counsel for the defender spoke to his written submissions and his proposed division of the matrimonial property. He invited me to make an order for payment of a capital sum of £107,090.90 to the defender, make a specific issue ordering that the children should attend Private School 1, interdict the pursuer from removing the children from Private School 1 and from taking steps to enrol them in any other school, and make an order regulating liability for the Private School 1 fees.

[24] The defender was both credible and reliable. She gave her evidence in a clear and straightforward manner. She explained the basis of her criticisms of the pursuer. The chronology of the litigation was important. I was invited to have regard to notes sheriffs Sheehan and Holligan had attached to various interlocutors and take these into account. They provided a factual record of events. There was a background to the criticism of the defender. The timing at which information was disclosed was important. In particular the pursuer's 17th and 18th inventories of productions were made available when he was taking steps regarding State School 1, Private School 1 fees were outstanding and there was an apparent change in behaviour associated with the size of the dividend declared in February 2020, the "massive" tax bill it generated, the early payment of that tax bill and then

the early payment of corporation tax shortly before a hearing. The defender was criticised for a lack of vouching of her future income, but she had explained that in a clear and cogent way. She had said that projections were just numbers on a page, anything could have been projected, she could have projected anything but had not done so. Standing Mr Webster's concession that he was not an expert in the provision of accountancy to the renewable sector, his opinion as to the pursuer's future income was not relied on. It was not accepted that Mr Webster lacked independence or was an advocate for the defender. The evidence in the affidavits from the defender's other three witnesses should be accepted.

[25] The majority of the matrimonial property had been agreed in the joint minute of admissions number 45 of process. The current value of the matrimonial home was agreed at £625,000. The loan of £12,000 from the pursuer's father was no longer disputed. The balance of the defender's Company A1 director's loan account remained in dispute. The defender had referred to this in her affidavit at para 7 and also from the witness box. For vouching reference was made to Mr Webster's first report, Mr Rowand's report and to production 6/9/43 where there was a figure of £40,827 which corresponded to the figure used by Mr Rowand. Although there was a discrepancy in the figures, neither expert questioned the existence of a loan. Although the defender said in evidence that £40,827 was more likely to be accurate, her affidavit gave a figure of £39,000 and this is the figure which should be used. The lower figure would also give the pursuer the benefit of the discrepancy between the two figures.

[26] Reference was made to the Family Law (Scotland) Act 1985, sections 8, 9, 10 and 27, and to *Little* v *Little* 1990 SLT 785 at p787B-D. The pursuer had not advanced a special circumstances argument on record, though evidence had been led and submissions made to that effect without objection. Counsel characterised the deductions sought by the pursuer in

respect of certain expenditure as being economic advantage and disadvantage arguments. During cross-examination the defender had conceded that it would be appropriate and fair for the pursuer to be credited with what was, in effect, her part of the joint obligation of the mortgage. The way that should be reflected was by crediting the pursuer with a balancing payment of £8,500 in respect of the mortgage. This figure was based, not on a refund of half the payments made by the pursuer, but with reference to the extent to which those payments had reduced the level of the mortgage since the relevant date. The defender had included the current day value of the matrimonial home in the schedule. The pursuer's claim for the boiler costs was rejected on the basis that no economic advantage arose, and in any event the pursuer's continued occupation of the property allowed him the benefit from this expenditure. No adjustment should be made for the deposit and rent for the defender's new flat because it provided accommodation for the children too. The £3,772 credit card figure should not be deducted, because there had been no agreement between the parties that this would be repaid and the defender's evidence on this should be preferred. The defender accepted that the various direct debits that had accrued prior to the relevant date should be shared. The post relevant date costs of £7,741 in respect of the matrimonial home should be rejected, as these were essentially his costs of living. There was nothing on record by the pursuer about the sale of the Company A1 client book to Company C1, but the evidence having been led without objection it was a matter for the court. The defender had acted in good faith and had not disadvantaged the pursuer. It did not amount to a special circumstance. After the relevant date things had moved on. Issues with Company B had affected the position of Company A3, and if the court were minded to penalise the defender in respect of Company A2 matters should be looked at in the round.

[27] Counsel referred to section 11 of the Children (Scotland) Act 1995. In support of the order sought he referred to the defender's evidence and affidavit, and the affidavits of the teachers and the defender's mother. He referred to the curator's report which contained the views of the children, and he invited me to attach significant weight to the curator's recommendations.

[28] The order for school fees was an award of aliment: sections 3(1)(b) ,4 and 5 of the 1985 Act. It could be varied by the court on a material change of circumstances. Reference was made to *Maclachlan* v *Maclachlan* 1998 SLT 693, but the decision there that school fees were a revenue expense did not apply in the present case because the defender was not seeking additional financial provision on divorce to meet the fees. *MacDonald* v *MacDonald* 1993 SCLR was distinguishable and not relied upon.

[29] The defender had set out in her affidavit at paras 104 - 105 the basis of her calculation of the school fees. The pursuer had produced no independent evidence to support the proposition that his earnings would drop substantially. His projections were based on other projections he had made. He was in control of the level of salary he set, and he set it low for tax purposes. He was the director of Company A3 and controlled how and when the second dividend would be distributed following the sale of C Lane. He was also the director of Company B and the extract forecast of its future net profits was simply a number on a page determined entirely by him and vouched by other documents prepared entirely by him. Although the pursuer was an accountant, the court should be wary about making findings in fact based on his professional opinion in his own case.

[30] The defender's resources and earning capacity also required to be considered, including capital. She had not prepared schedules or projections, as such documents are numbers on a page only and can be made to show different outcomes depending on the

information put into them. She expected to earn a good income in future and contribute to the school fees. Ultimately both parties expected to receive around £180,000 from Company A3. The pursuer's corporation tax figures were disputed by Mr Webster, as there would be section 455 refunds. The defender was prepared to use her share of Company A3 towards school fees if the pursuer was not made solely liable for them.

[31] If the full order for school fees was not made, then it should be made for a period of at least two years. That is in the best interests of the children and is supported by the curator. It was affordable. It would allow the older child to sit her GCSEs and the defender to apply for bursaries. The issue of transparency of finances could be dealt with then. If it was not financially viable the children's views could be taken and applications might be made to Private School 2, 3 or 4 or arrangements made for transfer to another school. Summary removal of the children now was the worst option for the children.

Response for the pursuer

[32] The question of resources arose if a capital sum in the region of £107,000 was made. Evidence had been led about foreseeable resources in the context of school fees. Resources could not be spent on both school fees and a capital sum. Reference was made to the resources in the pursuer's affidavit number 39 of process in paras 9 and 10. The pursuer had set out the use he expected to make of the anticipated dividend, and he could <u>just</u> afford to pay £30,000. He could not afford anything approaching £107,000. All he had was the house and a car and it was not appropriate to sell either to meet the claim.

[33] There were no pleadings about the Company A1 client book. It was not clear until 22 September 2020 with the receipt of the defender's affidavit and productions that it had

been sold at under value. It was plain on the evidence that there was an issue arising, and the evidence was not objected to.

Witnesses

[34] I have made findings in fact from each of the witnesses who gave evidence by affidavit.

The pursuer

[35] The pursuer is a 43 year old chartered accountant and a Member of the Institute of Chartered Accountants for England and Wales. He has been qualified for 15 years. He adopted his affidavits, numbers 5/13/1, 39 and 43 of process.

[36] The pursuer was an impressive witness. He had produced a considerable amount of information vouching his position. He had analysed his past income and expenditure, provided vouching for that, and made projections as to his likely future income and expenditure based on that. He had had the benefit of four very lucrative brokerage contracts in recent years, and he explained convincingly why it was extremely unlikely that he would have any more of these contracts. He explained the changes to the subsidy rules which again would affect his financial position.

[37] He had also prepared a projection for the school fees based on previous years' fees and historical increases. He had included music costs.

[38] Cross-examination was lengthy but did not undermine his evidence. He had not sought to avoid paying school fees by paying his income tax or by paying corporation tax months before the tax deadline: the tax bills would have been due in any event and he would have had to make provision for them. He would not have been paid interest on his

own current account or the company account due to the low rates of interest. Nor had he sought to avoid school fees by paying off the mortgage over C Lane in October 2018. That mortgage was coming to the end of its fixed rate period and moving onto a variable rate of about 7%. It made no financial sense to hold cash which would earn interest at the rate of about 0% when the mortgage could be paid off. C Lane was sold in October 2020 and the mortgage would have required to be repaid on sale in any event before the free proceeds were available. That money was not available for school fees.

[39] By paying interest on his directors loan to Company A3, he was not paying money to himself. The parties were shareholders of 42% each in Company A3 and the interest paid would be shared equally by the parties when a dividend was declared. His accountant had advised him that it was a prudent step in the management of Company A3 to pay the interest, as otherwise HMRC charged a fee.

[40] He had repaid loans due to Company A3 and Company B as prudent management of the companies in order to avoid higher rate corporation tax and personal charges, and also to allow a dividend agreed with the defender to be declared to pay for school fees and other costs incurred.

[41] It was suggested to him that as director of Company A3 larger dividends could be paid to the defender if not all the corporation tax or the debt to Company B was paid. He explained that that would amount to preferring the shareholders to the creditors and was not permitted. It was suggested to him that he should not have paid tax 9 months before the absolute deadline, but he explained that the tax would have been due in any event and could not be spent on school fees.

[42] The pursuer explained that his legal obligations precluded declaring a dividend while a company was insolvent, in other words when it could not pay debts which were

due. Company A3 owed corporation tax to HMRC and a loan to Company B, and as director of Company A3 he was not allowed to issue a dividend. Following the sale of C Lane by Company A3 the corporation tax due on the sale, the overdue corporation tax and the sum due to Company B required to be paid. In particular the latter two debts required to be paid before any dividend could be paid. To pay the dividends before paying the tax and the loan would be to prefer Company A3's shareholders to Company A3's creditors and was against the law.

[43] The pursuer had set up Company B after the parties separated because he was no longer to work for Company A3 on the same basis as before. He accepted that it would have been in Company A3's shareholders' interests for him to continue working for Company A3 at what was a submarket rate, but he was not prepared to do so. His responsibilities as director of Company A3 did not oblige him to work there. He had not removed any contracts from Company A3: it was his services which went through Company B.

[44] He admitted having made mistakes, volunteering that he had approached State School 2 about places when he had intended to approach State School 3.

[45] He did not take the opportunity to criticise the defender. When he was asked directly whether he thought the defender was lying to the court about the loan due to Company A1 of £39,000, he said that he did not think she would lie to the court, although she had lied to him. He thought she might simply be mistaken.

[46] Both Mr Rowand and Mr Webster accepted that the pursuer had expertise in the renewables market for the services provided by him via Company A3 and Company A2 and that he was a very capable and reputable operator.

[47] I do not think that the pursuer has manipulated the figures in an attempt to avoid paying Private School 1 fees. In contacting the Private School 2, 3 or 4 regarding exams and

in contacting the state schools thereafter I do not think that the pursuer was doing anything other than acting in the children's best interests. I accept his evidence that he was trying to create options for them pending proof. Sitting and passing the exams for private schools would not have committed them to attend. Nor would being offered places at state schools.

[48] I have no difficulty in accepting his evidence as credible and reliable. I preferred his evidence to that of the defender. I have made findings in fact based on his affidavits and his oral evidence.

The defender

[49] The defender is a fellow of the Institute of Chartered accountants for England and Wales.

[50] She adopted her affidavit number 35 of process.

[51] The defender was not an impressive witness. She admitted in cross-examination that there had been "a level of deception" surrounding the breakdown of the marriage because of her adultery. She is therefore someone who is prepared to lie in her own interests. There were inconsistencies within her own evidence. She was asked about whether it was fair to expect the pursuer subsidise the payments she made during the marriage to the deposit and rent on the flat she had obtained to further her relationship with her boyfriend as they were not costs connected to the parties' life together and she said "it was the only way I could leave that relationship … I was forced to incur it due to safety concerns before I could reveal I was leaving". I understood this to be a reference to domestic violence, and yet the defender met the pursuer the day after she had left him to request the continued use of his credit card. She also returned to the office at C Lane on the Monday. Both the meeting on the Saturday and the attendance at the office on the Monday appear inconsistent with a

suggestion that her safety was at risk. Her affidavit refers to the circumstances of her moving out but makes no reference to her safety (para 5). On several occasions she referred to the pursuer as "controlling", but that is inconsistent with her having a clandestine affair for some time of which he was completely unaware. Her evidence about the difficulty for Company A1 and Company A2 having to search for new premises conflicts with the ease with which she appears to have found accommodation to move into with her boyfriend without the pursuer even knowing.

[52] Cross-examination was prolonged by the defender's responses. Very few questions received a straightforward answer. She was extremely argumentative, fenced with questions and failed to concede matters which she should have conceded. Much time was taken up with para 9 of the pursuer's affidavit number 39 of process. She argued that the overdue corporation tax and debt to Company B did not need to be paid before the dividend was paid, and that this would allow a dividend of £127,000 to be paid to her. She was insistent that a dividend could be paid even when company debts were outstanding, and yet later accepted as accurate the guidance for directors of companies and accountants set out in the *Introduction to the Law on Dividends* produced by her own regulatory body (5/20/2 of process). That included a director's duty, before recommending or paying a dividend, to consider whether the company would, following the payment of the proposed dividend, be solvent and continue to be able to pay its debts as they fell due, the possibility of personal liability on the director if the company became insolvent after paying dividends, and the change in the director's duty from promoting the success of the company in the interests of the shareholders to a duty to consider or act in the interests of the creditors if the company was or was likely to be insolvent. Ultimately she conceded that if she were given a dividend of £127,000 as she suggested, then the second tranche of dividends in para 10 of the affidavit

would be reduced, the total amount she would get on the realisation of Company A3 would be £180,000 in any event and it was only a question of timing.

[53] The defender disputed at length the need for the pursuer to pay corporation tax in particular 9 months before the deadline. She appeared to suggest that the pursuer had embarked on a course of conduct to dissipate assets. She seemed to find it difficult to accept that if the corporation tax had not been paid in May 2020 then money would have had to be set aside to pay it in March 2021 and that it was not an asset that she could use for school fees. She did not accept that the pursuer was being prudent and presenting her with an accurate picture of the liabilities. She saw him as controlling the finances. She complained that she had not had full disclosure. The same issues arose with the pursuer's payment of personal tax and the repayment of the mortgage over C Lane in 2018. The defender said that the important point was not whether the mortgage was ever due to be repaid, but the spending in advance of court hearings. The mortgage could have been recovered from the sale of C Lane after the court hearings. She said the pursuer had acted as he did to support his argument against paying school fees. She thought the suggestion that the company had prudently reduced its monthly outgoings to meet the projected downturn in the forecast stretched credulity. She was asked if it was a conspiracy, and her response was that a conspiracy needed more than one person. She was asked if it was fraud, and she said that it was not: the pursuer had not done anything against the law.

[54] She criticised the pursuer's projections as just "numbers on a page" and said of the pursuer's 6 year budget prepared on the assumption that there would have been an earlier distribution to Company A3 shareholders following the sale of C Lane (number 5/19/17 of process) that "it represents nothing that is real". Her own documentation was scant and unvouched. She relied on production 6/9/43, a barely legible document lodged by her at the

bar for the purpose of cross-examination of the pursuer, to vouch her loan of £39,000 or £40,000 to Company A1. It was not a document starting with the director's loan balance at the prior year end and showing the transactions going into it up until the relevant date. Rather it was a series of unspecified payments over a number of years which were not even in chronological order. There were also four adjustments which were not explained, totalling over £20,000. It does not vouch a loan. I find it surprising that she, as an accountant herself, claiming that she could walk into an accountancy firm and earn £100,000 to £200,000, would have produced a document which was so unhelpful. I cannot rely on her figures.

[55] The defender went to proof seeking transfer of the pursuer's shares in both Company A1 and Company A2 to herself. She departed from that during cross-examination. She disputed during cross-examination that the pursuer's father's loan of £12,000 was outstanding, but her Counsel conceded this on day 5 of the proof after Counsel for the pursuer had concluded his submissions. These significant changes of her mind at a late stage are further indication of that she cannot be relied upon.

[56] The defender demonstrated unnecessary hostility towards the pursuer during her evidence. She said that she could not speak to whether the pursuer loved the children and said that it was her firm belief that the pursuer was not motivated by the best interests of the children, and that would seek to remove the children from Private School 1 even if he did have the money. She said his suggestion that they jointly apply for a bursary was made in bad faith. She accused him of being in potential breach of duty as a director of a company by making improper use of Company A3 funds to pay for eviction in his own personal interests. She accused him of mismanaging company and personal finances: while she recognised that the decisions he had taken were not illegal and were decisions open to him

to make, the mismanagement was, she said, by deliberately not organising the funds in the best interests of the children. She gave the example of paying the disputed amount of £12,000 to his father (a loan she conceded following the submissions for the pursuer had concluded). She suggested the pursuer had no interest in what school the children attended and that this could be seen from his "scattergun" approach to the selection of schools.

[57] I have not relied on the defender's evidence other than in relation to her possible income streams and ability to pay school fees. No other witnesses could speak to this, and findings in fact were required about her resources.

Experts

Greig Rowand

[58] Mr Rowand has a Bachelor of Commerce (Honours) degree from Edinburgh University. He has been a Member of the Institute of Chartered Accountants of Scotland since 1990. He specialises in Forensic and Investigative accounting and reporting and also in Corporate Finance. He works with many firms of litigation lawyers and with Counsel as an independent expert providing valuations for the purposes of divorce and other disputes. He has given expert evidence in the Court of Session, High Court and the sheriff court on 16 occasions since 1997, including in divorce actions. He has participated in mediations, arbitrations and independent determinations of disputes, including appointments by the President of the Institute of Chartered Accountants of Scotland. He assists with the Faculty of Advocates training, and in particular with share valuation.

[59] He had prepared two reports: the first is a report dated 28 October 2019 (number 5/10 of process) and the second is a letter dated 25 September 2020 (number 5/20/1 of process) and he adopted these as part of his evidence.

[60] Mr Rowand had been instructed to value the defender's share in Company A3 and the pursuer's shares in Company A2 and Company A1 at the relevant date. He had been provided with a copy of Mr Webster's report number 6/5/1 of process and instructed to discuss matters with him. They reached agreement on the relevant date values of all three companies.

[61] Mr Rowand had referred to the defender owing Company A1 £40,827 at the relevant date which might represent a matrimonial liability (para 7.2.9 of his first report). He thought the information he had been given was a listing of transactions, but he could not say whether he had seen 6/9/43 in some form. He found it difficult to make out the figures in that document, but it did not appear to be in chronological order. Nor did there appear to be an opening balance for the director's loan account for 2018, which he would have expected to appear at the start of the listing. He could not make out the suggested adjustments at the end of the list and could not explain them. He did not recall getting any documents which would have vouched the apparent entries for accrued pay. In order to work out the director's loan at the relevant date he would have needed to know the position on the director's loan account at the financial year end and the list of transactions vouching it and then the list of transactions to the relevant date.

[62] Mr Rowand had been asked to comment on Mr Webster's second report, and Mr Rowand had done that in his own second report. Mr Webster had valued Company A2 at £103,000 on an assets basis at the date of his first report on 26 November 2019 but at £46,000 on an assets basis in September 2020. Company A2's largest asset was the loan to Company A1, and the value of Company A2 depended on Company A1's ability to repay that loan. The main reason for Mr Webster's reduction in the value of Company A2 was that in his first report Mr Webster had assumed that the sum due from Company A1 to

Company A2 was recoverable in full, but in his second report he had written off £44,000 of the loan. There was nothing in the balance sheets of Company A1 at either date to suggest a deterioration in the financial position and ability of Company A1 to repay Company A2. The change in valuation of Company A2 appeared to have arisen mainly because of the change in Mr Webster's valuation of Company A1's client book. Mr Webster had attributed a value of £51,000 to Company A1's client book in his first report, which would have allowed Company A2 to be repaid in full. The defender had sold Company A1's client book to her other company, Company C1, for £10,000, which would have meant there were fewer funds in Company A1 to repay Company A2, with an allowance for an irrecoverable amount due from Company A2 being made by Mr Webster. No explanation was offered by Mr Webster in his report as to why the market value of the client book would fall by £41,000, when the original valuation of £51,000 had been based on estimated recurring turnover plus a multiplier and there was no evidence of a decrease in either of these components. Mr Webster had also allowed for liquidation costs of £5,000 for Company A2 in his second report but he did not explain why, and it was inconsistent for him to include these costs for Company A2 and Company A1 but not Company A3.

[63] If Company A1 had received £51,000 for the client book instead of £10,000, Company A1 would still have had a nil value at the current date using Mr Webster's methodology but the value of Company A2 would increase. Mr Webster had assumed that Company A1 would use funds to pay Company A2 in full before repaying Company A3, although there were issues with this. If £51,000 had been received for the client book for Company A1, Company A1's realisable assets would have increased by £41,000 leaving £88,000 to settle intercompany balances. If Company A2 were paid first, as Mr Webster suggested, then the

value of Company A2 would increase from £46,000 to £87,000, with only £3,000 rather than £44,000 being irrecoverable from Company A1.

[64] With reference to the valuation of Company A3, Mr Webster had valued it at £797,000 on an assets basis at the time of his first report on 26 November 2019 and at £426,000 on an assets basis at the time of his second report on 21 September 2020. One reason for the difference was the payment of a dividend of £228,572 to the three shareholders. Another reason was that in the first report Mr Webster had adjusted the figures to include the net assets of Company B, £125,000, but had removed this adjustment in his second report. In his first report Mr Webster explained that he had made the adjustment because the pursuer had transferred income and engagements with Company A3 clients to Company B, and that there might be a serious breach of the pursuer's statutory and fiduciary obligations as director of Company A3 to act in good faith and in the best interests of Company A3 (paras 9.5 - 9.7).

[65] Mr Rowand disagreed with Mr Webster's adjustment to transfer Company B's net assets of £125,000 to Company A3. The profit and loss account and balance sheet of Company B's first period of trading to 31 May 2019 showed that Company B achieved an operating profit of £154,000 on turnover of £166,000. The net asset position was £125,000, presumably after deduction of corporation tax. Mr Rowand explained that the typical approach for a "one-man company" such as Company B was to charge a modest level of salary and extract most of the earnings from the company by way of dividend. If the pursuer were undertaking the same work for another company in which there were external shareholders, as there were in Company A3 following the parties' separation, he would not adopt that approach but would have charged a market rate for his services. That rate would be the operating profit of £154,000, given that the fees received by Company B were solely

for the provision of the pursuer's services. Accordingly even if the work had been done in Company A3 there would not have been a profit of £125,000 because the pursuer would rightly have paid himself at the market rate for his services which would probably have ended in no profit at all. Instead the pursuer had done the work for Company B, charging a modest salary and leaving the rest of the profit to be taken as dividends or left in Company B, but this is what Mr Webster effectively transferred to Company A3. In his second report Mr Webster had not included an adjustment of this nature. Mr Webster's reasoning was that recovery of that asset was only likely to be available if the Company A3 shareholders presented a petition to the court on the basis of minority prejudice under section 994 of the Companies Act 2006, which would be expensive and with no certainty of outcome (para 8.9). Mr Rowand did not follow Mr Webster's logic. An independent accountant should provide his opinion on value and if an adjustment was required to give the market value of the business, then the adjustment should be noted: the costs of and likely outcome of litigating based on that were for others to consider and were not a reason for an accountant to change his independent opinion. Furthermore there was no change in circumstances between Mr Webster's two reports. If the cost of litigation had been a valid reason to exclude the £125,000 in the second report then it would have been a valid reason in the first report too.

[66] Cross-examination of Mr Rowand was limited. He had seen some financial information relating to the defender's loan to Company A1. Company A1 is insolvent: it has net liabilities and is not able to pay its liabilities as they fall due. Company A1 requires to be wound up, and accordingly liquidation costs should be included. Mr Rowand and Mr Webster had done asset valuations for all three companies and consistency required that liquidation costs should be allowed in each case. Mr Rowand would value a company and if he thought income required to be included, he would include it. If litigation was required,

that would require legal input which Mr Rowand would have sought rather than taking a view on it himself. Nor would he have excluded an asset on a pragmatic basis, having regard to potential litigation. The effect of Mr Webster's change was to reduce the value of the company and that was relevant whether someone was looking to sell or to wind up the company.

[67] I accept Mr Rowand's evidence. He has a considerable amount of experience in financial provision on divorce, where he is a recognised expert. He made cogent criticisms of Mr Webster's methodology and his reasoning. I have made relevant findings in fact based on his evidence.

Iain D C Webster

[68] Mr Webster has a Master of Arts degree, is a Chartered Accountant, has been a Member of the Institute of Chartered Accountants of Scotland since 1985, a Member of the Corporate Finance Faculty of the Institute of Chartered Accountants in England and Wales since 1997 and is a Fellow of the Securities Institute. He has provided evidence in a number of cases. His expertise is in valuing businesses. He had prepared two reports for these proceedings: a report dated 26 November 2019 (number 6/5/1 of process) and an updated report dated 21 September 2020.

[69] Mr Webster was cross-examined on the basis of the criticism levelled at him by Senior Counsel and Lady Smith in *Watt* v *Watt* (paras 54, 62 – 64, 69 - 72). He accepted that in *Watt* v *Watt* he had accepted instructions as an expert knowing that his firm had acted for the company for many years and that in doing so that betrayed a lack of judgment on his part as to the independence required of an expert. He did not accept Lady Smith's criticism in *Watt* v *Watt* that a number of his factual assertions were wrong, that he gave evidence on

a matter outwith his own knowledge and without expert advice, that he had taken into account a contractual matter in respect of which legal advice would have been required, that he lacked independence, that he sought to act as an advocate for his client and that there were problems with his methodology. He said *inter alia* that he had taken a view on the legal interpretation of a contract, and he had experience of contracts. He said that he had ended up giving evidence against his better judgment because a report had been lodged and someone from his firm had to speak to it. He said that he had exercised his duty to the court but Senior Counsel had done a very good job cross-examining him and Lady Smith had accepted the criticisms.

[70] Perhaps understandably, given that cross-examination began with *Watt* v *Watt*, Mr Webster was defensive.

[71] Mr Webster denied that he had been acting as an advocate for the defender. In his original report he had valued Company A3 at £797,000 by including assets of Company B worth £125,000 and accrued income of £16,000. Company B was incorporated post separation and the pursuer was the only shareholder in it. At the time of his original report the proposals were that the defender would sell her shares in Company A3 to the pursuer. Mr Webster said that this was a fair value on the basis of a willing seller and a willing buyer. He denied that he had done this to inflate the price that the defender would obtain on transfer. In his second report he had removed Company B from the valuation. By this time the pursuer did not want to buy the defender's shares. Mr Webster said that he had just updated the report for current circumstances and was not advocating for the defender. In examination in chief he had said that the later valuation took into account the expense of a potential section 994 petition, but if that had been a relevant consideration at the time of his second report it would have been relevant at the time of his first report too.

[72] Mr Webster admitted that in his second report he had not commented on the sale by the defender of Company A1's client book, which he had valued at £51,000 in his first report, to Company C1 for £10,000. He accepted that an independent objective expert might have thought to comment on a transfer by the defender to herself. He accepted that if the client book had been correctly valued in his first report and there was an absence of vouching about the subsequent sale then that sale might have been a sale significantly under value, and that this had not been mentioned in his report. He denied this was advocacy by omission on behalf of the defender.

[73] In his second report Mr Webster had commented on the pursuer's income forecasts. He was reluctant to accept that he did not have expertise in the provision of accountancy services in the renewable energy sector. He accepted that he did not have the expertise that the pursuer had of the renewable sector, but he thought that his previous experience of corporate finance equipped him to comment on the pursuer's figures because the pursuer's work was financial modelling. He did not agree with the pursuer's analysis that his income would fall. The pursuer had referred to the removal of subsidies, but Mr Webster referred to articles in Appendix XI to his report which he said showed that there had been a lifting of the block on onshore subsidies and painted a very positive outlook for the sector. He was taken to a report from *The Guardian* dated 16 March 2020 which stated that there had been a sharp decline in the number of new onshore windfarms since 2016 and that the rollout of new onshore wind capacity fell to its lowest level since 2015 in 2019. Mr Webster thought that there might be an upturn. He was referred to *The Guardian* article of 2 March 2020 which referred to the rollout of new onshore wind projects falling in 2019 to its lowest level since 2011, and he said that this did not indicate what might happen in future. Both the United Kingdom and the Scottish governments had ambitious targets to meet and the future

was not quite so dim. He accepted that he was not in a position to dispute the pursuer's expertise and evidence about Contract for Difference and wind farms and about why it was unlikely to create any increase in his business.

[74] In re-examination Mr Webster said his expertise to comment on the pursuer's future income came from being an expert in analysing numerical financial information and interpreting it for the future. He had looked at what the businesses did and what the pursuer said he would do and seen the disconnects.

[75] The pursuer himself (in his third affidavit number 43 of process) had criticised Mr Webster's second report insofar as it related to Mr Webster's analysis of the pursuer's projected future income and expenditure and the pursuer had been cross-examined on this by Counsel for the defender. In paras 10.6 and 10.7 Mr Webster had calculated that the pursuer would have an after-tax disposable average income three times the level that the pursuer himself had estimated. This was wrong, because Mr Webster had based his forecast on the pursuer's income for the previous five years and his calculation for those five years was incorrect. He did not adjust for the four brokerage contracts which would not be replicated and accounted for 50% of turnover. He did not recognise any sector specific factors, in particular that the renewable energy sector, particularly for smaller projects, had seen a huge decline since 2017, and that the number of projects commissioned had fallen from more than 700 in the year ending 31 May 2017 to 43 in the year ending 31 May 2019. His failure to deduct the intercompany turnover also overstated the position. No contracts were assigned or transferred from Company A3 to Company B.

[76] Ultimately Mr Webster conceded that he was not an expert in the provision of accountancy services to the renewable sector, and Counsel for the defender indicated in his submissions that Mr Webster's opinion as to the pursuer's future income was not relied on.

[77] I have carefully considered Mr Webster's evidence but I cannot rely on it. He has fallen into some of the same errors identified in *Watt* v *Watt*.

[78] In including the assets of Company B, a post separation company in which the pursuer was the sole director and shareholder, in the valuation of Company A3, in which the parties each held 42% of the shares, and in suggesting that the pursuer might be in breach of statutory and fiduciary duties, Mr Webster has failed to realise that the value in Company A3 during the marriage came from the pursuer taking a basic salary of approximately £12,000 a year because he was prepared to share the profits with his wife. On separation the pursuer was no longer prepared to work at below market value to create profits, 42% of which would go to the defender, and so he set up Company B, the assets of which are derived from the pursuer's services. Mr Webster has failed to realise that if the pursuer did not operate Company B on the basis of taking a reduced salary plus dividends as remuneration, he would have charged the market rate for his services and there would have been no profit in Company B to add to the value of Company A3 in November 2019. His explanation for deducting the value of Company B from the value of Company A3 in September 2020, namely the cost and uncertainty of minority shareholder litigation, was illogical because the same reasoning would have applied in November 2019. He has no qualifications to opine on legal issues. As an accountant, if he had thought Company A3 was entitled to the value of Company B, he should have included it in his valuation and let others decide whether to challenge it.

[79] The first valuation of Company A3 was in the defender's favour, because it artificially increased the value of the shares at a time when the pursuer was seeking to have Company A3 transferred to him. By the time of the second report, a transfer was no longer being sought and the basis changed.

[80] He provided no explanation for why the market value of the Company A1 client book fell by £41,000. The failure to address the defender's sale of Company A1's client book to Company C1 for £10,000 when it had been valued at £51,000, both companies being the defender's companies, was also in the defender's favour.

[81] He made arithmetical errors in his reports, which were pointed out by the pursuer in his third affidavit and conceded.

[82] He relied on two articles from *The Guardian* to justify his assertion that there was a very positive outlook for the windfarm sector, but those articles indicated the opposite. In making that assertion he also failed to appreciate the difference between windfarm businesses in general and the niche market in which the pursuer operated, and the convincing reasons the pursuer had given as to why he was extremely unlikely to secure any further brokerage contracts.

[83] Mr Webster's second report contains a section on the pursuer's income and expenditure which was not part of his first report. He was not qualified to provide expert evidence in relation to the pursuer's future income and expenditure because he had no expertise in the provision of accountancy services in the renewable energy sector, and Counsel for the defender ultimately conceded this. Some of the language used in this section of the report suggests that he is biased against the pursuer. In para 10.16 he described two of the pursuer's arguments as to why it would be extremely unlikely that he would secure any further brokerage contracts as not credible. He described the pursuer's tax payments, including his payment of tax in advance of the deadline, as "bizarre" (paras 10.26, 10.28). He believed that the pursuer's schedule of income and outgoings was "presented in a manner which is misleading", with the early payment of tax being "unnecessary and designed solely to show that the pursuer has no cash" (paras 10.37, 11.10).

[84] I am not prepare to conclude that Mr Webster was deliberately advocating on behalf of the defender, though his reports have had that effect. Mr Webster has, however, allowed himself to be drawn into the parties' dispute and he has clearly taken sides with the defender. He is not impartial. He may have misunderstood his role as an expert witness.

Marion Foy, curator ad litem

[85] On 31 January 2020 the court had considered appointing a curator to the children because three motions had been enrolled in relation to the children's education, and it appeared that the children were being drawn into the dispute over their education. Neither counsel had supported the appointment.

[86] The curator ad litem was appointed to the children on 12 August 2020 to safeguard their interests. The Note attached to the interlocutor referred to the dispute over the affordability of school fees and to the children having been involved in the dispute as to their education, and the need to appoint a curator to protect the interests of the children and to help express their views. A report was not called for, but there was a suggestion that the curator might be present at the next hearing. At the pre-proof hearing on 2 September 2020 the curator was present and offered to give an oral report, but I asked her to lodge a written report. I indicated that she was not expected to participate in the proof.

[87] The curator has taken the children's views, and I have incorporated some of these into the findings in fact. This is all that I can take from her report.

[88] I do not accept the curator's conclusions and recommendations. On the basis of partial financial information, she has concluded that the pursuer is able to afford Private School 1 fees, that he is not telling the truth and that his behaviour regarding the children's schooling is disappointing. At proof there was a full forensic examination by Counsel for

each party of all the financial evidence, including the expert accountancy evidence and the evidence of the parties who are themselves accountants.

[89] I do not know why the curator engaged in a discussion with the children about how they would have felt if they had had to leave Private School 1 before the end of the summer term, with Kate starting at a state primary school for a term and then transferring to State School 1, and with both missing Private School 1 end of term events and being unable say goodbye to their friends (page 28). By the time the curator spoke to the children this could not have happened, because the children had completed the academic year at Private School 1. The discussion is likely to have unsettled the children.

Legal framework

[90] The legal provisions applicable to the parties' claims for financial provision on divorce are set out in sections 8 - 10 and 27 of the Family Law (Scotland) Act 1985. In an action for divorce, either party to the marriage may apply to the court for certain orders including an order for the payment of a capital sum to that party by the other party and an order for the transfer of property to that party by the other party (section 8(1)). Where such an application has been made, the court shall make such order, if any, as is (a) justified by the principles set out in section 9 of the Act and (b) reasonable having regard to the resources of the parties (section 8(2)). "Resources" are defined in section 27(1) of the Act as meaning present and foreseeable resources. The only relevant principle relied on in this action is set out in section 9(1)(a) which provides that the net value of the matrimonial property should be shared fairly between the parties to the marriage.

[91] Section 10 of the Act considers the sharing of the value of the matrimonial property. Section 10(1) provides that in applying the principle set out in section 9(1)(a) of the Act, the

net value of the matrimonial property shall be taken to be shared fairly between the parties when it is shared equally or in such other proportions as are justified by special circumstances. "Matrimonial property" is all the property belonging to the parties or either of them at the relevant date which was acquired by either of them during the marriage but before the relevant date (section 10(4)). Subject to an exception which applies to property transferred by virtue of an order for the transfer of property, the net value of the property is the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties during the marriage which are outstanding at that date (section 10(2)). Where a transfer of property order is made, the property is to be valued at the transfer date rather than the relevant date (section 10(3A)). The "relevant date" is the date on which the parties ceased to cohabit (section 10(3)). Section 10(6) sets out examples of special circumstances which might justify a departure from equal sharing of the matrimonial property.

[92] Despite all the detail in the provisions of the Act "the matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense": *Little* v *Little* 1990 SLT 785 per Lord President Hope at 786L-787C. The underlying principle is that "the wealth acquired by the parties … or generated by their activity and efforts during the course of their life together is … to be shared": *Whittome* v *Whittome* (No 1) 1994 SLT 114 per Lord Osborne at 126C-D.

[93] Where a party argues that special circumstances exist, the court requires to consider whether special circumstances do exist, and if so whether that justifies a division in proportions other than equal: *Jacques* v *Jacques* 1997 SC (HL) 20 per Lord Jauncey of Tullichettle at 22, Lord Clyde at 24. Where special circumstances are found to exist an unequal division is not automatic.

[94] Section 10(3A) of the Act is concerned only with the valuation of the property that is being transferred, and has no application to property retained, and this is so whether or not the transfer is of one half of an asset where the recipient already owns the other half. The net value of the matrimonial property is to be determined by reference to the relevant date value: it is at the stage of distribution that the property will be transferred at the current day value. (See *Watt* v *Watt* 2009 FamLR 62 at paras 160, 161-165 and commentary).

[95] The legal provisions applicable to the orders sought by the parties regarding the regulation of payment of Private School 1 school fees are set out in sections 1 to 5 and 27 of the 1985 Act. In terms of section 1(1) and (2) a parent owes a child an obligation to provide such support as is reasonable in the circumstances, having regard to the matters to which the court is required or entitled to have regard under section 4 of the Act. Section 4 provides that:

> "4(1) In determining the amount of aliment to award … the court shall … have regard -
> (a) to the needs and resources of the parties;
> (b) to the earning capacities of the parties;
> (c) generally to all the circumstances of the case.
> (2) Where two or more parties owe an obligation of aliment to another person, there shall be no order of liability, but the court, in deciding how much, if any, aliment to award against any of those persons, shall have regard, among the other circumstances of the case, to the obligation of aliment owed by any other person."

[96] The court may, if it thinks fit, grant decree for aliment (section 3(1)). Decrees may be varied or recalled on a material change of circumstances (section 5). "Resources" mean present and foreseeable resources (section 27(1)).

[97] In *Maclachlan* v *Maclachlan* 1998 SLT 693 at 698F Lord Macfadyen opined that school fees were in their nature a revenue expense and that the court should be slow to make capital provision for a revenue expense. Section 3(2) of the Act recognises that with the prohibition on substituting lump sums for periodical payments.

[98] The legal provisions applicable to the specific issue orders sought by the parties are set out in the Children (Scotland) Act 1995, section 11. Section 11(2) provides that the court may make such order as it thinks fit. Section 11(7) provides:

> "11(7) … in considering whether or not to make an order … and what order to make, the court -
>
> (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
>
> (b) taking account of the child's age and maturity, shall so far as practicable -
>
> (i) give him an opportunity to indicate whether he wishes to express his views;
>
> (ii) if he does so wish, give him an opportunity to express them; and
>
> (iii) have regard to such views as he may express".

Reasons and decision

[99] I have explained why I preferred certain witnesses to others and that I have made findings in fact based on their evidence. Some of the findings in fact in relation to financial matters and to the dispute over schooling are particularly lengthy. I have felt it appropriate to make those findings in fact having regard to the nature of this action, which saw a number of highly contested interim hearings and five days of proof with complex, disputed accountancy evidence.

The orders for financial provision on divorce

[100] The extent of the matrimonial property and the values have largely been agreed. Counsel for the pursuer submitted, with reference to *Watt* v *Watt*, that the relevant date value of the matrimonial home required to be given at the stage of calculating the net value of the matrimonial property available for division, with adjustment for the current value of the matrimonial home being made in the defender's favour at the stage of division. Counsel

for the defender argued for the current value of the matrimonial home to be used when calculating the net value of the matrimonial property, with a balancing payment of £8,500 to be made to the pursuer at the stage of division. This figure was based, not on the actual payments made by the pursuer, but on the extent to which the outstanding balance on the mortgage had been reduced by those payments. He argued that this would have allowed both parties to share in the increase in the equity of the property, but he accepted that it would not have fully compensated the pursuer for the mortgage payments he had made since the relevant date. I prefer to follow the approach in *Watt* v *Watt*, having regard to the legal analysis of section 10(3A) of the Family Law (Scotland) Act 1985 in that case. The approach proposed by Counsel for the defender does not properly reflect the payments made by the pursuer in discharging the parties' joint and several obligation. The payments of £41,114.13 did not result in a reduction in the outstanding balance on the mortgage by the same amount partly because interest continued to accrue on that outstanding amount over the period since the relevant date. The pursuer met the cost of that interest for the defender, and it is appropriate that the full figure is deducted.

[101] I have preferred the defender's figures for the valuation of Company A2 (reflecting the 51% shareholding of the pursuer and the 49% shareholding of the defender) and for the defender's Smile account ending 4314 (having regard to the joint minute). The extent of the matrimonial property available for division is as follows.

Assets	Pursuer	Defender	Total
L Avenue	£575,000.00		£575,000.00
Hargreaves Lansdown pension	£20,597.00		£20,597.00

Legal & General pension		£6,747.00	£6,747.00
Company A3	£274,260.00	£274,260.00	£548,520.00
Company A1			
Company A2	£34,680.00	£33,320.00	£68,000.00
Jaguar XF	£19,275.00		£19,275.00
Mazda CX5		£12,825.00	£12,825.00
Number plate []	£600.00		£600.00
Number plate []		£526.00	£526.00
Smile account ending 9944	£1,136.23		£1,136.23
HSBC account ending 2465	£129.88		£129.88
Smile account ending 4314		£1,350.62	£1,350.62
RBS account ending 9063		£114.59	£114.59
Total Assets	£925,678.11	£329,143.21	£1,254,821.32

[102] The existence of the various debts and their values was largely agreed. I am not satisfied that the defender has proved that she had a loan outstanding to Company A1 at the relevant date of around £39,000. The documents she relied on contained figures which were inconsistent and 6/9/43, lodged during cross-examination of the pursuer for the purposes of

challenging his reliability, was illegible. It did not prove the existence of a loan. I have used the figure for the debt to Company A3 which was agreed in the joint minute.

[103] The matrimonial debts are as follows.

Liability	Pursuer	Defender	Total
Coventry Building Society 1	£210,361.33		£210,361.33
Coventry Building Society 2	£70,355.07		£70,355.07
MBNA account ending 3985	£17,146.33		£17,146.33
Amex ending 53004	£7,156.28		£7,156.28
Smile Visa ending 3872	£7,655.14		£7,655.14
Debt to pursuer's father	£12,000.00		£12,000.00
Debt to Company A3	£129,124.00		£129,124.00
Debt to Company A1			
Total matrimonial liabilities	£453,798.15		£453,798.15

[104] The net value of the matrimonial property is £801,023.17. A half share of this is £400,511.58. The defender retains matrimonial property worth £329,143.21. For equality

she will require a payment of £71,368.37. The net value of the assets retained by the pursuer is £471,879.96.

[105] Various payments were made by the parties after the relevant date, and the pursuer sought to have these taken into account at the stage of division. The defender did not dispute that the parties should both be liable for the sums taken three days after the relevant date from the pursuer's account by various direct debits for costs associated with the matrimonial home incurred before the relevant date. She disputed liability for the mortgage payments, on the basis that she had had her own housing costs. In my view the defender is liable for her share of the mortgage costs. The pursuer, in paying the whole of the mortgage, was discharging the defender's joint and several liability to the building society. He was increasing the equity in the property by reducing the loan, and the defender will benefit from that increase in equity. The cost of the boiler is also a legitimate deduction, the parties having known since before the relevant date that it was faulty. The pursuer also spent £7,741.60 on items required to maintain the matrimonial home including estate factor payments, building maintenance, life and critical illness cover in both parties' names, boiler checks, burglar alarm checks, roof maintenance and home maintenance for the period from May 2018 to September 2020. In doing so the pursuer has maintained or increased the value of the property, and the defender benefits from that because the transfer of her half share to the pursuer is valued at the current date, which is £50,000 more than the relevant date valuation.

[106] The pursuer has paid interest on two loans which were outstanding at the relevant date. The parties were accustomed to borrowing from the companies for their joint living expenses. These loans were matrimonial liabilities and it is appropriate that the defender contributes to the interest payments post separation.

[107] The cost of Private School 1 fees should be shared between the parties. Parties have joint and several liability for school fees in terms of their contract with Private School 1. The pursuer has made his concerns about the continued affordability of Private School 1 clear, but the defender has resisted that and continued to incur the fees. It is appropriate that she pays half of the fees.

[108] The payments made by the parties after the relevant date are as follows.

Payment	Pursuer	Defender	Total
BT DD	£50.99		£50.99
City of Edinburgh Council DD	£313.71		£313.71
Life insurance	£53.64		£53.64
Gas homecare	£39.13		£39.13
Gas and electricity	£97.50		£97.50
Boiler	£3,540.00		£3,540.00
Mortgage	£41,114.13		£41,114.13
House payments	£7,741.60		£7,741.60
Director's loan interest	£7,483.69		£7,483.69
Interest on loan to father	£900.00		£900.00
Music lessons	£712.00		£712.00
School laptop	£1,330.00		£1,330.00

School fees winter 2018		£13,143.82	£13,143.82
School fees spring 2019	£13,416.87		£13,416.87
School fees summer 2019	£6,409.00		£6,409.00
School fees winter 2019	£8,467.10	£14,874.63	£23,341.73
School fees spring 2020	£17,091.91		£17,091.91
Total	£108,761.27	£28,018.45	£136,779.72
50% of above	£54,380.64	£14,009.22	£68,389.86

[109] The pursuer sought further adjustments.

[110] The pursuer seeks to be repaid in full the £3,772.87 spent by the defender on the pursuer's credit card following separation, but the defender did not remember an agreement that this should be repaid. I prefer the pursuer's evidence. The discussion took place on "the morning after the night before" and he was "shell-shocked", as the pursuer put it. He was in no mood to agree to fund the defender's lifestyle with the paramour. The pursuer's evidence has the ring of truth. The defender's evidence on this point was unsatisfactory and unlikely.

[111] The pursuer sought repayment of the sums of £725.00 and £625.00 reflecting the sums of £1,450 and £1,250 spent by the defender on the deposit and rent of L Street immediately before the separation on the grounds that there were special circumstances

justifying an unequal division of the matrimonial property. I am satisfied that special circumstances exist. These costs were incurred not in connection with furthering the parties' life together: rather they were a rejection of the marriage. The defender left the pursuer without giving him any notice at all, and without offering him any say in whether such costs should be incurred. Tenancy deposits tend to be refundable in any event, and the defender ought to have the benefit of that in future. The special circumstances justify a departure from equal sharing of this liability. It would not be a fair division of the matrimonial property to make the pursuer pay half this cost.

[112] The pursuer also sought to deduct £20,090 from the sum to be paid to the defender on an equal sharing of the matrimonial property. This sum reflects his 49% shareholding in Company A1, and the sale by the defender of Company A1's client book to Company C1 for £10,000 when it had been valued at £51,000 both at the relevant date and in November 2019 by Mr Webster. It was not until the defender was part way through her cross-examination that it became clear she was no longer seeking a transfer of Company A1 to herself. In my view special circumstances exist in the defender having sold part of a matrimonial asset to her new company for £41,000 less that it was valued. She will retain the benefit of the client book in that other company. There was no evidence to suggest that a lower value should be attributed to the client book, other than the evidence of the defender herself which I do not accept. These are special circumstances and they justify a departure from equal sharing. It would not be fair not to take account of these special circumstances.

[113] From the £71,368.37 which would to be paid to the defender for equal sharing, the following adjustments need to be made.

Add balance due for increase in the value of the house	£25,000.00
Add 50% of payments made by the defender	£14,009.22
Less 50% of payments made by the pursuer	£54,380.64
Less credit card payments	£3,772.87
Less 50% deposit on L Street	£725.00
Less 50% rent on L Street	£625.00
Less 49% of the defender's gain on sale of Company A1 client book	£20,090.00
Sum due to defender	£30,784.08

[114] A fair sharing of the matrimonial property will be achieved by transferring the defender's share in the matrimonial home to the pursuer in return for a capital sum of £30,784.08. The pursuer has the resources to pay a sum of this nature, and no adjustment is required in terms of section 8(2)(b) of the Act.

The orders for payment of school fees

[115] The fees for Emily to attend Private School 1 for the academic year 2020 - 2021 are £29,925 and for Kate the fees are £16,445. Music tuition is an extra £780 for Emily and £1,560 for Kate for the current year. The pursuer calculated the total cost of sending the children to Private School 1 until the end of their secondary education as £331,116 whereas the defender calculated it as £285,769.50. The pursuer had included inflation at a rate of 5.4% based on his analysis of previous annual increases and he had also included the cost

of music lessons. The defender had excluded inflation in the expectation that the fees the parties charged for their own services would also see inflationary increases. She had not included music costs because she thought Kate would get a scholarship. Her calculation appears to have omitted the sibling discount on Kate's first three years of senior school. I prefer the pursuer's principled and reasoned calculation to the defender's rough and ready calculation. Either way the figures are large.

[116] The parties do not have the resources, individually or collectively, to continue to send the children to Private School 1. The pursuer's projected gross income for the next six years is £92,529, with a net figure of £68,371 each year, after deduction of tax and repayment of the director's loan. He cannot afford to pay £48,710 for school fees out of his net income. His normal expenditure is £78,227, leaving a shortfall of £9,856 before school fees are considered. In order to meet that level of expenditure Company B would require to generate an additional profit of £89,089 this year, with an increasing level of profit required in each subsequent year until Emily leaves school. The downturn in the renewable energy sector has affected the pursuer's income.

[117] The defender is unlikely to be able to contribute anything towards the fees from her income. Her future income will be in the region of £30,000 (from a company salary of £11,600 and Company A3 dividends of £18,115), from which her normal expenditure will have to be deducted. Although she claims to be able to earn in the region of £150,000 as an employee she has not done that to date.

[118] School fees are in their nature a revenue expense, and I would not be prepared to order that they are paid out of capital in this case. The matrimonial home requires to be retained as a home for the pursuer and the children and cannot simply be sold to fund

education. The capital sum payable to the defender and the dividends which are expected to be paid shortly will not cover much of the fees.

[119] I am not prepared to grant decree making either party liable for the payment of school fees. Having regard to the needs and resources of the parties and their earning capacities in particular, it is not reasonable to require either party to pay fees of £48,710 this year and the increased fees in subsequent years.

The specific issue orders for attendance at named schools

[120] This is a very sad case. Everyone agrees that it is in the children's best interests to remain at Private School 1 until they complete their secondary education. The children do not want to leave Private School 1 and they are of an age where their views should be given weight. The problem is that the parents can no longer afford the fees following the breakdown of their marriage. Fees are unpaid and there are concerns about how long Private School 1 will tolerate this. The defender has borrowed money to pay fees previously. The children are aware of the difficulties and that they may have to move schools. They hope that they will not have to.

[121] It is not feasible for the children to remain at Private School 1 for another two years because there are no funds for these two years. The children have not sat the entrance exams for the Private School 2, 3 or 4 and those fees are no longer affordable, having regard to the money the parties have spent litigating about the children's education. The only option now for the children is State School 1.

[122] The welfare of the children is my paramount consideration. The children face having to change school part of the way through an academic year. It is in the children's best interests to start at State School 1 immediately after the October break 2020. That will allow

Emily to change from the GCSE curriculum to the National 5 curriculum now, putting her in the best possible position for sitting those exams in summer 2022. It will allow Kate to join in with the many new pupils coming together at S1 stage at an early stage in the year when friendships are being made. It will allow the children to have certainty. Although the children are likely to be distressed and to find it daunting, the move to State School 1 will put an end to the uncertainty they have had over the last year and which has been causing Emily in particular some anxiety.

[123] Even if it were feasible for the children to continue at Private School 1 for a further two years, that would not be in the children's best interests. The uncertainty surrounding their schooling would continue. Further dispute between the parties would be likely, and further litigation possible. They might require to leave Private School 1 in two years' time. That would come at the worst possible time for Emily. Even if Emily were to move to Private School 2 in two years' time, where she started her education and where the transition might be smoothest for her in terms of making friends and knowing the school routine, she would still require to change from the English curriculum to the Scottish curriculum and then sit Highers after only two terms of teaching.

[124] I know that this is not what the children want, but moving to State School 1 now is the best option left for them in the circumstances. Standing the lack of agreement between the parties, specific issue orders are required.

[125] I am grateful to Counsel and to the solicitors for their assistance and the professional way in which they conducted this proof.